Modernisation or Transformation? User led design and the facilitation of systemic change in the Traffic Penalty Tribunal

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Abstract

Across the world, civil justice systems are increasingly replacing paper and in-person hearings with digital systems. The focus is commonly on a 'substitution' model, in which paper is replaced with electronic documents and courtrooms are substituted with video hearings. The ability of technology to move beyond substitution to transformation of what happens in the civil justice system has been mooted, but working examples remain rare. This article attempts to address this gap through an in-depth case study of the UK's Traffic Penalty Tribunal which focuses on the perspective of those who designed it. The article argues that the Tribunal's end-to-end digital and asynchronistic process has transformed the way that dispute resolution and prevention is imagined through the adoption of an iterative user-led design model developed over many years. It also draws attention to the potential of the system to introduce supervised settlement, in which pre-hearing communications between the parties are visible to the adjudicator, and the focus on systematic improvements in frontline decision making which go beyond precedent setting.

Introduction

Recent years have seen a number of calls for reform of the way disputes are managed in the UK civil and criminal justice system. Particular attention has been paid to the power of technology to render conflict management more efficient and to radically change the ways in which it is delivered. Increased use of technology is a central plank of the £1 billion court reform programme currently being implemented in England and Wales, which has been described as unprecedented in scope and pace and the most ambitious in the world.[1] The reform programme envisaged by the Ministry of Justice largely involves: technology facilitating online filing of claims, appeals, defences and evidence; automated case management, and increased use of video hearings. While these developments clearly change the medium through which citizens interact with the justice system, long-time observers of internet-based technologies have observed that such reforms tend to involve the mere substitution of paper or face-to-face communication with electronic versions of the same. , In short, paper-based procedures are converted into electronic exchanges and in-person hearings are replaced with video or telephone hearings.[2] This article considers the scope for a more fundamental transformation of the way that dispute resolution and dispute prevention are imagined and operationalised.

[1] N. Byrom, *Digital Justice: HMCTS Data Strategy and Delivering Access to Justice* (The Legal Education Foundation, 2019); R. Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019).

[2] O. Rabinovich-Einy and E. Katsh, "Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment" (2014) 1 International Journal of Online Dispute Resolution 5; see also Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims (Online Dispute Resolution Advisory Group)* (2015).

There is considerable variety amongst systems that are now going beyond this 'substitution model', but commentators have identified the next generation of developments as involving full automation or 'end-to-end' management of disputes, in which the parties can go from claim to resolution without any in-person interaction. These systems frequently allow for both synchronised and asynchronistic exchanges between the parties using email or messaging programmes. In doing so, they keep the justice system open twenty-four hours a day and seven days a week, allowing for a wide range of materials such as maps, photographs, data and graphs to be uploaded to a secure and confidential space to which both parties access at a time which is convenient to them. Internationally, the work of Canada's Civil Resolution Tribunal and the Victorian Civil and Administrative Tribunal in Australia have been highlighted as examples of second-generation systems that go beyond mere substitution of paper and buildings.[3] In the UK, the work of the Traffic Penalty Tribunal (TPT) is frequently referred to as being at the forefront of such innovation.[4] The TPT system bears many similarities to the Canadian and Australian systems alluded to, but has rarely been subjected to in-depth academic scrutiny by those interested in dispute resolution or civil justice reform.

This article seeks to remedy this gap in the existing literature and draws attention to the many ways in which the TPT aims to transform traditional methods of dispute resolution in the civil justice system. The findings reported cover the period from 1999, when the TPT was created, to 2022, when Caroline Sheppard – its inaugural Chief Adjudicator – retired.[5] The research reported explores the work of the TPT from the perspective of those who have designed it. It has benefited from the large amount of data made available on the TPT website[6], conversations with Tribunal staff[7] and additional data supplied by the TPT on 84,386 closed cases submitted between March 2016 and August 2021.[8] The paper is in three main sections. The first of these provides a broader context for discussion by considering the idea of parking

[3] S. Salter and D. Thompson, "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016) 3 McGill Journal of Dispute Resolution 113; S. Salter, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34 Windsor Yearbook of Accesss to Justice / Recueil annuel de Windsor d'accès à la justice 112; M.R. Voell, "Swimming Against the Tide: Standards of Review and the British Columbia Civil Resolution Tribunal" (2019) 32 Canadian Journal of Administrative Law and Practice 207; R. Dickson, "Does the Notice of Objection Mechanism Available to Civil Resolution Tribunal Small Claims Parties Enhance Access to Justice?" (2021) 54 University of British Columbia Law Review 119; V. Tan, "Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice" (2019) 24 Deakin Law Review 101.

[4] M. Adler, "A New Leviathan: Benefit Sanctions in the Twenty-First Century" (2016) 43 Journal of Law and Society 195; R. Thomas and J. Tomlinson, "Mapping Current Issues in Administrative Justice: Austerity and the 'More Bureaucratic Rationality' Approach" (2017) 39 Journal of Social Welfare and Family Law 380; R. Thomas and J. Tomlinson, "Remodelling Social Security Appeals (Again): The Advent of Online Tribunals" (2018) 25 Journal of Social Security Law 84; S. Prince 2020, "Encouragement of Mediation in England and Wales has been Futile: Is there Now a Role for Online Dispute Resolution in Settling Low-Value Claims?" (2020) 16 International Journal of Law in Context 181; Susskind, *Online Courts and the Future of Justice*; C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Oxford: Hart Publishing, 2019).

[5] Caroline Sheppard has since been replaced by Caroline Hamilton.

