



The Rules Committee

PO Box 60
Auckland

Telephone: (09) 916 9782
Facsimile: (04) 494 9701
Email: rulescommittee@justice.govt.nz
Website: www.courtsofnz.govt.nz

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Access to Justice 02/19

Circular 20 of 2019

Dear Committee Members,

Please find attached, for your consideration, a paper by Judge Kellar evaluating the impact of the District Court Rules on access to justice in that Court's Civil jurisdiction (**C 20 of 2019**).

Sebastian Hartley
Clerk to the Rules Committee

Access to justice in the civil jurisdiction of the District Court

Does the cost and complexity of adherence to the requirements of the District Court Rules 2014 (DCR) impede access to justice?

Introduction

- [1] Justice Kós recently remarked “[t]he rule of law depends on two things: accessibility to the institutions of justice and accountability of one citizen to another where rights have been infringed. Unsustainable litigation cost impairs both, and thereby the rule of law.”¹ The Chief Justice-designate Helen Winkelman, in a recent public statement, reinforced the focus of her 2014 Ethel Benjamin address when she noted that “Access to justice is the critical underpinning of the rule of law in our society ... Cost, delay and lack of representation act as barriers to justice.”
- [2] The objective of the District Courts Rules CR 2014 is “to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application.”² This was the objective of the preceding rules and is one of the key objectives of rules of civil procedure in other parts of the Commonwealth. Do the Rules facilitate the attainment of the objective? Or, does the cost of compliance with their requirements for pleadings, discovery and lengthy written statements of witnesses, actually serve to impede access to justice? This paper analyses what data there is available to answer that question but the answer largely comes from experience of users of the civil jurisdiction across all courts. Finally, this paper will offer some ideas to simplify procedure and to bring a case before a judge with minimal expense and delay.

¹ Hon Justice Stephen Kós “An address to the Legal Research Foundation Annual General Meeting” Auckland, 20 August 2018

² District Courts Rules 2014 r 1.3

Background

The 2009 reform of the District Courts Rules

- [3] The reforms of the District Courts Rules 2009 endeavoured to overcome impediments to access to justice in the civil jurisdiction of the District Court. The philosophy behind the 2009 rules was driven by two-key, related factors. The first was the staged process directed towards a contested witness action was cumbersome, slow and expensive. The second was that the focus of the existing rules on the defended witness action failed to recognise the reality that only between one and three per cent of some 15,000 civil proceedings filed each year actually reach trial.
- [4] The overriding objective of the 2009 Rules was settlement at an early stage. The full-scale witness action, with attendant expense and delay, was procedurally relegated to the place of last resort. Less cumbersome and expensive forms of trial were introduced: the short trial and the simplified trial. Summary judgment, one of the few procedural advances in the last 100 years, was available but only by judicial direction following a failed settlement conference.
- [5] The interpretative canons of the 2009 Rules were attainment of the just, speedy and inexpensive determination of proceedings. Explicit objectives included the equal treatment of parties, saving expense, recognition of the need for proportionality in connection with the importance and complexity of the case, the amount of money involved and the financial position of the parties.
- [6] A significant objective of the 2009 Rules was to make the process user friendly and accessible to lay people. The 2009 Rules were driven by a perception that half of all litigants were self-represented. They were intended to enhance access to justice both by reducing the cost of getting a dispute to the point at which meaningful settlement negotiations could occur and by making that process accessible to litigants. The form of Notice of Claim and Response and the Information capsules were designed to attain that objective.
- [7] The perception that half of all litigants are self-represented was shown, following a thorough analysis, to be a fallacy. The figures on which the perception was based

included institutional litigants including Banks, finance companies, debt collectors and, significantly, the Inland Revenue, which currently makes up eight per cent of proceedings filed. The actual number of truly self-represented litigants is closer to six per cent although that number rises by the time of trial.

- [8] Many of the key features of the 2009 Rules were met with acclaim amongst the legal profession, particularly the short and simplified forms of trial, which provided a relatively quick and inexpensive alternative to a summary judgment application. Other aspects of the Rules were not regarded as such a success. The form of notice of claim and response and the information capsules came in for special criticism. There was also a perception that the notice of claim procedure did not work well where third parties were involved or affirmative defences were raised. These factors prompted a thorough review of the 2009 Rules themselves.
- [9] Following extensive consultation with users of the Rules including not only the legal profession but also institutional users it became apparent that the forms did not allow the true nature of the claim or defence to be adequately identified. Moreover, the forms were not proving useful to those whom they were designed to help obtain access to justice, namely self-represented litigants. Reports from some Registries showed that despite the best efforts of registry staff self-represented litigants found the forms so confusing that they would not file a response to a claim.
- [10] The legal profession also overwhelmingly expressed the view that it was desirable for a proceeding to come before a judge in a case-management conference at an early stage of a proceeding. It was also considered desirable to have the ability to apply for summary judgment at the outset of a proceeding.

The 2014 reform of the District Courts Rules

- [11] The District Courts Rules 2014 retain three key aspects of the 2009 Rules namely the short and simplified trial process; the emphasis on settlement of a proceeding at an early stage; and a specific approach to summary judgment. The 2014 Rules also mirror the High Court Rules both as to organisation and content as far as possible. There were two key reasons for this. The first is that the same Rules will govern civil proceedings in

either the High Court or the District Court. Secondly, the jurisprudence, which has developed and continues to develop in respect of the High Court Rules will equally apply to the corresponding District Courts Rules.

