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LAW

TECHNOLOGY

INNOVATION

A TALE OF TWO COURTS

How Digital Transformation is Improving the Practice
of Law and Access to Justice for Albertans
by Donna C. Purcell, Q.C.

Enemy at the Gates:

Online Dispute Resolution
in the Time of COVID-19
by Justin Monahan

Mediating Through the Pandemic

by Sandra Weber

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| PANDEMIC- PROPELLED INNOVATION IN THE COURT SYSTEM- WHERE DO WE DO FROM HERE? |

By Barb Cotton of Bottom Line Research

Since the onset of the pandemic we have seen a paradigm shift away from in-person oral hearings in our court system, and an increasing emphasis on written advocacy and virtual hearings. There are critics of the recent innovations in the courts, propelled by the pandemic. In essence the critics are saying that the digitization of the court system has simply amounted to putting lipstick on the pig of the legacy court system, which is “fundamentally broken due to cost, delay and inaccessibility”.ⁱ Further, many of the challenges present in the pre-Covid court system are now compounded, with increased backlogs resulting from postponement of judicial proceedings as a result of Covid.

Per Suzanne E. Chiodo:

[T]his is why the recent changes will not be very effective in solving the problems that have plagued the civil justice system for decades. Expecting hearings by Zoom to address issues of cost, delay, and accessibility is like expecting a Benz Patent-Motorwagen to outrun a horse and buggy. This is because the use of virtual courts, while removing the cost and inconvenience of travel to court, does not result in the removal of any procedural steps. The cost and time savings will therefore be relatively modest. The scheduling of hearings will still depend on the availability of judges and counsel, as well as the availability of the technology in the courts concerned. The volume of materials will continue to grow. Self-represented litigants will still struggle to navigate the system. The experience of hearings by videoconference and teleconference in other jurisdictions has raised serious concerns about accessibility and other issues. If we simply "graft a digital layer onto the existing procedural systems", then "they can generate compounding negative externalities at a systemic level", including procedural unfairness. Richard Susskind [British law professor and futurist] confirmed this when giving evidence to the House of Lords Constitution Committee on the implications of COVID-19, stating that the aim of reform should not be to "take the English justice system and drop it into Zoom" but to "radically redesign the system" to improve access to justice. ⁱⁱ



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What should our “new normal” be then?

The former Supreme Court of Canada Chief Justice Beverley McLachlin has been thinking about this in the context of access to justice. She states that, in a broader view:

Around the country, people who care about justice are working to find solutions. Solutions, as Richard Susskind (*Online Courts and the Future of Justice*) writes, are of two forms. They can be what he calls “legacy based” — find new ways to make the systems we already have more efficient. Or they can be “vision based” — conceive entirely new ways to meet the problems of people seeking justice.

No one wants to throw away the system we have — a system that has served us well over the decades. But with vision, we can bring it into the 21st century. Perhaps the answer is to proceed on both fronts — preserve the values that underlie the legacy, while developing imaginative modern ways to help people find justice — what former Supreme Court Justice Thomas Cromwell has labelled “transformative justice.” Visionary thinking to update a legacy system. ⁱⁱⁱ

And what specifically will this entail?

It may be, as British law professor and legal futurist Richard Susskind predicts, that peoples’ civil legal problems will be dealt with in a pyramidal approach. At the entry level, computer programs supplemented by trained support staff will identify problems and potential solutions. Mediation techniques, again aided by technology, will follow. Most cases will be resolved at this stage. Those that do not resolve in these early stages, will proceed seamlessly into the court system, to be dealt with as cases now are, but with efficiencies enabled by technology. ^{iv}

Richard Susskind and others advocate for: “a system of online courts, where human judges hear evidence and arguments and render decisions by way of an online platform, all within a public dispute resolution (court or tribunal) system.” ^v These online courts may be most appropriate for low-value civil cases which do not turn on “fine issues of evidence or on credibility”, and would emphasize “paper-based adjudication and asynchronous means to communicate with parties”. ^{vi}

