HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: Constitutional implications of Covid-19

Wednesday 3 June 2020

10.30 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Howarth of Newport; Lord Howell of Guildford; Lord Pannick; Lord Sherbourne of Didsbury; Lord Wallace of Tankerness.

Evidence Session No. 2 Virtual Proceeding Questions 18 - 30

Witnesses

I: Professor Richard Susskind; Professor Dame Hazel Genn.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Professor Richard Susskind and Professor Dame Hazel Genn.

Q18 **The Chair:** This is the Constitution Committee of the House of Lords. We are today continuing our inquiry into the constitutional impact of Covid-19. We are taking evidence from Professor Susskind and Professor Dame Hazel Genn. We took evidence two weeks ago from the Lord Chief Justice and feel that the impact on the courts and tribunals system is significant.

I welcome our witnesses and thank them for coming. I want to start by asking in general terms what the impact on the courts and tribunals system has been and what the main challenges have been for those participating. Who would like to answer first?

Professor Richard Susskind: I am more than happy to. Good morning. The impact has, of course, been considerable. The court system is essentially a forum where people meet physically. As physical court rooms have shut, the Courts Service and judges have had to adapt rapidly to a radically different way of working. It is unprecedented both in this country and worldwide. Many of the developments that we are now seeing in place by way of emergency had been anticipated by the Government and others, but the speed at which the new systems and processes have had to be introduced has been very challenging. Here and around the world—I can speak about other jurisdictions as well—the challenges have been considerable.

To dip down into a little more detail—I am not sure as to the length of response that you want, so please tell me if I am speaking too much—some of the challenges are cultural, because it is a very different way of working. Some challenges are technical; many users are not familiar with the technologies. Some are procedural, because our law has developed with a physical, oral hearing in mind. It is a massive upheaval.

The Chair: We will come on to some of those challenges and the impact on participants. Lord Pannick, I think you wanted to come in on this point.

Q19 **Lord Pannick:** Professor Susskind, I am interested in your perception of how well the virtual system is working at the moment. My own experience of participating in remote court proceedings is that it is going rather well. However, I was very concerned to hear from the Bar Council yesterday that the volume of work has in many cases almost ground to a halt. That is its perception. I would be very interested in your evidence and, indeed, that of Professor Genn on how the system is working.

Is any work being conducted systematically to identify how the remote systems are working? Who is doing that work? Is it being left to people such as you, Professor Susskind, or is there some official analysis of what is going on, so that statistics can be provided to people like us and we can analyse the position?

Professor Richard Susskind: There are a number of questions there. Overall, I would say that the response has been remarkable in the circumstances, for the reasons that I have just suggested: that the changes are fundamental and pervasive.

Relative to other jurisdictions, for those of you who are interested, I would recommend the website www.remotecourts.org where more than 50 countries have reported on their progress. Relative to other jurisdictions, I would say that we have responded and adapted very well.

However, it is also fair to say that the response has been different in different parts of the system. For example, the criminal system has found it far harder to adapt than the civil system; the family system is a different story, too. I shall come back shortly to your question about who is gathering data. The response is therefore better than I would have expected as someone who has worked in the system for many years, but there can be no doubt that large quantities of work simply cannot be addressed by the courts because they require physical hearings—for example, jury trials.

On how we know what is going on, it is an interesting day to ask that question, because the Civil Justice Council is today producing a report featuring interviews with more than 1,000 lawyers. Overall, the feedback from them has been fairly positive. The Family Justice Observatory, funded by Nuffield, has also undertaken a study. I do not know of similar studies in criminal, but I know anecdotally that the tribunals system is gathering large amounts of data and that tribunals in particular have been adapting well.

The question you ask is terribly important, because we have several challenges. We have the challenge of getting through the crisis. We then have the challenge of coping with the backlog, and then we have the general challenge of improving access to justice because we have a system that, in common with those of so many other countries, is widely recognised as not offering sufficient and affordable access.

My hope is that we can gather data about what works well, what does not work, where cases need certainly a traditional oral hearing, and what kinds of cases or parts of cases can be done more effectively than, or as well as, in the courts system.

I, and others, are calling for more data to be gathered so that government bodies, independent academics and others can scrutinise this experience. We have here a major unscheduled pilot or experiment. Frankly, I have been speculating for years that these technologies could improve our ways of working, but there is no evidence from the future, as it were. We now have a massive load of evidence, but we are not capturing it well enough, and I shall come back to that later. However, the question raised by Lord Pannick is vital.

Professor Genn will be able to speak more authoritatively about the kinds of research that can and should be done, as well as the kinds of data that should be gathered.

The Chair: This is an opportunity to bring in Professor Genn on the overview, and we will come on later to some of the specifics. The basic challenge faced by the courts and tribunals has been very significant, so I would ask you to start by giving us an overview of that.

Professor Dame Hazel Genn: I agree with Richard that it was the most extraordinary scramble. We have to remember that our courts system was starting from virtually below sea level on this. While there has been a large courts transformation programme, we were nowhere near as far along the way that we needed to be in order to meet these challenges.

The people in the system, in particular the judiciary and the lawyers, have worked really hard to make things work. I am not going to get hung up on the technical difficulties, because it is clear that they were massive, but that is what one would expect. People were unfamiliar with the different kinds of technologies and were sometimes using teleconferencing, sometimes using video—all sorts of things like that.

I pay tribute to our judiciary, who I believe have done an amazing job with, in most cases, virtually no previous training in how to manage these kinds of situations. That includes the full-time, salaried judiciary and the part-time judges who we depend on to make our system work. They too have had no training and indeed no equipment, and I want to make a further point about that. As I say, it was a massive scramble that started from a very low base, with everyone doing as much as they could.

There is no current, systematic data collection, which is very important, but what the pilot has shown us, from the bits of information that we have from the rapid review of family and civil, as well as a bit having been done on administrative justice, along with the anecdotal evidence that I have picked up from my own Centre for Access to Justice, which has been representing people in telephone hearings, is that there are both opportunities and real risks.

There have been opportunities in this, but the pilot itself does not give us all the information, because all of us who work at the poverty or poor law—the social welfare—end of the system recognise that there are people who have not been coming forward or whose cases have been adjourned or held back. Given that, we do not have the experience of some of those who are the hardest to help to draw on at the moment, which leaves a big gap.

The things we need to understand include how the different types of technology work with different kinds of users, by which I mean lawyers, judges and different kinds of litigants. I refer to different kinds of litigants with different capabilities, because this works differently for people with those different kinds of capability. There are also different kinds of cases: is it in a court?; a family hearing?; is it civil or high-grade commercial?;

is it a tribunal hearing where someone is having money claimed back where they think they have been overpaid? Depending on the jurisdiction, is it an interlocutory hearing or is it a substantive decision hearing? What kinds of technology will work best?