- [12] The ability to apply for summary judgment was very restricted under the 2009 Rules. The reasoning for the restriction was twofold. First, the emphasis was on the promotion of early settlement. Secondly, defended summary judgment applications were successful in less than a third of all cases. The restrictions were not popular with the legal profession. Rather than ceasing to apply for summary judgment, applicants (usually but not always the plaintiff) applied for summary judgment in the High Court often for modest sums of money well within the monetary jurisdiction of the District Court. Amendments to the 2009 Rules eased the restrictions somewhat but the demand continued for summary judgment to return to the District Court as of right in all proceedings.
- [13] Case management is one of the most significant areas of reform and the one where there are differences in approach with the High Court. It is the expectation of the sub-committee who reviewed the 2014 Rules that the statement of claim and defence requirements together with an early case management conference will lead to better definition of the issues in a proceeding enabling the case to be resolved in a manner consistent with the objectives of the Rules.
- [14] Case management in the High Court has to deal with different types of proceedings, which are managed in different ways. The 2014 Rules provide for a uniform approach irrespective of the type of proceeding. Rule 7.2 of the 2014 Rules provides that apart from situations where no statement of defence or other response has been filed in a proceeding a first case management conference shall be convened not less than 25 working days after the statement of defence is filed and before 50 working days after the proceeding was filed.
- [15] Rule 7.2(3) of the 2014 Rules prescribes the agenda for the first case management conference. The conference must address –
- Schedule 3 Part A matters
 - Interlocutory applications

Mode of trial

Judicial settlement conference

Any other matter, which the parties have discussed

- [16] Part A of Schedule 3 deals with matters as to whether initial disclosure has been provided, the adequacy of the pleadings and the documents disclosed with them to identify the issues, whether discovery is required prior to a judicial settlement conference or short trial, the addition of any other parties, the categorisation of the proceeding in relation to costs and any other matters. The parties are expected to have discussed all of those matters between them and filed a joint memorandum wherever possible.
- [17] One of the key features of the first case management conference is the determination of whether the mode of trial is to be a short trial. If a short trial is not allocated then a judicial settlement conference must be held as soon as practicable after the parties have dealt with the other matters in Rule 7.2(3)(a) and (b). Where the parties are unable to agree counsel at the first case management conference is expected to be ready to make submissions upon the mode of trial as there is an expectation that a decision will be made at the conference. While Rule 10.2 permits the mode of trial to be changed on application or the Court's own motion the significance of the determination as to mode of trial cannot be underestimated.
- [18] A second case management conference will be convened where settlement is not achieved in the judicial settlement conference. The Registrar must allocate a date for the second conference no later than 10 working days after the judicial settlement conference itself. This represents something of a departure from the 2009 Rules, which required a directions conference to be convened upon the conclusion of an unsuccessful settlement conference. Despite the requirement, directions conferences were not always held at that time where the parties having exhausted any goodwill towards each other in the judicial settlement conference had little appetite to remain while the judge made directions for the conduct of the case.
- [19] The agenda for the second case management conference is contained within Part B of Schedule 3 of the 2014 Rules. The parties are required to file a joint or separate

memorandum covering matters including the mode of trial, whether any amendment to the pleadings is required, the joinder of any additional parties, discovery, interlocutory applications, the close of pleadings date and the estimate of the duration of the trial and proposals for the giving of any expert evidence. The schedule also requires the parties to identify agreed facts and to deal with the agreed bundle of documents. As with the first case management conference there is an expectation that the parties will have discussed the requirements and at least endeavoured to agree upon them.

[20] As with the first case management conference determination of the mode of trial is one of the key matters to be addressed in the second case management conference. Even where a short trial was not determined to be the mode of trial at the first case management conference there is no reason why a short trial could not be allocated at that stage.

[21] The three forms of mode of trial remain as a distinctive feature of the District Courts Rules 2014 in much the same form as the 2009 Rules. A short trial will generally be allocated where the case can come to a hearing quickly, the issues are relatively uncomplicated, or a modest amount is at stake, and the trial time is not likely to exceed one day.

The present Rules – does compliance with the rules impede access to justice?

[22] The prevailing view amongst litigants and lawyers is that the cost of civil litigation can often be disproportionate to the value of the claim. There is nothing new about this. The Final Report to the Lord Chancellor on the civil justice in England and Wales on “Access to Justice” in July 1996³ identified the defects in the system, amongst others, as being that it is too expensive in that the costs often exceed the value of the claim and too slow in bringing cases to a conclusion and too unequal. More recently, In Australia, Hayne J wrote:⁴

³ “Access to Justice” Final Report by the Right Honourable the Lord Woolf Master of the Rolls (“the Woolf Report”)

⁴ K M Hayne “The Australian Judicial System: Causes for Dissatisfaction” (2018) ALJ 32 at 42 - 43

- a. Australia has longed since reached the point where contested civil litigation in the superior courts is beyond the purse of any but the wealthiest enterprises, the insured, or those very few who can qualify for some form of legal aid ... The Judicial system is not serving those who cannot, or will not, resort to it for the determination of disputes. ...Cost and delay, together, are important considerations for those who cannot or will not resort to the court but prefer instead to go to arbitration. To those who cannot or will not submit their disputes to determination by the courts, the judicial system is simply irrelevant.

