

Covid-19 and the English Legal System

Paper for the socio-legal conference, 7 November 2020, Centre for Inter-disciplinary Legal Studies, School of Law, Renmin University of China and the China Institute for Socio-Legal Studies, Shanghai Jiao Tong University.

Professor Penny Darbyshire, Kingston University, London and University of Notre Dame, Indiana (London Law Centre), author of *Darbyshire on the English Legal System* (Sweet & Maxwell, 2020) and *Sitting in Judgment – the working lives of judges* (Hart, 2011). pennydarbyshire.com Interpreter: Dr Yong Han, Manchester University.

The pandemic affected legal systems worldwide. These are the effects on the legal system of Wales and England, from March 2020. (The following is an adapted and updated version of the Covid-19 preface of Darbyshire 2020, above).

Legislation and Parliament

The UK Parliament passed the Coronavirus Act 2020, renewable every six months. It gives ministers sweeping powers to make delegated legislation and introduce criminal offences. Two Select Committees, watchdogs over the Government, produced reports warning of the constitutional and human rights implications, that powers affecting civil liberties, such as quarantining, must be exercised in a proportionate and non-discriminatory way. See Zander. Parliamentarians soon objected that this concentration of governmental power was undemocratic so measures are now debated in Parliament. England, Scotland, Northern Ireland and Wales are all acting autonomously with day-to-day protective regimes.

By April, the House of Commons was operating on Zoom, with up to 120 participants, plus 50 remaining in the chamber. These hybrid proceedings have been extended to March 2021. Proxy voting is permitted for vulnerable Parliamentarians. The (brilliant) Parliament website provides links to news, research and analysis on Coronavirus. There are currently 58 Parliamentary reports and ongoing inquiries on the economic and social effects of Coronavirus.

Lawyers and Legal Services

Financial Effects

- There was a 6.6 % drop in revenue for legal services in the first quarter of 2020. A review of the top 40 UK LLP law firms showed (to my astonishment) that no fewer than 55 per cent had too little cash to cover one month's operating expenses. The Law Society said that 71 per cent of small firms may have to close within six months. A Bar Council survey found that 74% of self-employed barristers said they would not survive a year. With the criminal bar hit hardest, the Crown Prosecution Service paid barristers a £500 upfront fee in criminal cases. The Solicitors' Charity created a hardship fund, as did QC appointments, the Inns of Court and The Solicitors Benevolent Association. The Government confirmed that self-employed barristers and some chambers qualified for the Coronavirus Business Interruption Loan Scheme and VAT deferral.
- Surveys found that women lawyers appeared to be more badly affected; working fewer hours and on a reduced income and more likely to have been made redundant.
- By October 2020, prospects are much improved but recovery is shaky. The Office of National Statistics reported that law firm revenues for August 2020 were over 10% less than August 2019. Some law firms have used profits to repay government grants provided under the Furlough Scheme and they have repaid employees who suffered pay cuts.
- Despite fears, top law firms confirm that they are retaining all or most of their trainees.

- Two law firms committed lawyers' time to helping businesses.

Legal Tech and Remote Working

Inevitably, more lawyers have been advising clients online and over the phone, as well as meeting in conferencing software platforms, as these have become the default methods of working worldwide in all deskbound jobs. An October 2020 survey of local government lawyers showed that only 4% wanted to go back to the office fulltime. While 29% said that working hours had increased, 68% said flexibility had improved and 57% said work-life balance had improved. 51% said the quality of their work was unaffected and 28% said that it had improved. Overall, lawyers said that the quantity of their output was 97% of pre-lockdown output. Previous surveys had consistently found that lawyers disliked working in open plan offices and that this reduced productivity. "Even with four children in the house, I have found there are fewer distractions than working in an office", said one. (This will come as no surprise to some academics, many of whom have been working productively from home for decades. Throughout my studenthood and career, since 1971, I have found I can only work productively from home, without distractions of chatting to students and colleagues.) Lawyers surveyed said that getting used to software was challenging. For instance, 29% of managers had not used matter management software and 44% had not used practice management software. Client relationships had changed but not suffered. Only 13% of lawyers wanted to work remotely 100% of the time. Most wanted to work two days per week in the office. (My comment: UK workers have some of the world's longest commutes. From my village, it takes 3 hours per day to commute into London and back, and costs £500 per month so it is not surprising that my village neighbours are very happy working from home. The National Association of Estate Agents has reported a very high demand for rural properties as people move out of town, especially London).

