The Honourable Society of Lincoln's Inn

The Treasurer's Lecture

Delivered by The Rt Hon Lord Briggs of Westbourne on 12 December 2024

Access To Civil Justice

(I) What is it and why does it matter?

1. Access to justice is a vital consideration for any process or court system designed to resolve civil disputes and enforce civil rights (even where they are not disputed), and therefore for any democratic society which prides itself as being built upon respect for the rule of law.

2. One of the eight general principles of the rule of law suggested by Lord Bingham in his celebrated book of the same name (which I know is familiar to many student lawyers, if only for the purpose of their university applications) is that:

> '*Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties themselves are unable to resolve.*'[1]

3. In essence – at least for the purposes of this lecture – what is meant by 'access to justice' is the practical availability of the courts, as supplemented by various forms of alternative dispute resolution (ADR), for allowing people to vindicate their civil rights, obtain redress when those rights have been infringed, and resolve disputes about them.

4. As for why it matters, Lord Bingham's words explaining the necessity of access to justice for the rule of law are hard to improve upon, and I will not attempt to do so. He wrote:

> '*It would seem to be an obvious implication of the principle that everyone is bound by and entitled to the protection of the law that people should be able, in*

[1] T. Bingham, *The Rule of Law* (2010), 85.

the last resort, to go to court to have their civil rights and claims determined. An unenforceable right or claim is a thing of little value to anyone.'[2]

5. One way that access to justice can be conceptualised is as the necessary practical corollary of the fundamental right to a fair hearing that has long been recognised at common law and now also finds expression in Article 6 of the ECHR. Quite simply, you cannot have a fair hearing if you do not have access to a court in reasonable time, or at affordable cost.

6. Lord Reed's leading judgment in the *Unison*[3] case – which I will come back to – traces the idea back to *Magna Carta*:

> *'In English law, the right of access to the courts has long been recognised. The central idea is expressed in chapter 40 of the Magna Carta of 1215 ("Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam"), which remains on the statute book in the closing words of chapter 29 of the version issued by Edward I in 1297:*
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> > *"We will sell to no man, we will not deny or defer to any man either Justice or Right."*
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> *Those words are not a prohibition on the charging of court fees, but* ***they are a guarantee of access to courts which administer justice promptly and fairly****.*
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> *The significance of that guarantee was emphasised by Sir Edward Coke in Part 2 of his Institutes of the Laws of England (written in the 1620s, but published posthumously in 1642). Citing chapter 29 of the 1297 Charter, he commented:*
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> > *"And therefore,* ***every Subject of this Realme****, for injury done to him in bonis, terris, vel persona [in goods, in lands, or in person], by any other Subject . . .* ***may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.*** *Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia; Plena, quia Justitia non debet claudicare; & Celeris, quia dilatio est quaedam negatio [Free, because nothing is more iniquitous than saleable justice; full, because justice ought not to limp;*

[2] Bingham, 85.
[3] *R (on the application of Unison) v Lord Chancellor* [2020] A.C. 869; [2017] UKSC 51, [74]–[75] (my emphasis).

> *and speedy, because delay is in effect a denial]; and then it is both Justice and Right." (1809 ed, pp 55—56.)*
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> *More than a century later, Blackstone cited Coke in his Commentaries on the Laws of England (1765—1769), and stated:*
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> > *"**A . . . right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.** (Book I, Chapter 1, "Absolute Rights of Individuals", p 141.)'*

7. As Coke's words about free and speedy justice suggest, the right to a fair hearing and the more practical matter of access to justice are two sides of the same coin. One is of little use without the other. It is the more glamorous side – the right to a fair hearing per se – that tends to get the most attention. But the fairest and most just courts in the world (which ours have a real claim to be) are of no use at all to those who don't have realistic access to them.

8. That is a good reason to focus on the practical side of things tonight. Whether justice is, to quote Coke, free and speedy – or, in modern parlance, conducted efficiently and at proportionate cost – remains at the heart of the practical issue of whether or not people really do have access to justice.

9. In particular, there are four elements of our courts and justice system that need to be considered to evaluate the degree to which people have access to justice: (i) the legal principle that everyone has a right to a fair hearing within a reasonable time and at proportionate cost , which I have already touched upon; (ii) the efficiency and economy of the dispute resolution processes available and the systems they use; (iii) the means by which legal costs are controlled and how far they are recoverable from the losing side; and (iv) the extent to which funding – whether public or private – is available to litigants. I will deal with each of these in turn, in varying depth, in what follows.

10. But before embarking on that exercise, there is another reason – aside from its intrinsic importance – why I would like to take this opportunity to discuss access to civil justice.

That reason is that it is nearly 10 years since I was commissioned to lead the Civil Courts Structure Review in July 2015. My final report was published a year later, in July 2016, and provided a detailed assessment of the then existing structure of the civil courts and a series of recommendations for the future, almost all of which were accepted by both the Ministry of Justice and the judiciary. Access to justice was inevitably at the forefront of my mind in carrying out that exercise, and it is with the benefit of that vantage point that I would now like to look at access to civil justice 10 years on: where have we got to, and where do we go from here?

11. In my Interim report in 2015 I said this:

> *"The single, most pervasive and intractable weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals, for that tiny minority still in receipt of Legal Aid, for those (mainly with personal injury claims) able to obtain no win no fee agreements with their lawyers, for the few who obtain free advice and representation, and for substantial business entities. In short, most ordinary people and small businesses struggle to benefit from the strengths of our civil justice system."*

I am sorry to have to say that, although real progress has been made in several areas, this less than happy assessment still largely holds good, nearly 10 years later.

(II) <u>Where have we got to, and where do we go from here?</u>

A. Legal principles

Starting on a positive note, I should go back and place into context the extracts I quoted a moment ago from Lord Reed's judgment in *R (on the application of UNISON)*

v Lord Chancellor[4] – which came out in 2017, after the publication of my final report but before I joined the Supreme Court bench.

