Legal Information Management, 18 (2018), pp. 70–75

doi:10.1017/S1472669618000166

DATA PROTECTION AND GDPR

Transparency, Data Protection and the Law Courts of the Future

Abstract: This article by Paul Magrath examines the tensions between data protection and transparency in the context of a long overdue digital revolution in the courts of England and Wales. Many traditional hearings are being replaced by virtual or video-conference type hearings, and may in time be dealt with by an online court. There are concerns that open justice may suffer. Yet any attempt to remedy this with more transparent scrutiny of court information will need to conform to the stricter data protection regime under GDPR as well as respecting the privacy of litigants and the presumption of innocence. The author is Head of Product Development and Online Content with ICLR and a trustee of the Transparency Project.
Keywords: data protection; GDPR; open justice; online courts; law courts

INTRODUCTION

The courts of England and Wales are going through their biggest shakeup since the 1870s, with traditional paper-cluttered courts giving way to digital files and virtual hearings, and yet scant thought appears to have been given to preserving the notion of open justice. There is a risk that virtual and online justice will end up being secret justice. Add to that the massive step-change in the rights of data subjects caught up in litigation, following the implementation of the EU's General Data Protection Regulation, and you have the makings of a perfect storm of legal information confusion. This article charts the changes being wrought to the conduct of litigation, considers the consequences for transparency and public legal information, and flags up some of the issues likely to arise under GDPR and the new Data Protection Act 2018. It concentrates on developments in England and Wales, though much of it applies equally to the other jurisdictions of the United Kingdom.

THE LAW COURTS OF THE FUTURE

In July 2016, the final report of the Civil Courts Structure Review chaired by Lord Justice Briggs (the Briggs Review) recommended a number of reforms of the civil justice system, including an Online Court and other digital developments.[1] In September 2016 the Ministry of Justice launched a consultation, *Transforming our justice system*, in which it announced that the government had now set aside £1 billion to invest in the modernisation of the civil courts and tribunals and the criminal justice system. What has become known as the HMCTS Reform programme involves a number of strands developing over a six-year period, with the whole process expected to be completed by 2022.[2]

One of the strands is an ongoing programme of reducing and consolidating the court estate. Court buildings deemed inefficient, underused or too costly to maintain are being sold off, and the proceeds ploughed into building and maintaining modern court centres. The aim, according to HMCTS, is to have "fewer, better court buildings for those cases that need to be heard in person".

The difficulties of travelling to a remote physical court can be eradicated, HMCTS argue, by holding a virtual hearing instead. Judges already conduct some pre-trial and case management hearings by telephone or video-link, but this will be extended to cover a much wider range of business, including substantive contested hearings.

However, virtual hearings have not been universally welcomed by legal professionals, many of whom point to the well documented problems with video links currently in use (or not, as often happens) in both criminal and civil hearings. The President of the Family Division, Sir James Munby, memorably complained in one of his regular briefings, that:

> The video links in too many family courts are a disgrace – prone to the link failing and with desperately poor sound and picture quality. […] On one recent occasion when, having moved to another court in the Royal Courts of Justice, I used a video link, everyone and everything appeared on screen in such a bright blue shade as to remind me of *Avatar*. On another recent occasion everything on screen appeared bathed in that

> green translucent glow one associates with underwater photography.[3]

Quite apart from the technical issues, justice campaigners point out that the quality of interaction with remote parties or witnesses is often poor, even when the technology works. The charity Transform Justice, among others, has been particularly vigilant in relation to the risks of prejudice to prisoners on remand or defendants in criminal trials.[4]

Despite these objections, HMCTS is determined to forge ahead. In March 2018 the first full hearing of a tax appeal was conducted remotely with the court via web-cam links, in the full glare of media scrutiny. Joshua Rozenberg,[5] presenter of BBC radio 4's Law in Action, and Owen Bowcott, legal affairs correspondent of The Guardian,[6] both described how the judge, sitting in a court in London, saw and heard representations from a litigant in person (the taxpayer), speaking from his home, and an official from the Revenue, speaking from her office in Belfast. Both had been invited to log into a private Skype-like website developed by HMCTS, access to which was controlled by the judge.

Though referred to as 'virtual' court hearings, these are really video or remote hearings. (We are not yet in the world of virtual reality, or 'Ready Litigant One'.) But an even more radical departure from the traditional courtroom is the Online Court.

