

Online Courts: Refresh for Justice

The place of Courts in the age of the internet

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[1] It is a privilege and a pleasure to address you today on the topic of online dispute resolution (ODR) and the courts.

[2] One of the very positive aspects of ODR is that it engages a wide range of disciplines. This forum is an important opportunity for you as members of a number of different disciplines and countries with different perspectives to share your different expertise and visions for the future.

[3] As we know, information technology and artificial intelligence is developing at a pace that could not have been imagined even 10 years ago. Professor Richard Susskind's predictions in his book "Tomorrow's Lawyers" may now seem conservative.

[4] In this address I want to reflect on how the courts could respond and take advantage of the new technologies and engage with ODR. I will limit my remarks to what I think is possible in the *near* future. I will leave discussion about judges and parties appearing as holograms,¹ and artificial intelligence being used to assist human judicial decision-making for another day. My focus will necessarily be on New Zealand, but I will consider some of the steps being taken in overseas jurisdictions.

[5] I became a Judge in 1995, 23 years ago. Then, when I was assigned a new case a registry officer would wheel a trolley into my chambers stacked with several large boxes of paper files. The internet search facilities and email systems were basic.

¹ Genn at 11.

[6] In the intervening years the internet and mobile devices have reshaped many aspects of our daily lives. We can do our banking while on public transport or watching Netflix, fridges send us messages when our milk is about to expire. Drones can deliver pizza. You can even find your life partner through an app on your phone.

[7] But last week, when I was assigned my latest case, the files didn't pop up on an internal server or tablet, and they weren't delivered by drone. They were still delivered on that same trolley from 1995. If anything, the number of boxes and paper had increased.

[8] The technological revolution that has changed so much of our lives is yet to bring the same changes to how courts operate. That is not to say nothing is being done. In the High Court of New Zealand we are in the process of digitising our filing system, we use video technology to enable parties and witnesses in court proceedings to appear remotely or from overseas, there is technology to assist with electronic discovery, such as Technology Assisted Review (TAR), we have electronic protocols and practice notes and some trials are conducted using electronic documents and files. We have good research resources through the internet and good email and intranet systems. But technology promises and enables much more than that.

[9] My focus today is on how ODR has been applied to the resolution of disputes and how it might be applied or incorporated as part of or an aspect of the civil justice system. The potential impact of technology on the criminal justice system raises quite separate considerations and is worthy of a conference on its own.

[10] Civil law is also important. It governs all aspects of our lives, from how we engage in commerce to how we arrange our personal and family affairs. It allows us to challenge decisions of the Government and discourages us from harming our fellow citizens.

[11] I have no doubt that technology will change the administration of justice and how courts resolve civil disputes. It is inevitable. The challenge for us is to ensure that the changes achieve the objective of improving access to justice while maintaining the rule of law.

[12] I begin by noting some innovative ways courts and tribunals are incorporating ODR around the globe.

eBay

[13] As you might expect, the early adopters of ODR were not countries or judicial systems, but global corporates. eBay began an ODR pilot in 1999, expanded it in 2003 and today resolves more than 60 million disputes every year.² [eBay's system adopts a staged process. It helps users identify the root of their problem and the likely solutions. Next, it allows the parties to negotiate directly with assistance from technology. Finally, eBay decides the case if the users could not.] Paypal has something similar.

Netherlands

[14] A number of countries have already looked at the use of ODR in high volume litigation. Many of you will be familiar with the Dutch website for separating couples called Rechtwijzer. For a time, following its launch in 2007, the website was the posterchild for ODR. It asked users a series of questions, which adapted to the users' circumstances. It automatically guided them through the legal aspects of the conflict, advising them what they could do themselves and directing them to external services. In 2015, it added a stage of online mediation and enabled users to draft separation agreements that were ready for final legal approval.³

[15] The website was a collaboration between the Hague Institute for the Internationalisation of Law (HiiL), the Dutch Legal Aid Board, and Modria, a US company whose founders helped develop the ODR systems for eBay and Paypal. The website initially cost €2.3m.⁴ Unfortunately, in 2017, it was shut down.⁵ The number

² Colin Rule "Designing a Global Online Dispute Resolution System: Lessons Learned from eBay" 2017 University of St Thomas Law Journal 355.