12. In a perfectly illustrative example of the point that I just tried to make – that access to justice is about both high-minded principle and practical functionality – despite all the Latin, that case was about a very practical issue.

13. The question was whether a new fee regime with respect to proceedings in the employment tribunals, introduced by the Lord Chancellor under the powers granted by section 42 of the Tribunals, Courts and Enforcement Act 2007, was unlawful because of its effect on access to justice.[5]

14. There is nothing inherently objectionable about court fees or equivalent charges in specialist tribunals per se. However, the striking fact of the matter in that case was that, following the coming into force of the new regime, there was a 'dramatic and persistent fall in the number of claims brought', a fall of roughly 66–70%.[6]

15. It was in this context that Lord Reed, with whom the other justices all agreed, cited that passage I read out a few moments ago in my introduction to this lecture. The extent of the power conferred upon the Lord Chancellor by section 42 of the Act had to be considered in the light of those weighty constitutional principles.[7]

16. Accordingly, since the Fee Order effectively prevented access to justice (either by making fees unaffordable, or by making claims not worth bringing given the disproportionate nature of the fees), it was unlawful.[8]

17. That decision marked an important demonstration of the way that the government power to raise court fees – what might seem to be a purely bureaucratic or mechanical matter – will generally be constrained by the principle of access to justice. It underlines

[4] See above.
[5] Ibid., [1].
[6] Ibid., [39].
[7] Ibid., [65].
[8] Ibid., [96], [98].

the importance of practical access to justice as the no less important sibling of the right to a fair trial.

18. One interesting aspect of the decision was that, while the Supreme Court noted that the common law approach was consistent with EU law, itself reflecting Article 6 of the ECHR and the decisions of the ECtHR, the focus was on looking at the common law first and foremost, in which the principle of access to justice is not only deeply embedded but also very much a 'live' principle in terms of its real interaction with the practical business of court fees and the administration of the justice system in general.

19. It used to be thought that the right to a fair hearing principle prevented the courts from ordering parties to engage in ADR, and mediation in particular. This was, so everybody thought, laid down by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* (*Halsey*).[9] Thereafter the courts did all they could to encourage parties to use ADR, including imposing costs penalties if they did not (see e.g. *PGF II SA v OMFS Company 1 Ltd*[10]). But they never summoned up the nerve to depart from *Halsey* until the 2023 Court of Appeal decision in *Churchill v Merthyr Tydfil*.[11] In that case a landowner faced with an encroachment of Japanese knotweed from neighbouring land owned by the local council refused to engage with the council's bespoke mediation process before pursuing a claim in the courts. The Court of Appeal said that the dictum in *Halsey* to the effect that a court order for mediation was contrary to Art 6 ECHR was both obiter and wrong. Although Mr Churchill was not ordered to use the council's scheme, it is now clear that courts can actually *order*, rather than merely encourage, parties to engage in alternative dispute resolution procedures like mediation, preliminary neutral evaluation or non-binding adjudication, without necessarily infringing the parties' rights to a fair trial. That is, provided that three conditions are met: (i) it does not infringe the essence of that right, (ii) it pursues a legitimate aim, and (iii) it does so by reasonably proportionate means. This was incidentally, and in sharp contrast with the *UNISON* case, decided entirely along Human Rights

[9] [2004] EWCA Civ 576, [2004] 1 WLR 3002.
[10] [2013] EWCA Civ 1288.
[11] [2023] EWCA Civ 1416.

Convention lines, although I do not think a common law approach would have led to a significantly different result, even though the conditions might have been differently expressed.

20. The ability of the court to order ADR is an important, but not entirely new, development. Alternative dispute resolution procedures are often of great benefit to parties who would otherwise end up in protracted, time-consuming and prohibitively expensive litigation. And they also free up the civil courts to concentrate their limited resources on those disputes which really cannot be resolved by any other means. Non-binding adjudication is a good example of ADR, both in mandatory and voluntary form. A right to have an adjudication was conferred by Parliament for most types of building construction contract disputes in 1996. Although not finally binding, most adjudication outcomes tend to be accepted, rather than challenged, by the parties, and the scheme has proved to be a great success: see *Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd*.[12]

21. By way of two examples of the value of voluntary adjudication, first, I visited the Civil Resolution Tribunal in British Columbia by way of research for my 2016 review, considering that it might be a prototype for an online court in England. It was an online platform then in the final stages of design and early trials, backed by primary legislation. It has since then made great strides as the go-to place for the non-binding resolution of various types of small civil claims.

22. Secondly, and again as part of my 2016 review, I applauded the Professional Negligence Lawyers Association for its efforts in developing and promoting a voluntary adjudication scheme, which had been launched in 2015 and relaunched in 2016 shortly before the publication of my final report. As I understand it, while that scheme initially struggled to attract much business, it has, thanks to a working group involving the Professional Negligence Bar Association (who now oversee the scheme) and representatives from the Association of British Insurers and the Ministry of Justice, as well as the PNLA, blossomed into an established process fully supported by the

[12] [2020] UKSC 25, [11] to [14].

insurance industry.[13] Its advantages are clear from the fact that it was specifically endorsed by Mr Justice Fraser in his judgment in *Beattie Passive Norse Ltd v Canham Consulting Limited* a few years ago as a far quicker and less expensive way to settle a dispute than a High Court trial: it was, he said, 'a great pity that the parties did not adopt that method of resolving their dispute in this case' with the assistance of an experienced silk in the field as the adjudicator.[14]

23. The advantages of such methods have also now begun to be reflected in the Civil Procedure Rules. Sticking with the professional negligence example, the pre-action protocol for professional negligence cases has – since 2018 – included a provision stipulating that the Letter of Claim should provide an indication whether the party wishes to refer the dispute to adjudication and give reasons if they do not wish to do so.[15] And the CPR now incorporate a requirement for parties to small claims to (up to £10,000) to attend a mediation at an early stage, using the state-provided (free but rudimentary) Small Claims Mediation Service.

