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The Small Claims Paper Determination Pilot: Filtering out the County Courts' 'Garbage Claims'

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The Small Claims Paper Determination Pilot removes the right to oral hearing for low-value claims in the County Courts. Such a move continues a worrying trend of filtering out claims and claimants who are deemed unworthy of the court's time. Such a move requires more careful thought as to the potential consequences.

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In March 2022, the *MLR* published an article by Linda Mulcahy and Wendy Teeder examining the phenomenon of the vanishing trial and its impact on civil justice systems that rely on precedent. Drawing on an extensive data set Mulcahy and Teeder show that although trials have declined in parts of the civil justice system, in the County Court they aren't vanishing at all. Instead: 'trials of smaller matters are now experiencing something of a renaissance.' This is something of a surprise, given the 'many structural pressures to settle built into the English and Welsh litigation process.' It is interesting in this context of rising County Court trials to consider the most recent attempt by the Ministry of Justice to reduce their numbers.

On 1 June 2022, Civil Procedure Rules Practice Direction 51ZC — The 'Small Claims Paper Determination Pilot' will come into force, removing the right to an oral hearing for certain civil cases in the County Courts. Signed into being by Sir Geoffrey Vos, Master of the Rolls and Head of Civil Justice, as well as the Parliamentary Under-Secretary for Justice, David Watson, the pilot removes access to trial for claims less than £1000 with no obvious issues of legal complexity or 'significant factual dispute'. Other cases that fall under the pilot's schema include flight delay compensation claims and parking ticket claims. The overall decision as to which cases are suitable, however, are a matter of judicial discretion and could include *any* small claims: the examples given are only those cited as 'may be suitable'.[1] Instead of a trial, such cases will be

determined on paper, and may take place despite any party (and potentially all parties) in the case not consenting to such an arrangement.

By removing the right to an oral hearing, the Small Claims Paper Pilot process, taking place in six County Courts to begin with, joins the Single Justice Procedure, a mechanism brought in in the criminal courts, which also allows cases to be determined on paper, with no requirement for the defendant's presence. The latter, applying to those charged with summary-only non-imprisonable offences, allows a sitting magistrate to determine the outcome on paper alone with the assistance of a legal adviser. Currently mostly used for driving insurance and TV licensing cases, police offences are also appearing in the lists and include such offences as people failing to have valid covid-testing packages when arriving in England.[2]

Whilst these two procedures seem disparate — one civil, one criminal; one online, one offline —they both form part of a concerted move by the Ministry of Justice to curtail access to trial for litigants and defendants whose issues are not deemed worthy of the court's time. This attitude is not new, of course. In the civil justice system, the push towards settlement has sought to de-incentivise such claims from reaching the courts over a long period of time. Similarly, in the criminal courts, the desire to avoid trial for minor offences has seen mechanisms such as expecting a plea at first hearing and incentivising guilty pleas by offering time-contingent sentencing reductions.

The rationale for all such moves is to speed up proceedings by reducing the volume of low-value claims or minor offences with which the courts have to deal. This desire is also evident in the Ministry of Justice Digital Justice programme, discussed previously in the *Review* by Jane Donoghue and (in the Forum) by Grainne McKeever. This shift, often called a move to the 'online court', in fact aims at the widespread exclusion from the courts of a majority of low-value civil claims.[3] As Sir Geoffrey Vos outlined at a speech at the Socio-Legal Studies Association Annual Conference at the University of York this year, a 'funnel process' will ensure that only a tiny minority of civil claims will be deemed eligible to go before a judge. All other matters will be resolved through online dispute resolution.

It is hard to disagree with the desire for less overburdened courts; we know that courts struggle to deal with caseloads (not helped by the removal of legal aid for most areas of civil justice, the selling off of the courtroom estate, and a reduction in specialist legal advice which has resulted from the failure adequately to compensate legal aid practitioners), and the County Courts deal with the highest volume of cases in the civil justice system by far. But the key issue here remains the blunt instrument that is being used to determine a case's worth: financial value. Initiatives such as the Small Claims Paper Determination Pilot make clear that matters that fall below a particular financial threshold are highly likely to be weaned out.

Those who disagree with me might point out that this practice direction does indeed contain an explicit provision clarifying that cases raising issues of significant factual dispute or legal complexity will be an exception to this financial test. That sounds fine, *on paper*. But such exceptionalism relies on said issues being made out explicitly and coherently in the written claim or defence. Given that the majority of small claims falling below the £1000 threshold will be made by those without access to legal representation, the court is essentially requiring litigants in person (LiPs) to identify the legal issues accurately or lose the right to go to an oral hearing.