THE ONLINE COURT

In his interim report[7], Briggs said there was now an opportunity to

> "design from scratch and build from its foundations a wholly new court for the specific purpose of enabling individuals and small businesses to vindicate their civil rights in a range of small and moderate cases … without recourse of lawyers or with such minimal recourse that their services can sensibly be afforded."

How this will work is still, to be honest, a little unclear. In his ebook on the topic,[8] Rozenberg suggests there will be three tiers or stages of engagement. The first will be an online "decision-tree" type of questionnaire to help identify legal and factual issues in dispute. Supporting evidence could be scanned and filed online. For most claims, the process of completing the online forms should help to clarify what the claimant wants, and the exchange of claim and any response may be enough to arrive at a settlement.

Case management and some sort of mediation provided by a legally qualified case officer, acting under judicial supervision, will constitute the second stage of the process. If no settlement is achieved, the case will proceed to the third stage, in which the court either resolves the case without a hearing, or a hearing will be arranged, perhaps by telephone or video conference. If necessary, there could be a physical hearing, with all parties present in one room (though some witnesses might give evidence by video link).

There has been anxiety about the extent to which the process could exclude lawyers, but in Rozenberg's view such concerns are exaggerated. For example, a claim by a consumer against a business defendant could be handled by lawyers on the defendant's side, even when using the online court mechanism. The Briggs Report makes clear, at para 6.22, that "It is not a design objective of the Online Court to exclude lawyers", merely to ensure that "the new court should as far as possible be equally accessible to both lawyers and LiPs" (litigants in person). What the online court may well achieve, however, is a culture of early settlement, both through its initial case issue triage and its timely filing of supporting documentation.

As the system develops to handle more complex claims, it will need to accommodate not just electronic filing and exchange of documents and evidence, but also the exchange of legal materials such as law reports, statutes and commentary of the sort traditionally lugged to court in lever-arch "authorities bundles". An interesting development from a publisher's perspective will be how the online court interacts with legal information databases, such as ICLR.3, LexisNexis, Westlaw et al. Arguably, it should be sufficient to cite a case and provide a link to one or more such resources, or if necessary download a PDF of the case to include in the e-bundle.

So much for information going into the virtual or online court process. What about information coming out of it?

OPEN JUSTICE AND TRANSPARENCY

The big plus for online and virtual justice is its lack of demand for formal court space. (Hence the sell-off of old and under-used courts.) While the judge may decide to sit in a court room, they need not do so. They can manage the virtual courtroom of a video-linked hearing from their chambers, and the parties can log in from their respective homes or offices.

But where is the press bench? Where does the law reporter sit? And where is the public gallery?

HMCTS have explained that there will be special "viewing booths" located in physical court buildings (possibly other public buildings too) where members of the media and the public will be able to listen to and watch in real time, on a dedicated terminal, those hearings which are being conducted via video-link or conference phone. These locations will be supervised by court staff to ensure viewers behave properly and don't record or broadcast the "proceedings", or commit some other contempt of court.

The legislation to provide for this (including the creation of new offences) was originally included in the Courts and Prisons Bill 2016–2017 (see, clause 34 and

https://doi.org/10.1017/S1472669618000166 Published online by Cambridge University Press

Schedule 6)[9], but that was lost in the hurried "wash-up" before the general election in May 2017. Since then, although there was talk of a Courts Bill in the Queen's Speech in June 2017, no replacement legislation has yet been drafted. (The current Courts and Tribunals (Judiciary and Functions of Staff) Bill appears to be aimed at something different: to provide statutory authority for legally trained case workers to carry out some routine judicial functions short of actually reaching a final determination of a case. Such functions would be defined by rules of court.)

The viewing booth idea has a curiously retro feel to it. It's almost as though those planning the digital solution to litigation have come up with an analogue solution to open justice. Watching a video hearing should be more like streaming a movie. If the whole hearing is recorded, it should be possible to watch it from anywhere, as one can for hearings in the UK Supreme Court, via its own YouTube channel.

As for digital case documents or online exchanges in the Online Court, there seems no good reason (technically at least) why they should not be accessible in the same way as judgments currently are. Controls could be implemented, enabling different levels of access. For example, the Crown Court Digital Case System (DCS) currently controls access according to whoever is seeking to look at something. A judge will have access to more of the documents than, say, the defendant or a CPS caseworker.

LISTINGS AND RESULTS

In its response to the original Transforming our justice system consultation (February 2017) the MoJ said:

> "In relation to transparency, we are currently developing a solution which will ensure that the principle of open justice is maintained as we move to digital channels. We will ensure that all interested parties, including victims, witnesses, the public and the press, will have access to case listings and outcomes where appropriate."