24. Privately run alternative dispute resolution mechanisms enabling the swift and economical resolution of disputes must also be part of the future if access to justice is to be taken seriously, particularly bearing in mind the present funding constraints upon the court service. Such processes tackle that problem by side-stepping traditional litigation although, importantly, not entirely replacing it, given the non-binding nature of many mediation/adjudication processes and the need to be compliant with common law and Article 6 rights of access to a fair trial in a state's courts. And the prospect of an affordable trial if ADR fails is an essential spur towards ensuring that ADR produces

[13] *Final Report* (2016), [6.99] (https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf); https://pnba.co.uk/wp-content/uploads/2024/03/PNBA-Adjudication-Scheme-5-Feb-19-VW-chair.docx.
[14] [2021] EWHC 1116 (TCC), [152].
[15] *Pre-Action Protocol for Professional Negligence*, 6.2(i).

just outcomes. A party offered an unjustly low amount in a mediation needs to be able to say, and to mean, "no, I will see you in court".

25. Ombudsman services are now an increasingly important and economical avenue for the vindication of consumers' civil rights in particular fields, such as financial services. Although usually provided by the state, and financed at no cost to the consumer by the industry concerned, they are not part of the court service, and do not finally adjudicate upon the parties' rights.

B. Systems and processes

26. As the *UNISON* case makes clear, court or tribunal fees present a specific barrier to access to justice, but they also exemplify the wider point made by Lord Reed in that case, that access to justice is impeded in circumstances where the cost of litigation – whether due to court fees or otherwise, not least as a result of legal fees – makes it irrational to pursue a particular type of claim. The cost of pursuing a claim ought not to be out of all proportion to the value of the remedy sought, but at present it all too often is. The less efficiently the court system works, the more time lawyers are likely to have to spend on the case, and so the more expensive the process.

27. Of course, it is possible to bring a claim as a litigant in person (though this may be impractical where the legal issues are complex), but the cost of doing so in terms of the loss of time and energy, and well as, perhaps, the emotional and personal toll, and the sheer inconvenience of it, is often immense. These considerations generally also apply, albeit to a lesser degree, to those who instruct lawyers to do the heavy lifting. For these reasons, the efficiency of our dispute resolution processes, and, in particular, their ability to deal with lower value claims at a proportionate cost, is of huge importance for access to justice.

28. It was to this end that I made much, in my final report in 2016, of the idea of an 'Online Court'. The main aim of that proposal was to provide a way for relatively small and

simple claims to be dealt with efficiently and with minimal involvement from lawyers.[16] The process I envisaged had three stages:[17]

> *'(1) an automated online triage stage designed to help litigants without lawyers articulate their claim in a form which the court can resolve, and to upload their key documents and evidence; (2) a conciliation stage, handled by a Case Officer; and (3) a determination stage, where those disputed cases which cannot be settled are determined by a Judge, by whichever of a face to face trial, video or telephone hearing or determination on the documents is the most appropriate.'*

29. The work of any such court would inevitably need to be limited, at least to begin with. Professional negligence again provides a good example: in my 2016 report I concluded that the complexity and asymmetry often apparent in professional negligence cases would mean that for all the benefits of the Online Court, such claims would not, initially, be suitable for that avenue. In time, I thought, there was the potential for attaching a specialist panel of experts to the Online Court to enable that deficiency to be overcome.[18]

30. As it happens, even that more limited vision of the Online Court has yet to come into existence. As part of the HMCTS Reform Programme there was designed and rolled out a basic form of online court called Online Civil Money Claims. Although digitally much more advanced and user-friendly than its rudimentary predecessor Money Claims Online, it never had the vital process of automated triage built in at stage one enabling litigants to articulate their claims without the assistance of lawyers. That is what I had described in my 2016 report as the key feature which would have opened the way to the pursuit of modest and not too complicated claims by litigants in person, at a proportionate cost.

31. That is not to say that the idea has been wholly abandoned or that no progress has been made. OCMC has been widely used since its launch as a pilot scheme in 2017, and achieves high user-satisfaction ratings and considerable savings in time. But it

[16] *Final Report,* [6.2].
[17] *Final Report,* [6.4].
[18] *Final Report*, [6.99].

has progressed along a somewhat different and in some ways less ambitious path than that which I had recommended.[19]

32. As my predecessor as Treasurer, the Master of the Rolls, the Rt Hon. Sir Geoffrey Vos explained in a talk he gave at UCL earlier this year, what the 'Digital Justice System' sets out to do is facilitate digital connections among the various existing non-court dispute resolution services (public and private), and between those services and the newly digitised courts and tribunals.[20] Sections 19–33 of the Judicial Review and Courts Act 2022 provide the statutory framework for a set of procedural rules to be determined by an Online Procedure Rules Committee, with the ultimate aim of enabling all types of dispute resolution to be fully accessible through integrated online services, creating a one-stop shop for advice, mediation and arbitration portals, ombudsman services, and the digital court process.[21]

33. It is perhaps a sad reflection of the complexity of court reform that I made a similar recommendation in 2016. I suggested that such a committee was needed to do the blue-sky thinking about how to digitise the civil courts, so that its establishment was needed urgently. It was (like almost all my recommendations) accepted by both the judiciary and the Ministry of Justice, but it took 6 years for the necessary primary legislation to be passed to enable an Online Rules Committee to be set up. And even now, it has yet to produce any rules. Meanwhile digitisation has proceeded in an essentially haphazard way, uninformed by any master strategy, and backed by an

[19] G. Vos, 'UCL – The Future Of Courts: Expert Panel And Discussion' (2024), [2] (https://www.judiciary.uk/wp-content/uploads/2024/05/UCL-The-Future-of-Courts-OPRC-DJS.pdf).
[20] Vos, 'The Future of Courts', [3].
[21] Ibid., [5].

ever-lengthening series of pilot practice directions, under the essentially non-digital and therefore inappropriate umbrella of the Civil Procedure Rules.