[6] See further: *https://www.trafficpenaltytribunal.gov.uk/appeals-data/.*

[7] Particular thanks are due to Caroline Sheppard and Patrick Duckworth (of Amped Consultancy, contracted by the TPT as a Principal Consultant for Communications and Digital), who kindly shared data not available on the TPT website and met with the author for on four occasions to discuss their work. The author is also grateful to Wend Teeder and Jack Head for their assistance in analysing the data and identifying sources.

[8] Where data from 2016 or 2021 appears missing, data for one quarter of each year has been calculated on the basis of data in the remaining three quarters.

as a social and legal problem. The second goes on to examine the caseload and work of the TPT. The third considers the ways in which the work of the TPT can be seen as shifting debate about how appellants and respondents engage with the justice system with a particular focus on how user led design can be realised in practice. The final section of the paper considers the broader implications of the case study.

Traffic as a social and legal problem

The TPT decides motorists' appeals against Penalty Charge Notices (PCNs) issued by civil enforcement authorities in England (outside London) and Wales. This work involves appeals against PCNs issued by over 300 English and Welsh local authorities for contraventions relating to parking and other traffic restrictions, such as bus lanes, yellow box junctions and clean air zones. The TPT also decides appeals against PCNs issued by charging authorities in relation to other road user charging schemes.[9] The relatively low number of appeals involved mean that this work can easily be dismissed as a form of mundane governance.[10] A closer look at the work of the Tribunal reveals, however, that the enforcement of traffic violations is significant for a host of reasons, touching upon a number of important debates about surveillance culture, the collective good, the climate crisis and democratic accountability. It is also the case that traffic management schemes are unpopular with the public and continue to attract a lot of attention in the press.

From the early years of the twentieth century, cars and their drivers have been subjected to a staggering array of regulatory controls as successive governments have used the law to try to change the behaviour of motorists.[11] In common with every developed nation, the number of cars, demand for parking spaces and ever more extensive road networks have impacted on the quality of life of the general public, and raised a host of issues for public health officials, planners and local economies.[12] In the words of the Transport Select Committee (2005-6):

> Apart from the *scale* of the problem, these contraventions are *in themselves* anti-social because their result is to interfere with the daily lives of millions of people by: causing congestion, disrupting bus schedules, obstructing pedestrians and road users, and endangering public safety.[13]

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[9] This includes the Dartford-Thurrock River Crossing ('Dart Charge'), the Mersey Gateway and Silver Jubilee Bridge Crossings ('Merseyflow') and the Durham Road User Charge Zone.

[10] S. Woolgar and D. Neyland, *Mundane Governance: Ontology and Accountability* (Oxford: Oxford University Press, 2013).

[11] P. Merriman, "Relational Governance, Distributed Agency and the Unfolding of Movements, Habits and Environments: Parking Practices and Regulations in England" (2019) 37 Environment and Planning C: Politics and Space 1400. Consider for example the introduction of the Highway code, road signs, the driving test, pedestrian crossings, seat belts, wheel clamping, CCTV surveillance cameras, one way systems, yellow lines, yellow box junctions, parking meters. See further Newburn and Ward, *Orderly Britain: How Britain has Resolved Everyday Problems, from Dog Fouling to Double Parking.*

[12] C. Buchanon, *Traffic in Towns: A Study of the Long Term Problems of Traffic in Urban Areas – Reports of the Steering Group and Working Group Appointed by the Minister of Transport* (HMSO, 1963); P. Donovan and P. Lawrence, "Road Traffic Offending and an Inner-London Magistrates' Court (1913-1963)" (2008) 12 Crime, Histoire & Sociétés / Crime, History & Societies 119; C. Emsley, "'Mother, what did Policeman do When there Weren't any Motors?' The Law, the Police and the Regulation of Motor Traffic in England, 1900-1939" (1993) 36 The Historical Journal 357.

[13] House of Commons Transport Committee, *Parking Policy and Enforcement: Seventh Report of Session 2005-06 (Volume 1)* (TSO, 2006), HC 748-I, 5-6.

The invention of the car has also had a significant impact on *who* comes into contact with the justice system. The development of road traffic legislation in the early twentieth century represented the first time that the ruling elite had used the criminal law to regulate the leisure activities of its own class. This is said to account for the fact that motorists in the 1930s often made 'state trials' out of prosecutions for even the most minor of offences. They were often supported in their efforts by the newly formed Royal Automobile Association or the Automobile Association.[14]

Car ownership has since increased across society and brought new issues to the fore. By the end of the 2018 financial year, 78 per cent of households owned at least one car or van, though there continues to be an uneven distribution of ownership across income groups.[15] One implication of increased car ownership is that the contemporary regulation of traffic is characterised as bringing a very large number of otherwise law-abiding citizens into contact with the civil justice system.[16] Trends in who is most affected by the regulation of traffic violations have also changed with mass ownership of motorised vehicles prompting widespread concern about noise and environmental pollution. Those subject to regulation is also changing with the development of clean air zones that disproportionately penalise lower socio-economic groups less able to afford to transition to electric, hybrid or lower emission vehicles.

Legal responses to the question of how to regulate traffic violations have also changed since motorised traffic first became a societal problem. Infringements were for many years, managed by the police. However, by the 1960s a fifth of police time was taken up with traffic duties, and rising crime rates meant that the police were increasingly keen to avoid these duties. The *Road Traffic and Roads Improvement Act 1960* allowed the police to appoint traffic wardens to carry out this work. For many years, wardens were encouraged to move on motorists and advise them about alternative parking places rather than issuing tickets. This policy served two objectives: it educated the public and solved congestion problems, without unpopular fines being imposed on citizens.