³ <https://www.newlawjournal.co.uk/content/online-cometh>

⁴ Roger Smith and Alan Paterson (Nov 2013) Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution At 59. Available at https://pureportal.strath.ac.uk/files-asset/51875825/Smith_Paterson_CPLS_Face_to_face_legal_services_and_their_alternatives.pdf

⁵ Though it lives on under different management at Uitelkaar.nl.

of paying users did not “come close” to the projected targets.⁶ Negotiations with a partner in the UK market also fell through, as did talks with the Dutch government and other investors to fund further development.

Canada

[16] The failure of Rechtwijzer has not stalled momentum for ODR. In 2016, the non-profit Legal Services Society in British Columbia adopted the same technology to provide free advice and ODR for separating couples.⁷

[17] British Columbia’s tribunals are also applying ODR. The province’s Civil Resolution Tribunal launched an online service in 2016, initially for disputes between condominium owners, but it has since expanded to include civil claims worth CAD\$5,000 or less,⁸ a limit that is expected to be raised if the website proves successful.⁹

[18] The website guides claimants through a series of interactive questions and lets them email their claim to the respondent.¹⁰ If the respondent agrees to engage, the parties enter online mediation and, if successful, they can create an agreement together online. Figures show users had made 14,000 claims by February this year.¹¹ About 700 cases had been resolved by that date, most of which were settled. Only 12 had required the tribunal to rule.

Australia

[19] In Australia, the Federal Government attempted something more ambitious. It announced in early 2017 that it was creating an artificially intelligent assistant for its national disability insurance scheme. It would speak with the voice of Hollywood

⁶ HiiL Annual Report and Accounts 2016 at 17.

⁷ The website also provides legal advice for family violence, mortgage debt, wills & personal planning.

⁸ https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/british_columbiaodr.html

⁹ <https://www.canadianlawyermag.com/legalfeeds/civil-resolution-tribunal-set-to-launch-small-claims-dispute-tool-7287/>

¹⁰ <http://www.smallclaimsbcc.ca/settlement-options/ODR>

¹¹ https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/british_columbiaodr.html

actress Cate Blanchett and would get smarter with every interaction. However, the project appeared to have stalled by September last year.

China

[20] China launched its first online court in August last year in Huangzhou, the country's e-commerce hub.¹² All aspects of the case, including a stage of mediation, are intended to be conducted online, including by video conferencing. By the end of its first year, it had concluded more than 10,000 cases, with an average trial time of 28 minutes.¹³ Two further online courts were launched in September this year in Beijing and Guangzhou. The courts hear disputes relating to the internet, including those related to online purchases, loans, copyright and domain names. The rationale is that, for these types of disputes, the evidence is mainly generated and stored on the internet. Litigants are able to establish the authenticity of electronic evidence using blockchain technology.

Singapore

[21] The Singaporean courts are about to launch an online platform to help advise motorists who have been involved in traffic accidents.¹⁴ Users will first be guided through a series of questions about the accident. The platform then takes this information, compares it against precedent cases and historical data, and then applying algorithms, advises the users of the likely outcome in their case if they proceed to court. It is hoped this information will lead to more meaningful settlement discussions. The State Courts hope to have the platform up and running in the first quarter of next year.

Dubai

[22] The Dubai International Financial Centre Courts' Small Claims Tribunal hears claims up to £100,000 (approximately).