34. Nonetheless integration should if it is achieved ensure that people do not fall between the cracks of the various parts of the courts and wider justice system. Instead, they will, to quote Sir Geoffrey,

> *'be able to be directed and redirected around the digital ecosystem in order to find the resolution process most appropriate for their problem or problems. The whole process is aimed at fast solutions and resolutions.'*[22]

35. As Sir Geoffrey goes on to say, the reality is that since we are already digitising anyway, the objective is merely to do so in a coordinated manner.[23] The trouble is that if a complex new digital structure is to be built that works in an integrated manner, it wouldn't have been a bad idea to design it first, rather than the other way round.

36. That brings me to another topic that I need to deal with: the effect of the COVID-19 pandemic. It struck right in the middle of the conduct by the Court Service of a (then) well-funded Reform Programme. The essential idea behind the Programme was that you could make long-term savings by digitisation of the court service which would make it possible to provide as good or even better a service in much fewer very expensive buildings. By the time the pandemic struck the supposedly redundant court buildings had been closed, and many sold, but the digitisation was only partly designed and installed. Further, the pandemic caused critical staff leading the Reform Programme to be re-deployed to other higher priority work (like running the NHS).

37. So you could fairly describe the pandemic and consequential lockdown as the perfect storm. For the very best of reasons it forced everyone involved in delivering civil justice to make use of what was already available to meet what, during lockdown, was an almost existential crisis for a justice system that still depended mainly upon paper and

[22] Ibid., [12].
[23] Ibid., [14].

face to face contact. The progression of radical new design and development just had to be put on the back burner.

38. But the pandemic wasn't all bad in its effects upon access to justice, at least in the civil courts. It radically accelerated the adoption of available modern technology in most of our civil courts and in many tribunals. By available modern technology I mean the telephone, the video conference and electronic documents. I can best illustrate this from my own experience in the Supreme Court and Privy Council, although I believe it was largely replicated across most of the English civil courts, where the absence of juries made continuing to hear cases, but remotely, a practicable proposition.

39. Prior to the pandemic, we had in the Supreme Court been trialling paperless hearings. I had been the original guinea pig 18 months previously, (having just conducted my 2016 review on an entirely paperless basis), and had been joined by three colleagues by the time the pandemic started. Upon lockdown all twelve of us became incarcerated in our separate homes all around the UK (including Scotland and Northern Ireland). We could not meet face to face, and the delivery of case papers to each of us would have been ruinously expensive, if even possible. Within a single week, all our hearings became entirely paperless, and conducted on Zoom-type multi-port video conferences, while at the same time continuing to be live-streamed to the world via our website, as they had been since the court opened in 2009. The same occurred in Privy Council cases, where we had already offered remote hearings with one or more of the overseas parties appearing on screen rather than flying halfway round the world for a hearing of one to two days. All the hearings became fully remote international video conferences, without any loss of live streaming. The important point is that we managed to continue our previously fixed hearing programme throughout lockdown without needing a single adjournment, save only on one or two occasions where counsel was incapacitated by COVID.

40. Similarly, remote hearings in the High Court – adopted as an emergency COVID measure – continue now to be regularly used for short, interim or case management

hearings.[24] In the County Court there has continued to be a very large increase in (mainly telephone) remote hearings.

41. On the other hand, the disruption caused by the pandemic may well be at least partly responsible for the worrying backlog that appears to have built up in the lower civil courts (quite apart from the much more serious backlog in the criminal system): the official statistics show that the average time taken for civil cases to go from issue of proceedings to trial – in fast- and multi-track cases – rose from around 54 weeks in 2016 to around 80 weeks in 2023 – an increase of nearly 50%. For trials in the small claims track (which deals with lower value cases), the equivalent numbers are 31 and 54, an even worse increase of almost 75%.[25]

42. On the other hand, the available statistics show that, where parts of the court service have been digitised, there is a major, I would say game-changing, improvement, both in timeliness and efficiency. I will give two examples, both in the patchwork of digitisation being introduced in the County Court. First, the OCMC (for money claims up to £25,000) takes 9 weeks to get a case from issue to a standard directions order, whereas on paper it takes 30 weeks. Secondly, the parallel scheme for unliquidated damages claims has reduced the time for the same progress from 37 weeks to 13 weeks. When it is borne in mind that only about 5% of cases in the County court go all the way to trial, this helps set the worrying increase in progression to trial in a less disheartening perspective.

43. So there is a clear need for greater efficiency. Technology must be a large part of any solution, but the design, building and introduction of large scale new digital technology

[24] G. Vos, 'Justice in the Digital Age' (2023), [5] (https://www.judiciary.uk/wp-content/uploads/2023/11/20231102-MR-Speech-150-Anniversary-of-TCC.pdf).
[25] Civil Justice Statistics Quarterly: January to March 2024 Tables – see Table 1.5 (available here: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2024).

is both time-consuming and expensive in both monetary and human resources. As I shall later discuss, resources are at present very limited.

44. What Sir Geoffrey has described as the 'wild card' in this process is the impact of artificial intelligence.[26] I will come back to another way in which AI may assist access to justice later on, but for now I will simply sketch how AI might be used to streamline the dispute resolution process and to improve, or possibly – one day – even supplant, some aspects of judicial decision-making.