A major strand of the Reform programme has been the long overdue transition from a paper-based filing system to one that is digital by default. Although digital case management has already been happening in the criminal justice system, the Business and Property Courts and, to a more limited extent in certain locations within the Family Court, the HMCTS Reform programme is rolling this out much further.

As well as case documents, the management of listing and the publication of results are also being overhauled. Part of the problem with listing is that it is managed separately within each court or jurisdiction. There is a limit to what can be done centrally to rationalise the system without treading on the toes of the judges who manage the listings in their own courts and tribunals, but HMCTS have said that they are making the system more responsive and allowing "better, data-supported decisions on how heavily to list to avoid wasting the time either of judges, or of those coming to court."[10]

They plan to harmonise the online publication of listings across all jurisdictions and courts, whilst continuing to strike the balance between respect for data protection and the principle of open justice. The intention is that information regarding listing will be published in a single, central online location, with a search function to allow users to find cases by court and date, but with information only being made available for a limited period as a safeguard against data mining and the prejudicial misuse of personal data. (There is a risk, for example, of 'blacklists' being compiled, naming people who may at one time have appeared in a court or tribunal, regardless of whether they were convicted, or whether they won or lost their claim.)

In the case of results and outcomes, HMCTS have also indicated an intention to regularise the process, which currently varies between criminal, civil and family cases, and in different courts. Again, there is the desire to provide openness of access for proper scrutiny of the justice system, balanced against a fear of risk to individuals, the need to protect sensitive or confidential data, and to promote the rehabilitation of offenders by preventing access to 'spent' convictions. For that reason, they have also suggested results would only be available for a limited time, and mechanisms should be in place to prevent data mining.

JUDGMENTS

The balance between transparency and data protection is a tricky one. However, it is something that can and should be managed carefully, and not in a knee-jerk way or simply by reference to what seems administratively most convenient. It is worth thinking about how this balance is currently struck in the case of judgments, which have been published in one form or another for centuries, and are now a major source of open legal information.

Cases heard and judgments delivered in open court may be reported fairly and accurately (to do otherwise may amount to contempt of court), while those heard in private or in chambers may be reported only with the permission of, and subject to any restrictions imposed by, the court.[11] Cases involving children are subject to additional restrictions.[12] However, most judgments in the senior courts (the High Court or equivalent jurisdictions, and higher appellate courts) are published or publishable, appearing on BAILII or the Judiciary website, or in the case of tribunals on the Gov.uk website; many also appear as judgment transcripts via ICLR and other legal platforms, and of these a proportion will also be selected for one or more series of law reports. Law reports in one form or another have been published for hundreds of years, and in the common law tradition cases have been listed, heard and reported by reference to the names of the parties. Any reputational damage thus engendered has basically had to be taken as an occupational hazard of litigation.

https://doi.org/10.1017/S1472669618000166 Published online by Cambridge University Press

Cases heard in the criminal courts have traditionally been widely reported by the press, though the comprehensiveness of such coverage is shrinking.[13] Until recently, most local newspapers sent a reporter to the local magistrates' court to cover motoring and low level criminal offences, thus ensuring a level of local scrutiny of the justices themselves, as well as of the administration of justice. The public gallery in the Crown Court has often been crowded with members of the public as well as supporters of the defendants or complainants involved. Decisions in the Court of Appeal (Criminal Division) about the admissibility of evidence, the reliability of verdicts or the excessiveness of the sentence, have formed the subject matter of general and specialist law reports. In all these reports, defendants' names have been published and remain in the public domain.

However, there is a difference between finding a name in a yellowing newspaper cutting or an obscure volume of legal precedents in a law library, and finding (with astonishing ease) the same name via an internet search. What if the conviction is now spent (within the meaning of the Rehabilitation of Offenders Act 1974? This is something that the "right to be forgotten" under what is now the GDPR seeks to address.