As I said, another issue is who is being left out at the moment, which will be difficult to capture. Who are we not reaching because they are intellectually excluded? We talk about digital exclusion, but there is also intellectual exclusion along with emotional exclusion. Who is afraid of dealing with these issues on the telephone? I cannot tell you just how long I spent this morning sorting out my laptop and my papers to get ready for this session, and I am a reasonably capable person who uses certain kinds of technology a lot.

There are many different things that we need to understand, and this has been an experiment that has been done at great speed. I agree with Richard that everyone has done as much as they possibly can, and we can now see that there are some real opportunities in this to make things flow more smoothly and easily for certain kinds of people in certain kinds of cases. However, there are also some real risks, and we have to make sure that going forward we put a system in place that captures evidence about what is going on as well as information about who has not been included: who have we lost in terms of access to justice? Who do we risk losing as we come out of Covid?

The Chair: We will want to follow up on some of those specific points. Basically, we can pay tribute to the people who have kept the show on the road at all, but we will have to delve deeper and find some of the consequences.

Q20 **Lord Dunlop:** Are we yet in a position to draw lessons from the operation of virtual proceedings during the current pandemic? Further, specifically on the point about data, Professor Genn has already said that there is a bit of a data vacuum in this area. Perhaps you could say a little more about the different types of data and analysis that we need in order to understand the benefits and shortcomings of virtual proceedings.

I have one final point. The CEO of the Courts Service has promised to build excellent data systems into all new courts systems. Can I ask both of you whether you are confident that this is indeed happening?

Professor Dame Hazel Genn: We have data from the Nuffield Family Justice Observatory, which I have quickly skimmed through. I have also looked in detail at a report that was published today by the Civil Justice Council. There is some really useful information from lawyers working largely on commercial cases and personal injury cases where there have been certain kinds of proceedings. They show what kinds of technologies have worked well and what kinds have worked less well.

I have information from my Centre for Access to Justice that has done some telephone hearings in welfare benefits tribunals. I have two cases that give an example of what is missing: it is information from the non-professional users of the system. For me, that is critical, because that is

what the system is there for and to serve. We need to know about the experience of the people who are in the system. In particular, we need to know about the experience of somebody who loses in the system. Do they think that they have lost in a process which they felt was fair and which they could participate in? Do they feel that they were heard and that the judge was listening to them? These are the aspects of procedural fairness. We also need information about the different outcomes from using the different kinds of technology.

We need to hear about the experiences of judges and lawyers, but most importantly we need to understand the experience of different kinds of non-professional users of the system—that includes the repeat players, the people who are quite used to going to court—and about the majority of people for whom being in any kind of court hearing or proceeding is a one-off event in their lives. It has never happened before and is not likely to happen again, but it may mean everything to them. We need to understand what their experiences are.

I have two cases that I have been talking to the people in my team about this week, and here I pay tribute to them because they have been wonderful. One person was dealing with a welfare benefits case. She was offered a telephone hearing. She had been to one before and she felt quite capable. She managed it and she got a decision in her favour.

The second person, when offered a telephone hearing, said, "Absolutely not." Part of his problem was anxiety and he said that he absolutely could not do it. We were really worried about how he was going to do in that hearing, because it came up with very little notice. At the hearing, the tribunal decided that this was not a case that could be dealt with by telephone or on the papers and that it needed to see the applicant. For me, that is an example of judges doing the correct triage. They looked at the situation and said, "This case is not appropriate for either a telephone hearing or a hearing on paper. We need to see the person in order to be able to get more information from them". That will be critical in the future.

The data that we need to collect will help us to understand which kinds of users will be able to manage better using telephone, video or even having a decision on the papers. We do not have that information now. You also asked whether HMCTS is collecting that data. First, HMCTS can collect data only from people who enter the system; it cannot tell us anything about people who do not engage with the system.

On the question of whether it is collecting all the data we need from those who do engage with the system, I am not 100% sure that that is happening. I have had very mixed messages on that. For as long as I have been in the business of collecting data on the civil justice system, I have certainly argued for better data collection about what is in our courts and tribunals, what happens to people and what the outcomes are. Frankly, we still do not have that information. We have better information on criminal justice than on civil justice or tribunals.

Richard may know better about that commitment in HMCTS, but I am not currently convinced that we are collecting the data we need to be able to answer the questions about who is using the system, the outcomes they get and their perceptions of the fairness of the procedure by which they have been dealt with, nor that, if we were to be collecting that data, particularly on demographics, we would have clues about who we are missing—some of the hardest to help groups who are not engaging with the system.

The Chair: Professor Susskind, would you like to put some light on this as well?

Professor Richard Susskind: I wonder if we could take a step backwards to be absolutely clear on the concepts, because there are all sorts of terms flying around here and elsewhere about online, virtual, digital and electronic hearings. Let me try to pass along to you the classification that I gave to the senior judiciary to try to bring some kind of clarity and consistency.

We have physical courts; I call the alternative remote courts, which is perhaps an unfortunate term, but the important thing here is that there are three subcategories: audio hearing, video hearing and paper hearing.

An audio hearing is essentially a hearing by telephone, and there are two sorts: the first is when there is a physical hearing, but some people are participating by phone; the second sort is where everyone is participating in some kind of telephone conference.

Similarly, there is the video hearing—not unlike the hearing we have today, which I would call a full video hearing, because everyone is participating by video. For a long time, we have had partial video hearings, where there is a physical courtroom and proceedings but some participants are engaged by video link.

Thirdly, there is the paper hearing, where arguments and evidence are submitted in paper form alone and the judge responds in kind. They are the three broad options: audio, video and paper hearing.

The previous question asked what we are learning. One thing that is emerging quite clearly is that the video hearing, in broad terms, is better than the audio hearing. A lot more information is conveyed. For example, if we were all on an audio call, we would have a less rich experience. I can see your faces and your expressions. A second finding is that it is very tiring to do these hearings. Judges who are used to sitting for two and a half hours in the morning and in the afternoon report that more breaks are needed.

A third thing that is emerging is that there needs to be ways for lawyers and clients to communicate with one another during the hearings, because they are not sitting together and are not able to write notes or talk to one another. A fourth thing that is emerging is that it is quite hard to handle cases where there are large bodies of documents involved. We

do not have good document management systems to support these kinds of hearings.

Generally, I think many people have been surprised at how effective a video hearing can be. Another finding or conclusion emerging is that partial hearings are not so effective and throw up questions of procedural fairness. That is to say, if some people are in a physical courtroom and others are communicating by video, there seems to be an imbalance.

This is a remarkable thing; it is not just for courts, but for Parliament and for meetings generally. I can imagine a world in which we are back in buildings but, when there is a video hearing, we all do this from our offices rather than getting together.