45. The first thing to note is that semi-automated dispute resolution systems already exist and can be highly effective. For example, I understand that eBay uses one such process to deal with the great many low value claims that result from sales on their platform. The parties in dispute are funnelled towards a settlement via a series of online forms, with no human adjudication or intervention at all. In a small minority of cases – around 10% – no agreement is reached at that stage and so a human mediator steps in to help.[27]

46. That might seem to provide a rough template for how the smallest value court claims could be dealt with in the first instance. The problem comes when bigger things are at stake. First, you need to have confidence in the quality and reliability of the automated/semi-automated process; second, people need to accept its legitimacy. Even if super-intelligent AI one day achieves the first, the second may prove the bigger challenge. A typical person might be happy to have a dispute about a small claim arising from the purchase of an electric kettle on eBay resolved by a robot very quickly and at minimal cost. But what if the dispute is about whether you can stay in your home, or keep your children or even your liberty? Whether these disputes should

[26] Vos, 'The Future of Courts', [24].
[27] P. Hodge, 'The Law and AI: where are we going?' (2023), 19–20 (https://supremecourt.uk/uploads/speech_231130_336aa18930.pdf).

continue to be resolved by human judges is a democratic question, not merely dependent upon the rate of advance of AI.

C. Controlling costs

47. Amending the processes by which disputes are resolved is the most direct way to improve access to justice. But this is only one angle from which the problem can be approached.

48. Another angle of attack is presented by the treatment of costs. If well-resourced defendants can hire expensive lawyers to do extensive work, that leaves claimants risking a fortune on the success of their case, not merely because of their own costs, which they can to some extent limit, but critically due to the risk as to liability for their opponents' costs, which they cannot. Many meritorious claims are, potentially, stifled as a result of costs risk. Even where they are not, claimants may be forced by the costs risk to accept a mediated settlement for much less than their claim is really worth. The courts have long been alive to this problem and have developed various ways of trying to contain the costs recoverable from the other side by a winning party. The problem is that involving the courts in the detailed management and assessment of costs – in order to ensure that they are reasonably incurred and proportionate to the size of the claim at hand – is itself a resource-intensive process for all those involved.

49. One attempt to contain costs and reduce asymmetry in an efficient manner is by imposing a fixed recoverable costs regime. What that means, as some of you may be aware, it that – regardless of the costs actually incurred by a party in litigation – the amounts it can recover from the other side (if it is successful) are determined by a set of tables contained in Practice Direction 45, which stipulate the amounts recoverable by reference to the stage, complexity, and value of the claim. The objective is two-fold. On the one hand, it should simplify and economise the regime for recovering costs, reducing the resource burden on courts and parties, and providing clarity and certainty for clients so that they can make an informed choice about whether, or how far, a claim is worth pursuing. One the other, it should also work to reduce the level of costs incurred overall, by providing a framework of reference as to what reasonable and

proportional costs should look like, and by incentivising lawyers to keep their costs within that which their clients will be able to recover (or else risk non-payment even if the claim is successful).

50. Fixed recoverable costs have applied in personal injury claims for less than £25,000 for more than a decade. But a recent development has radically extended their scope. In October 2023 the fixed recoverable costs regime was extended in two significant ways. In the first place, it now encompasses claims other than those in respect of personal injury. In the second, by virtue of its application to a new 'intermediate track', it will now apply to claims worth up to £100,000.[28] Accordingly, a large proportion of all civil litigation will now fall within the scope of the fixed recoverable costs regime.

51. This has been a controversial change. And it has been a long time coming. It followed a recommendation contained in the 2017 report by Sir Rupert Jackson and a consultation on that report carried out in 2019. It was also, in fact, a development I foresaw in my 2016 report.[29] Nonetheless there have been widespread complaints about it.[30]

52. It is troubling that these complaints criticise fixed recoverable costs on access to justice grounds – the very thing they are meant to help with. These varied complaints can generally be resolved into two key criticisms.

53. First, there is the idea that the fixed costs regime puts form before substance and fails to tackle the real issue. It ignores the need to streamline court processes so that they are more cost-effective. It is a sticking plaster that inevitably favours the wealthy and well-resourced – those who are not concerned about spending more on legal fees than they would ever be able to recover under the regime. This threatens claims that, due

[28] See the official note available here: https://www.justice.gov.uk/documents/frc-public-notice-updated.pdf.
[29] *Final Report*, [3.2] et seq.
[30] See e.g.: a note on the Law Society website at https://www.lawsociety.org.uk/topics/civil-litigation/fixed-recoverable-costs; C. Richards, 'The Extension of Fixed Costs – Two Steps Forward and Five Steps Back' (2023) (https://www.exchangechambers.co.uk/the-extension-of-fixed-costs-two-steps-forward-and-five-steps-back/Of); M. Ahmed, 'Fixed Recoverable Costs, Vulnerability and Access to Justice', *J.P.I. Law* 2024, 1, 77-89, 89.

to the work actually necessary to bring the claim outweighing the costs recoverable, become non-viable for those without such resources.

54. Second, there is the criticism that the functioning of any system of fixed costs is dependent on accurate assessments as to what those fixed costs should be, together with comprehensive and clearly drafted governing rules. In fact, so the criticism goes, those figures have been set unrealistically low without reference to adequate data, the rules themselves are likely to contain troublesome ambiguities or flawed assumptions, and the whole regime is a complicated extra burden for lawyers, judges, and parties to have to come to terms with.

55. Both of these criticisms are serious. Still, I think there is room for optimism. In their own way, neither criticism is perhaps the obstacle that it might seem.

56. With regard to the first criticism – that fixed costs are a mere sticking plaster – this complaint loses much of its force once one stops thinking about the costs regime in isolation and starts thinking about it as only one of many angles of attack that need to be exploited to make our civil courts work better, and to improve access to justice. As I suggested in my 2016 report, costs reform is only an adjunct to technological developments and other measures which actually improve the efficiency – and so drive down the costs – of the dispute resolution process, not an alternative.

57. Turning to the second criticism, I wonder whether this is really anything more than a pointed observation that, as is so often the case, the devil is in the detail. Yes, careful attention needs to be paid to improving and updating the relevant rules and the tables of fixed costs themselves, as well as ensuring that the regime does not become so complicated as to become unmanageable.