Since 2007, when the Legal Services Act 2007 liberated lawyers' business structures, the number of independent barristers and solicitors operating purely online has increased and the chapter on lawyers in my textbook lists a litany of examples of new business structures and new ways of working initiated by UK lawyers and law firms. Obviously, Covid-19 has accelerated lawyers' inventiveness. New apps, such as Smart Will have attracted investors. In September 2020, Clyde & Co announced a new private prosecutions service for a range of offences "fraud, intellectual property and trademark infringements and regulatory offences", noting that governments are underfunded and a backlog has been caused by Covid-19.

The Bar Standards Board said some of its members might continue operating remotely. For example, one set of virtual chambers of criminal barristers thinks this trend will continue. This set has no real chambers, they simply rent serviced offices, as necessary. The Bar Council Chair thinks this will damage people's career prospects.

Courts and Tribunals

- Court and tribunal proceedings halved by May 2020. There was an 88% reduction in receipt of civil cases BUT employment tribunal claims increased by 18% in April to June, because unemployment increased.
- Judges were instructed to conduct remote hearings where possible, opening them to the public gaze, or recording them. 160 court buildings were kept open to the public for essential hearings. Judges immediately embraced video platforms. The Planning Court carried on as normal, remotely. Skype for Business was used in a Court of Protection hearing but judges considered online proceedings unsuitable for some family cases.
- Co-op Legal Services reported a 42 per cent increase in divorce inquiries. Domestic abuse helplines reported a 25 per cent increase in calls. Family courts reported a fivefold increase in emergency care proceedings to protect children. 500 judges, including retired judges and part-timers, were recruited to help deal with the increased workload. By October 2020, the

President of the Family Division reported that almost all family courts have cleared their backlog and that courts have been busier than ever before. But remote working was stressful.

- The Court of Appeal and the President of the Family Division ruled that remote hearings were not suitable for adoption or care proceedings where child abuse was alleged. The Nuffield Family Justice Observatory reported on remote family hearings. They found advantages and disadvantages.
- All courts and tribunals issued practice directions on remote working, requiring documents to be filed electronically, where possible. A High Court judge took charge of live services. Judges instructed parties to how to make pdf bundles and to minimize their skeleton arguments and witness statements.
- The courts refused to adjourn a 5-week trial about a City landmark building, “the Boomerang”, ordering parties to explore technological trial options.
- The first Commercial Court Zoom trial was a success: a Kazakhstan State claim involving \$530 million of assets. The Technology and Construction Court ruled that the biggest class action in history, relating to a Brazilian dam collapse, could go ahead remotely.
- The UK Supreme Court carried on as normal, appearing online, with Justices working from home. They pride themselves on transparency and on normally attracting thousands of visitors so they launched online educational resources “bringing the Supreme Court to you”.
- Jury trials were suspended. Before the lockdown, there was a 37,000 criminal case backlog, increasing to 45,000 by 1 July. They were resumed with social distancing from May, progressively. There is a big backlog of jury trials despite the fact that 77 Crown Courts and 7 other locations have now resumed trials. Pre-trial hearings, case management and sentencing can all be done online.
- There is a big backlog of criminal cases in magistrates’ courts too (445,000 on July 1). Her Majesty’s Courts and Tribunals Service (HMCTS) announced that some evening courts would sit, from 17.00 to 20.00.
- 14 “Nightingale [emergency] courts” were established to ease pressure, in disused courts and public buildings, including the Ministry of Justice.
- The Inns of Court College of Advocacy published “Principles for Remote Advocacy”.
- Property repossession proceedings by landlords and mortgage companies were suspended but have now restarted with the help of 200 extra judges to hear the backlog.
- HMCTS tested and expanded its use of fully video hearings, currently in use in certain family, civil and tax tribunal hearings.
- HMCTS have developed a new case management system, Common Platform.
- They produce extremely useful weekly updates online, [here](#). They announced that their Service Centres were open from 08.00 during weekdays. On their web pages they have placed links to services, such as applying for a divorce or a money claim. Judges produced more user guides to courts and tribunals.
- 40 law firms and some insurance companies signed up to a collaborative approach over personal injury claims.

Evaluation: the effects on access to justice

- A Justice minister announced a two-year, £3.1 million grant to support litigants in person.
- The Parliamentary Justice Committee launched an inquiry into the effect of Covid-19 on the justice system.
- The Equalities and Human Rights Commission expressed concerns that increased digitisation threatened access to justice for disabled people. People with learning disabilities and brain injuries were not able to participate effectively in criminal proceedings.
- HMCTS assured the Justice Committee that vulnerable people would not be forced to use digital-only procedures.