For many years, those who contested parking tickets had the right to have their case heard in the magistrates courts, though only six per cent of people chose to do so.[17] Limited manpower and a focus on rehabilitation rather than punishment also meant that many motorists were able to avoid fines. Research conducted in 1973 suggested that 90 per cent of vehicles on a yellow line evaded a ticket. This gave rise to concerns that the law was being

[14] Donovan and Lawrence, "Road Traffic Offending and an Inner-London Magistrates' Court (1913-1963)"; Emsley, "'Mother, what did Policeman do When there Weren't any Motors?' The Law, the Police and the Regulation of Motor Traffic in England, 1900-1939".
[15] Only 35% of the lowest 10% of the population owning a car compared to 93% of the top decile. Owner occupiers or those buying a home with a mortgage are most likely to own a car (89%) compared with 65% in rented accommodation and 46% in social housing. See further: Office of National Statistics https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances
[16] Emsley, "'Mother, what did Policeman do When there Weren't any Motors?' The Law, the Police and the Regulation of Motor Traffic in England, 1900-1939".
[17] T. Newburn and A. Ward, *Orderly Britain: How Britain has Resolved Everyday Problems, from Dog Fouling to Double Parking* (London: Robinson, 2022).

brought into disrepute.[18] In evidence to the Transport Select Committee, the Association of London Government reported that:

> "In many parts of London, there was parking anarchy and London boroughs wished to end that. Estimates in the early 1990s were that less than one per cent of illegally parked cars received any form of penalty."[19]

By the 1990s, the argument began to be made that parking enforcement was not even something the police should be responsible for. Chief constables found it hard to devote resources to traffic enforcement when faced with competing priorities against which the performance of their forces were measured.[20] There was also a long history of the Magistrates' Courts feeling frustrated at having to deal with high volumes of offences that were technically criminal, in essence regulatory.[21] This led to repeated calls for the de-criminalisation of motoring offences by the police and local authorities.[22] The latter were particularly frustrated by the fact that they were accountable for local transport policy and traffic regulations, but unable to enforce them effectively.[23]

Parliament responded to these concerns with the introduction of the *Road Traffic Act 1991*, which was built on and strengthened by the *Traffic Management Act 2004*. Not only did these statutes transfer responsibility for fixed penalties from the police and criminal courts to local authorities, they imposed owner liability – rather than driver liability – to pay the penalties. In doing so, they introduced a shift from judicial sanctions to regulatory administrative sanctions; or from punishment to discipline.[24] Penalties were no longer considered in the Magistrates' Courts, but were reconceived as civil debts. This decriminalisation process has many positive benefits for the citizen, who can avoid a criminal record, but has also led to increased enforcement at the expense of education.[25]

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[18] Newburn and Ward, *Orderly Britain: How Britain has Resolved Everyday Problems, from Dog Fouling to Double Parking*; House of Commons Transport Committee, *Parking Policy and Enforcement: Seventh Report of Session 2005-06 (Volume 1)*, 3.

[19] House of Commons Transport Committee, *Parking Policy and Enforcement: Seventh Report of Session 2005-06 (Volume 1)*, 8.

[20] House of Commons Transport Committee, *Parking Policy and Enforcement: Seventh Report of Session 2005-06 (Volume 1)*, 8.

[21] Emsley, "'Mother, what did Policeman do When there Weren't any Motors?' The Law, the Police and the Regulation of Motor Traffic in England, 1900-1939"; Donovan and Lawrence, "Road Traffic Offending and an Inner-London Magistrates' Court (1913-1963)"; Adler, "A New Leviathan: Benefit Sanctions in the Twenty-First Century".

[22] House of Commons Transport Committee, *Parking Policy and Enforcement: Seventh Report of Session 2005-06 (Volume 1)*.

[23] Parking Forum, "Decriminalised Parking Enforcement" (2004), Position Paper 3, *https://www.britishparking.co.uk/write/Documents/Library/position%20papers/Position%20Paper%2003.pdf.*

[24] The *Road Traffic Regulation Act 1984* had already given powers to enforce certain parking regulations to councils, though enforcement still took place in the criminal courts.

[25] Emsley, "'Mother, what did Policeman do When there Weren't any Motors?' The Law, the Police and the Regulation of Motor Traffic in England, 1900-1939"; Adler, "A New Leviathan: Benefit Sanctions in the Twenty-First Century".