So some early findings are emerging, but let me agree with Hazel when she said that we just do not have the data. I hesitated with this, because I think that the Courts Service, under all sorts of pressures, with reduced resources and in the context of this seismic shift that I have mentioned, is doing remarkably well.

So it is a lot to ask that we have to capture data as we go along, but we really do have to ask that. If we are to use this experience to help reform our courts system and to take the best of this new way of working to improve access to justice, we simply must know more.

This is dealt with well by the Civil Justice Council report, which shows that gathering a lot of the data to do that work about the cases needed to be done by hand, as it were. It involved desk research rather than simply a print-out of what hearings there were, where they were, what technology was used, whether they were open to the public, whether there were technology issues and what the outcomes might be.

That information is just not available in datasets today, and we have to do everything that we can to try to encourage HMCTS and everyone working in the system to capture data, so that scholars like Hazel can analyse it every which way and come out with evidence so that, for the first time, our future thinking about technology in the courts will be evidence-based. We have never had that opportunity before. But we have to move beyond speculation, anecdote and the personal preferences of individual participants to something much more systematic. We need to have the rigour of the clinical health trial, because this is the future of our justice system, in my view.

The Chair: Baroness Fookes, you will probably want to follow up on some of those comments that we have heard.

Q21 **Baroness Fookes:** Indeed, yes. We have obviously looked at an enormously wide field, with great implications. If we come back for the moment to the short term, what decisions should be taken in the immediate term—for, say, the next six months? What resources are needed and what decisions should be made to help the system in the short term?

Professor Dame Hazel Genn: Shall I go first? Then Richard can correct me. I think we need to try to sort out the technology, which is a practical thing, and, as Richard said, get the telephone conferencing and video to work as well as they can. Having talked to judges as well, I agree that although video conferencing is tiring, it is much better when you can see the parties, but that raises questions about the parties' access to equipment.

We need to sort out the technology and we need to focus on collecting the evidence, because we need to start putting those systems in place now. If we are going to collect evidence, we need to do it now, not in six months' time. We need to get those systems up and running to help us understand the opportunities and the risks.

We need to train the judiciary in all jurisdictions, first on best practice; they have not had time to do this. There needs to be a programme of training for the judiciary so that they understand what is best practice or what is working well in their jurisdictions for certain kinds of cases. They also need to understand how different technologies work with different kinds of litigants in order to triage properly. We are leaving it to judges to decide what form of hearing it is. Preferably you will get the consent of the parties, but the judges can determine which cases will be dealt with by telephone, by video, or on the papers.

Those are big decisions, so they need to feel confident about the information they are using to undertake that triage. The profession has a big job in training representatives to think about how they manage different kinds of hearings and how they work with their clients, particularly when they are not in the same room.

I have heard several people say that it is terribly difficult when the judge makes a suggestion in a hearing and not everyone is in the same room. How do you have a quick chat with your client as to what to do? It means that you need three or four different devices so you can be WhatsApping somebody while you are on Zoom or on the telephone, or whatever else.

We need training for judges and for representatives. As I said, we need to get ourselves into a situation where we can collect systematic evidence and start to analyse it, so that we can be constantly feeding it in—kind of as we have been doing in dealing with the pandemic—learning all the time as we go along, improving our processes and refining them, to deliver the best quality of outcome for everybody involved in the system.

This will help us to deliver procedural fairness for litigants and substantively just outcomes for parties. That is what people want from the system, and our system is good at doing it.

Professor Richard Susskind: Thank you, Baroness Fookes. It is a terribly important question. Although we are focusing in some of our discussion on the longer term, we have a court system to keep up and running.

One difficulty here is that it is hard to change the wheel on a moving car, as it were. We have this major machine moving forward. It might surprise people when I say that we have to be quite modest about what we are trying to achieve technically to keep the system up and running. For me, to answer your question about the short term, it is about stabilising and improving the rather ad hoc systems that have understandably been put in place, so as to minimise disruption.

We have to watch that we are not too ambitious in bringing in new technologies. It is important that we increase confidence across the judiciary in using the initial basic systems; that we train, as Hazel suggested; that there is support available including technical support; that there is standardisation of practice; that we gather users' stories so that there is a community of judges who can speak to one another about what works well and what does not.

Hazel is absolutely right that we need clarity on the question of allocation: which kinds of cases must be reserved for physical hearings and which can go to audio, video or paper hearings—there needs to be standardisation of that process.

There needs to be simplification of the protocols that have emerged. What the judges have achieved has been hugely impressive—a whole body of new practice directions and protocols. But it must be quite overwhelming, I would imagine, if you are a judge on the ground with a large case load, working in this rather alien environment.

We need simple, practical, punchy guidance for very committed individuals who find themselves slightly at sea. I know that the temptation will be to continue bringing in new technologies and evolve, but I would like to see stabilisation of the current systems.

I do not believe, unless some miracle comes about, that this will last for only a few weeks. I think there will be another six months or a year of this focus on minimising the disruption by making the most of the technology that we currently have.

If a lesson has emerged, it is that we can go quite a long way using the existing technologies. We have to make our user community—the judges and the lawyers—more comfortable with the new normal, to use the cliché.

Professor Dame Hazel Genn: I want to add something very quickly that I forgot to mention, which I think is terribly important. During the however many months in which we are stabilising and sorting this out, we must think about the needs of the advice sector, which has been pretty much savaged by cuts to legal aid and so on. To provide the support for people who, as Richard said, will be going through this for a long time, we must not forget that this part of the sector—not-for-profit, social welfare legal advisers—need assistance in providing support for people who cannot help themselves.

Q22 **Lord Faulks:** Good morning. I should declare an interest as a practising barrister. Members of my Chambers have been grappling with the problems that have been thrown up by the coronavirus and various remote hearings.

I think it has mostly been successful. One colleague did a hearing in the Supreme Court which worked pretty well but, of course, that was a very contained experience. There are variations in the challenges that different types of hearings throw up.

For example, I was due to do a 10-day trial in July, which involved witnesses whose credibility was likely to be an issue. I am glad to say that the case was settled; but one of the reasons for that was that there was real uncertainty on both sides as to how easy it would be to feel confident about the outcome given that none of the witnesses would be present and the hearing was all going to be done remotely. The High Court could not offer a hearing with anybody present at all.

The hearing would have been put off for a year or so, which in effect would have been a denial of justice. This is an important constitutional issue for us: that notwithstanding the fact that this unscheduled pilot has been largely successful, there are some cases that can cause problems and real questions.

Would either of you like to comment on this?

Professor Dame Hazel Genn: That might be an example of the kind of case where you would say, "This needs a face-to-face hearing, but will it be feasible in the time?"

Being able to see people on video is better than nothing. I understand the importance that people place on the assessment of credibility, and there are debates about that. But certainly, being able to see people and pick up visual cues is very important, both for judges and juries. That is a huge practical problem.

