

The English Online Court

A Research Proposal for Its Evaluation

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Abstract

The most difficult challenge of modern-day courts has been their inequality in terms of access and outcomes. Much effort has been devoted to render court proceedings quicker, less expensive, and more comprehensible, especially for litigants in person (LIPs) as they represent the majority of court users in civil proceedings. There is an ongoing 1.4 billion court reform program in England and Wales, which is introducing new online processes, including notably, the Online Civil Money Claims (OCMC), which current pilot has already processed over 300,000 small claims under £10,000. This new digital court process provides a unique site for exploring the potential and challenges associated with the shift to online proceedings in terms of access to justice, equality of outcomes and perceptions of fairness. To that end, this paper discusses the background of the OCMC process and a research proposal for its evaluation. By empirically understanding what elements of the digital dispute resolution process work well and those that need improvement, there is a unique opportunity to identify design changes in the digital court, so that it can become more accessible and fairer for LIPs, who represent the largest group of court users, and therefore whose views determine the level of public confidence in the English legal system.

Keywords: digital justice, online dispute resolution, online court, ADR, litigants in person.

This presentation relates to a research proposal for the evaluation of the English online court, which is in effect the Small Claims Court moving online. In England, the so-called Small Claims Track allows for the processing of claims under £10,000. In addition, there is a Money Claims process, which is a simple process for money claims under £100,000 when there is evidence of that debt and a defence has not been entered; in these cases, the judge is allowed to issue a default judgment without the need for any party to meet in person. But when a defence is entered in a money claim, the process used to move offline.

The idea of the online court is that it will start online and it will proceed the entire process from the beginning to the end online. It was first conceptualised in England by the Civil Justice Council ODR Advisory Board, chaired by Richard Susskind, and amongst its members included Tim Wallis, Graham Ross and I. That was back in February 2015, and then a few months later, in April 2015 JUSTICE,

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which is a high profile human rights and law reform NGO, also issued a report chaired by the English Lord Justice Burnett of the Court of Appeal, that called for the need to digitalise the court service in order to increase access to justice, in particular for lay litigants in person -*i.e.*, those self-represented litigants that go to court without legal counsel. This is very common for the small claims because if you have legal representation you cannot recover the cost of the lawyer's fees. One of the main findings in these preliminary reports is that it is not cost effective to have legal representation for low value claims as their cost would often be disproportionate. But the idea of the online court really took off when Lord Briggs, who is now a member of the Supreme Court in the UK, issued a report commissioned by the Judiciary back in 2016 entitled Civil Courts Structure Review. In the report, his main recommendation was the launch of what he called the Online Solutions Court. This court has been operating since 2017 on a pilot basis and it is due to be completed next year. Myself, together with other colleagues, namely, Orna Rabinovich, Ayelet Sela and a colleague from Leicester, Tony Cole, are developing a research proposal to evaluate the experience of litigants in person participating in this online court.

Lord Briggs found in his report that 'the single most pervasive and indeed shocking weakness of our civil courts is that they fail to provide reasonable access to justice for the ordinary individuals'. His main recommendation to overcome this weakness was the launch of what he called the Online Solutions Court for claims under £25,000. For those familiar with the Civil Resolution Tribunal in British Columbia in Canada, this tribunal was the blueprint for the Online Solutions Court. Yet, the idea of the online court became a reality when the UK government committed public investment in the modernisation and digitalisation of the courts. The Government issued first a public consultation called 'The Transformation of Our Justice System' back in September 2016, and then it issued a response in February 2017 where it embraced Lord Briggs recommendations. The initial commitment was for £732 million, but the budget has already increased to £1.4 billion to cover the modernisation all courts and tribunals, including their digitalisation, by the end of November 2023. The aim is for all courts and tribunals in England and Wales to operate digitally by default. One of them it is the so-called 'Online Civil Money Claims', which many people refer to as the 'Online Court', or what Lord Briggs called the Online Solutions Court, which I'll discuss in more detail in a moment. But first, let me also touch on what Sir Colin Birss mentioned yesterday in his keynote about this idea of the common platform, which include an online forum or website interface that will channel all civil, family and tribunal cases. Accordingly, all types of cases, saved for criminal cases, will, in first instance, be channelled via this online clearing-house that will provide some information to prospective claimants. The goal of this platform is to integrate the existing pre-action protocols, to refer parties to ADR processes (including to private ADR providers) that can help to resolve disputes at an early stage when possible, and if not, then the case will move on digitally to a court or tribunal. This platform is underpinned by a statute that received royal assent only six days ago, the Judicial Review and Courts Act 2022.