58. There must not be complacency as to the continuous refinement of the fixed costs regime, but I think that it would be misguided to abandon it. It may be that the extension of fixed costs to cases valued at up to £100,000 is too recent yet to have generated statistics against which the hopes and fears of its promoters and detractors

can be measured against objective criteria. That would in due course be a worthwhile exercise.

59. On the subject of continuous refinement, one place where a change might be merited is in relation to how the extended fixed costs regime interacts with qualified one-way costs shifting (QOCS). As you will know, QOCS essentially means that unsuccessful claimants in personal injury cases are protected from having costs orders enforced against them. In my report from eight years ago, I noted that QOCS had been:

> *'a powerful promoter of access to justice, in an area where the playing field is at first sight sharply tilted against the individual claimant, facing a sophisticated insurance company as the real (even if not nominal) defendant. It was the very asymmetry inherent in such litigation which led Jackson LJ to recommend such a regime for personal injuries. He did not do so for professional negligence claims in the non-clinical sphere, even where the claimant is an individual or small business. The result is that access to justice for the pursuit of those claims lags far behind that for personal injuries'.*[31]

60. I note that more recently still, this issue was raised by at least one professional body in response to the Civil Justice Council Consultation on Civil Costs in 2022.[32] If we are thinking about costs control as a means of improving access to justice then an appropriate extension of QOCS might well be a good place to start.

D. Funding

61. In my final part of this survey of the various angles from which access to justice in our civil justice system needs to be considered, I would like to touch briefly on a further element: the way that civil courts and civil claims are funded.

62. I will take the civil courts first. In 2016, the civil courts, viewed separately from family courts, tribunals and criminal courts, made an operating annual profit of about £95 million. This came mainly from the quite modest fees charged for what are called 'bulk claims' that is, claims mainly by utility companies to enforce undisputed debts, which

[31] *Final Report,* [6.29].
[32] *Response to the Civil Justice Council Consultation on Civil Costs*, 1 (Microsoft Word - PNLA CJC Costs Review Response November 2022).

were even then dealt with on a highly efficient digital and automated basis. The profits were deployed to meet part of the cost of the inevitably loss-making family and criminal courts. Since then, the pandemic understandably produced a sudden inversion from profit to loss, from which the civil courts are only slowly recovering, not even yet having reached break even. The last available figure is a loss of just over £40 million for 2022–23.

63. The civil courts are (apart from any surplus generated by court fees) funded from the Ministry of Justice departmental budget. It is not a 'protected' department, and has prisons among commitments which might easily be seen as attracting a higher political priority for scarce funds. You might think that, inherently, the criminal and family courts could well attract a higher priority for taxpayer funding than the civil courts. But for as long as the civil courts made a healthy profit, it would be understandable if they commanded a high priority for investment funding. A more efficient civil court would cost the taxpayer nothing to run, and yield more revenue to help fund the other loss-making courts.

64. But if that profitability has gone, you may think that the prospect of generous state funding to make the civil courts more efficient could be remote. And the current statistics about the time taken from issue of proceedings to trial show a remorseless increase not merely during the pandemic, but in the years thereafter, with no sign of any improvement. They are getting worse, not bouncing, or even creeping, back. This combination of lack of profitability and increasing waiting times for trial threatens serious consequences for access to justice. First, if it takes longer to get justice, then it is inherently less accessible than before. Secondly, if there is little money with which to fund improvements in efficiency, then the threats to access to justice represented by the disproportionate cost of civil litigation (as highlighted in my 2016 review) are unlikely to be addressed any time soon.

65. I do not by that gloomy assessment mean to say that there have been no improvements since 2016 in the efficiency of the civil courts and therefore in the cost-effectiveness of civil litigation. On the contrary, digitisation and hybrid or remote

hearings have come on a long way since then, and the tyranny of paper (with all the huge inefficiencies in paper handling) has largely ended in the High Court and above, even if the digitisation process still has a long way to go in the County Court. Time taken to get cases from issue to directions in digitised cases is very much shorter than on their paper equivalents. But no-one would say that we have yet come near to winning the battle to make civil litigation truly cost-effective, and that is why the diminishing prospect of further improvements is so serious. So I will turn to the funding of claims (and defences), i.e. the cost of civil litigation to the parties.

66. There are certainly still some who see the only satisfactory solution in this area as a return to historical levels of civil legal aid, bearing in mind that, according to the House of Commons Library, the estimated proportion of the population eligible for civil legal aid remained around 50% from 1988 to 2001, but had fallen to 25% by 2016.[33] That happy return has not happened so far. Without straying into politics, the current constraints upon government expenditure do seem to make it unlikely that this will happen any time soon.

67. In the meantime, we cannot ignore the modern phenomenon that is third-party litigation funding, which had been coming along in leaps and bounds following the effective end of the common law prohibition based on maintenance and champerty. In last year's *PACCAR* case,[34] the Supreme Court delivered a big shock to the litigation funding industry, because it decided that the words 'claims management services' in section 58AA of the Courts and Legal Services Act 1990 covered litigation funding agreements that gave the funders a share of any damages awarded. Accordingly, such agreements were 'damages-based agreements' within the meaning of the Act and were therefore unenforceable unless they complied with certain regulatory conditions (which they did not in the instant case, and in many like it). This appears to have been the unintended consequence of poor statutory drafting, rather than of

[33] *Spending of the Ministry of Justice on Legal Aid*, 6 – see table on eligibility for civil legal aid (https://researchbriefings.files.parliament.uk/documents/CDP-2020-0115/CDP-2020-0115.pdf).
[34] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28.

any real wish by Parliament to put a spoke in the wheel of a growing commercial funding source which was making a real contribution to access to civil justice. I certainly do not suggest that my colleagues in the majority on the Supreme Court panel got the issue of construction wrong! Those more closely involved in first instance proceedings than me will have a better grasp of this than I do, but my understanding is that the *PACCAR* decision caused a wide swathe of commercial litigation funding to fall off a cliff, at least in the short term.