[23] Data supplied by the Analytics and Insight (Courts and Tribunals) group of the Ministry of Justice on 16 November 2018 reveals that the following numbers of general civil proceedings were filed in the District Court:

2013/2014	2014/2015	2015/2016	2016/2017	2017/2018
13,181	10,619	11,240	12,836	13,648

Figure 1 Total general civil proceedings filed in the District Court between 2013 and 2018

[24] The Court Management System (CMS) records 31 categories of claim but the vast majority are described as being “Debt Recovery” and/or “Financial/Credit Contract” as shown in Figure 2

2013/2014	2014/2015	2015/2016	2016/2017	2017/2018
11,366	10,064	10,803	12,245	12,927

Figure 2 Total general civil proceedings filed between 2013 and 2018 as “debt recovery” or “Financial/Credit Recovery”

[25] As Dr Toy-Cronin notes in her paper “Access to Justice in the District Court of New Zealand⁵ any analysis of the data needs to be interpreted carefully. A simple example serves to reinforce this caveat: The Ministry of Justice data shows that a total of five general proceedings under the category “Natural Disasters – Christchurch Earthquakes” were filed in the 2016/2017 year (just one) and four in the 2017/2018 year. In fact, the following proceedings have been filed on the Earthquake List in the Christchurch District Court since the list began in 2012:

2012	2013	2014	2015	2016	2017	2018	2019
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17	48	11	3	9	52	103	6
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= 249

Figure 3 Total “Earthquake Claim” proceedings filed between 2012 and 2019

[26] From some 13,000 general civil proceedings being filed each year, there were 718 defended civil proceedings in the District Court as at September 2018. This is a measure of the active civil cases which are awaiting substantive hearing or awaiting final judgment. Dr Toy-Cronin analyses the differences in the definition of “Total Active Case” as between the Disputes Tribunal, District Court and High Court.⁶

[27] Despite the numbers of general proceedings being filed remaining fairly constant the numbers of defended civil proceedings have steadily increased from 547 to 718 in the period between September 2016 and September 2018.

[28] Dr Toy-Cronin has calculated the proportion of active cases that are defended in the District Court as at 30 Jun 2017 –

a. = 520/9018

⁵ Dr Bridgette Toy-Cronin & Dr Bridget Irvine, University of Otago Legal Issues Centre, 15 February 2019

⁶ *Ibid* at Part B

b. = 5.77 % of active cases being defended as at 30 June 2017.

Using the 2018 data the position is –

c. = 718/12,927

d. = 5.55 % of active cases being defended as at September 2018

Figure 3 The proportion as a number and percentage of defended active cases to the total number of general civil proceedings

- [29] Such information as is available on the identity of the plaintiffs and the nature of the claims being brought in the District Court indicates that the majority of general proceedings are brought by debt-collection entities – banks, finance companies, IRD, local authorities – in which judgment is obtained by default or formal proof. The Inland Revenue alone brings some eight percent of general civil proceedings in the District Court. The actual number of self-represented plaintiffs is difficult to estimate, absent reliable data, but is in the region of six per cent. The number of self-represented litigants increase however as the case progresses to a hearing.
- [30] The result of Dr Toy-Cronin’s analysis is that as between the Disputes Tribunal, the District Court and the High Court the District Court remains the court that litigants are least likely to access for these reasons:⁷
- a. A belief that the District Court civil jurisdiction should only be used for simple matters;
 - b. The District Court is seen as heavily dominated by criminal and family proceedings, with very limited civil resource, particularly outside the main centres. The lack of resource extends to the civil registry. Some registries steer the parties to the Disputes Tribunal even for claims within the jurisdiction of the District Court.

⁷ Ibid Part 4 pp 8 - 10

- c. Lawyers did not like the centralised registry as they were unable to talk to a case manager who understood the case.

A report to the Chief District Court Judge by Judge G M Harrison in February 2016 and subsequent experience shows however that to a large extent the Central Processing Unit has addressed this criticism. A registry officer from the CPU will now contact/be available for personal contact with the parties.

- d. There is a perception that the District Court is slower to resolve proceedings than the High Court.

The position now is that 77% of defended civil proceedings are disposed of within one year and only seven per cent of the caseload is aged over two years.

- e. The District Court has become too settlement driven; it is now paper heavy and “more resolution driven” and concerned with “trial avoidance”.⁸
- f. As the main cost of running a court case is legal fees regardless of the court in which the case is filed, there is no benefit in bringing a proceeding in the District Court. There also seemed not to be a good understanding of the forms of simplified and short trial.

[31] As Dr Toy-Cronin noted⁹ more data is required about who the users of the court are and “understanding the current profile of users of the any court is key data in planning any rule changes to attempt to increase access to justice. Such data as is available suggests that the large majority of those who commence general civil proceedings are debt-collection entities but that the parties to most of the defended cases are private individuals and/or corporate entities.”

[32] Whether or not the requirements of the Rules create an impediment to access to justice can be examined in various different situations. Many if not most “debt collection”

⁸ Ibid p 9

⁹ Ibid Part 5, pp 10 - 11

cases are disposed of by the entry of judgment by default, the defendant having taken no steps in the proceeding. Recent years have seen the rise of “pay-day” loans in which a person borrows a relatively small sum of money to meet a power bill or to buy groceries on short term loans. The annualised cost of interest of these loans plus collection and other costs runs into the hundreds of a percent, sometimes as much as 600% per annum.

[33] I am unaware of any case where a defendant has filed a statement of defence to a “pay-day” loan proceeding on the basis that the rate of interest is excessive. It seems likely that a defendant would perceive that there was nothing she or he could do to defend the proceeding and that the costs of so doing would be beyond their already extremely limited means. Whenever a plaintiff in these proceedings seeks judgment by default, the proceeding is put before a judge who may give notice under s 120 of the Credit Contracts and Consumer Finance Act 2003 of an intention to re-open the credit contract after having considered the guidelines contained in s 124 of that Act. This has occurred in a number of situations, most notably involving a pay-day lender trading as ‘Moola’ where the court consolidated some 100 proceedings, appointed amicus to assist the court and invited the Commerce Commission to intervene (which it did). Before the hearing, however, but after detailed directions were made as to the provision of evidence and submissions, the plaintiff discontinued all the proceedings.

