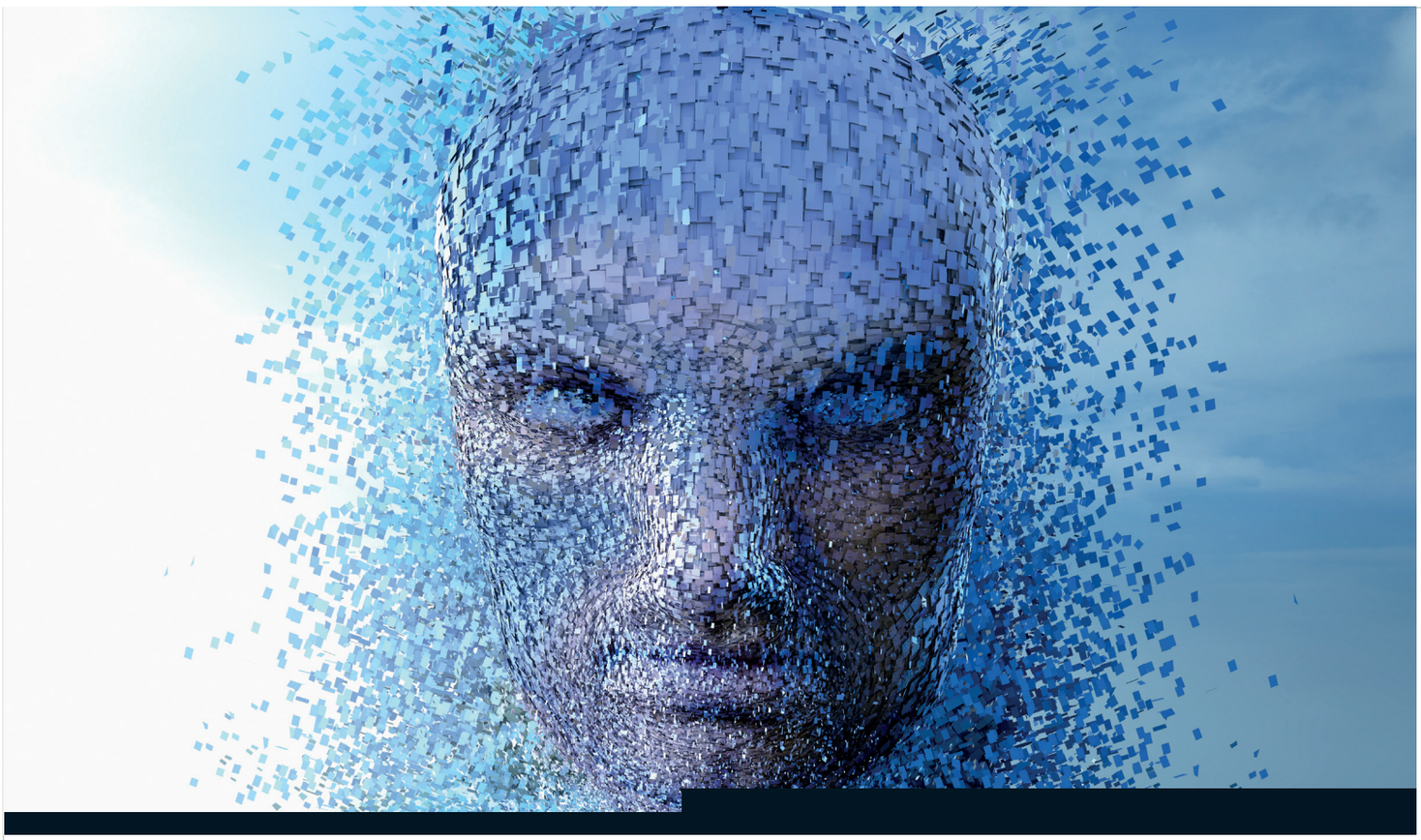
A new era

Major change is coming to the way civil justice is carried out, predicts **Dominic Regan**



Woolf 1999. Jackson 2013. Vos and Birss 2024-6. Our new master of the rolls Sir Geoffrey Vos, who took office in January, has wasted no time in spelling out the profound changes to the civil procedure process that he wants to bring about.

In his introductions to the *White Book* in 2019 and 2020, he identified areas of concern. We have too many rules. His vision was a much slimmer guide to them. He revealed that he treasures his 1999 *White Book*, a comparatively slender tome which set out the old rules of the Supreme Court. Interestingly, his successor as general editor, Lord Justice Coulson, has squared up and defended the quantity of content in his introduction this year. He explains that the government constantly introduces new legislation and such material cannot be ignored.

CHANGE IS COMING

Tweaking and editing the rules is one thing, but far greater changes that will affect all litigants, represented or not, are coming down the line. Both the MR and Lord Justice Birss have delivered suspiciously similar speeches setting out their vision and, as we shall see, 'work has already started'. There will be no turning back.

Reform will be on two fronts. The first affects the processes applied to achieve dispute resolution. Paper should be banished. The litigation process must be totally electronic. Remote hearings necessitated by Covid are here to stay. Everyone will be required to issue online. The 'digitally disadvantaged' will be helped to gain access. No exceptions will be carved out for them. The entire civil justice system will migrate online; family work and tribunals will all be captured.

These changes merely tweak the underlying processes. So, bundles are still to be filled, but electronically rather than in paper form.

The second front of reform is much more radical. Technology has transformed the world. In his most recent speech, delivered to the LSE on 17 June, Vos referenced on-chain smart contracts, which have the advantage of immutably and irrebuttably recording every kind of consumer and business transaction. He also acknowledged digital currencies, electronic transferable documentation and instantaneous high-quality worldwide communications.

