

PERFECT LAW CONFERENCE ON GLOBAL CLASS ACTIONS AND MASS TORTS

KEYNOTE SPEECH BY LORD BRIGGS

It's both a privilege and a delight to be asked to say a few words at this prestigious conference. I'm told that it's because I'm thought to have given the cause of collective actions a little friendly nudge in a case in 2020, more than five years ago, called *Mastercard*. But studying the agenda for this conference leaves me feeling thoroughly out of my depth, and unqualified to add anything really useful to its deliberations. There is a theory that once a barrister or a judge has done one big case in a particular field, he or she may properly be regarded as an expert in it, worth listening to. If it were true I could hold myself out as an expert in a whole range of abstruse subjects, like collisions at sea, nuclear fuel reprocessing, Islamic finance, the VAT treatment of securitisation transactions. The list is almost endless. But it's simply not true.

Nonetheless collective and class actions do occupy a special place in my legal heart, because of the unique contribution they make both to the rule of law and to access to justice. Taking those in reverse order, everyone agrees that collective or class actions enable large numbers of small claims to be pursued which would otherwise involve prohibitively disproportionate expense and costs risk. They also put the class on something more like a level playing field when battling against a very large corporation, public or private. Their contribution to the rule of law is less obvious, but equally important. The rule of law prevails when every person, be they ever so large and well-resourced,

knows that acting unlawfully will lead to them being brought to book, and to have to pay compensation to their victims. The presence of a court system armed with procedures which enable multitudes of small claimants to combine to enforce their rights is a vital spur to lawful behaviour by those with the power otherwise to ride roughshod over the numerous small people who from time to time get in their way.

But this evening I want to spend a few moments thinking aloud about another, even newer entrant into this field of access to justice and the rule of law, namely Artificial Intelligence, or AI. Ten years ago, when I carried out my Civil Courts Structure Review, AI was not all that much more than a cloud on the horizon, however hard Prof Richard Suskind was trying to warn us that it was just round the corner. Then the thrust of modernisation was digitisation rather than AI, getting rid of the monstrous tyranny of paper. I did recommend that the Court service should design a system of On-line Court triage under which a claimant's grievance could be converted into a workable Particulars of Claim. The recommendation was accepted, but it hadn't happened before it got blown away by COVID. And we did discuss, at numerous public meetings, the question whether, one day, judges might be replaced by robots (a process then called "the disintermediation of judges"). But it was then just pie in the sky. No-one was losing any sleep over it, apart perhaps for Richard.

But now his prophesies have, or are just about to, come to pass, and quite suddenly. There are now a group of competing open AI (LLM) platforms available to the public, either free or for very modest subscription which already can, in the hands of a non-legally qualified complainant with reasonable computer skills, generate passable Particulars of Claim from the user's stream of

consciousness description of their grievance, sufficient to get the complainant through the court door as a LIP, there to fall into the helping hands of the endlessly kind and caring District Judge who first looks at the claim.

Of course it won't (yet at least) be as good as a professionally prepared claim, and it may initially contain fakes, mistakes and hallucinations until the development of AI technology irons them out. But it will do. It involves no input from a lawyer and, apart from the modest subscription and the (equally modest) Court issue fee, it's FREE!!!

Now you don't have to gaze into a crystal ball to see that this development could, probably will, have seismic effects on access to justice. I have on another occasion described it as likely to lead to a tsunami of small to moderate value civil claims, once litigants are enabled by Open AI to formulate them without the assistance of lawyers. And the same platforms can (if you prompt them carefully) provide some quite persuasive legal advice on the merits (or at least persuasive looking to the uninitiated). I know. I've been experimenting in my spare time. Last time I tried I got back diametrically opposed answers from two competing platforms (Chat GPT and Google AI), but they both looked equally persuasive. And bearing in mind the staggering sums being invested in the development of this type of AI, it's performance is only going to get better.

But the big increase in the number of claims will only produce better access to justice if the courts, staff and judges, have the capacity to manage and adjudicate upon them within a reasonable time, rather than (as for criminal cases in the Crown Court) just add them to an ever-increasing backlog. And there

the equation starts to get rather complicated. At present the civil courts use human beings both for case management and adjudication, with some help from digitisation but almost none from AI, although that may be about to change. An AI platform may take seconds to draft a civil claim, but the court managers and judges will typically take more time by orders of magnitude just to read and respond to it, let alone adjudicate upon it.

Ten years ago the civil courts made a healthy annual operating surplus, of the order of £100 million a year, so it might have been thought that the provision of more court staff and judges to handle an increased workload was just good business for the government and indirectly for the taxpayer. In fact the economics weren't as simple as that, but in any event the surpluses were all swept away by the Pandemic, and have still not returned.

Meanwhile waiting lists for trial are getting longer, even ahead of the tsunami of new claims which I foresee.

Now I just don't see the taxpayer wanting to fund a big increase in the staff and judges of the civil courts. On any view the Crown Courts are (probably rightly) going to command a higher priority for any increased funding on justice, even if such an increase were to be forthcoming, which may be open to doubt. So it is inevitable that AI is going to have to come to the rescue of court staff and judges in increasing their productivity. In fact that has started to happen already, and the MoJ and Court Service make no bones about it. Although it is unlikely that the court service will be able to spend anything like the amounts which law firms are now investing in bespoke legal AI, the robotisation of the courts' response to incoming AI prepared claims is just going to have to proceed apace, if the civil courts are not going to sink under the burden of the tsunami.