I think that running a long trial remotely will be very difficult, but Richard might know more about the plans in the criminal justice context.

Professor Richard Susskind: I want to comment, rather, on the issue of whether one can take evidence. The experience of many judges and barristers, as many have said, is that you need to see the whites of someone's eyes. It quite interesting.

I do not really want you all fiddling with your system, but we are on a system just now called Zoom. In the top right corner, there is something called "speaker view". I suspect that on what you all have before you, we all appear like a series of tiles. You may not wish to do this but, if you go into speaker view and press the button, I suddenly appear—I know it is grotesque—in full technicolour as they used to say, all over your screen.

The difference between looking at me as, frankly, a postage stamp on the screen, as opposed to my filling the entire screen, is manifest. What is coming through—again, this is a global experience from remote courts

worldwide—is that many attorneys from the United States and lawyers from around the world are reporting that, actually, they find it remarkably effective. They can get nearer to the whites of the eyes—actually, not just metaphorically—than in a court room.

So, I do not think we should make assumptions. Clearly, we need systematic data, but we should not make assumptions that, if evidence needs to be taken or there are questions of credibility, there is no way that this can be achieved through the video hearing. Also, in lower-value cases, there are issues about whether it is proportionate to hold physical hearing in any event.

What has emerged as a generality across the world is that these video systems seem to have worked quite well with large, complex commercial cases. So, I would not immediately say that that is a category that needs to be reserved.

At the same time—we might discuss this a little later—I can imagine that during the course of a dispute, sometimes the judge will say, "We need to gather together physically". At other times, they will say, "Actually, it will be sufficient to have a video hearing". On particular issues, in the same way, I think Hazel's judge said, "We need to have a physical hearing". The judge will have discretion to determine—presumably the parties will have views on this, too—whether the hearing mechanism is appropriate.

I do find fascinating the feedback from those who express surprise that you can get a real sense of a person's credibility, or demeanour, by looking at them on quite a high-definition screen, where the video is close to their face. I accept that there is a whole bundle of other body signals. Lord Faulks, as a barrister of many years standing, you will have an instinct about someone from the way they are standing or the set of their shoulder. We lose a lot of that, but you could say that this will emerge as the new craft of the future—the online barrister who can read the signals better.

Q23 **Baroness Corston:** For what types of proceedings is an online dispute resolution process an effective or sensible addition, and what are the implications of using such a process?

Professor Dame Hazel Genn: ODR processes can be very useful, particularly in commercial cases, where settlement is a real possibility or where settlement negotiations often take place. It could be a useful add-on in relation to small claims where there is reasonably rough bargaining power. Interestingly, dispute resolution processes can be helpful even in some complex tribunal cases, where there are very difficult issues to sort out and where reaching some kind of a settlement, rather than having a binary decision, can be quite helpful.

There will certainly be cases where the addition of, or opportunity to use, an online dispute resolution process will be a helpful supplement, so long as people understand the significance of what they are opting in to or are involved in and what it means for the eventual outcome. This comes back

again to people's levels of capability and the kinds of people and kinds of cases involved, and whether they understand the implications. I am sure that Richard has quite strong views on this. I am quite agnostic on ODR.

Professor Richard Susskind: Thank you, Baroness Corston. This question goes to the nub of something that we are not very clear on yet. I have written a book about online courts, and that is one of the unanswered questions. We have all these new facilities, but it is not yet clear to us which types of problems or issues are best dealt with physically and which are best dealt with by some kind of online mechanism.

If I understand your question correctly, or appropriately, the early thinking is that ODR is good for preliminary hearings, for case management meetings, for interlocutory hearings, for trials where perhaps there is not much evidence, and for trials where there are not huge numbers of documents. There is a general view, on grounds of proportionality, that this kind of process is good in relation to high-volume, low-value cases.

I know that Hazel and I are sounding like broken records on this, but we do not yet really have the data. I think it will become clearer in a few years' time. We will look back and think that it is unbelievable that we used to assemble in a physical court room for a 10-minute hearing, for a case management discussion or for a case that is quite straightforward. We want to build evidence on this.

Whereas six months ago I speculated that benefits were to be gained from a more accessible and efficient system, for the categories that I have just mentioned the evidence suggests that an online process makes sense. None of that, as I say in my book, is to say that some kind of online hearing is better than appearing physically before the finest judge in the land; it is to say that we are running a public service here, it has to be available and proportionate, and experience suggests to us that there might be a different way of disposing of some of the massive caseload.

More importantly, as Hazel referred to, many disputes in our society do not sniff the court system because people regard it as unaffordable, too forbidding, inaccessible or not part of their world. Would it not be wonderful if we had a service that was genuinely part of people's world, allowing of course for computer literacy, confidence in using the system and so forth?

Professor Dame Hazel Genn: I just want to say that it is not just about computer literacy. The ability to take advantage of online proceedings, or indeed to take part in any proceedings in any way, requires not just computer literacy but literacy in general. We have very high levels of low literacy here, with people for whom English is not their first language and different capabilities in comprehension. Sometimes people do not even understand the significance to legal outcomes of ticking one box rather than another. Therefore, there are a lot of questions to be asked.

As Richard says, we are just at the beginning. I hope that in a few years' time we will have much better evidence of how remote systems can contribute to our system of justice. Where we absolutely need to continue with face-to-face hearings, we need to know why that is, what it delivers, what we gain from those hearings and the range of things that we might gain from remote hearings in the future. I am sure that in the future we will have a mixture of the two, and I hope that it will be well calibrated to the needs and capabilities of the users of the system—in particular, the non-professional users of the system.

Q24 **Lord Hennessy of Nympsfield:** May I pick up on Hazel's point about legal outcomes? It seems to me that what is lurking behind every aspect of our discussion this morning is: will this move to digital, with distancing of witnesses and so on, change legal outcomes? I have to confess that I am a stranger to the world of the courts, because I have led a very sheltered life and it is many years since I was a juror.

However, it seems to me that the quality of outcome and the outcomes themselves could be changed if people lost the intangibles about which you have both been so eloquent—seeing the whites of the eyes and picking up facial signals. The same question lurking behind this and several other questions that we have still to ask is: because of the new world that we are moving in, do we think that decisions will go differently from the way they would have gone if we were still in the old one?

Professor Dame Hazel Genn: This is a critical question, and I am afraid that a lot of the discussion on this focuses on process and not on outcome. The purpose of the justice system is for people to achieve an outcome, and the people who should be most in our minds are those who do not get the outcome that they want. They need to leave the process feeling that they have been through a fair process in which they participated, where they were heard and where the judge was open minded.

My question is how we can deliver those things through various kinds of remote hearings, but we do not know. Unless we collect the data, we will not know whether different kinds of hearings deliver different kinds of outcomes. That is really important.