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Let now move on to discuss the process of the Online Court, also known as the Online Civil Money Claim. This is an ODR process which, as I mentioned earlier, is very similar to the Civil Resolution Tribunal in British Columbia. But first it is worth noting that the cost of developing this technology is partly being raised from the sale of underused court estate in England and Wales. Thus, the UK Government is selling under-used courthouses, and investing the proceeds in developing the technology; and that is an important part of the budget. Apparently, there are many County Court hearing centres across England and Wales that have been under capacity as the number of civil cases have dropped significantly over the last two decades.

The Online Civil Money Claim has three main procedural stages. The first one is the issue of the claim online via the website; there is some filtering questions to ensure that the claim fits in the current scope of the pilot. Once the claim is submitted online, and the fees are paid online too, then somebody from the court services will print the claim and will post it via regular snail mail to the defendant. Then, the defendant will be given the opportunity to issue a defence online or on paper. In most cases they do it online as it is more convenient. The defendant can also make a without prejudice offer to settle, meaning that the judge will not be aware of an offer being made. Under the present pilot there is only one opportunity to make a single offer. My understanding is that during the pilot only a small percentage of cases, maybe around 6%, settled at this stage.

When cases are not settled, they move to the second procedural stage, the conciliation. Lord Briggs said that this conciliatory stage should be a culturally normal element of the legal proceedings; thus it should be imbedded in the legal proceedings. This conciliation or mediation stage was, up until last year, an opt in model, whereby the defendant was first invited to participate in a telephone mediation in advance of the hearing, and if the defendant agrees, then the invitation is sent to the claimant. This conciliatory process, which is free of cost, is a sort of assisted negotiation whereby a civil servant trained in mediation phones the parties separately for up to an hour and helps them to explore a settlement. The opt in model has now changed after a short evaluation to an opt out model, whereby parties are automatically allocated to a slot for a telephone mediation, unless one of them expressly states that they do not wish to participate in the telephone mediation. Approximately, around 30% of the defended claims settle at the opt-out telephone mediation. If the claim doesn't settle, then a legal advisor is appointed. This is a bit of a misnomer because the legal advisor cannot provide legal advice to the parties as doing so would impinge on the parties' right of equality of arms. Instead, legal advisors provide case management support, and for certain low value claims, currently in the pilot for those cases under £300, they can also issue online directions.

If parties do not settle at this stage, the case moves to the final stage of judicial adjudication (*i.e.*, the trial), where the judge, as you heard yesterday from our keynote, under a new sub-pilot is allowed to decide low-value cases without a hearing, which is a major departure from the traditional common law approach where orality is a central element of the trial. However, the judge may prefer to have a telephone or video conferencing hearing. This was obviously mainstream

during the COVID-19 pandemic, in particular during the lockdown periods. Exceptionally, the judge may require parties to attend a face to face hearing, such as when cross examination is necessary or for higher value claims. English judges have also been experimenting with something called ‘continuous online hearings’ in a pilot tested in the Social Security Tribunal for certain types of claims, whereby the tribunal (*i.e.*, the judge and the two lay members or wingers) will contact the applicant (*i.e.* the appellant) whose social benefit has been denied by the State, to obtain the necessary information in order to make a preliminary decision. This is just a recommendation that parties can accept or reject. If parties accept it, the case is settled. If one of them rejects it, then the case is moved onto the hearing with a different panel of judges in the tribunal. There is not public information about the outcome of this pilot, but it has not been extended so far. I suspect this is a question of costs –in other words, that the cost of running the continuous online hearings is more expensive than not having it; but there may be other factors that could have impacted on the decision of not expanding this pilot.