The legal dispute process must change! Vos asserts that 'the vast bulk of civil disputes… are amenable to a streamlined online dispute resolution process'. He believes that this would have equal application to employment, tribunal and private family disputes.

In consequence, this inherently faster process will save time for individuals and businesses alike. Within 24 months, we are promised, online justice will be a reality for all of the most common claims such as actions for damages, debt, possession and family disputes.

ALTERNATIVE APPROACH

The judiciary is keener than ever on alternative dispute resolution. I am increasingly asked to address practitioners on this subject. The first thing I always point out is that judges do not want to judge. Their collective desire is for matters to settle upon mutually acceptable

terms. This approach also underpins early neutral evaluation and the infrastructure that is Part 36.

Sir Geoffrey asserts that ADR ought properly be renamed as 'dispute resolution', 'for there is nothing alternative about what is or should be an integral part of dispute termination'.

He considers that online systems facilitate 'continuous mediated interventions aimed at every stage' of dispute resolution. It is proposed that the technology will spot opportunities for mediation as a matter progresses, and prompts will be sent to the litigants.

In turn, the migration to an online process facilitates pre-action portals for every form of claim. Portals already exist in personal injury and the most recent whiplash portal. Each portal will provide an opportunity to sift claims, ensuring that they are correctly allocated.

Lord Justice Birss, deputy head of civil justice, delivered his big reform speech to Fordham Law School, New York, in April.

At the core of this new regime, he explained, will be the 'funnel'; a single online point of entry for an integrated court IT system. All civil, family and administrative tribunal actions will come in through the funnel. It will identify the appropriate destination for the putative action and forward it on. 'We are working on the beginnings of this right now, on a project called case builder', he said.

They are also, he says, working on a court system that lawyers will have to sign up to. By doing so, they consent to accept service of all legal documents electronically. Some of the recurring nightmares about service will presumably be averted.

One massive advantage that Birss LJ identified was that the court online process would not accept a claim or response unless requisite information was supplied. Take directions. Parties today are expected to furnish the court with information enabling it to deliver case management directions within 14 days of a case being defended. That obligation is frequently breached, leading to 'a cottage industry of judges and staff chasing' the miscreant. So, a defendant would not be permitted to defend unless and until relevant questions were answered. 'The non-compliance problem has vanished', and resulting delays would be a problem no more.

This approach has already been introduced in matrimonial law. Just search 'How to apply for divorce online', and you will find an elegant flowchart that sets out for the lay reader every step along the way. More importantly, the online application form will only allow an individual to proceed if complete and accurate information is supplied. The reforms have led to a 98% drop in the number of applications being returned, because the system ensures that requisite details are given. Indeed, the civil servant who implemented these changes told me with pride that on Christmas Day 2018, a total of 13 spouses successfully filed a divorce petition!

Reverting to the thoughts of our revolutionary master of the rolls, when he spoke at the Law Society Civil Litigation Autumn Conference on 9 October 2019, he envisaged a day when artificial intelligence would be used to decide the outcome of some disputes. Regularly mentioned is the facility by which today eBay uses technology to resolve 60 million disputes each year between vendors and purchasers. The commoditisation of claims by tech is looming somewhere on the horizon.

What will become of live trials? Both Birss LJ and Lord Vos MR, having witnessed online hearings as the norm since the spring of 2020, think there should be no return to the status quo ante. 'My sense is that there must be a process that does not so often involve getting lawyers, parties, experts and witnesses all in one place at one time, sometimes for days on end,' said Vos. Presumably, if no such process does exist, then our senior judiciary would not shy away from creating one. Mostyn J has spoken enthusiastically about taking medical evidence remotely, so that professionals can maximise the amount of time they have to care for patients.

Lord Justice Birss, demonstrating what looks like overt antipathy to trials in person, opined in his Fordham Talk that most trials will in future be conducted at least in part by video conference. 'Even if the advocates and the judge are in the same physical space, other lawyers, clients and witnesses may very well not be,' he said. With apparent relish, he points out that appeals 'do not need witnesses at all', which is obviously correct.

It will clearly be necessary to determine what types of issues could be resolved by judges in a sequential online process. It is envisaged that the number of disputes will fall away too. 'The real revolution will come when consumers and SMEs alike use entirely electronic transferable documentation and on-chain retail and wholesale digital currencies. Disputes are less likely in that space to be about what was agreed, because that will all be irreversibly recorded in the electronic record,' said Vos.

Debt cases, which in the real world fully occupy the courts, will be handled differently. The expectation is that payment plans would be agreed or, in extremis, online enforcement. The MR rightly observes that thinking has been dominated by the very small number of high-end cases, which is 'letting the tail wag the dog'. One must look across the entire litigation terrain where modest matters represent the bulk of the workload.

Technology is going to transform litigation in a way that was not envisaged a decade ago

I remember a revered litigator saying to me after publication of the Jackson Report in 2010 'It will never happen'. It did. Sir Geoffrey has acknowledged that the difficult part of this grand plan is deciding how judges should ultimately resolve the legal and factual issues that will always be with us, albeit to a lesser extent. 'A hearing of some kind, virtual or physical, remains the only outcome,' he said.

A substantial investment is inevitable if a sophisticated, integrated and all – embracing new structure is to be put in place. Sir Geoffrey Vos is tenacious, and I think he will get his way. Despite criticism and setbacks, he has stood behind the disclosure pilot running in the Business and Property Courts. It is going to be revamped in the autumn.

Like it or loathe it, technology is going to transform litigation in a way that was not envisaged just a decade ago.

Dominic Regan of City Law School is an expert in legal costs and an adviser to Affiniti Finance