Some of the work that I have done in the past has shown that if you go to a tribunal and you opt for a paper hearing, your chances of succeeding are much lower than if you attend the hearing physically. That has been known for a very long time, but the question is why? Is it because the judge can see the whites of your eyes, or is it because at a physical hearing the judge can gather information that was not available in the papers?

We need to understand those kinds of things. The question of a substantive outcome is very important. It is just as important, or possibly more important, than the question about process. You can enjoy a process and say, "Yes, that was really great", but you might not get what you are legally entitled to.

Baroness Drake: Good morning. I take the point that one needs the data to move beyond speculation, but we are keenly interested in the impact of virtual proceedings on different groups, and you are beginning to see that in some of the supplementary questions we are putting to you. I seek your view on the impact of virtual proceedings on litigants, and on access to justice more broadly. In the light of those views, what systems and support do you think will be required to protect access to justice?

The Chair: Lord Howarth wants to follow up on similar points.

Lord Howarth of Newport: I have three very quick questions arising out of what has been said. Both witnesses have praised the judiciary for their alertness and committed response. I think Professor Genn mentioned that they had to do this without training or—[*Connection lost.*]

The Chair: Sorry, can we get some technological assistance here? Is anybody able to hear what Lord Howarth is saying? Lord Howarth, we heard only the odd word. Perhaps we can come back to you. I will let Professor Susskind in while we try to sort out the technical difficulties. Professor Susskind, do you want to take up the points that Baroness Drake raised and which we talked about before?

Professor Richard Susskind: I just want to follow up on Lord Hennessy's observation. I would never be interested in this if I thought there was a sense in which decisions of a non-physical court system would be unfair. We need to determine the kinds of cases where the fairness of decisions is equivalent to the judicial system, or even outperforms and improves on the system.

We have empirical evidence on this. The Civil Resolution Tribunal in Canada, for example, has done extensive research on fairness of decisions and of the process. Similarly, detailed academic studies are ongoing in the United States as well. The early evidence is very encouraging.

I fully accept that there will be some cases where it is hard to imagine a just outcome without a physical congregation, but we have to be open to the evidence which suggests that in many cases we can achieve justice in some sort of online proceeding.

There is another kind of justice—I could bore you senseless on the seven kinds of justice—around which there are important questions: distributive justice. We live in a society—and we should collectively be ashamed—in which access to justice is given to very few indeed. It seems to me that having a perfect system for a very small number of people—a ceremonial Rolls-Royce that a few can afford, where everyone else is left to walk—is unacceptable. If we can develop a system that is perhaps rougher at the edges in its process but delivers fair decisions, that is something that we should be open to.

That links to the question about the impact on litigants. For me, this is about accessibility. Is it not unbelievable, looking worldwide, that only 46% of people, according to OECD figures, have access to lawyers and courts? More people in our world have access to the internet than have access to courts systems.

Actually, the same is true in this country. It is hard to avoid the conclusion that our current system is too expensive, too time-consuming, too combative, and is unintelligible to the non-user. So we have to be terribly careful, when taking potshots at virtual options, to remember that the status quo itself is deeply defective.

One of our collective challenges is to improve the current system. There is no point in comparing online courts to some idealised, perfect model of the delivery of justice that does not exist. Our current system, I argue, is in a parlous state. We should be looking here for improvement, rather than perfection.

Hazel has written and spoken so compellingly on this in the past, and I fully accept that there is a group we have to be deeply concerned about: people who are, frankly, hard to reach, whether in the physical system or using online options. We have a problem of accessibility. People cannot afford legal advice, and the courts system in turn is not open to them.

We face a related issue. We will see the emergence, as we are already, of online private sector alternatives to dispute resolution. In a way, that is quite attractive: that is to say, people can have their disputes resolved quite quickly by some sort of electronic form of ODR, have expert determinations and mediation and the like. But it worries me if people's first port of call when they have a legal dispute is not our public courts system. The rule of law depends on the daily affirmation and delivery of authoritative, binding decisions by our judges. If the market provides a more desirable alternative, we should rightly question our system.

My life's work has been about how we can increase access to justice by the use of precisely the kinds of technologies that have been foisted upon our system over the past few months. Let us learn from this experience.

There is a related point here. Quite a lot of judges and lawyers are of the view that once our lives can return to normal—we hope that is very soon—we will just pile all the cases back into the old physical court system. I think that this view is deeply flawed. We have to learn from this experience, as they are in medicine, where people are understanding that GP consultations via Skype can work out in many cases. We have to learn from the experience, capture what works well and understand what does not. We need to meet the backlog and the access to justice challenge using these new emerging systems.

On a data point again, the report out today on the civil justice system shows that we have had only a handful of responses from litigants in person. We really need more information about what it is like to be a non-legal user, if I can put it that way, of these remote courts.

Professor Dame Hazel Genn: I am not suggesting that we are aiming for some kind of perfect system that we do not have at the moment. What I worry about, and need to know, is that we have not actually reduced access to justice but increased it. I am concerned that people who were capable of accessing the justice system could now be excluded. That would be a poor downside to this. Our hope is that we can attract more people in, and only time will tell.

It is quite clear already from the evidence of the Civil Justice Council rapid review, and from intelligence I am getting from people on the ground, that regular clients at the lower end of the income spectrum are not making the inquiries that we would expect; they cannot access the forms of advice that they would have done in the past.

I am not arguing that we go for a perfect world. I am saying that I do not want to lose the level of access that we have now, and I would want, preferably, to find ways of increasing it.

The Chair: I am sorry that we cannot make Lord Howarth's connection sufficiently good to bring him back in. I will move on to Lord Sherbourne.

Q25 **Lord Sherbourne of Didsbury:** I want to focus on a couple of points that have arisen in the discussion in a very practical way. We have had a clear explanation of the nature of the present proceedings, the different technologies, the hybrid courts, and so on.

So one question is: what have the practical problems been in the current period that have perhaps made the administration of justice less effective? Secondly, focusing in particular on the non-professional participants, what practical help can we give those people in the present period? Thirdly, if over time we move to a much more effective and smoother system of digital and remote courts and systems, what might be the practical advantages of that over the old system?

Professor Richard Susskind: Thank you very much for that question on practical problems. We just saw exhibited with poor Lord Howarth a second ago that sometimes there are technical difficulties. You are fortunate in having some kind of technical support; we saw it even today in the introduction to proceedings.

But the Courts Service is very stretched, and we can also envisage a future—it is part of the vision of the Courts Service in the future—that before you enter some kind of remote court there is a waiting room, your connection is checked, and procedural processes are introduced. That would raise the level of confidence that it is a more professional environment.

So there have been technical issues, which will be overcome in the future when, for example, the technical connection is constantly being monitored and people are given assistance in how to use these systems—which buttons to press. We have videos today that help people who are preparing for a physical court hearing who are self-represented. Similarly, on YouTube or wherever, we can have systems that would help people to

track through how to use what is, after all, a basic app. Overwhelmingly, most people in the country use remarkably sophisticated technology on their hand-held phones and they navigate their way around. They do so because help is available, and we need to make that practical help available.