[34] The Rules themselves do not impede access to justice in these cases. Indeed, it is one of the strengths of the central registry for civil proceedings that there are consistent practices for dealing with claims, which appear to be oppressive. Legislation to limit the cost of borrowing and collection costs is currently being considered. Education and advice through Community Law Centres and budgetary advice services should be available to assist defendants in these proceedings.

[35] There is a general sense amongst lawyers, however, that it is uneconomic to bring a defended civil claim in the District Court for anything much less than \$100,000. If a plaintiff succeeds in its claim then it is likely that she or he would be awarded costs that may recompense the successful party for half to two-thirds of the actual costs. Of course, the Rules provide for awards of increased costs or even the actual lawyer-own client costs but such awards are rare. So, a plaintiff might spend at least \$30,000 -

\$40,000 in bringing a relatively straightforward claim that takes some two to three days of hearing time and would recover \$15,000 - \$20,000 in costs against the losing party. Aside from the cost of preparing for the hearing and appearing in court at the fixture, much of the cost is incurred in the preparation of witness statements, which are often lengthy and may serve little utility.

[36] The District Court Rules 2014 contains mechanisms that limit the cost of civil litigation: interlocutory applications are limited to those, which are absolutely necessary; discovery is almost always tailored to the matters at issue; there is emphasis on the early identification of the real issues at controversy in the case; best endeavours are used to estimate and limit the hearing time. And, the emphasis is on endeavouring to obtain early resolution of the case. Hence, no change to the rules is required in order to promote access to justice – the rules need to be used and applied as intended to achieve the objective of the rules. Nonetheless there are a number of measures, which could be considered to reduce cost and waiting times, including online courts. At the foot of this paper I have examined online dispute resolution and outlined online courts in other jurisdictions.

Some recommendations:

[37] The New Zealand Bar Association¹⁰ wrote “Court procedures continue to affect the cost and efficiency of resolving litigation. While efficiency in time and cost are desirable, a balance must be struck with the needs of the parties for substantive justice.”¹¹ The Report outlined several options, which may help reduce hearing times including –

- i. Greater judicial involvement in the assessment of the length of trials;
- ii. More structured and disciplined use of hearing time
- iii. Greater use of the “short-trial”

¹⁰ “Access to Justice” Report of the New Zealand Bar Association Working Group into Access to Justice 2018

¹¹ Ibid Access Point 3: Court Procedures

- iv. An initial determination procedure to provide a “first blush” answer from the Court.

[38] The Bar Association made a number of recommendations to renew discussion about:

- i. The need for agreed statements of facts, issues and chronologies. Anecdotal evidence is that the time taken to negotiate such documents outweighs their usefulness.
- ii. Identification of cases which may not require written briefs and/or submissions. Removing written briefs or submissions would have fundamental effect in terms of cost and time as well as justice and workload of the judiciary and staff. Hence, the Bar Association does not recommend it. Nonetheless, there is much to be said for the oral tradition of the courts and for allowing participants to “have their say.”
- iii. Exploring methods of setting hearing time allocations and dates which are observed by the parties to prevent hearings exceeding their allocations.
- iv. A review of party and party costs for litigants in person
- v. Exploration of new models for the provision of legal services including unbundled legal services, value billing, flat fees, contingency fees and low bono.¹²

[39] Justice Kós recently¹³ made a number of suggestions for improving access to justice as follows:

- i. It should be mandatory for initial pleadings in all cases to be certified by a lawyer. Where a litigant in person is involved, civil legal aid to that extent

¹² Ibid

¹³ “An address to the Legal Research Foundation Annual General Meeting Auckland 20 August 2018

should be provided to ensure that good arguments are identified and really bad arguments jettisoned;

- ii. A special list be developed in the District Court for unrepresented litigants who wanted representation but genuinely could not afford it. The Judge would conduct the case in a civilian way – including leading the questioning process at trial and promptly producing a brief statement;
- iii. Cut back written briefs of evidence. Will-say statements are the primary alternative used, quite satisfactorily, in a number of reputable civil jurisdictions. And, like discovery, tailored orders for fuller witness statements on specific issues, in complex cases, might be made where justification can be demonstrated as is done in Victoria, Australia;
- iv. Increase the jurisdiction of the Disputes Tribunal, possibly to as much as \$100,000 with the ability (as currently exists) to refer complex cases where witnesses are called, to the District Court. Note, however, that the current limited right of appeal in s 50 Disputes Tribunals Act may need to be reviewed. A compromise might be to increase the jurisdiction of the Disputes Tribunal to \$50,000 with the existing right of appeal being limited to procedural error.

Conclusion

[40] Some relatively simple legislative and regulatory changes could improve access to justice such as –

- i. Increasing the jurisdiction of the Disputes Tribunal to \$50,000 with existing rights of appeal;
- ii. Permitting the provision of unbundled legal advice to assist otherwise unrepresented litigants with the preparation of pleadings that should be certified by a lawyer;
- iii. Reviewing the costs regime particularly in relation to litigants in person.

[41] The existing District Court Rules contain sufficient flexibility to enable many of the recommendations referred to above to be implemented. In particular –

- i. The identification of cases that do not require written statements of evidence, agreed statements of fact, issue and chronologies;
- ii. Even greater judicial involvement in the assessment of the length of trials and a structured process for the use of hearing time;
- iii. The use of the short-trial procedure to resolve disputes on a commercial time-scale.

[42] As Dr Toy-Cronin concluded¹⁴ “if the [Rules] Committee is considering any rule changes to improve access to justice, a robust study into the effect of that change is undertaken.” Dr Toy-Cronin wrote that rather than only compiling Ministry of Justice statistics, the Committee organise a study to measure the effect of proposed rule changes by either an evaluative study or a randomised control study.