Now for as long as AI (or robotisation) is just introduced at the edges of the process of the determination of civil claims, in streamlining case management, providing summaries of court files and checking the grammar and spelling of draft judgments, even doing a bit of legal research, you may fairly say: what's the problem? And I would agree. But this sort of assistance to what is still an essentially human-run process probably isn't going to increase productivity by anything approaching the necessary amount. The big question is, can or more importantly should AI actually replace the human element which currently lies at the heart of judging? And if so, for what types of judicial work on what types of cases? This is where the equation gets really complicated.

AI has already replaced human adjudication of civil disputes outside court in a range of very low value cases, e.g. on the dispute resolution facility on EBay. Whether it should replace judges in the court system at all, or if so, how far, is to my mind a democratic question. Who or what does the public want as the arbiter of their disputes? My current guess (informed from discussion during my CCSR 10 years ago and not shaken since then) is that while the average taxpayer may be happy for a robot to decide a small dispute about a second hand electric kettle bought on EBay, if the dispute is going to put at risk their liberty, their home, their access to their children or bring about their financial ruin or bankruptcy, then they would, at the moment, prefer for such matters to be decided by a human rather than a robot.

There are sound reasons for this (quite apart from avoiding an existential threat to my continued professional existence). Judges undertake to deliver justice, equity and mercy, not just a

mechanically or statistically accurate outcome. Litigants (especially the losers) want reasoned decisions. At present AI doesn't do those things very well, if at all. And the idea that an AI platform is free from bias is just a canard (duck).

There is probably a hard-to-define threshold or spectrum between those cases which the public may be happy to have resolved by a robot (usually on the grounds of speed and proportionality) and those for which they would still prefer a human, i.e. a judge. That line may well shift over time. It will probably be affected by improvements in AI. The robots are getting cleverer faster than the humans. But the spectrum is also likely to shift by reference to the public perception about just how much a judge is putting into the management and determination of their case. Does the judge just use AI to check the draft which he or she has prepared, or does the judge ask the AI platform for a first draft, which he or she then considers and amends or approves.

Now you may ask, does that difference really matter? There are probably many, all over the world, who think not. Judges in the CJEU, the Strasbourg court and even the US Supreme Court don't do all the original judgment writing. They often review and approve the drafting done by their referendaires or law clerks, whereas I and my colleagues in the SC still do all the judgment writing ourselves. There is no way of saying which approach is the better. At least they are all human beings, working collegiately together under judicial leadership. But a first draft judgment written by an AI platform is something very different. The platform is the creation of a foreign mega-corporation, owing no allegiance to the UK, having no lawyer's vocational calling, no interest in the rule of law or access to justice and no relevant regulatory

supervision. It's simply there to make a profit (and maybe one day to rule the world). Or so the public may think, and with good reason. And they may ask how good as a judge is a human being likely to be if their daily role is just to edit, check and approve work done by someone, or something, else? And if their thoughts go down that road, might they not end up thinking that the supposed benefits of a human judge are outweighed by the speed, cheapness, infinite capacity for work and predictability of an AI driven robot?

But what has all this got to do with collective and class actions? I suggest three things. First, I don't think that the tsunami effect of AI being able (or nearly able) to supplant a lawyer in enabling LIPs to bring their own claims cheaply will have much leverage in reducing the need for collective and class actions in promoting access to justice. There are other powerful disincentives to members of the public pursuing those types of claim themselves, such as costs risk, the stresses of being actively engaged in litigation and the unwelcome prospect of suing a large, rich corporation. Undertaking those burdens will still be disproportionate to the modest likely benefits.

Secondly, I have no doubt that AI has much to offer in increasing the productivity of those law firms actively engaged in such litigation, and assisting potential funders in apprising the risks and rewards of investment. You will know the detail much better than me.

But thirdly, and this is the hardest part of the equation of all, where does collective and class litigation feature on the spectrum of civil litigation which either does, or does not, qualify for the replacement of judges by AI (i.e. robots)? If you look at that

question from the perspective of a lawyer or funder engaged in such litigation, you would probably think, right at the human judge end of the spectrum. The work is complex, it involves difficult common issues, it generates enormous claims. And Parliament may be taken to have agreed, in giving the judges and other human staff of the Competition Appeal Tribunal a statutory key role as gatekeeper, manager and first instance adjudicator of the disputes raised by collective actions, and important discretionary powers.

But we live in a democracy, and our judges are paid by the taxpayer. Look at the same spectrum question from the perspective of one of the millions of potential claimants in a *Mastercard* type of claim. For each of them a very modest amount is at stake. Their liberty, their family, their solvency and their homes are not at risk. For each of them, this type of claim might lie right at the bottom, AI robot end, of the spectrum. And it is no answer to say that a million small claims makes up a big claim. It just means a million voters with small claims. The law firm and the funder might think it a big, complex claim, but they are not voters.

And this isn't just an existential problem for judges like me. If we were to get to a stage where these types of claims were prepared by AI and then adjudicated by AI, why should the process need human lawyers, or their funders, to intermediate between two different robots? It might even be the same robot.

Now please don't let this spoil your dinner. But I do think we should all recognise the need, even while rushing to buy AI tools to improve our productivity, to recognise, polish and promote those uniquely human qualities which, I firmly believe, will ensure

both human judges and human lawyers a central place in the rule of law for a long time to come.