The other practical problem—you may not think that this is practical—is that there is a cultural issue. There is no doubt that some people—judges, for example—are instinctively, viscerally nervous about jumping to the video hearing, and many have defaulted to the audio hearing. The phone is the comfort zone, the video hearing otherwise.

We have to recognise—I have done detailed research on this, and I do not say this lightly—that as a community, the legal community is technologically conservative compared to other professions, such as doctors, auditors, tax advisers and so forth. So we have had this very practical problem of a user group who by and large are quite conservative when it comes to technology being asked, overnight, to conduct their daily activity in a foreign environment.

You asked about non-professional users, and I think I have covered that; we need to have practical help online. However—the Government are working along the right lines here, and I will be interested to hear what Hazel has to say—there is a whole programme called Assisted Digital, anticipating that some people might not have the technical skills or otherwise the competence, confidence and abilities. There will and should be human beings available to help those who need assistance. It is not just judges and lawyers who are apprehensive about this new environment; it must be terribly forbidding for non-lawyers to appear in this environment. Whether it is more or less forbidding than appearing in a physical courtroom is an interesting question that we can ask ourselves.

It seems to me that there is lots of practical help that we can give. Hazel mentioned best practice earlier. We have to pick up all sorts of tips, not just in this country but around the world, about what works and what does not. Very quickly, for example, people will say that they use WhatsApp when communicating between lawyers and clients online, and set up a conversation so that they can have a dialogue at the same time. That was a tiny instance of something that emerged within a couple of days as the sensible thing to do.

We need to capture all of that. Would it not be great if judges and, similarly, non-lawyers had available at their fingertips just the top 20 tips for conducting a hearing online? It would help immediately.

The Chair: Thank you. I will bring in Professor Genn and then move to Lord Howell, then we will try Lord Howarth again to see whether that connection is better.

Professor Dame Hazel Genn: May I add something on support for non-professional users? It is not just a matter of being able to use an app such as WhatsApp. Clearly, some people have difficulty uploading

documents, which they need to be able to do. Remember, if someone is on their own, even if they are on the telephone or doing this sort of thing, they need support. They are told in the instructions that they are not supposed to have anybody in the room with them, so they are supposed to be on their own, and they are only allowed to drink a glass of water and things like that.

Technical assistance needs to be available. I have spoken to judges who say that they have three different devices working at the same time so that they can read their documents on one thing, and so on. How many people will have that? If they even have an adviser—let us suppose that someone from the CAB or from a law centre is advising them—they will not be in the room with them, so how do they communicate with them? They may be able to do that after lockdown.

The other question is whether there is more or less of a sense of foreboding than there is when sitting outside a courtroom. I have sat outside courtrooms and tribunals with people waiting to go in, and it is quite nerve-wracking, but they can have someone sitting with them and can chat. When you are sitting on your own in your kitchen in front of a laptop, thinking, "Is this going to work or not? What's going to happen?" and waiting for the judge to call you on the telephone, believe me, that can be quite anxiety inducing.

The people for whom this could be a real benefit are people with disabilities, who would find it difficult to travel to a courtroom and who will find it much easier and less stressful in many ways—physically less stressful—to be able to do things at home. However, they will still need that technical support and the right kind of equipment, and they will need to be able to understand what to do and expect.

The information available online for users and potential users, which I have looked at, is tremendously dense; it is all, pretty much as far as I can see, the written word, and you have to plough your way through it to work out what is going to happen: "What am I supposed to do? I can only drink water, I mustn't have anyone else in the room, I mustn't record"—all those kinds of things. It may be that over time we can produce good videos and YouTube things; I learned how to fix my dishwasher the other night by looking at something on YouTube, so we can all learn things from watching how they are done.

I am sure there are improvements that could be made, but in the immediate next six months to a year there will need to be a lot of emphasis on how we provide support for individuals who do not have high levels of capability and who have never done this before. We need to remember that.

Q26 **Lord Howell of Guildford:** Professor Dame Genn, you have made the fascinating suggestion that this world of online proceedings may take us away from adversarial court battles and all that towards a more inquisitorial system. Of course, if that is the way we go, that changes the whole way in which our cases are conducted—the whole flavour of English

and British law. I would like to hear your views on that.

Two questions arise from that. First, if inquisition rather than adversarial challenge between great QCs and so on is the way we are going, does that require completely new skills and characteristics in our judges, because it is a different way of conducting things?

Secondly, does this mean that in fact we will see far more dispute settlement outside courts, going rather, in global terms, the way of Japan, which has many fewer court hearings and indeed lawyers, or the other way towards America, where the whole place is swamped in litigation the whole time and one can hardly move without some kind of court involvement?

Professor Dame Hazel Genn: The point I was making was particularly in relation to the idea of online continuous hearings that have been proposed for tribunals, where they can look at the information, see what information is missing, and ask people for additional information, so that not everything hangs on what happens at the hearing and that process can go on.

I thought that actually it could be quite helpful for litigants in person, because it gives them the opportunity to produce additional information that they have not managed to produce, but it does change the character of proceedings. Whatever happens, whether or not we have online continuous hearings, which I have heard are very expensive and time-consuming to do—you might have a view on that—moving from face-to-face, set-piece hearings in the way people congregate together and the way we take evidence might mean an adaptation in everybody's behaviour. It means that lawyers will have to adapt to different kinds of procedures and that judges will have to adapt to dealing with evidence in different ways. That is why I said that we really need a good training programme and to learn from practice.

The Chair: Professor Susskind, do you want to mention your reaction to Lord Howell's point about moving towards an inquisitorial system?

Professor Richard Susskind: I have given a lot of thought to this. It raises a broader, really important question. Is the idea here that we take the existing English justice system and drop it into Zoom or some kind of electronic environment, or do we take the opportunity, as I and others have been arguing for some time? The role of technology is not to automate and somehow perpetuate our old inefficiencies; it is surely to allow us perhaps to resolve problems in new, different and improved ways. If that means that for low-value disputes, for example, a less combative, more investigatory mode of dispute resolution is proportionate and delivers the just outcomes we require, we should be open to that and, as Sir Ernest Ryder has said, to retraining tribunal judges to conduct a different kind of hearing.

I did not know, Hazel, about the relative costs, but I know that there is enthusiasm in tribunal cases for the judges to be more participative. It goes beyond case management; I rather euphemistically call it

"nudging", but it could be a far more participative process. Although I know that for many people the adversarial system is at the heart of the English justice system, if, as I say, our system is not delivering the outcomes we require, we should be open, especially if it is not involving lawyers, to thinking, "I wonder whether there is a different way that the technology enables us to reach just solutions?" It seems to me that just as our whole workforce is having to retrain in the light of technological change, so too might judges.