We already know that being able to identify the legal importance of a particular claim or defence is exceedingly difficult for LiPs. This fact is the reason why, in the civil courts, judges have been given the explicit duty to assist LiPs to ensure equality of

arms. Unfortunately, such judicial support for LiPs relies on there being an oral hearing in the first place. Once the hearing is removed, no such assistance will be available. This essentially means that LiPs, denied initial legal aid support to identify and support claims, and then denied legal aid for representation in any proceedings, will now also be unable to be supported by the judiciary on whom they rely to consider the potential merit of their claim beyond what is in the written (possibly incomplete or incorrect) documentation that they have managed, without legal assistance, to submit to the court.

One might argue that there shouldn't be different standards and expectations for unrepresented parties compared with those who do have legal representation. Indeed, the courts have shown themselves to be stringent in expectations for LiPs, for example in terms of delivery modes and timelines, and have repeatedly discussed the importance of avoiding 'indulging' the LiP. But even if one is happy to see fewer LiPs in the courts, and even if one does not particularly care about access to justice for all litigants, these developments, and this pilot in particular, pose two key issues that we should all worry about.

I. Precedent

The first issue is one that ought to be of concern to even the most doctrinal, positivistic and rule-bound legal practitioner or scholar: excluding claims from being argued orally in court will impede the development of the common law. Mulcahy explicitly makes this argument about civil settlement in her 2013 article 'The Collective Interest in Private Dispute Resolution'. In this piece, Mulcahy queries 'the extent to which the policy and rules governing the management of civil litigation reflect a genuine commitment to the development of the common law.' As she points out, 'claims about the development of doctrine are rendered somewhat hollow if our legal system is not facilitating the pursuit of cases with precedent-setting potential.'

Whilst an on-paper decision is still a formal process, the fact that there is no oral hearing will substantially stunt the likelihood of identifying what is of potential legal significance. This, of course, is because the oral hearing has inherent value. As observed in *Sengupta v Holmes*

> oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it. […] It is a commonplace for a hearing to start with a clear expression of view by the judge or judges, which may strongly favour one side; […] and the position [the advocate] has to meet. He [sic] often meets it.

There is an essential, qualitative difference between paper materials and in person hearings. Having the chance to see and hear from the perspective of the courts can provide better quality evidence.[4] It could easily be imagined that the particulars of claim supplied by unrepresented parties might fail to emphasise a key issue requiring legal clarification: in an oral hearing this can be drawn out by a competent judge or given voice to by a persuasive advocate.

In addition, precedence isn't just about the what, but also the who. Whilst Mulcahy and Teeder's recent article notes that the volume of precedent has *not* declined, they note that 'we regularly refer to precedent as "judge-made" law without reference to the litigants who determine what issues are offered up to the appellate courts for determination.' The move to paper hearings, much like the move towards court digitisation, risks the exclusion from precedent-formation of certain types of people regardless of legal merit: their status will not be recognised *because theirs are low*

value claims. This failure therefore does not just include failure to do justice to a particular litigant. It also includes the failure to allow their precedence to be established in legal doctrine. As Mulcahy notes, 'precedence is important to us all not only because of the solution it provides to a particular dispute but also because of the ways in which it facilitates bargaining in the shadow of the law by future unknown disputants.'

It is notable that in his SLSA conference address, Sir Geoffrey Vos defended such a funnelling of unimportant cases away from courts by citing the example of jurisdictions where parking ticket disputes could reach the Supreme Court, a position he declared 'obviously absurd'. He has presumably forgotten about, or is unaware of, *Parking Eye v Beavis*, a case about a parking ticket that did indeed reach the Supreme Court, and which clarified the position on private parking charges in contract law.[5] Given that the amount dealt with in *Beavis* was £200 and it was about parking tickets, this case would have fallen under the scope of the pilot. Whilst Mr Beavis had representation and was clearly motivated to pursue the case, which means that perhaps such a case might have been picked up for oral hearing, this should be a lesson to us about the assumptions that lie behind the equation that is often made between minor financial value and legal importance.[6] As Mulcahy and Teeder note 'it is pertinent to ask whether it is only those with deep pockets that can afford to take a case' to the Supreme Court.

Ultimately, removing the right to oral hearing is likely to do injustice to specific litigants, and raises serious questions about what kinds of issues, and what kinds of people, are having their disputes taken up for appellate consideration. This has future consequences on the bargaining and settlement process for other litigants.[7] Removing the right to an oral hearing also, of course, raises significant questions about i) whether such a pilot is in conformity with the Article 6 ECHR right to a fair trial, and ii) whether this process is proportionate in line with the overriding objectives of civil justice. The latter two points are important; however, I want to pursue a slightly different argument for the rest of this *Forum* piece. My second concern about the pilot relates to a more general point about who the law is (and isn't) for.