¹² <https://www.netcourt.gov.cn/portal/main/en/index.htm>

¹³ <http://www.loc.gov/law/foreign-news/article/china-supreme-court-issues-rules-on-internet-courts-allowing-for-blockchain-evidence/>

¹⁴ <https://www.straitstimes.com/singapore/courts-crime/online-simulator-to-help-motorists-predict-possible-outcomes-of-accident>

United States

[23] In the United States, there are a number of initiatives involving ODR and the courts, examples are the small claims courts in Ohio and Utah and traffic courts in Michigan.¹⁵

England and Wales

[24] The UK has taken important and ambitious steps to incorporate ODR into the operation of courts. The background is that in 2016, its Government announced it would spend £1b to modernise its justice system.¹⁶

[25] There is to be a single online system for starting and managing criminal, civil and family cases as well as cases in tribunals. In time, the courts will let the circumstances of the case decide whether to hold hearings online, by telephone or video, or in person. Some cases will be dealt with entirely online.

[26] The entire criminal justice system will be digitised, allowing cases to be managed online from charge to conviction. Victims and witnesses will receive updates about the cases they are involved in. For minor criminal cases, defendants will be able to plead guilty online, receive a conviction and then instantly pay a fine and costs.

[27] But it is in the civil and tribunal jurisdictions where the proposals are most advanced. There are currently two main initiatives, first a proposal to allow disputes over social security and child support to be resolved entirely online.¹⁷ The second is to establish an Online Court, where claims of £25,000 or less will be resolved entirely online by default, but also in person where appropriate.

¹⁵ Joint Technology Committee “Case Studies for ODR for Courts: A view from the front lines” (29 November 2017).

¹⁶ Lord Chancellor, Lord Chief Justice, Senior President of Tribunals “Transforming Our Justice System”, September 2016, at 3.

¹⁷ Transforming Our Justice System at 6 and 15.

Current challenges for access to justice

[28] One of the biggest challenges civil court systems face is that for many, the current court processes are too slow, expensive or complicated to use.¹⁸ Lawyers can help ease the complexity, but they are costly, and court fees are significant. It is becoming more difficult for people to access the courts.¹⁹ The number of people who choose to represent themselves is increasing. Self-represented litigants have to do the best they can in a bewildering legal environment.²⁰ For those who represent themselves, the rules and laws are complex. Even those with financial means are not immune to the costs and delays associated with litigation.

[29] This problem of access to justice is not new. But it is exacerbated by the increasing costs of litigation, which is in part a result of the increasing complexity of litigation. As society has become more sophisticated so have civil cases become more complex. The volume of documentation and electronic records can be extensive. Parties can spend considerable time and expense on the interlocutory stages of a proceeding, particularly on discovery. Trials are increasing in length.

[30] A recent study showed that on average, a general civil proceeding in the High Court is estimated to take 381 days from the time the plaintiff first files until final disposition.²¹ A significant number take longer. A recent report estimated the average length of hearing a defended civil case was eight days.

[31] Does ODR promise a solution to some of these challenges? Can it work with and within an established court system? The UK's Online Court suggests it might do so. We have common aims. In announcing the reforms, which include an integrated ODR system, the Lord Chief Justice and Tribunal President confirmed the purpose of the Online Court was to address the issue of access to justice. They said:²²

We must make sure that the justice system is proportionate in order to save people time, shrink their costs, and reduce the impact of legal proceedings on

¹⁸ Genn at 6.

¹⁹ David Neuberger, President of the Supreme Court of the United Kingdom “Keynote Address: A View From On High” (Civil Mediation Conference, London, 12 May 2015) at [26].

²⁰ Genn at 6.

²¹ The Wheels of Justice: Understanding the Pace of Civil High Court Cases at 35.

²² Lord Chancellor, Lord Chief Justice and Senior President of Tribunals “Transforming Our Justice System” September 2016 at 5.

their lives. Justice delayed is justice denied. Low value cases or those of modest social significance should be dealt with quickly.