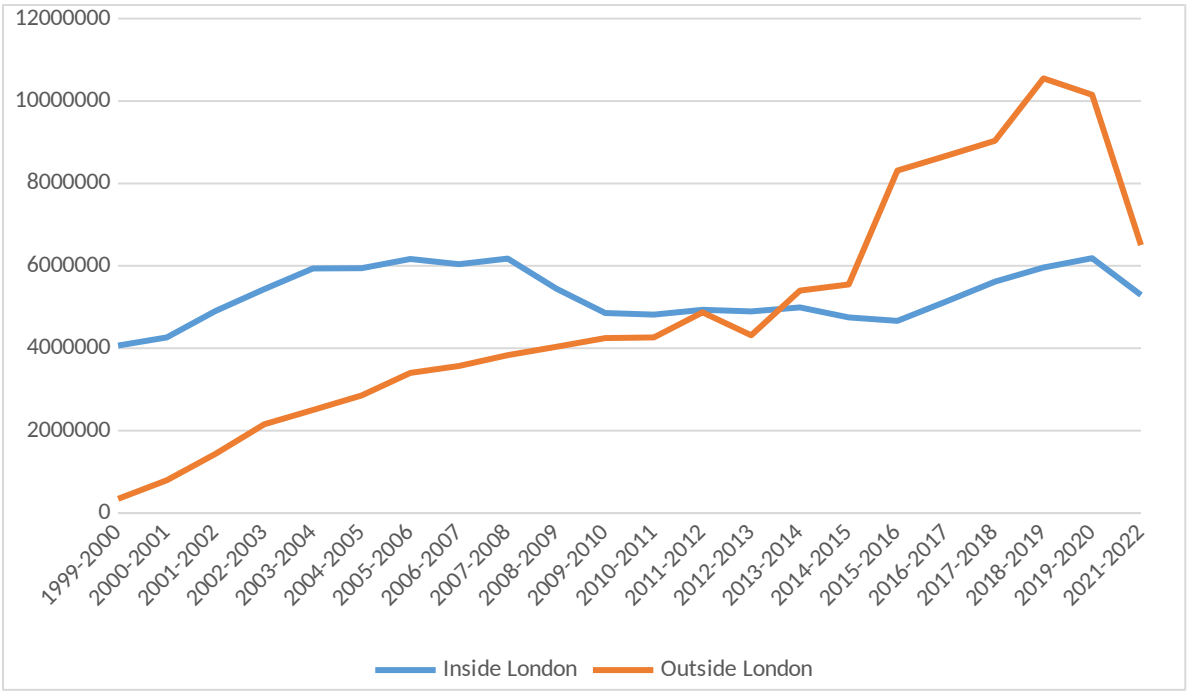

Chart One: Penalty Charge Notices imposed by local authorities inside and outside of London (England and Wales) 1999-2022 Source: Various[26]

The financial incentives given to local authorities to issue PCNs proved controversial in the aftermath of decriminalisation and the introduction of civil enforcement. The money the public had previously paid in fines to HM Treasury soon became an important new source of revenue for local authorities.[27] Together with the rise in the number of officers responsible for enforcement, this led to record numbers of parking tickets being issued.[28] Chart one, shows the increasing number of penalty charge notices issued inside and outside of London since the enforcement process was decriminalised. This indicates that in 2018-19 – just before the COVID pandemic when car use fell drastically – over 16.5 million PCNs were issued in England and Wales. This compares with a total of 4.4 million PCNs in 1999-2000.

Decriminalisation may well have increased the efficiency and effectiveness of the scheme for the greater good,[29] but the increase in PCNs issued has never been popular with the public. Debate has focused on over-zealous parking attendants and, in 2005, Knowles argued that 'There can be little doubt that the introduction of car parking restrictions and employment of parking attendants has done absolutely nothing for the better image of local authorities.' [30] Guidance issued under the *Traffic Management Act 2004* has since made clear that civil parking enforcement should be viewed as a means by which an authority can effectively

[26] Annual Statistics of the Traffic Penalty Tribunal. For 2018-19 onwards they are taken from the TPT website (https://www.trafficpenaltytribunal.gov.uk/appeals-data/). The London statistics are taken from the London Councils parking enforcement and appeals statistics: *https://www.londoncouncils.gov.uk/services/parking-services/parking-and-traffic/parking-information-professionals/information.*
[27] R. Kerley, "Controlling Urban Car Parking – An Exemplar for Public Management?" (2007) 20 International Journal of Public Sector Management 519.
[28] Parking Forum, "Decriminalised Parking Enforcement".
[29] Kerley, "Controlling Urban Car Parking – An Exemplar for Public Management?".
[30] Knowles, R., 2005 Political Impartiality of the Local Government Office, Justice of the Peace 169 p 202

deliver wider transport strategies and objectives, rather than a way of raising revenue.[31] However, the issue remains controversial. Data acquired by Churchill Insurance through a series of freedom of information requests in 2022 found that councils in England and Wales bring in £255 million pounds a year in parking fines alone, and that such tickets are issued at a rate of 10 per minute. Some Councils were found to have acquired as much as £32 million a year in penalty fines for parking offences.[32] Despite the many benefits of traffic regulation to the environment and local economies, enforcement regimes for traffic contraventions have also given rise to concerns about the regulatory state.[33] The press commonly cites the issue of PCNs as indicative of a deeper malaise that reflects a growing surveillance culture. Disquiet has also prompted the formation of pressure groups such as the No To Mob, Scrap Mersey Tolls and the National Alliance Against Tolls, which are dedicated to the reform of parking and civil enforcement penalty regimes, and over-zealous enforcement.

Caroline Sheppard has argued that civil enforcement of parking and minor traffic offences can justifiably be seen as unconstitutional, in that local authorities make the regulations, enforce them by imposing penalty charges – which they retain – and deal with objections to the penalties.[34] She has also suggested that the scheme promotes a form of administrative plea bargaining , which intentionally discourages citizens – whether they consider themselves liable or not – from appealing against the penalty. This takes the form of a statutory provision that requires authorities to accept half the penalty if people pay the penalty within 14 days. Those opting to pay early cannot be said to be admitting liability but this is often the easiest way to deal with the PCN for those who can afford it.

Viewed in these various political contexts, the work of the TPT remains important to the political legitimacy of civil enforcement authorities and the schemes they oversee. More specifically, the Tribunal provides an important buffer against disproportionate regulation of individuals by drawing attention to inappropriate behaviour on the part of authorities. In the words of the Transport Select Committee 2005-06:

> ….as media portrayals of over-zealous and disproportionate enforcement persist, there is a risk that the public perception of parking operations will deteriorate to the point where the appropriateness of *any* parking controls is brought into question (Author's emphasis). [35]

This renders the need for oversight of traffic management regimes, the protection of the rights of the citizen, robust management of appeals and diplomatic management of the tensions between local government and citizens much more important than is evident when one only considers the amount of the penalty imposed.