68. A Bill to remedy the unintended consequences of *PACCAR* was before Parliament in the summer before being killed off by the General Election. My understanding is that the whole issue of litigation funding is being made the subject of a report requested from the Civil Justice Council. While their undoubted wisdom will no doubt be very welcome, the likely delay in the progress of remedial legislation means that *PACCAR* is likely to remain a gaping wound in litigation funding for at least three years after the case was decided.

69. Nonetheless, despite that judgment, and despite the common law's historical aversion to it, litigation funding seems now to be, at least in principle, a widely accepted feature of modern litigation. Indeed, in the leading judgment in the *PACCAR* case itself, Lord Sales noted that the 'funding of litigation by third parties is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice'.[35] Much as with costs, what are needed are sensible controls that promote fairness and access to justice at the same time.

(III) Filling in the gaps

A. Pro bono

70. However much the structures, processes, and resources available for civil dispute resolution are improved, there will inevitably remain cracks into which some cases and

[35] Ibid., [11].

some persons fall. There will always be a gap between what formal structures – no matter how gold-plated – can achieve and true access to justice. I am not of course suggesting that this means we should give up on access to justice as an unobtainable dream, or let up in our efforts to make civil litigation more efficient and therefore cost-effective. What I am suggesting is that we all ought to do our part to fill the gaps which remain, and which may not easily or soon be closed, by offering our services as lawyers pro bono.

71. The best way to do that is to try to establish it as a part of your practice from the very beginning – even while you are still a student and certainly once you are a junior practitioner. It is best to see it as a core part of one's vocation from the very beginning – a fundamental part of your career as a lawyer – rather than an optional add-on to be considered at some later date.

72. Indeed, some overseas jurisdictions set mandatory requirements that lawyers or law students complete a certain amount of pro bono work: in Singapore, for example, 20 hours of pro bono work is a graduation requirement for law students; in New York, 50 hours of pro bono work are needed before a candidate can be admitted to the Bar; and in Indonesia the requirement goes further, and 50 hours is required annually in order for lawyers to retain their advocacy identity cards.[36] Part of the reason for this is not just that it is good for access to justice, but also that there is much to learn from doing pro bono work, especially where that takes you slightly outside your usual area of practice or enables you to take on a greater degree of responsibility than would be typical at your particular level of seniority.

73. There are plenty of ways to get involved, not all of which require you to have become a fully qualified practitioner as opposed to a student or pupil.

    a. For those with post-pupillage experience, the Chancery Bar Litigant in Person Support Scheme (or CLIPS) offers on-the-day advice and representation to the increasing numbers of litigants in person in the

[36] See here: https://www.lw.com/admin/upload/SiteAttachments/Survey-Summary-Chart-2019.pdf.

Interim Applications Court, and is fully supported, indeed treasured, by the judges of the Chancery Division.[37] That is one of a number of schemes run by the charity Advocate, which provides a gateway to taking on pro bono cases for those in their second six months pupillage and beyond.[38]

b. For those who are still in law school (the majority, I expect, of this audience), I would endorse the Support Through Court scheme, which is again focused on supporting litigants in person, but by explaining court processes, assisting with forms and paperwork, and attending hearings, rather than anything particularly legal technical. What might seem like very simple guidance and reassurance can make a world of difference for those navigating what can seem to be an impossibly intimidating and bewildering system (it can sometimes even seem that way to those who work in it day to day).[39] Your law school may have its own pro bono activities as well.

c. There is also the Free Representation Unit which provides excellent opportunities to get real advocacy experience appearing in social security or employment cases.[40]

d. And of course there are opportunities with Citizens Advice and Law Centres, and no doubt various other organisations as well: the National Pro Bono Centre website is a good resource for anyone keen to see what is out there – and that should be all of you![41]

e. I should also commend the annual 'Pro Bono Week' to you, which offers an inspiring and educational series of events relating to many different

[37] See here: https://www.chba.org.uk/about-us/the-association/clips-chancery-bar-litigant-in-person-support-scheme.
[38] See here: https://weareadvocate.org.uk/volunteer/barrister-volunteering.html.
[39] See here: https://supportthroughcourt.org/get-involved/volunteer/service-volunteers/.
[40] See here: https://www.thefru.org.uk/volunteers.
[41] See here: https://www.nationalprobonocentre.org.uk/volunteer/volunteering-opportunities/.

aspects of pro bono work each November (so, unfortunately, you may have just missed one).

B. Public legal education

74. Pro bono work fulfils the – as I said earlier, inevitably necessary – function of a stop-gap mechanism for those who face difficulty in accessing legal advice and representation. But prevention is better than cure. Approached from one end of the problem, prevention means the sorts of things I discussed earlier – better structures for resolving disputes in and out of court, and better ways to ensure proceedings are not stifled by disproportionate costs or an absence of funding. But prevention can also be approached from the bottom up.

75. What I am talking about is public legal education. In general, the extent to which people understand the basics of our legal and courts system is worryingly low. That must mean that many people with potential legal claims have little or no idea of if or how they might pursue them, just as it leads others to be intimidated or dissuaded from trying to assert or defend their rights against those who purport to have superior legal knowledge. Much has been made, in recent years, of how this lack of

understanding can feed into mistrust or even hostility towards judges and courts, and even towards lawyers more generally.

76. The importance of public legal education was recognised by the government in 2018, when it published a list of seven goals for public legal education over the following 10 years. These goals include:

> *'2. PLE will be of high quality, maintained to ensure that it remains accurate and accessible and useful for the people who need it.*
>
> *3. PLE will be universal and reach across all demographics, prioritising children, young adults and vulnerable groups.*
>
> *4. PLE will be scaled up through delivery by the legal community.'*[42]

77. That last point is of particular significance for this audience; while not offering legal services pro bono per se, engaging with public legal education programmes, like those that provide sessions for school children, is another way that lawyers and law students can serve their communities.