[R]ichard Susskind defines online courts as “an online service to which appropriate cases will be allocated; a court with a simplified body of rules; constructed from the ground up on the back of technology rather [than] grafting technology onto existing court processes; and designed to be accessible to non-lawyers.” The simplification of processes and the use of technology to transform civil justice, instead of simply facilitating existing processes, is the key to addressing issues of cost, delay, and accessibility. ^{vii}

Many taking this view hold up the British Columbia Civil Resolutions Tribunal as an exemplar of success. This tribunal generally does not permit users of the system to be represented by a lawyer, other than in motor vehicle accident cases. Another avatar would be the Alberta Kenney government plan to change the traffic ticket appeal process, only aborted in the face of significant public protest. ^{viii}

Bottom Line: in a post-Covid world, there will likely be a continuing emphasis on written advocacy, with virtual advocacy likely to be a continuing significant feature of the judicial system. Supreme Court of Canada Chief Justice Richard Wagner, who leads the Action Committee on Court Operations in Response to COVID-19 with Federal Minister of Justice and Attorney General of Canada David Lametti, has acknowledged that in some instances, for example in the trial courts where witnesses are examined, and with respect to jury trials, in-person hearings in the courtroom will continue to be optimal, and may be necessary. The appellate courts will continue to emphasize the importance of written advocacy, however, and there may be fewer opportunities for oral advocacy in the appellate courts. ^{ix}

The current digitization of the court systems brought about as a result of necessity due to the pandemic may be the end of the innovation in our court systems for the foreseeable future, or we may be heading into the future with the on-line courts advocated for by Susskind. The continuing importance of written and virtual advocacy seems a certainty, however, and the new skills of advocates necessitated by the pandemic will likely continue to be of growing importance.

i Suzanne E. Chiodo, “Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?” (2020), 57 Osgoode Hall LJ 801-833

ii *ibid*

iii Beverley McLachlin, “Access to Justice: Visionary thinking to update a legacy system”, May 12, 2020, *The Lawyer’s Daily*

iv Beverley McLachlin, “Access to Justice: A plea for technology in the justice system”, July 17, 2020,

The Lawyer’s Daily

v *Supra*, note i

vi Cristin Schmitz, “Post-COVID courts could see less oral advocacy, more paper-based and remote adjudication: SCC’s Wagner”, May 21, 2020, *The Lawyer’s Daily*

vii *Supra*, note i

viii Alberta government cancels plans for new traffic court strategy” <<cbc.ca/news/Canada/Calgary/alberta-government-traffic-ticket-disputes-court-changes-16394139>>

ix *Supra*, note vi

The work performed by the Rand Corporation that produced practice parameters for Chiropractic in the treatment of lower back disorders, known as the Mercy Guidelines, acknowledged several factors that "compete with recovery". These include degenerative changes of the spine, spondylolisthesis, biomechanical stress from the job and home activities, psychosocial stress, previous injury, and exacerbation of injury while under care. A delay in recovery of 1.5 times may occur with pain lasting more than eight days. The presence of severe pain may prolong treatment up to two times longer than usual. Recovery from an injury superimposed on a preexisting condition may increase recovery time by 1.5 to 2 times.

As post-covid research and clinical findings are ongoing, I think the healthcare industry could learn a great deal from how MVA patients are approached and treated. The dedicated attorneys and providers should warrant a seat at the table. Our accident model offers tangible insight into how a patient is changed in an accident and the resources needed to help them return as productive and functioning in society. It does not always happen that a patient can of course, however, no other industry encompasses our insight into the individual potential and a patient's fight for a **Return to Pre-Injury Status**.

After the Impact Injury care was started in 2017 and is dedicated to the treatment of motor vehicle collisions and chronic pain due to trauma that has plateaued under current protocols. Innovation in treatment models, teaching pain-impact informed strategies, better education of occupant vectors, more incentive to prevent chronic pain has resulted in improved patient care in private practice. Successful Treatment means a Return to Pre-Injury Status with a strong intention to do so.



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