About the Traffic Parking Tribunal

[31] Department for Transport, Guidance for Local Authorities in Enforcing Parking Restrictions (2020), *https://www.gov.uk/government/publications/civil-enforcement-of-parking-contraventions/guidance-for-local-authorities-on-enforcing-parking-restrictions*.
[32] C. Wheeler, "10 Parking Fines Issued Every Minute Across Britain" (DirectLine Group, 2022), *https://www.directlinegroup.co.uk/en/news/brand-news/2022/10-parking-fines-issued-every-minute-across-britain-.html*. Based on Freedom of Information Act request made to Local and County Councils across the UK in March 2022. Overall, 71.8% of councils responded to the request, with 50.0% providing usable data.
[33] Kerley, "Controlling Urban Car Parking – An Exemplar for Public Management?".
[34] Interview with the author (London, January 2023).
[35] House of Commons Transport Committee, *Parking Policy and Enforcement: Seventh Report of Session 2005-06 (Volume 1)*, 6.

The *Road Traffic Act 1991* originally introduced a right of appeal to independent adjudicators against PCNs issued in London. In 2000, the TPT of England and Wales was established and extended the same right across England and Wales. Traffic restrictions enforced by civil enforcement authorities which end up with the TPT include: parking; bus lanes and moving traffic[36]; littering from vehicles (England only); as clean air zones; and bridge crossings such as the Dartford-Thurrock River Crossing ('Dart Charge') and Mersey Gateway/Silver Jubilee Bridge Crossings ('Merseyflow') schemes.[37] An appeal to the Tribunal can only be made once a PCN has been contested with the authority that issued it, and the authority have issued a Notice of Rejection of Representations.

The Traffic Penalty Tribunal is funded by a Joint Committee of over 300 local authorities and charging authorities in England (outside London) and Wales, known collectively as PATROL.[38] In providing funding for the TPT, these authorities are fulfilling a statutory duty to make provision for independent adjudication of appeals against the PCNs they issue. At the time of the study, there were twenty-five part-time adjudicators deciding appeals; all of whom lawyers with at least five years post-qualification experience. Their independence from local authorities is managed in two ways. Firstly, their appointment is agreed by the Lord Chancellor. Secondly, they are not employees or members of the PATROL Joint Committee. TPT adjudicators decide whether a person on whom a PCN is served is liable to pay, based on evidence uploaded into the digital case file by the appellant and authority. The adjudicators make findings of fact and apply the law contained in traffic regulations, procedural regulations and any public law issues that might arise in the case. The adjudicators work remotely and generally input the decision they make and the reasons for it into the case file, which can be read by the parties online. They are supported by 14 administrative staff, based in Wilmslow in Cheshire, who also provide customer support to the parties.

In line with other dispute resolution systems, a relatively small number of people issued with PCNs actually choose to appeal. In addition to the usual disincentives to enter into a dispute, this small number is indicative of the behavioural efficacy of encouraging pragmatism in settling the penalty at half price. Data from 1999-2021 shows that although the proportion of PCNs appealed outside London fluctuates from year to year, it has never reached more than 0.45% of all PCNs issued.[39] Research commissioned by the TPT, published in 2016, indicated that not everyone was aware of how to appeal, despite efforts to make this clear on the face of the PCN.[40] A large proportion of those issued with a PCN may accept that they were technically at fault, especially when this is supported by an enforcement camera.[41] Others may prefer to pay within 14 days to avoid the bother of a failed appeal which could make them liable for the full penalty is not determined within the 14 day period.

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[36] Significantly, it is the only English and Welsh tribunal that straddles two jurisdictions following Welsh devolution; a development fuelled by the fact that motorists frequently travel between the two jurisdictions.
[37] Appeals against bus lane and parking contraventions in England have been processed through FOAM since 2016 and others have been added over time.
[38] This stands for Parking and Traffic Regulations outside London.
[39] There is no discernible pattern over time with the proportion peaking in 2003 and then 2016.
[40] J. Raine et al, "To Appeal or Not to Appeal? Motorists' Awareness and Experience of The Traffic Penalty Tribunal: A Research Report" (Institute of Local Government Studies, 2016).
[41] General Regulations (England), Regulation 10. General Provisions (Wales), Regulation 10
See https://www.legislation.gov.uk/uksi/2007/3483/regulation/10/made

Chart two shows that, despite the small proportion of PCNs that result in an appeal, the overall level of appeals coming into the TPT represents a significant caseload. At a pre-Covid peak in 2016/17, the total number of appeals managed by the TPT was larger (37,399) than the total number of cases heard in Employment Tribunals in England and Wales, and just below the total heard in the Social Security and Child Support Tribunal.[42] As chart two indicates, the majority of work currently undertaken by the TPT relates to four particular schemes: parking contraventions in England and Wales; bus lanes in England and Wales, and the Dart Charge and Merseyflow schemes.[43] The mix of cases is likely to change again in the future as more clean air zones are created. [44]