II. Garbage Claims

I have so far critiqued the equation of financial merit with legal merit that is likely to result from the decision-making in this pilot. This first concern connects to a broader second point: the more general squeezing-out of lower-value litigants from the gaze of the courts. In Sally Engle Merry's trenchant sociolegal examination of low value and minor civil and criminal proceedings in the US in 1980s and 1990s, she noted the way that legal professionals in the court referred to lower value claims as 'garbage' or 'junk' cases. Merry noted that whilst the courts retained the rhetoric of access to justice for all, they made a clear distinction between those cases that were a waste of time and those that weren't. In this respect, the state both promised access to justice and then failed to provide it. As Merry argued: '[litigants] are both invited and encouraged into the court and, at the same time, denied legal handling.'

Part of this mood of discouragement is due to the tendency to demonise those who pursue claims that aren't deemed important enough by the courts. Such litigants can be labelled vexatious or time-wasting and have their claims classified as 'frivolous.' As Abi Adams and Jeremias Prassl discussed in the pages of this *Review* in 2017, the association of low value litigation with vexatious litigation is partly what allowed the then Secretary of State for Justice, Chris Grayling, to raise Employment Tribunal fees in 2017, using the line that he was stamping out 'litigiousness'.[8] This fiction of

litigiousness, trotted out at regular intervals and unsupported by any data, could instead be restated as a means by which we are told that, as Merry says, 'family and neighbourhood problems are not worthy of the time and attention of the legal community. Indeed, while much of the concern about cuts to legal aid related to the feared influx of LiPs into the courtroom, at the ten-year mark from the Legal Aid, Sentencing and Punishment Act 2012, we see mounting evidence that people who have valid claims are simply no longer able to access the courts.

In addition, the 'denial of legal handling' for litigants leaves an impression of a legal system uninterested in taking seriously the complaints of those without significant financial status. As such it ties into wider growing populist beliefs of the law's failure to be in-step with the lived experience of the majority of the population. This is a real concern: that the courts truly become the reserve of the rich that the public often already perceives them to be. In my doctoral research into LiPs, many of my interviewees felt they were treated with disdain or prejudice and that the courts simply did not want them to be there. Too often, populist perceptions of legal process as being lofty, inaccessible, classist or remote is ridiculed as fuelled by social media and therefore not rooted in reality. I would argue, conversely, that if my research with LiPs showed me anything, it suggested that it was the negative experiences *of* litigation that stoked their beliefs about law's inaccessibility. As such this pilot will simply serve to aggravate what many already believe: that the courts are only for the rich, and that the legal system does not care about litigants' 'garbage' claims.

We need to take seriously, then, the extent to which faith or trust in legal institutions can be eroded through the continued emphasis on pushing out lower value claims from the courts. Oral hearings do more than allow greater facilitation of discussions of a specific issue. This isn't just about precedence; nor is it simply about access to justice. Oral hearings provide encounters between the professionals of the legal process and laypersons. Such encounters are an essential part of ensuring that those who work in the courts retain knowledge and understanding of the kind of lives lived by those whose decisions they affect and who will be bound by their future decisions. Ultimately, if there is a stark or growing gap in affluence between judges and ordinary litigants it is more—not less—important that this encounter is maintained. Judges spending time with 'banal' litigants and 'banal' cases is important. This is the stuff of how law influences and affects people. So, this is another reason to worry about the Small Claims Paper Determination Pilot. If we are serious about the accessibility of the courts, and serious about maintaining trust in legal institutions, we should not undermine these values by removing all but the rich from the court's gaze.

References

[1] The Practice Direction explicitly targets £1000 claims and under as an obvious choice for the pilot, but makes clear that *any* small claim is potentially eligible which could include cases up to £10000 (the current small claims limit).

[2] The Single Justice Procedure was also used when people contested fines under the Coronavirus Restrictions regulations.

[3] The Briggs report, initially outlining a vision for digital courts, noted that 'Online Courts' was a misnomer and preferred 'Online Solutions'.

[4] There are of course exceptions to this, as demonstrated by the existence of protections for children and vulnerable and intimidated witnesses.

[5] I wasn't aware of this either at the time; thanks to TT Arvind for pointing this out.

[6] For those who enjoy a Bentham reference, this explicit relationship between financial value and legal merit was one he regularly criticised: 'What to one man may be trivial, to another may be of high importance. In pecuniary cases, the smaller the sum in dispute the less reserve is used in branding the conduct of parties with the charge of litigation, of which, in such cases, the reproach is apt to fall principally, if not exclusively, to the plaintiffs share.' Jeremy Bentham, *A Protest Against Law Taxes* (London 1795) 34–36.

[7] It should also go without saying that such a move is likely to be a false economy; given that the right to appeal remains in such cases (although the appeal cannot be about the failure to have an oral hearing) it seems likely that this may well simply also result in a higher volume of appeals.

[8] The fee rise was overturned by the court although no doubt during the time the fees were in place, many people no longer went to law and so presumably the desired effect was achieved.

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