- In May 2020 Dr Natalie Byrom published a rapid (two week) review of the impact of Covid-19 measures on civil justice, commissioned by the Civil Justice Council. There were over 1000 survey respondents, mainly lawyers, but only 14 litigants in person (LIPs). Data were collected on 480 hearings, mostly high value, short audio hearings. Around half of respondents experienced technical difficulties but over 70 per cent of lawyers were satisfied. Commercial firms were keen to expand the use of technology. In other legal fields, “respondents recommended maximising the use of remote hearings in preliminary matters, interlocutory hearings and trials without evidence, particularly where both sides were represented”. Nevertheless, respondents noted a lack of availability and accessibility of legal advice and a rise in legal need disproportionately affecting those on low incomes. They felt that the under-investment in court facilities and technology, especially in the lower courts, had compounded problems. They noted a lack of support at court for LIPs, causing distress. They felt that lay parties and LIPs would struggle with the technology. There was a need for more research and data collection. In response, Etherton M.R., head of civil justice, established a working group. When interviewed on *Law in Action*, BBC Radio 4, 2 June 2020, Dr. Byrom said that while higher courts were coping well, lower courts lacked the funding and support to make remote proceedings work properly and provide access to justice for litigants in person and there was an urgent need to find out more about remote hearings, given that the Court and Tribunal Reform programme, which commenced in 2016, was predicated on the use of technology. LIPs responding to the survey found telephone hearings to be stressful. Dr. Byrom said that poor technology and support for judges and litigants in the lower courts compounded the barriers to access to justice for ordinary people. She pointed out that her study was 60 times bigger than HMCTS’s own study and there was an urgent need for better research to provide evidence-based planning for the use of remote courts.
- Richard Susskind established Remote Courts Worldwide “to help the global community of justice workers...to share their experiences of 'remote' alternatives to traditional court hearings” (website). It is supported partly by HMCTS and by the UK LawTech Delivery Panel.

Legal Aid and Support

Two court-based advice services, called Support Through Court and RCJ Advice have now started a “safe space project” to provide litigants in person with working pods and tablet computers in order to safely contact volunteer advisers if they cannot do so from home.

A new digital platform to simplify applications for legal aid is being piloted, (two decades late, in my opinion). The Treasury announced a £5.4 million support package for legal advice. £3 million went to law centres and the rest went to set up a Community Justice Fund. City firms contributed £85,000. The requirements for applying for LA in domestic violence cases were relaxed. Lawyers were urged to claim £1 million in unpaid LA fees and were enabled to collect their fees quickly.

Commentary

In 2016, the Ministry of Justice announced a sweeping “reform” programme, which would close hundreds of court buildings and place certain proceedings online and clearly the Covid-19 emergency has played into their hands and enabled a striking acceleration of this policy. I have two concerns: transparency and access to justice. British justice is meant to be open to public scrutiny. While court visiting has dwindled to almost nothing since the 1970s, I fear that we have created a system of “justice behind closed doors”, though some academics consider that online meeting software has rendered family courts much more open. Secondly, I am gravely concerned about access to justice. Courts in the UK are not full of rich people asserting their property rights, they are full of “the

dispossessed” as I call them: people with multiple civil problems such as homelessness, unemployment and consequent financial, family and debt problems. In the criminal, civil and family courts, there are a disproportionate number of people whose problems are caused by poor health, mental health, a lack of mental capacity and drug abuse and often all of these factors. These court users often do not use English as a first language and have high levels of illiteracy, let alone computer illiteracy, and a lack of access to appropriate hardware. While online proceedings make life easier for those of us who live our working and private lives online, they must be a bewildering nightmare for “normal” court users who are indeed abnormal members of society.

Bibliography

Dr Natalie Byrom, *The impact of COVID-19 measures on the civil justice system* (Civil Justice Council, 2020), CJC website.

Nuffield Family Justice Observatory <https://nuffieldjo.org.uk/>

Her Majesty’s Courts and Tribunals Service <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service>

“Life after lockdown” survey by LexisNexis and the Local Government Lawyer

<https://localgovernmentlawyer.co.uk/lockdown/?page=1>

Pennydarbyshire.com

Remote Courts Worldwide <https://remotecourts.org/>

Support Through Court <https://www.supportthroughcourt.org/>

UK Parliament <https://www.parliament.uk/>

UK Supreme Court Online Educational Resources <https://www.supremecourt.uk/news/online-educational-resources.html>

Westlaw UK Current Awareness

M. Zander, “An Extraordinary Act of Parliament” (2020) 170 NLJ 7882, p15.

Thank you for listening! For further reading, please see Darbyshire 2020. I welcome queries from students, and academics worldwide.