[43] Wholesale reform of the District Court Rules 2014 is neither necessary nor desirable to improve access to justice. The mechanisms already exist within the rules to achieve the objective of rules. But, some changes can be considered. But, where change is being considered, robust study into the effect of the changes should be undertaken.

Annexures:

Online courts – analysis

“Access to Justice in the District Court of New Zealand” Dr Bridgette Toy-Cronin & Dr Bridget Irvine, 15 October 2019

¹⁴ fn 5 at p 11

On-line courts

- [44] Former Solicitor-General Mike Heron was recently quoted as saying that online courts are a “no brainer”.¹⁵
- [45] He suggested the current paper-based, rule-bound and lawyer-heavy system is unsuited to providing access to justice. Mr Heron has launched a private online service “Complete Online Disputes Resolution” (“CODR”) which specialises in divorce proceedings but covers contract; consumer; healthcare; commercial; property; relationship property; trust and insurance disputes.¹⁶ The only exceptions are criminal and employment issues.
- [46] CODR focuses on civil disputes above the level of the Disputes Tribunal but claims it can solve small disputes faster and with more expertise than the Tribunal although at a greater cost.¹⁷
- [47] One party fills out a claim form online. CODR seeks information from the other party, assesses the dispute and appoints an expert based on their expertise, cost and availability. Parties are provided with a quote for resolving the dispute.
- [48] The expert identifies and refines the issues with the parties and a time frame is agreed. A digital meeting is convened for the parties to mediate the dispute. Any matters that cannot be agreed are determined by the expert at a later date. This may require the parties to submit evidence. The expert delivers his decision within 30 days of submissions being filed.
- [49] If the matter cannot be heard on the papers a hearing will occur and cross examination can take place (at the expert’s direction). The expert delivers his decision within 30 days of the hearing.
- [50] Parties are able to use lawyers.

¹⁵ “Online courts are a no-brainer” Stuff article 6 December 2018

¹⁶ www.codr.co.nz

¹⁷ New Zealand Law Society “Online dispute resolution: filling some of the access to justice void?” Law Talk 905 31 March 2017

- [51] CODR Manager Steven Bird argues that with a \$60,000 dispute that will cost \$30,000 to litigate, most people will walk away. But if doing it online will cost \$5,000 then they are more likely to proceed. The first “divorce” case cost \$10,000 and was resolved via a two-hour hearing.
- [52] Mr Heron accepts the system is less effective when there is uneven bargaining power because it is too costly for the party with less money to sue. He suggests the answer is a compulsory, public system which might first replace the Disputes Tribunal and then expand to cover all types of civil disputes.
- [53] The CODR website includes articles on the different types of disputes, discouraging applicants from resorting to court proceedings and advertising CODR services.
- [54] Some law firms such as Legal Beagle and Ebborn Law also offer online services, largely via video conferencing.

United Kingdom

- [55] Lord Justice Briggs, of the Supreme Court in his Civil Courts Structure Review created a model for an online court which can be used without a lawyer.¹⁸
- [56] The aim of the Online Solutions Court (“OSR”) is to protect the civil courts from their current weaknesses and threats by extending their high quality civil justice service to “a silent community” who currently find them inaccessible.
- [57] An invite only pilot project was launched in August 2017, with 1800 users by April 2018. Eighty per cent found the service very good and easy to use.¹⁹ Around 57% issued a claim, while 13% fell out. A total of 40% of users filed a defence and just over 15% were referred to mediation, although only 27% of these attended. Calls to the support team were 0.5 per claim.
- [58] The Courts and Tribunal’s Service claim the system has improved access to justice as engagement from defendants has improved. However, the judiciary threatened to pull

¹⁸ Lord Justice Briggs Civil Courts Structure Review: Interim Report and Lord Justice Briggs Civil Courts Structure Review: Final Report available at www.judiciary.uk/?s=civil+courts+structure+review

¹⁹ HM Courts and Tribunals press release dated 6 April 2018 available at <https://www.gov.uk/government/news/quicker-way-to-resolve-claim-disputes-launched-online>

out of the pilot over false claims about its success and premature plans to make it public.²⁰ The pilot has been extended to April 2020.

- [59] The OSR, will deal with claims up to \$25,000 (\$10,000 during the pilot) with some exceptions including personal injury and professional negligence. It will become compulsory for claims within its jurisdiction, with an ability to transfer complex and important cases to the higher courts. It will be accessible by tablet and smartphone.
- [60] Lord Briggs argues modest disputes attract the most disproportionate cost if litigated using lawyers but that complex issues of fact and law are more effectively resolved by the adversarial system.
- [61] To create a court truly designed for self-represented litigants, the OSR will be separate from the mainstream courts, with its own rules and procedure.
- [62] Lord Briggs claims that using the same judges, allowing face to face hearings, where required, and providing a right of appeal to the County Court and Court of Appeal will ensure the ODR doesn't deliver second class justice compared to the courts.
- [63] The OSR aspires to be accessible without a lawyer, but does not exclude them. Lord Briggs identifies advantages in designing the court in a way that encourages lawyers to offer early, bespoke legal advice on the merits of a case, uncoupled from a full expensive retainer. This would address concerns over a rise in unqualified advisors, meritless claims and imbalances of power. Limited cost recovery on a fixed fee basis would incentivise such services.
- [64] In response to criticism that the OSR is a rash step in the dark Lord Briggs cites the successful operation of online dispute resolution under E-bay and Cybersettle which settle more civil disputes than the civil courts.
- [65] The model has three steps. Stage one involves an automated, interactive triage system which guides the applicant through an analysis of their grievance to produce a claim capable of being understood by the respondent and resolved by the court.