I have looked at this at length in my latest book. I do not see any fundamental jurisprudential difficulties in low-value disputes becoming less adversarial. The great judge in the United States, Jerome Frank, talked about the difference between the fight theory of dispute resolution and the truth theory. We live in the realm of the fight theory: our disputes are a little bit of a fight, whereas, arguably at least, the inquisitorial, investigatory system tries to find truth. It seems to me that finding truth is rather a good thing.

The Chair: We are getting very deep here, but you are raising some really interesting questions. We will try Lord Howarth again and hope that his technological problems have been solved.

Q27 **Lord Howarth of Newport:** Thank you very much. Yes, I will have another go, if I may. I have some specific questions. When Professor Genn was praising the judges for their quick and positive response to the present crisis, she observed that they had been doing this without training or equipment. Am I right in thinking that, even as far back as 2016, HMCTS and the Government announced a court modernisation programme and an intention to move on a substantial scale to remote hearings? How can it be that there is still no training or equipment? That is one question.

You have both emphasised the need to gather appropriate data. What are your views on how this should actually be done? Whose responsibility is it to establish the categories of data that are required and to ensure that that data is indeed gathered systematically?

My third question is on the backlog in the Crown Court—37,000 and rising, even before the pandemic. Short of moving to an inquisitorial system, short of moving to judge-only trials, which are very radical changes that would need extensive public debate, we face a crisis about justice delayed and justice denied. Can technology, can remote hearings, assist us in addressing this very urgent crisis that we have in Crown Courts?

Professor Dame Hazel Genn: I am sorry; I have another technical hitch. I have discovered that when my landline goes off I get cut off from Zoom. I do not know why; I will work that out one day. I missed some of what was said, but I think I heard most of it. I think you were asking about whose job it is to collect data.

I think it is the job of HMCTS, the Ministry of Justice and independent research organisations. I have to say that I believe that investment in

research in the operation of the civil justice system has been extremely weak on the availability of research funding to do work on this. This is a magnificent opportunity for people to do really high-quality and much-needed research. It is the job of everyone. The Courts Service is in a position to collect data that other people are not in a position to collect, but it is the responsibility of a large number of organisations to do this. I hope that your report might be helpful in stimulating people to get on with that job.

Your other question was about the backlog in jury trials. I have heard that, because there have been so many adjournments, some jurisdictions, including some of the tribunals, are eating through their backlogs. I am not sure how they are doing that, whether they are making decisions on the papers or whatever, but some people are managing to clear historical backlogs very well because so many cases been adjourned, but all we are doing is storing up pent-up demand. As soon as lockdown ends, there will be a real flood of cases. That would be quite difficult to manage.

As far as Crown Courts are concerned, I am not that familiar with the criminal justice system. Richard might have better information about what is planned there. I know that the question whether we should have judge-only trials has been hotly contested for many years. There are provisions for judge-only trials, and of course in Northern Ireland there have been Diplock trials for years, but I know that in general that is not popular. I do not know whether Richard has any thoughts on that.

Professor Richard Susskind: While you were offline, there was another question from Lord Howarth: why are judges and lawyers not better equipped and better trained? You are absolutely right: there is a £1 billion reform programme going through HMCTS. In fairness, the technologies that are envisaged there are not necessarily the technologies that are being rolled out now. Most judges would say that if you want to work effectively at home, you need more than one screen. That is not something that HMCTS had in mind. It is rolling out the cloud video platform, of course, which will be an improved, generic video hearing environment, but that was not scheduled to come out quite yet, so the training was not yet in place.

I suspect I am less critical than you might be of the judges not having the facilities and training on technology that has not yet been made available to them. Be in no doubt, though, that over the past three decades there has been a massive struggle adequately to equip judges with appropriate technology. Hopefully, this will accelerate the process.

I think you very well express the dilemma for criminal. If it is any comfort, there are other countries that have massive backlogs. If I can take you to Brazil for a second, there is a backlog in the court system of Brazil extending to 80 million cases, not just criminal. That gives you a sense that this is a global phenomenon.

You are so right that a lot of the more radical steps that we might instinctively think we could take would require extensive public debates, that jury trial goes to the heart of our feelings about what it is to be convicted in a public forum of some kind of crime.

I would be very nervous about having virtual jury trials, for example. There are preliminary hearings, less serious crimes, that we can imagine. On our remotecourts.org website, there is an interesting case study by a magistrate who disposed of a minor criminal issue online. When one reads that, one thinks, "Well, actually, that just makes sense". Certainly for lesser offences we should be open to the idea of hearings done by video, but we face a major public challenge in how to cope with the massive backlog that will inevitably build up of serious criminal cases where people's liberty is at stake. Out of all this, that is the great challenge that emerges.

The Chair: Let us move on. Lord Faulks wants to come back on the next dimension.

Q28 **Lord Faulks:** I want to ask you about the position of online, or remote, courts and the media. It is, of course, important that justice is seen to be done—I should declare an interest as chair of the press regulation body. We know that there is a problem with reporting of court proceedings generally, even in conventional form.

Where you have virtual proceedings, there seems to be a particularly acute problem in the constitutionality of court proceedings not being seen. How do you think the balance should be struck between accessibility and transparency on the one hand and the fact that there are rules that prevent you recording and transmitting proceedings?

Professor Richard Susskind: Open justice is another of my categories of justice; I have talked about substantive justice, procedural justice and distributive justice. Another, pulling in a different direction as you rightly said, is open justice. You can imagine a cheap, cheerful, quick system that is closed, and people would say, "Well, there is a fundamental problem there".

My starting point in this discussion is that open justice does not trump all other arguments. We make decisions to hold hearings in private when there are issues of national security or vulnerable witnesses. Decisions that we have made over the years not to have cameras in the court room suggest that open justice does not trump all other values.

I argue that there are two aspects to open justice, one of which will become increasingly important. The first is what I call real-time transparency: the ability to go in and look at the justice system in action, to sit in a physical courtroom. The second I call information transparency, which is the ability easily to find out about the justice system. In a democratic society, we should be able to find out the volumes of cases, the results of individual cases, when and where cases are held, which parties are involved, what judges are at play, and so forth. Today, we have in the physical court system quite a lot of real-time transparency

but very limited information transparency; it is very hard for most people to find out what is going on in the courts system. Such opacity weakens confidence in the system.

We may perhaps see the reverse. There might be less real time—we will not be able to walk into a physical court room—but if we design our systems well, we should have far more information available. An increase in information is possible in an online environment.

It is interesting that you ask the question today, because it was addressed also in the Civil Justice Council's report. I think it is fair to say that the media in general have felt that access to video hearings has been at an acceptable level. Indeed, I have spoken to some journalists who have said that they could visit two or three hearings in one day, at a time when that was technically impossible. While we see in local newspapers the decline of the local court reporter, it will be possible to visit "local" courts in the new world.