[32] There are three stages to the Online Court. First, litigants can lodge their case with the aid of automated questions and guidance. Second, Court officers engage the parties in mediation or conciliation, to assist in settling the dispute. Third, for those cases that do not settle, a Judge will determine the case. The default position is that all three stages will occur online.

[33] I have to say that as a judge, the integration of ODR into the Online Court is the feature of the UK system that really interests me. Judges are very familiar with ADR. But the perception most judges have of ODR is that it is very much an alternative system which operates outside and independently of the existing court system. One of the key differences between the Online Court and the Dutch and Canadian websites is that the Online Court uses ODR to reimage not only mediation, but also litigation. Judicial oversight is part of the process.

[34] You will not be surprised to learn that I consider judicial oversight is important. Even acknowledging the usefulness of mediation, litigation is central to the rule of law.²³ For wider society, the decisions of the courts clarify what the law is, which helps future parties decide whether they have a good case and whether to settle.²⁴ But the benefits to society of a civil justice system are greater than simply providing precedent. As Lord Reed of the Supreme Court of the United Kingdom recently explained:²⁵

... the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.

[35] Importantly, cases that go to a hearing before a judge are decided based on law, not on what the parties are prepared to live with. Court hearings presided over by a

²³ Genn at 6.

²⁴ *R (UNISON) v Lord Chancellor (Nos 1 and 2)* [2017] UKSC 51, [2017] 3 WLR 409 at [70].

²⁵ At [71].

Judge (even via screen) can also provide greater protection where there is an imbalance of power between the parties.

Empowering litigants to make their own case

[36] I return to the issues an Online Court might address. Currently, the first hurdle for litigants in traditional litigation is getting their case off the ground. They are confronted with the courts' rules on how to file; by when, in what form, and how to serve. They also need to determine where their case fits within a complex system of laws. It can be difficult to do this without legal assistance.

[37] An Online Court can address these issues. Litigants interact with an automated online system that presents them with a series of questions that will be tailored to their dispute. Properly structured an online court system will extract the essential alleged facts and evidence about the case right from the outset. The website should provide basic explanations of relevant legal principles and point litigants in the direction of affordable or free legal advice.²⁶

[38] While the focus so far has been on litigants in person, lawyers should not be excluded from the process. They can add value by formulating claims and defences on line for their clients.

[39] This first stage is the most radical aspect of the Online Court and one which Lord Briggs says "(if it works) would provide a quantum leap in the navigability of the civil courts".²⁷ I agree. Harnessing technology in the initial stages of civil disputes should improve access to the courts by lowering costs and demystifying the process.

[40] But there are challenges with the proposals. Lord Briggs acknowledges the first stage will be the hardest and most time consuming to design and test.²⁸ The most difficult aspect is not necessarily in the design of the IT, but in the formulation of the questions themselves.²⁹ They will have to be comprehensive enough to anticipate the

²⁶ Briggs final report at [6.64].

²⁷ Briggs, final report at [6.61].

²⁸ Briggs Final report at [6.68].

²⁹ At [6.62].

vast range of human disputes,³⁰ and worded in a way so the process is accessible to litigants from a wide range of backgrounds. All judges have experienced cases where the good point is buried amongst a number of hopeless points. When you add to this mix the fact that the law is constantly changing through legislation and decisions of the courts, the complexity of the challenge is obvious.³¹

[41] If these challenges can be overcome, there will be many positives. The progression of cases is often hampered by parties not following the rules of procedure. While the rules are designed to ensure parties act fairly in the pursuit or defence of a claim, there are a number of procedural rules that may apply, so much so that it is not uncommon for lawyers to fail to comply. Litigants in person often struggle to follow these rules.

[42] One of the benefits of an automated, interactive system is that it will remove the need for parties and lawyers alike to be familiar with the detailed rules.³² The online platform can incorporate the rules so that litigants comply with procedure simply by using the platform. Litigants will receive reminder alerts to upload evidence or lodge documents by certain dates.