²⁰ Nick Hilborne "Judiciary threatens to pull out of Online Court pilot over lack of communication from officials."
Downloaded from legalfutru.es.co.uk/latest-news

- [66] For example, if the applicant ticks “building dispute” the software presents tick boxes for quality of work, amount charged and delays in completion. Ticking the appropriate box reveals further questions such as if the building works were covered by an agreement and if in writing requiring the applicant attach a copy. The system delivers the resulting document to the court and to the respondent electronically (by email or a text with website link). The system then takes the respondent through a similar investigatory process to generate a defence document. There is online advice as to the basic legal principles applicable to that type of dispute and online help.
- [67] The system also provides information on alternative options outside of the court such as the ombudsmen scheme.
- [68] There is then a short exchange between the parties designed to find out whether the dispute needs to go to court, recognising that most claims issued in the civil courts are undisputed.
- [69] Lord Briggs argues this approach has three advantages:
- a. Parties communicate to each other the relevant details and evidence at the earliest possible stage providing a substitute for pre-action protocols used by solicitors.
 - b. It provides early opportunities for conciliation by exchange of information and advice on mediation.
 - c. If the matter proceeds to trial all the information is available on electronic file making judicial preparation easier.
 - d. It limits the cases that need to progress to the next stage by encouraging parties to view the court process as a last resort.
- [70] Stage two involves a mix of case management and conciliation conducted by a judicially supervised case officer, online and over the phone. Lord Briggs argues this makes conciliation a cultural norm rather than an optional and extraneous process. Case management decisions are reviewable by a judge.

[71] Stage three involves the judge determining the issue either on the documents, on the telephone, by video or at a face-to-face hearing, but with no default assumption that there must be a traditional trial, except in complex cases or appeals. This makes the process more investigative as well as making the judge his or her own lawyer.

[72] The UK's court modernisation programme also includes:

- a. Ninety-nine per cent of divorces to be granted online by a judge
- b. An online make a plea service currently available for people charged with traffic offences. This offers defendants who plead guilty the option of accepting an immediate conviction and a predetermined standard penalty imposed by an automated online process. Defendants will be able to rescind the plea for one week.
- c. An online tribunals service initially allowing claimants to start and progress appeals in social security and child support cases.
- d. Improved video links from courts to police stations to allow virtual hearings, although not for full trials or sentencing.

British Columbia

[73] British Columbia is the first jurisdiction to have an operational online tribunal. The Civil Resolution Tribunal ("CRT") was established by law and has been in operation since 2016. It resolves small claims disputes up to \$5,000 and certain strata property claims of any amount.²¹ From 1 April 2019, it will resolve motor vehicle accident claims of \$50,000 and under.

[74] In November 2018, the CRT received 387 new disputes (342 small claims and 45 strata) with an average of 467 cases per month since April 2018.²² Seventy-five per cent of users said they would recommend the CRT.

²¹ <https://civilresolutionbc.ca/how-the-crt-works/>

²² <https://civilresolutionbc.ca/crt-statistics-snapshot-november-2018/>

- [75] The CRT is a mandatory, system for all claims falling under the tribunal's jurisdiction. It is premised on a collaborative, non-adversarial approach.²³ Lawyers are not permitted, with some exceptions.
- [76] It is available 24 hours a day and is accessible via computer or smartphone, with a fee of \$100 for claims of up to \$3,000 and \$125 for up to 45,000. Fee waivers are available. The entire process takes on average sixty to ninety days.
- [77] The CRT has a pre-application solution explorer designed to identify the user's issue and provide them with the information and tools to see if they can resolve it. This allows parties to anonymously understand their legal case, its merits, strengths and weakness and explore available courses of actions.
- [78] The best way to illustrate this step is by example. Available options were sale and purchase of goods and services; loans and debts; construction and renovations; employment; insurance; personal injury or property. I ticked goods and services, I ticked goods were for personal use. I ticked that the seller was in the business of selling that good or service, after being given examples such as shops and hairdressers. I was then given a fact sheet on consumer protection. I then had to identify the issue e.g. problem with quality, delivery, causing injury, wanting to end contract etc. I ticked quality and was provided with information about buying goods and a guide to reviewing my sales contract. I was then given some resolution options such as asking for a refund or repair or claiming under a warranty. I was then asked to choose which option I would like to take. The system produced a template letter which I could edit to my needs and download. It also provided a work book on negotiating a solution. Finally, it provided a summary of the issue with links to the information I had received.
- [79] If the user wishes to pursue their claim through the tribunal, the information they entered at the pre-stage is carried forward. There is a further interactive application process from which the system creates a dispute resolution notice outlining the issue and suggesting possible solutions. If the application is declined reasons and alternative remedies are provided.