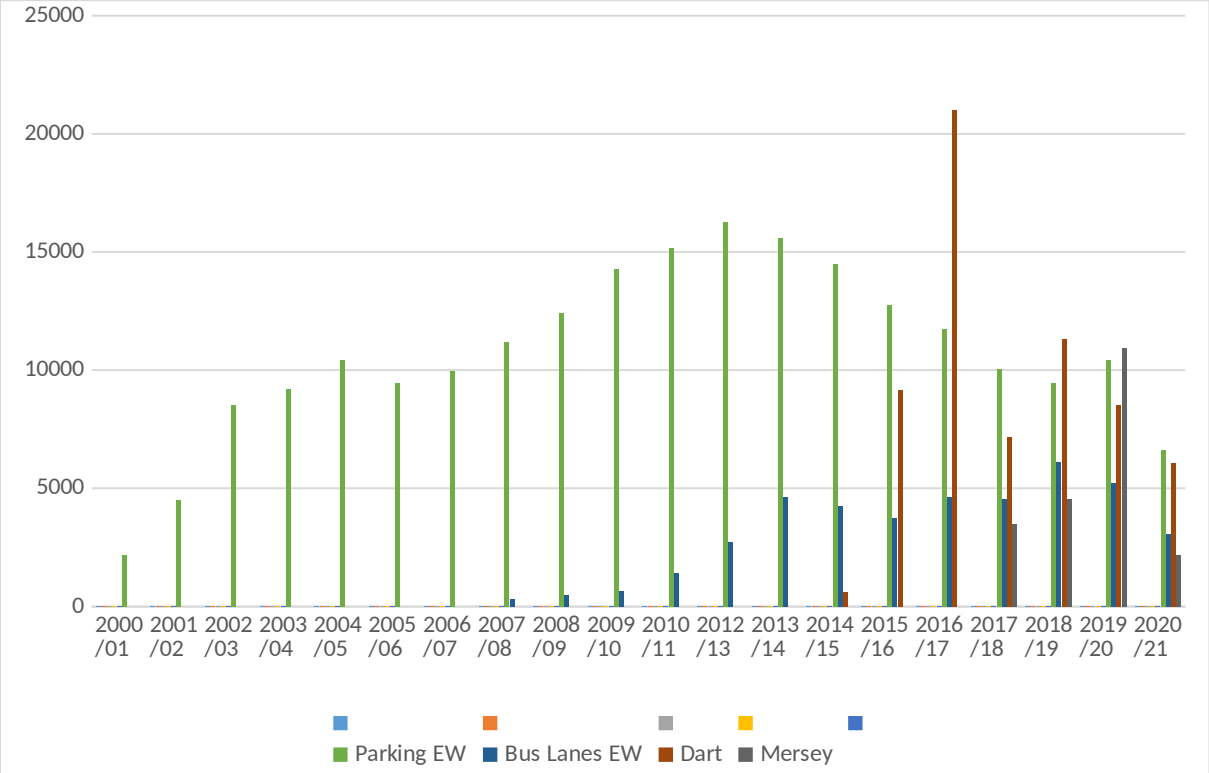

Chart Two: Total number of appeals against PCNs in England and Wales by year and type of appeal (Source: TPT website and annual reports)[45]

[42] G. Sturge, *Court Statistics for England and Wales* (Commons Library Research Briefing, 31 January 2023), *https://researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf*.

[43] There is no data on appeals relating to littering from vehicles on the TPT website, but data supplied separately by the Tribunal suggests that there were just 6 appeals relating to littering out of a total of 13,310 in 2020.

[44] The vast majority of appeals 2016-2021 (84%) related to a single PCN, with just 10% involving two PCNs and only 5% relating to five or more. The majority of appeals relate to individuals (92%) with just 8% being brought by companies. Cases involving multiple PCNs were most likely to relate to the Merseyflow and Dart Charge road user charging schemes, and reflect the higher rate of appeals by repeat player haulage companies and fleets of hire cars using these routes.

[45] This data does not include statistics on the littering from vehicles, which is not made available on the TPT website. The additional dataset shared with the author shows that there are relatively few appeals about this issue.

Any discussion of trends does, however, have to be approached with caution, as it is not always possible to compare like with like across the time period shown in chart two. There are several reasons for this. Firstly, relatively low levels of activity between 2002-2008 can be explained by the fact that few local authorities outside London had adopted the decriminalised scheme in this period. The majority introduced civil enforcement after the *Traffic Management Act 2004* came into force. Secondly, the adoption of civil enforcement after 2004 did not result in a significant rise in appeals immediately.[46] This legislation gave councils more tools to manage parking policies, coordinate street works and enforce some moving traffic offences, but detailed regulations expanding on the Act continued to be produced in the years that followed it. This encouraged local authorities to be cautious about issuing PCNs and contesting appeals while they were acclimatising themselves to the new regulatory framework. Thirdly, the online dispute resolution scheme developed by the TPT, which made it easier to lodge and pursue an appeal, was not launched until 2016. Local authorities then joined this scheme in a piecemeal fashion. Fourthly, the jurisdiction of the TPT has also changed and expanded significantly since it was first established, particularly in respect of road user charging schemes, which have contributed to a marked increase in certain types of PCNs and appeals. The Durham Road User Charge Zone was introduced in 2002, followed by the Dart Charge scheme in 2014 and the Merseyflow scheme in 2017. The first clean air zones came into operation in 2021.[47] Fifthly, the introduction of these various schemes can create spikes in activity in their early years of operation. These are caused by local residents becoming familiar with the schemes; the positioning and content of signs is revisited following representations and appeals; and insights into the operation of the scheme are gleaned through TPT decisions. By way of example, this explains the large increase in cases relating to the Dart Charge in 2016-17. Caroline Sheppard explained in interview that when the clean air zone scheme in Birmingham was first introduced, the associated enforcement and appeals explanation page on the TPT website quickly became one of the most visited because people were unfamiliar with the scheme and keen to contest the PCNs issued. Staff shortages at Birmingham City Council at the time also meant that the charging authority did not have the manpower to deal with the sort of enquiries that might have avoided an appeal. Finally, an increase in PCN and appeals activity may reflect any number of phenomena at a local authority level, such as the creation of new bus lanes, increased vigilance on the part of parking attendants or a reduction in the ability of people to pay fines in times of economic downturn.