The digitalisation of the proceedings allows for the specialisation of judges. If there is no need to have judges in every locality as they can be contacted online, it makes sense that instead of having generalist judges that are required to rule on a variety of common civil claims (*e.g.*, debts, airline disputes, or tenant and landlord issues, etc), they can now be specialised judges in fields where there is a high volume of claims. In this way, their expertise will enable them to issue decisions in a more consistent and faster way. When I started working as an adjudicator for CEDR in different panels, the first time I dealt with a specific type of dispute it took me much longer to decide the case than when I decide a case after having done many other similar cases in the same field. Hence, I would argue that specialisation could lead to greater efficiency and consistency in the decision making. Next, I will provide you with some additional information about the online court pilot, and then I move on to the research proposal that we’re working on.

The Online Court pilot started in 2017 and it will finish in November 2023. Thus far, it has resolved around 300,000 cases. The scope of the pilot was initially restricted for a litigant person (*i.e.*, self-represented litigants) against another litigant in person, and bit by bit was expanded to incorporate defendants who are legally represented. The pilot is currently operating for claims under £10,000, but the plan is to increase it for civil claims up to £25,000. The types of cases vary, but the main bulk are debts, mostly undefended. The majority of these debts are of low value. For example, if you don’t pay your electricity bill, most of these cases in England and Wales will end up in court. Also, very frequent are cases related to private parking fines and some personal injuries cases, especially those resulting from road traffic accidents. There are also two pre-court ODR platform that supports online negotiation for these types of road traffic cases, namely, the Damages Portal and the Official Injury Claim. In addition, there are a number of sub pilots that operate in the Online Court.

One of these sub-pilots is the online directions that can now be issued by legal advisors, currently only for claims under £300, which can be appealed to a judge. In practice, only very few appeals from these legal advisors, who are basically court

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clerks, have been overturned by judges. Based on this success, it is plausible that the current economic threshold of the advisors will be increased soon.

In a similar vein, it is likely that in the future more higher value cases will be decided on the documents, without a costly hearing. My understanding from what Sir Colin said yesterday is that there are four County Court hearing centres that decide these cases without a hearing. Another recent change was the incorporation of bulk litigants into the online court pilot. These are often collection agencies; they purchase debt and they chase multiple defendants. These are frequently consumers that do not defend these claims. Therefore, a key question to ask is whether the ODR process makes it easier for court users to defend a claim. If the process is online, would it be easier to enter a defence? well that's one of the questions that we would like to examine empirically.

The expectation is that the Online Court, *i.e.*, Online Civil Money Claim, will process the highest number of civil claims in the country. Currently, in this Small Claims Track most court users are litigants in person, thus it's quite important to get it right as this court process would determine the level of public confidence that most citizens will have with the courts. Indeed, these small claims, together with divorce cases and personal injury claims, are the most likely avenues that most individuals have to get in contact with the civil justice system.

Let me now share with you the project proposal that we are presently developing for the Economic and Social Research Council Research Grant scheme. The working title is 'Access to Justice and Fairness for Self Represented Litigants with Small Claims in the Area of Digital Courts'. As already mentioned I'm collaborating in this project proposal with colleagues Orna, Ayelet and Tony. The goal of this project is to evaluate the experience of litigants in person going to the online court during the first year of operation in terms of access to justice, equality of outcomes, and procedural justice. With regards to the methodology, briefly, we would like to examine court administrative data and judgments of 2,000 cases as well as an additional 400 of cases that reached the trial stage. As you may be aware, especially for those of you who come from a common law jurisdiction, less than 5% of civil claims reach the trial stage. The big bulk of cases are undefended claims, so the judge issues a default judgment. The remaining (three quarters or so) are either settled or withdrawn, with only a small percentage of cases reaching the final trial stage. It must be acknowledged that small claims, where there is a higher percentage of litigants in person, are more likely to move to the trial stage, where the figure could be around 10% of the claims reaching the trial. That's why we want a separate sample of cases that reach the trial stage. We intend to look at case management data and the judgments, and we also want to complement these quantitative data analyses with surveys of court users, in particular to unearth the experience of litigants in person. The idea is to code this data, to correlate it, and to identify any patterns to see what can we do to improve the court in order to make it fairer, more effective, and more accessible for litigants in person. In addition, we intend to carry out qualitative research by interviewing around sixty litigants in person and other key stakeholders, such as legal advisers and judges dealing with these cases.