Although the leading authority on open justice, *Scott v Scott* [1913] AC 417 was a divorce case, under the Family Procedure Rules 2010 most family cases involving children, and many involving adult financial disputes, are now heard in private, leading to complaints by the press of justice being done "in secret" or "behind closed doors". In response to such criticism, and in an attempt to deal with misleading and tendentious media reporting of family cases, the current President of the Family Division, Sir James Munby, has determinedly promoted a transparency agenda initiated by his predecessor, the late Sir Nicholas Wall. In 2014 he issued, in respect of both the Family Courts and the Court of Protection, practice guidance directing judges to publish certain categories of case on BAILII and/or the Judiciary website, even though they had been heard in private.[14]

A major issue with publishing such judgments is the need to anonymise the parties and redact information in the published judgment to avoid the risk of identification of any children or (in the Court of Protection) incapacitous parties involved. Research published by Cardiff University showed that, over the first two years of the scheme, adherence to the guidance was 'patchy' with some judges published nearly everything and others barely anything; but also, alarmingly, revealed a number of cases where redaction and anonymisation had failed and it was possible to identify the children by reference to other facts (what is known as 'jigsaw' identification).[15]

The tension between transparency and confidentiality can arise in non-family civil cases as well, such as those involving commercial secrets or price-sensitive information; and in the case of children or domestic violence there is a crossover between family and criminal protections which do not always coincide, even where the same parties are involved in both jurisdictions.[16]

There is an obvious danger in making more information about ongoing litigation public, even if developments in digital case management make this possible and open justice makes it desirable. In an earlier article, *Judgments as Public Information*,[17] I sketched out a 'vision' in which all case data – from initial filing, through supporting documentation, an audio or video file of the hearing, to the judgment and consequential orders – would be accessible from the same page on a court website, subject to reasonable data protection and permissions.

That still seems a good way forward, but I can see it needs to be refined in the light of the greater protection of the data rights of individuals that we now expect, both in the light of recent scandals about the abuse of personal data, and of the much tighter legislative and regulatory regimes now being put in place.

LOOKING AHEAD: GDPR AND THE DATA PROTECTION BILL

The General Data Protection Regulation (GDPR) (EU) 2016/679 overhauls and updates European law on data protection and introduces, among other things, a "right of erasure" which enhances the existing "right to be forgotten" derived from earlier European legislation, and a "right to rectification" of personal data which is inaccurate or incomplete.

However, one of the key exemptions to the GDPR relates to "the protection of judicial independence and proceedings". Others cover processing in the public interest, including for "law enforcement purposes". Also relevant, for such purposes, is the Police and Criminal justice Directive (PCJD) (EU) 2016/680, which deals with data collected and retained for the purposes of the prevention, detection, trial and punishment of crimes.

There are also exemptions available under GDPR for processing in respect of the "prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security" as well as for "enforcement of civil law claims" (Article 23).

The GDPR envisages domestic legislation providing for the operation of these and other exemptions from the strict rules governing data processing (provided it is lawfully done) and the need to retain data only for the limited period necessary for the purpose for which it was collected. In the UK, the Data Protection Act 1998 will be replaced by the Data Protection Act 2018, whose purpose is to overhaul the UK's data protection regime, as well as supplementing the GDPR. The provisions of the GDPR will continue to apply in the UK post-Brexit, by virtue of the European Union (Withdrawal) Bill.

DATA PROCESSING BY THE COURTS

Section 117 of the Data Protection Act 2018 provides:

https://doi.org/10.1017/S1472669618000166 Published online by Cambridge University Press

> "*Competence in relation to courts etc*"
>
> Nothing in this Act permits or requires the Commissioner to exercise functions in relation to the processing of personal data by — (a) an individual acting in a judicial capacity, or (b) a court or tribunal acting in its judicial capacity (and see also Article 55(3) of the GDPR)."

This basically excludes 'judicial processing' of data from the ambit of control by the Information Commissioner's Office (ICO). Article 55(3) provides that "Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity." The reason for the exclusion is to respect judicial independence. Recital (20) of the Preamble to GDPR states: "It should be possible to entrust supervision of such data processing operations to specific bodies within the judicial system of the Member State." So it appears to leave the control and processing of data by the courts under a form of self-regulation by the judiciary. While protecting the independence of the judiciary, this would also avoid any risk of conflict with the ICO, whose decisions against data controllers are subject to being judicially reviewed by the courts.

At the time of writing, neither the Ministry of Justice nor the Judiciary had announced any policy or other information about this, though the published minutes of the Civil Procedure Rule Committee indicate that the matter has been discussed with a view to the inclusion of a 'privacy notice' in all court forms and documents where personal information is provided by an individual or third party.

There is also a question as to what constitutes the processing of data by a court or tribunal "acting in its judicial capacity". Does it include digital case management processing, as well as the actual hearing or decision-making process, or is that a purely administrative rather than a judicial process?

What are the risks? If data concerning an individual caught up in civil or criminal litigation is processed by the courts in a manner that is not covered by the judicial exemption, for example because it is retained for administrative rather than judicial purposes, what can the data subject do about it? They can seek its rectification, under Article 16, if it wrong; its erasure, under Article 17, if "no longer necessary in relation to the purposes for which [it was] collected or otherwise processed"; or a restriction on its processing, under Article 18.