78. There also seems to be a lot to learn from other countries. In my 2016 report, I remarked on how public legal education seemed to operate at a markedly higher level in those jurisdictions – such as California and British Columbia – which never had such significant civil legal aid as used to be provided in our system.[43] A report by the Self-Represented Litigation Network from 2016, which surveyed various operations in the United States, not least in California, emphasised that internet- (and telephone-) based services – for example combining a telephone or web chat service with an easily accessible website to provide legal information (if not legal advice) – are not only highly

[42] See here: https://www.gov.uk/government/news/our-vision-for-legal-education.
[43] *Final Report*, [6.115]–[6.119].

effective (offering, for example, instant access in a way that in-person services could never plausibly do) but also cost-effective.[44]

79. The good news is that technology and its adoption have come a long way since 2016. Access to the internet by smartphone is entirely the norm, and it is natural for people to look to online resources as their first port of call when dealing with more or less any difficulty, including a legal one. I quite often use Google to find relevant law reports even when sitting in the Supreme Court. It is – at least in theory – easier than ever for ordinary members of the public to get information about their legal situation and the options that may be available to them: at the touch of a finger on their smartphone wherever they happen to be. For those who wish to dig deeper, legislation, and case law too, is increasingly freely available online, for example via the government's legislation website, in the case of statutes, and via the British and Irish legal Information Institute website (BAILII) with regard to cases. I would also add Google, but for some reason not all my colleagues agree.

80. The increasing use of artificial intelligence for providing initial responses to legal queries is in its infancy but represents a major area for innovation. We are all now aware of the dangers of the 'hallucinations' that large language models can produce, so caution is warranted, but there is much to be said for the development of AI tools that can provide an initial stab at an answer to a question based on a corpus of legal material (Practical Law seems to have a tool of roughly this sort now integrated into its platform). Adequately reliable systems, if developed, might be able to provide – properly caveated – instant responses to queries in a way that may not be too dissimilar from how a student volunteer at a law centre might answer a question about court procedure over the phone, perhaps with the option to seek further guidance from a human operator (in the way that we are seeing customer service chat functions work). There would need to be appropriate safeguards. But the advantage is that

[44] *Executive Summary of the Resource Guide on Serving Self-Represented Litigants Remotely* (2016) https://www.srln.org/system/files/attachments/Remote%20Guide%20Executive%20Summary%208-16-16_0.pdf).

chatbots can work every hour of every day and serve many thousands of inquiring citizens at the same time.

81. Since the Supreme Court's inception, now fifteen years ago, public legal education has also been at the heart of its mission. Part of the rationale for transferring the judicial function of the Appellate Committee of the House of Lords to a new, more straightforwardly named institution with its own separate building was to make its function and workings more transparent to the general public. That commitment to transparency and education continues today – I recently spent a Friday morning answering very thoughtful questions (remotely – another example of how the Court has adopted modern technology) put to me by a class of sixth-form students from a school in Wales, as part of our 'Ask a Justice' initiative.

82. It would be remiss of me not to also mention that the Supreme Court has just completed the final stage of its 'Change Programme', which now enables, among other things, a more efficient fully digitised online registry system and public access in advance of the hearing to the written cases of the parties so that members of the public can consult these documents if they wish, while preparing for or watching hearings or reading press summaries or judgments – adding a critical element of visibility and transparency to the proceedings before our highest court. In its small way, transparency of this kind makes its own indirect contribution to access to justice: if the courts seem intelligible and trustworthy then people – who might not otherwise have contemplated it at all – will be more willing to make proper use of them to vindicate their rights. Our new Portal, with its new procedure rules, went live only last week, on time and on budget!

(IV) Conclusion

83. Stepping back for a moment, a cynic might think that many of the initiatives and ideas I have discussed this evening – having the effect of removing obstacles to bringing and pursuing legal claims – could simply lead to a more litigious society, and that this might be undesirable. For various reasons, the United States is, as a whole, a good deal more litigiously minded than the UK, and I am not convinced that it is a happier

society as a result. I would be minded to agree with my former colleague Jonathan Sumption in thinking that, in some ways, litigation – with its harsh binary outcomes – is a social evil, albeit a necessary one.[45] Those of us who making a living from it would do well to remember that.

84. But access to justice is not about encouraging a litigious society. Quite the reverse. If people have a better understanding of the legal rights they possess and greater access to alternative dispute resolution processes, backed up by the prospect of efficient and cost-effective legal proceedings, that can only be a good thing. Misunderstandings would be less likely to arise or would soon be clarified; disputes readily settled; and claims sensibly and efficiently pursued and defended as appropriate. As much as I enjoy the world of the courtroom, I would cautiously suggest that if the consequence is that there is slightly less courtroom work for the barristers and judges of the future, it would be well worth it.

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85. As I hope is now clear, ensuring access to justice is not about any single thing, but about the interaction of many. Extensive pro bono provision, for example, is not a substitute for improving the efficiency of the dispute resolution process itself – looking both within and outside the courtroom – nor for constructing a costs regime that promotes certainty and proportionality and helps to control risk. There are many different angles from which the problems facing access to justice can and must be attacked. I have set out several of them this evening, but there will others. Addressing the problem comprehensively is likely to require an ongoing process of both substantive reform and incremental refinement. I did not have all the answers in 2016, and my (sort of) hermit's life in the Supreme Court for most of the time since leaves me even less well qualified to advise now than I was then. Harnessing our collective wisdom – not only the experience of established practitioners, but also the fresh

[45] J. Sumption, *Law in a Time of Crisis* (2021), 132.

perspectives of those first beginning their careers as students, pupils, or junior barristers – is our best chance.