Transformation of dispute resolution

Innovation in the methods the TPT has developed to resolve disputes is in many ways more significant than statistics about its use. The Ministry of Justice has for some time had a policy of using technology to improve the civil justice system. Rabinovich-Einy and Katsh have argued that when technology is embraced by policy makers it has most often been seen as an efficiency enhancer in high-volume systems of this kind,[48] and low value cases or those of modest social significance, such as the type being considered here, have been particular

[46] Despite the Act having received Royal Assent in 2004, the Department for Transport did not introduce its provisions until 2007. By only applying it to parking at that stage, they undermined the purpose of the provisions in bringing civil enforcement of minor traffic, including bus lanes, under a single regulatory regime.
[47] Currently, clean air zones are in operation in Bath, Birmingham, Bradford, Bristol, Newcastle and Gateshead, Oxford (a Zero Emission Zone), Portsmouth and Sheffield: *https://www.patrol-uk.info/charging-clean-air-zones-local-authority-plans/.*

targets of the modernisation programme in England and Wales.[49] Several sections of the civil justice system are now experimenting with end to end digital systems but the TPT remains central to this history. Not only was it an early adopter of the move to end-to-end online dispute resolution but arguably the first adjudicatory system in the UK, and the world, to do so.[50]

The modernisation programme launched by HM Courts and Tribunals Service has been severely criticised for the undue haste with which digitalisation has been introduced.[51] In contrast, innovations in the TPT system were initiated gradually, allowing ample time to consult, review, test prototypes and re-design where necessary. This included the introduction of service by electronic transfer in 1993; remote working by adjudicators and electronic submission of decisions in 2006; telephone hearings in 2007; online appeal forms in 2008; and submission of local authority evidence by webmail in 2010. But the real innovations developed by TPT relate to what Rabinovich-Einy and Katsh have labelled 'disruptive' uses of technology which involve more fundamental shifts in thinking about the way civil and administrative justice is delivered[52] It is argued that these occurred in the TPT system from 2012 when the underlying model of dispute resolution placed the user experience at the centre and moved away from traditional ways of thinking about when and how exchange, discovery, and the creation of bundles happened. These themes are explored in more depth in the sections that follow.

User-led design

As interactions between humans are increasingly moderated by machines, social scientists have begun to realise the importance of human or user-led design of digital media. Arguing that systems solely developed by engineers and computer scientists tend to be driven by the need to address technical solutions or change human behaviour to fit with what technology can do, human-centred designers have stressed the importance of paying closer attention to the goals and needs of users and how they experience automated communication systems. Advocates of this approach have argued that not only is it imperative to employ interdisciplinary design teams, but that resources need to be devoted to user feedback in system design. Approaching design in this way frequently involves a cyclical process of consultation, research, prototyping, testing, further consultation, research, evaluation and re-design.[53] Participative approaches to user-led design might involve observing how people use technology and respond to it, priority ordering techniques or interviews about their

[48] Rabinovich-Einy and Katsh, "Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment".
[49] The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming our Justice System* (2016), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf*.
[50] Susskind 2019 Online Courts and the Future of Justice.
[51] Particular attention has been paid to the fact that it has involved multiple projects designed to create new technology from scratch involving a diverse group of users based in different pockets of the civil, criminal, tribunal and family court systems which each have their own unique cultures. See further National Audit Office, 2019, The challenges in implementing digital change, HC 575; and House of Commons Justice Committee 2019, Court and Tribunal reforms Second Report of Session 2019 Report, together with formal minutes relating to the report HC 190.
[52] Rabinovich-Einy and Katsh, "Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment".
[53] In a justice context see for instance AUTHOR

experiences. Such practices are increasingly seen as essential to the notion of responsible technological innovation.[54]

One of the reasons why debate about user-led design is so important is the increasing recognition that technology is not a neutral medium for change. The designers of technological systems frequently embed their own personal or corporate values and perspectives into programmes and devices, meaning they are biased towards certain ways of seeing the world. This can mean that disempowered users of systems are unable to influence new forms of knowledge production or emerging ways of thinking about technology. The result is what Fricker has famously labelled a hermeneutic form of epistemic injustice.[55] In a civil justice context, it has recently become fashionable to talk about making existing dispute resolution systems accessible to non-lawyers.[56] Indeed, this has become something of an imperative following the severe reduction in the availability of legal aid following the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. But what does user led design mean in practice in a justice setting?

A key feature of the design of the TPT online dispute resolution system is the ongoing attention paid to users' needs. In the midst of rapid modernisation of the English and Welsh Justice system it is valuable to reflect on the ways in which user needs were researched and understood by the TPT, not least because the Ministry of Justice and HM Courts and Tribunals Service have been criticised for their lack of in-depth engagement with the lay users of the civil justice system.[57] The TPT system has been designed with the needs of two users at the fore: lay appellants and civil enforcement authorities. From 2012, the Tribunal began to work with local authorities in the development of a single online portal, allowing the tracking and recording of appeals on an internal authority facing dashboard and responses to the appellant and TPT on an external facing dashboard. This involved consultation with a representative sample of authorities through 'pathfinder' engagements which reflected the iterative design cycle model described above. An early prototype of the TPT system was launched in 2013, known as BECK (Best Evidence Cloud Knowledge). A Stakeholder Engagement Manager with knowledge of managing contested PCNs from a local authority perspective at Brighton & Hove City Council was subsequently recruited to help develop a system that authorities would be incentivised to use instead of those developed internally. A review of the prototype was conducted in 2014, followed by a series of respondent authority workshops in 2015.