That is a slightly different question from that of public access. Again, the Courts Service has worked hard, offering access under certain conditions to members of the public to come and view. Certainly, for video hearings, I believe that we can achieve, both for the media and members of the public, increased transparency. Online continuous hearings or hearings on the papers alone are a different matter that I have dealt with at length, but I suspect that your question is more about video hearings. While it has not necessarily been achieved in all cases over the past few weeks, I say with some confidence that, as a matter of technology, we can increase access to the experience of observing some kind of court process in action. I respond quite positively and confidently to that.

Professor Dame Hazel Genn: I do not disagree with that. The Civil Justice Council's rapid review contains positive reports from people in the media. People involved to whom I have spoken seem to think that there are some real opportunities. If the public can watch what goes on in remote hearings that would normally be public, it will make it easier for them to see what is going on and keep a judge under review. There could be some genuine opportunities for transparency. As Richard said, transparency does not trump everything else; we have private hearings, so that is not my biggest concern.

Q29 **Lord Wallace of Tankerness:** We have certainly found this a stimulating and thought-provoking session. I think I glean from both our witnesses that when we are through this current crisis it would be a mistake to go back to where we started. In Professor Susskind's words, we should not perpetuate the old inefficiencies.

That being the case, what procedural and legal resource requirements do you think there are as we move to the future in expanding or extending remote proceedings? Where might there be proper limitations to—to use Professor Susskind's terminology—the remote courts?

Professor Richard Susskind: Could I divide what I think needs to be done into the medium and the long terms? In the medium term, we have

to ensure—I really hope that you can support this—that the experience of the remote courts informs, and where appropriate leads, to changes in the current courts and tribunals reform programme. I am not stipulating what these changes need to be, but we have this massive ongoing programme costing the taxpayer more than £1 billion. A lot of it is premised on technology; a lot is premised on warranted assumptions, but we now have so much experience that someone has to take a step back—there is early work on this—and say, "In light of this experience, what does this mean for the priorities and direction of the reform programme?"

It is the most ambitious court reform programme in the world. We should be proud of it, but we have to make sure that the—incredibly competent—civil servants driving it are given the space not just to carry on driving it forward, as previously articulated, but to benefit from this experience.

Longer term, we have the opportunity radically to redesign our courts system and put in place a new configuration of people, of processes, of technologies and of physical spaces that I think on balance would be superior and could be sustainable and accessible.

Incidentally, it is wrong—we all fall into this trap; I do, too—to think in a binary way about physical courts or remote courts. Let me put it a different way. Court service should be a blend of a variety of facilities. Sometimes it will be in a physical courtroom, sometimes it will be a video hearing, by phone or by paper alone. Our challenge is to take a step back, look at the workload facing the Courts Service today, extend that to the workload that Hazel points out and to what I call the latent market—those who need help but do not get it today—and do the analysis to find which of these techniques, in light of our experience, are best suited to that workload.

A huge process analysis needs to be undertaken so that we allocate cases and parts of cases to the most efficient resolution mechanism, consistent, as Lord Hennessy was stressing, with the delivery of substantively just outcomes. That is absolutely crucial for me.

I do not know whether that helps to set up Hazel to follow up, but for me there is a medium-term "Let's make sure that the reform programme is informed and changed appropriately", and a long-term "Let's for goodness sake not just default back to the old ways of working. Let's take the best of this and take our understanding, so that we can deliver a better justice system".

Professor Dame Hazel Genn: At the risk of violently agreeing with Richard on one occasion, in the short to medium term we certainly need to sort out the technology, but we must make sure that we collect the data about what is going on to review it and to keep it under review, and to bake data collection into the architecture of the systems that we are making.

I like the idea of taking a pause, standing back and using this opportunity to ask ourselves questions about this massive reform programme that we are undertaking. At the end of the day, we can have a system that better meets the needs of the very wide variety of people who use our courts and tribunal system. That is what I started out with, that we need to understand better what works best for whom and in what circumstances, and what delivers a substantively just outcome.

Q30 **Lord Faulks:** I of course entirely agree that when this coronavirus is over and we can, at least in theory, go back to where we were, we should not ignore the lessons that we have learned.

Perhaps both of you can confirm my experience at least, which is that even before coronavirus the profession and the court system was using technology in a number of different ways. I would not want the Committee to get the impression that it was so conservative that it was not taking on technology to facilitate settlements and have remote hearings. We can build on that. I hope you will agree that, conservative though the profession may be, there was an accommodation of modern technology within the way it was practised.

Professor Dame Hazel Genn: The profession has absolutely started in recent years to embrace new technology. The problem for us is that the court system was not designed or set up for, and there had been no investment in, the technological infrastructure of the court system that would make it possible for the courts to move into a world more modern than this paper-heavy system with antiquated machinery that people were using.

That is why I started out at the beginning of the session by saying that we were starting from below sea level when we had to deal with coronavirus, despite the reform programme. We have not had the investment in the courts which other jurisdictions might have enjoyed over the years. The profession has probably been ahead of what the courts were able to manage because of the restrictions on the technology that they were using and, to some extent, the skills of the judiciary and the way they have been trained to do things. Richard will probably have a view on that as well.

The Chair: Professor Susskind, the last word.

Professor Richard Susskind: Thank you. There are two uses of technology; I call them automation and transformation. Automation is the use of technology to streamline, optimise, improve and sustain traditional ways of working. Transformation is using technology to allow you to do things fundamentally differently.

For the last 50 years, court technology and legal technology have been automation. It is not a criticism, it is an observation, that lawyers and court service providers have grafted technology on to our traditional ways of working, so we have been using technology to turbocharge our old ways of working. But in my unkinder moments I think that often gives us

"mess for less": it often takes a messy process and makes it slightly more efficient.

The real strategic attraction of using technology in a transformative way—we can see this in so many other sectors, from medicine to manufacturing, and elsewhere—is that technology sometimes allows us to do things that were not possible previously. Goodness me, can you imagine if this was 1990, before the invention of the world wide web, before email or even telephone conferencing of any significance? Our system would have ground to a halt.

The technology has allowed us to deliver a courts service in a way not possible previously. That has to be our watchword for the future. I am not really interested in the use of technology further to streamline our processes, which go back to the 1870s or, more distantly, to 900 years ago. I wonder whether, in a digital society, technology can facilitate entirely new ways to resolve the very important disputes that people have.

So you are right in a way that we have invested heavily in technology and that there has been an openness, but I would argue it has been the wrong kind of technology.

The Chair: Thank you very much, and I thank both our witnesses, Professor Genn and Professor Susskind. It has been very interesting. I am sure that we will want to follow up on many of the points that have been raised. You have given us plenty of food for thought. Thank you very much indeed.