Facilitating settlement

[43] As I indicated earlier, one of the most interesting aspects of the proposed Online Court is the inclusion of a structured mediation or conciliation ODR process within the Online Court system. In the UK, this second stage is viewed as a significant departure from current practice, where courts might encourage mediation, but have not yet embedded it into their processes.³³

[44] I accept the rationale for including ADR by the use of ODR within the Online Court is that parties should have autonomy to decide how they wish to resolve their dispute and that settlement, as long as it is just a settlement, is itself a public good.³⁴ The Master of the Rolls, Lord Etherton, believes that including mediation within the

³⁰ Civ Justice Quarterly at 76.

³¹ Final report at [6.62].

³² Etherton at [53].

³³ Etherton at [25]–[26].

³⁴ Etherton at [26].

Online Court by ODR will help save it from the fate of the Rechtwijzer, which operated as an alternative to the courts. He has said:³⁵

Settlement and adjudication will not operate within rival systems, but as complementary mechanisms within a holistic system. We are seeking to enhance our civil court, not create an online alternative to it. As such the question of preference that undermined take-up in The Netherlands is unlikely to be replicated here.

[45] Professor Hazel Genn sounds a note of caution. She suggests that bringing mediation into the court process risks undermining the judiciary's core purpose of vindicating rights, because the court may begin playing a part in agreements that are not just.³⁶

[46] But as I have suggested, ADR has played a part in the resolution of civil disputes in New Zealand for a number of years. It is something our judges are familiar with. The possibility of ADR is addressed at case management conferences. Its availability has been significant in enabling the High Court to deal with the large volume of cases arising from the Christchurch earthquakes. A number of years ago a court-annexed mediation service was trialled in Auckland to address the large number of "leaky home" cases filed with the court there. It is a relatively short step to take to include a structured mediation by the means of ODR as part of an Online Court. The bold step is in the establishment of the Online Court itself.

[47] Concern about the inclusion of ODR as an integral part of a court process is also mitigated by the availability of adjudication by a judge as part of the process if the ODR fails to resolve the dispute. If the parties to the ODR mediation know that they have the option to have their claim resolved within a short time after the ODR mediation by inexpensive online adjudication, any settlement reached is more likely to reflect their substantive rights.

Adjudication

[48] The final feature of an Online Court is for there to be a Judge to determine the cases that do not settle. In the UK model the default position is that adjudication will

³⁵ Etherton at [50].

³⁶ Genn at [11].

occur online, with the potential for parties to give evidence by phone or video. But it will still be possible for some cases to be determined by trial in a physical courtroom, if necessary.

[49] An objection sometimes raised is that virtual hearings will be less fair or effective than traditional hearings. Currently, parties see and hear justice being done in a physical space that communicates the seriousness of the process and its public nature.³⁷ They have their day in court and are heard. Will a litigant feel the same way if their only interaction with a judge is via their computer screen, or by web chat? From a judge's point of view, how will virtual hearings affect his or her ability to assess the credibility of a witness and control the court? Another challenge will be ensuring open access to the business of the court if hearings are conducted online.

[50] Lord Thomas has suggested that the advantages of physical attendance in courts may be overstated.³⁸ Judges are already cautious about placing too much emphasis on witness demeanour. Credibility is now more often resolved by the logic of the case and/or contemporaneous documents. It also has to be recognised that members of the public are now much more familiar with and accepting of, interacting through computer or tablet screens. Skyping and videoconferencing for personal and business purposes is common.

[51] Another criticism of an Online Court is that it may be seen to provide "second-class justice".³⁹ But as Lord Briggs notes, comparing the Online Court to traditional litigation "ignores the harsh reality that such litigation is so expensive that it is either unaffordable or imprudent, where modest sums are at stake". As Professor Richard Susskind has recently said: "Maybe [online] isn't quite as good, but it's available. I'm seeking improvement, not perfection".⁴⁰

[52] For smaller claims in particular, there is a pressing need to ensure that access to justice is a practical right, not just a theoretical one.⁴¹

³⁷ Genn at 12.