Here it is the list of variables that we seek to identify. In terms of the party variables, we will extract from the data whether a party is legally represented or

not; and from the surveys we could find out if they are court users that should be considered vulnerable because of their age, or because they needed digital assistance. We will also look at the gender. Do men go to court more often than women? Do they defend claims more often than women? Race, education, income factors can also throw light on who is using the Online Court. Is it being used mostly by well-educated white males? We will also look at case attributes: what type of cases go to this court? are they defended or not? Crucially we will examine the parties' choice of pathway: do they choose the online pathway or do they prefer the paper route? Another important variable is the process used to resolve the claim. We will examine whether cases are disposed via negotiation, the telephone mediation or using adjudication. The idea is to correlate the findings. Are litigants in person more likely to reach the adjudication stage or are they more likely to settle? Also, we will look at the outcomes, whether the claim succeeds or not, the remedy that is awarded, and the mode of disposition of the claim: Is the case settled? was the judgment reached by default? was there a hearing, and if so, was it a remote hearing or was it face to face? Or was the case decided on the documents? And, was enforcement sought?

I am going to finish here by discussing the three main objectives of this research proposal. Firstly, we look at access to justice; secondly, at distributive justice; and thirdly, at procedural justice. In terms of access to justice, we want to establish empirically how the Online Civil Money Claims impacts on litigants in person ability to seek access to justice in order to identify barriers that are encountered by different types of litigants in person. Accordingly, we seek to establish if ODR is likely to increase the parties' ability to issue a claim. Are cases resolved quicker and cheaper online than in person? We could compare the results with some historical data of face to face cases. Is the Online Court often used outside the normal office hours? We're actually not certain whether the court service is currently capturing these data. Indeed, this is one of the main challenges we face in completing the research proposal.

In terms of distributive justice, we intend to identify the parties' choices of processes and pathways. Accordingly, we will examine the choice of process to resolve the claim (*e.g.*, negotiation, mediation or adjudication) and the choice of pathway (online or face to face), and determine how these factors impact on the type of legal outcomes obtained. Is there more use of ADR and settlements in the online pathway? Are there more trials or not? and crucially – and this could be tricky to establish accurately – we will try to identify comparable cases and see how their outcomes are affected by the parties' variables. For instance, if a party is represented, is he more likely to resolve the case quicker than a litigant in person? Are they more likely to settle?

Furthermore, the demographic characteristics of the parties may impact on the outcome. We intend to extract this information from a survey, and this will be the basis for our analysis on procedural justice, the third and final element of this project, which seeks to unearth the experience of litigants in persons had when participating in the legal proceedings, both online and offline. We will be connecting their perceptions of procedural fairness with case outcomes across different processes, media, and parties protected characteristics. How litigants in person

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perceive the process in terms of access to justice, fairness, effectiveness, and outcome satisfaction? More specifically, do litigants in person think that when they participate in an online hearing they are getting the same level of justice than when they are face to face, or not? Thus, these are the types of questions that we are interested in asking court users that interact with the process online as well as offline.

Currently we are in contact with the court services in order to obtain approval for gaining access to the court data as well as to court users. This is proving to be quite challenging, but I think it could be rewarding because we have very little empirical information about the experience of online court users. Therefore, what we are trying to do here is to identify lessons that can help improve the design of Online Court processes, so that they can provide a fair and efficient service to those litigants for whom these processes are designed for.