²³ Orna Rabinovich-Einy and Ethan Katsh, "The New New Courts" (2017) 67 American University Law Review 166

- [80] There is provision for urgent applications, persons lacking IT access and persons with a disability.
- [81] The applicant must serve the dispute notice on the respondent and complete and return a proof of notice form to the CRT.
- [82] Parties can seek legal help, but cannot be legally represented unless they are a child or have a mental impairment or obtain permission. The system provides applicants with contact details for the CRT's lawyer referral service which provides a thirty minute advice session. There is also a map of pro bono clinics.
- [83] The CRT sends the applicant the respondent's response and an outline of the next steps depending on whether the respondent disagrees, makes a counter claim or makes a claim against a third party. If there is no response the applicant can apply for a default decision and order.
- [84] If the other party responds the parties are sent tips for successful negotiation and a negotiation preparation worksheet. The parties can send messages to the other parties via the CRT. If they reach an agreement they can request the tribunal turn it into an enforceable order.
- [85] If the parties don't negotiate an agreement a facilitator will talk to each party to reach an understanding of the issue and then conduct a mediation with them to see if they can settle the issues. This can either be simultaneous in real time or with each party in turn. The facilitator is not limited to a purely facilitative role but may provide parties with an evaluation of their legal case to try to bring them closer together.²⁴ Most claims are resolved at this stage. If not, the facilitator will prepare the parties for the tribunal decision process, including identifying the required evidence.
- [86] If negotiation and mediation prove unsuccessful one of the CRT's tribunal members will consider the parties arguments and the evidence and make a binding decision. Decisions are normally done on the papers, but if the tribunal member deems it necessary, or a party obtains permission, an oral hearing will be held, usually by telephone or video conferencing.

²⁴ Orna Rabinovich-Einy and Ethan Katsh, above n 23 at 190

- [87] A copy of a reasoned decision, which is enforceable as a court order, is sent to the parties by email, mail or fax with some decisions published on the website.
- [88] For small claims, the parties have 28 days to submit a notice of objection form. The tribunal then provides them with a certificate of completion to enable them to file a new small claims process with the Provincial Court. For strata disputes, the parties can apply to the Supreme Court for leave to appeal the decision.

The Netherlands

- [89] The Rechtwijzer in the Netherlands was launched in 2014 but was discontinued due to lack of financial viability, low usage and difficulties in collaborating with the justice system. It has been replaced by a new venture Justice42.²⁵
- [90] It was a voluntary service for divorcing couples who wanted to collaborate to seek an amicable settlement.²⁶
- [91] As with the other systems an initial diagnosis phase identified the issues including custody, housing, property division and ongoing support.
- [92] An online negotiation phase allowed the parties to negotiate using self-help tools such as an alimony calculator.
- [93] A neutral lawyer evaluated any agreement reached by the parties to address any power differences.

²⁵ See <https://law-tech-a2j.org/odr/the-rechtwijzer-rides-again/>

²⁶ Orna Rabinovich-Einy and Ethan Katsh at 193

Australia

- [94] E-Courtroom is a virtual courtroom used for the management of some matters before the Federal Court of Australia. It allows parties to file submissions and evidence online and the court to make directions or orders.²⁷

United States

- [95] Matterhorn is an online platform developed by Michigan Law Professor JJ Prescott.²⁸ It has been used by several state courts to handle warrants and traffic violations but has been expanded to cover small claims and family disputes.
- [96] Prescott argues every year millions of individuals struggle to appear in court to address minor legal issues. This may be because of the courthouse's location, work commitments, a disability, or fear that an inability to pay a determination will result in arrest. These barriers can result in very minor matters escalating.
- [97] The platform allows the litigant to communicate with prosecutors online and submit a statement. Any recommendation made by a prosecutor is reviewed by a judge.

Online Courts and Access to Justice

Advantages

- [98] Online courts can be accessed at any time and from anywhere that has access to the internet. This not only removes geographical or physical barriers it significantly reduces both direct costs and indirect costs such as time off work.
- [99] This will extend access to justice by reaching what Lord Briggs termed the "silent community" who currently see the courts as inaccessible, whether because they believe the cost will be disproportionate to their claim, or other reasons.

²⁷ <http://www.fedcourt.gov.au/online-services/ecourtroom>

²⁸ JJ Prescott "Assessing Access to Justice Outreach Strategies" (2018) 174 *Journal of Institutional and Theoretical Economics* 34

- [100] Whilst for some parties, access to an online system will be a barrier, access on mobile phones will mitigate this as could provision at community law centres or libraries.
- [101] The simple language and tailored options offered in the new systems allow unrepresented parties to better understand their rights and options and work out their interests and needs.²⁹
- [102] The use of automated online processes for the earlier stages, rather than people and places, allows the court to process far more claims reducing wait times.
- [103] The CRT's explorer or triage stage refers parties to both legal and non-legal avenues, including alternative dispute resolution processes, providing parties who would be uncomfortable taking court action with the tools to resolve a grievance and limiting the cases that require adjudication.³⁰
- [104] The interactive system allows parties with limited or no legal knowledge to navigate through legal rules and procedures by answering simple questions and receiving individualised answers and advice.
- [105] The use of pre-fixed options for answers levels the playing field for those parties who would struggle to produce accurate, comprehensive and persuasive submissions. Submissions are likely to be more targeted and succinct.
- [106] Fixed procedural options also prevent procedural advantages by more powerful parties.³¹
- [107] The use of algorithms and online communications can limit human discretion, increase consistency and reduce human bias against groups who are traditionally discriminated against.³²
- [108] The self-help tools and information sheets also provide a level of legal education absent in mainstream courts.

²⁹ Orna Rabinovich-Einy and Ethan Katsh above n 23 at 212

³⁰ Orna Rabinovich-Einy and Ethan Katsh above n 23 at 208

³¹ At 209

³² At 204

- [109] By decreasing the amount of time spent on routine minor cases judges will be able to devote more time and attention to those cases that require human expertise and wisdom.³³
- [110] The focus in designing the software is on user experience, often not the case with traditional courtrooms.
- [111] Data collected from party responses and from feedback forms can be used to refine the court and further reduce barriers to access.
- [112] Further, there is an opportunity to identify issues which are not yet legal wrongs but which may merit recognition or to identify existing laws that need better enforcement.³⁴
- [113] The collection of data therefore has the ability to make the law more responsive and improve the rule of law.
- [114] So much of our lives is now conducted online with many private companies such as e-bay and trade me setting up associated online dispute resolution processes. More private systems devoted purely to dispute resolution, such as CODR, are likely to emerge. The development of a public model, grounded in the court system, is essential to ensure that individuals' problems are resolved in a transparent, fair and just manner and that the courts are not side-lined.