Where the material has been published, for example in a list of results, that might involve removing or redacting the data subject's name. An example would be mention of a minor conviction of the sort that would, after some years, be 'spent' for the purposes of the Rehabilitation of Offenders Act; and although the data subject would no longer be required to declare it, for example in a job application, its existence might be detected on an internet search.

The same would be true if the conviction were mentioned in a judgment. However, there is now a specific exemption in the Act, at Schedule 1, para 26, for "publication of legal judgments" which covers both the court (if not already covered by the judicial exemption) and, one assumes, any publisher. There remains a question as to whether that would cover any ancillary information published alongside the judgment, for example the full names of the parties or other factual matter incorporating personal data not included in the judgment.

CONCLUSION

The modernisation of the courts and the management of litigation within them is long overdue. It is crucial, as it moves into the digital, virtual and online world, that justice remains transparent; but in doing so it must also respect the privacy and protect the data of the individuals caught up in it. What needs to be visible and transparent is not the people caught up in the justice system, but the system itself.

How this is done needs to be resolved before the massive Reform programme is too far advanced to prevent the implementation of appropriate mechanisms of transparency and accountability. The issue goes further than viewing booths and online court lists. It involves a fundamental examination of the relationship between the courts, their users, and the public.

Footnotes

[1] Briggs LJ, Civil Courts Structure Review: Final Report, 27 July 2016 www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/.

[2] Ministry of Justice: Transforming our justice system: summary of reforms and consultation, September 2016 https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf.

[3] Sixteenth View from the President's Chambers: Children and vulnerable witnesses: where are we? https://www.familylaw.co.uk/news_and_comment/16th-view-from-the-president-s-chambers-children-and-vulnerable-witnesses-where-are-we#.WsIVQtPwY-k.

[4] P Gibbs, Defendants on Video – conveyor belt justice or a revolution in access? (Transform Justice, October 2017) http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf.

[5] Rozenberg, Tribunal Holds First Video Appeal (Facebook post, 26 March 2018) https://www.facebook.com/JoshuaRozenbergQC/posts/425053307916591:0.

[6] Bowcott, First virtual court case held using claimant's laptop camera (The Guardian, 26 March 2018) https://www.theguardian.com/law/2018/mar/26/first-virtual-court-case-held-using-claimant-laptop-camera?CMP=share_btn_tw.

https://doi.org/10.1017/S1472669618000166 Published online by Cambridge University Press

[7] Briggs, Civil Courts Structure Review: Interim Report, para 5.106 (December 2015) https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf.
[8] Rozenberg, J: The Online Court: will IT work? (2017, Kindle editions).
[9] https://publications.parliament.uk/pa/bills/cbill/2016-2017/0170/17170.pdf.
[10] According to a recent handout at an HMCTS Reform Roadshow held at the Royal Courts of Justice in London.
[11] See Contempt of Court Act 1981, s 4 and Administration of Justice Act 1960, s 12 respectively.
[12] See Children Act 1989, s 97.
[13] See, for example, Crisis in Our Courts – and How to Solve it (Transparency Project, 21 January 2018) http://www.transparencyproject.org.uk/crisis-in-our-courts-and-how-to-solve-it/.
[14] Practice Guidance (Family Courts: Transparency) [2014] EWHC B3 (Fam); [2014] 1 WLR 230 and Practice Guidance (Court of Protection: Transparency) [2014] EWHC B2 (COP); [2014] 1 WLR 235 (16 Jan 2014).
[15] J Doughty, A Twaite and P Magrath, Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people (Cardiff University, March 2017).
[16] For a fuller discussion of these tensions, see Doughty, Reed and Magrath, Transparency in the Family Courts: Publicity and Privacy in Practice (Bloomsbury Professional, 2018).
[17] Legal Information Management 15 (2015), pp 189–195, at p 189.

Biography

Paul Magrath is Head of Product Development at ICLR and editor of their blog, where he writes the Weekly Notes roundup of legal news and commentary. He is also a founding member and trustee of the Transparency Project, whose objects include the promotion of open justice and public legal education, particularly in relation to family law. His new book, Transparency in the Family Courts – publicity and privacy in practice, co-written with Julie Doughty and Lucy Reed, is published by Bloomsbury Professional (May 2018).

https://doi.org/10.1017/S1472669618000166 Published online by Cambridge University Press