³⁸ Lord Thomas at [16].

³⁹ Briggs final report, at [6.6]–[6.10].

⁴⁰ Court Excellence and Innovation Conference, Dubai 2018.

⁴¹ Etherton at [22].

Conclusion

[53] What does this all mean for New Zealand? The current Secretary for Justice indicated earlier this year there were no plans to follow the UK example.⁴² He suggested the New Zealand approach was incremental rather than built around a single big-bang. The focus was on smaller, bite-size chunks.

[54] As I outlined earlier, a number of steps have been taken to support the modernisation of the court process. There are other available steps such as:

- enabling court users to obtain information using smart phones;
- payment of fees and fines online;
- providing forms online;
- enabling litigants in person to file electronically (booths in Court buildings);
- sending automated reminder messages by text.

But these can all be characterised as refinements to an existing process. The issue that needs to be discussed is whether the process itself, at least for small value claims, needs to be changed and the possibility of Online Courts incorporating ODR as part of the process should be pursued.

[55] I suggest it will be important for New Zealand (and other countries) to carefully watch the implementation and operation of the UK Online Court. It appears to provide a well-researched model which, if successful, could be implemented in New Zealand.

⁴² Andrew Bridgman in Law Talk <http://www.lawsociety.org.nz/practice-resources/the-business-of-law/practice-systems-and-tools/information-technology-in-the-new-zealand-court-system>

[56] If we are to consider using ODR as anything more than an alternative to the existing civil justice system, an Online Court, directed at the resolution of low value, high volume disputes, is an obvious model.

[57] The Disputes Tribunal was initially established as the Small Claims Tribunal in 1988. Its jurisdiction is currently \$15,000 (or \$20,000 by agreement). On the last available figures, it dealt with just under 14,500 claims a year. Now, 30 years on from its establishment, it is surely time to review it and to consider replacing the Tribunal with an Online Court within the District Court perhaps, similar to that established in the UK with an initial jurisdiction of up to say \$50,000. Disputes up to that level are generally less complex and lend themselves to more automated processes. But they cannot presently be economically brought, even in the District Court. The use of an Online Court with ODR for these types of disputes would speed up their resolution and reduce costs. It would allow those with limited means to access their legal rights and facilitate access to justice.

[58] Of course, that will not address the issues of larger claims. But developments in these areas are incremental. If the Online court is shown to be able to effectively deliver justice for small claims, its use in larger claims can then be considered. Sir Geoffrey Vos, Chancellor of the High Court, has recently suggested that the development of the Online Court in the UK is bound to be the blueprint for the roll-out of ODR to more significant and high value disputes.⁴³

[59] I end on a cautionary note. It will be tempting to focus on quantitative outcomes when reviewing the success or otherwise of the UK Online Court system. But any review of such a system must also ensure that the outcomes it achieves are just, which is more difficult to assess.

[60] If we are to accept a form of ODR within the court system as opposed to acknowledging its value outside the process, it will be important for its credibility and acceptance that it is included as part of a model which retains the features of a judicial process leading ultimately, if necessary, to a reasoned decision by a judge. For that

⁴³ The Law Society's Inaugural Lecture on the Future of the Law, 8 May 2018.

reason I support the Online Court model. It is important that courts continue to issue judgments to independently and publicly vindicate personal rights. As Professor Genn says, the courts cannot afford to lose sight of their core purpose in vindicating citizens' rights.⁴⁴

Access to justice ... means something more than being able to complete an online form and feel comfortable with the process. It requires the ability to engage, to participate, to be dealt with by fair procedures and to receive a substantively just outcome.

[61] There are a number of challenges facing the Court system at present. ODR within an integrated Online Court may provide some answers. The path ahead is not straightforward, nor is it without potholes. A conference such as this is a positive and important step along that challenging road.

⁴⁴ Genn at 6.