Disadvantages

- [115] It appears that the growth in private online dispute resolution systems is wearing down opposition to a public model. The current assumption is that this will increase access to justice without fundamentally changing the nature of the courts.³⁵ In the current models, algorithms are not a substitute for judicial determination, which continues to be human based. Perhaps the greatest concern is that, if online dispute resolution is accepted, the distinction between software occupying a facilitative role, and not a

³³ M Bulinski JJ Prescott Online Case Resolution Systems: enhancing Access, Fairness, Accuracy and Efficiency (2016) 21 Mich. J. Race & L. 205

³⁴ At 192

³⁵ At 213

determinative role, might not be maintained. Algorithms can do a better job than humans of collecting, organising and processing information.³⁶ However, as Professor Condlin notes, whilst algorithms can think they cannot reason.

- [116] Decisions in individual cases don't just enforce the law but develop it. Algorithms can only enforce existing law, although data analysis could identify the need for new law.³⁷
- [117] Professor Condlin suggests we need to ask if "the cheap and efficient processing of disputes is a capitulation to the conditions of modern society rather than a superior system for administering justice".³⁸
- [118] He suggests that current models are both substantively and procedurally weak raising justice and fairness concerns. He suggests they can only provide acceptable redress in simple routine disputes with little at stake and not in complex disputes where case specific, legal, moral and political reasoning is required or emotional engagement with the interests of the parties is needed.³⁹
- [119] Lord Briggs, also accepted that ODR is only suited to relatively straightforward questions of fact and law. As the system will be compulsory, more complex matters will need to be referred to the mainstream courts. If, as with ODR, the system operates under its own rules and procedures, there may be issues with consistency between the two lines of authority.
- [120] However, if the system is opt-in only it may become a second-class justice system for those who cannot afford to use the mainstream system.
- [121] The current systems require parties to outline their claims using fixed predefined questions and categories with no capacity for storytelling. These may fail to capture all the complexities of a claim or by reducing it to a single issue prevent a party from recovering everything it should.⁴⁰ They also limit the opportunity to argue the

³⁶ Robert Condlin "Online Dispute Resolution: Stinky, Repugnant or Drab" (2017) 18 *Cardozo J of Conflict Resol* 717 at 723 and 756

³⁷ Orna Rabinovich-Einy and Ethan Katsh above n 23 at 168

³⁸ Condlin above n 36 at 721

³⁹ At 723

⁴⁰ At 722 and 736

substantive merits of a claim undermining the fairness of individual outcomes and, if widespread, the legitimacy of the system itself.⁴¹

- [122] Condlin notes that private ODR systems are created by contract, rely on the agreement of the participants for legitimacy and need only take into the account the parties' interests. By contrast, public systems are created by law, rely on their ability to protect a much wider range of interests for legitimacy and must consider the interests of third parties, the legal system and the background of moral, social and political norms.⁴²
- [123] Algorithms are secret and known only to their owners or creators. Algorithms may reflect their programmers own biases or operate in discriminatory or unpredictable ways which may not be identifiable where they produce an outcome without a chain of reasoning.
- [124] This is inconsistent with the principle that justice is based on substantive standards and procedural rules that are transparent and known equally to all. It is of particular concern where algorithms are used at the determinative stages as with the UK's plea system.
- [125] Professor Condlin suggests that electronic text-based exchanges in limited text boxes, may buy parties time to think before responding and remove personal characteristics and unnecessary emotion, irrelevancy or repetition. This makes it more likely that disputes will be resolved on what is said rather than how it is said or who says it. However, delays in responses may increase distrust and a lack of non-verbal cues and rapport building practices may reduce social co-operation impeding effective dispute resolution.⁴³
- [126] One of the key concerns is imbalances of power. In the CRT lawyers can advise but not represent parties. Many types of claims, such as ACC, housing, insurance, consumer, and divorce involve imbalances of power. Whilst these exist in mainstream courts they may be less obvious to judges online.

⁴¹ At 722

⁴² At 734

⁴³ At 752

- [127] A related issue is the ability of judges to assess the reliability or credibility of witnesses or parties where most matters are done on the papers or even over the phone.⁴⁴ Further, removal of the intimidation factor, experienced by witnesses in court, makes false testimony more likely.
- [128] The system also raises concerns about open justice both in terms of people accessing courtrooms and the number of judgements published.
- [129] For some digital communication is still inaccessible. Unless this is addressed in a meaningful way this may result in a lack of access to justice by society's most vulnerable.
- [130] If judges from the mainstream court adjudicate claims the new accessibility may result in a sudden increase in claims impacting on the ability to meet demand without disappointing new expectations.
- [131] Further concerns include ensuring the security of data from leaks or hacking attempts and verifying the identity of the applicant.

Online courts - conclusions

- [132] It appears that online courts have a potential to increase access to justice by opening up the court system to a silent community who currently see it as inaccessible.
- [133] If a court centred system is not developed there is a risk that many claims will be resolved by private systems raising concerns about transparency, fairness and justice.
- [134] However, these same concerns are raised by the current public models suggesting that, rather than extending the high-quality system of justice provided by the courts, they will offer a second-class system of justice.
- [135] New Zealand may benefit from waiting and learning from the issues identified by the UK system before proceeding with its own system.

⁴⁴ Doron Menashe "A Critical Analysis of the Online Court" (2018) 39:4 U. Pa. J. Int'l L 921