These various design stages came to a conclusion in 2016 when the Fast Online Appeals Management (FOAM) system was launched and rolled-out to 309 local authorities in 2017 in place of their own systems. The efficiency of the FOAM system has been such that not having to prepare a paper bundle now was estimated in 2019 to save local authorities two to three hours in case preparation and has decreased their costs by £160 a case.[58] The TPT have calculated that this amounted to savings of £4 million across authorities in the two years

[54] M. Jirotka et al, "Responsible Research and Innovation in the Digital Age" (2017) 60 Communications of the ACM 62.
[55] M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007).
[56] The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming our Justice System.*
[57] AUTHOR
[58] Thomas and Tomlinson, "Mapping Current Issues in Administrative Justice: Austerity and the 'More Bureaucratic Rationality' Approach".

following the launch of FOAM.[59] Reflecting on the broader success of the scheme the TPT has argued that:

> One of the key triumphs of the TPT's FOAM system is the way in which its workflow aligns with the system processes of the respondent enforcement authorities, which are party to the appeals. This is the result of continual engagement and synchronisation with these authorities throughout the development process.[60]

When compared with the civil and criminal justice systems in England and Wales, where extensive delays in processing cases are extensive, the FOAM system is capable of producing decisions very quickly. As the TPT has argued:

> Online digital case management is crucial for all disputes, however serious or complex. The ability to communicate with parties and obtain a swift outcome promotes trust and confidence in the process and enhances respect for the decision. When the parties are aggravated by delay and complex processes, they lose faith in the system and the authority of the resolution process. [61]p.5

Data from 2021-22 shows that 10 per cent of cases were resolved in one day; 21 per cent within 2–7 days; 19 per cent within 8–14 days; 31 per cent in 15–28 days, and 19 per cent in 29 days or more. This equates to 81 per cent of cases being dealt with in 28 days or less. In addition to increasing case handling costs within participating authorities, the launch of the FOAM system has allowed the TPT to increase its workload while also being able to reduce its costs per case.[62] The time savings are such that local authorities have since been asked to give blanket approval for much faster service of documents than is prescribed in the relevant regulations. At a session in which the author was taken through the system with the TPT team, one randomly selected case was shown to have been begun by an appellant at 9.42 am and reviewed by the local authority which decided not to contest the decision at 9.55 am. An email was sent to the appellant from TPT staff at 11.23 am on the same day, indicating that their appeal had been successful.

The design, evaluation and redesign process adopted by TPT has also taken into account the needs of lay users. The system is easy to navigate, uses accessible language, can be accessed on computers, tablets and smartphones at any time of the day[63] and allows for end-to-end online engagement from lodge of appeal to determination of it. Appellants can register their case, explain what happened in their own words and upload evidence to their online case file

[59] Traffic Penalty Tribunal, Revolutionising a Service, 2019. Available at: https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Revolutionising-a-Service_2020.pdf. Last accessed September 2023.
[60] Traffic Penalty Tribunal, Revolutionising a Service, 2019. Available at: https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Revolutionising-a-Service_2020.pdf. Last accessed September 2023.
[61] Traffic Penalty Tribunal, Dispute resolution through the Fast Online Appeals Management (FOAM) system, 2021, https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2021/11/Traffic-Penalty-Tribunal-Paper_Fast-Online-Appeals-Management-FOAM-System-and-Key-Principles_221121.pdf. Last accessed September 2023.
[62] Traffic Penalty Tribunal, Dispute resolution through the Fast Online Appeals Management (FOAM) system, 2021, https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2021/11/Traffic-Penalty-Tribunal-Paper_Fast-Online-Appeals-Management-FOAM-System-and-Key-Principles_221121.pdf. Last accessed September 2023.
[63] Administrative support is only available in office hours.

to support their case at a time convenient to them. They can also maintain online contact with the adjudicator assigned to the case and customer liaison team. FOAM also simplifies the process of evidence production, rendering the notion of a discrete 'bundle' of evidence redundant. Appellants can upload annotated photographs, drawings, short films and documents that support their case, using their phone, such as screenshots of messages at any point in the case.

The system is sensitive to the needs of the laity, providing dropdown menus with pre-set answers to standard questions, such as whether the appellant is an individual or an organisation. A particularly noteworthy example of accessible design relates to the provision of information about the ground for appeal. The law relating to this is complex for the layman and comes from a range of sources. At the time of writing, these included three Acts of Parliament, 22 sets of regulations and 13 orders, in addition to local byelaws. During reviews of the system TPT staff were concerned that even when the correct regulations could be identified, they were frequently considered to be incomprehensible to the laity. In the interests of making the system easy to use and understand, the council traffic orders now sit in an online repository in the system, rather than having to be sent to the appellant. Moreover, the grounds for appeal listed in the FOAM system do not always use the exact wording employed in the relevant regulations, having been replaced by language that is easier to understand.

The TPT has also remained sensitive to evidence that appellants might abandon their claim because of the difficulties they face in answering questions about the grounds. By way of example, the TPT discovered early in the development of its digital systems that a significant number of appellants abandoned their appeal when asked to name their ground for appeal. In response to this, an additional category of 'I do not know which ground of appeal is relevant' was added to the FOAM system in the hope of keeping appellants in the system. This seems remarkable in an era in which commentators have become concerned about the the many disincentives to pursue rights that have been put in place by governments.[64] TPT appellants are now asked to explain briefly their case and TPT staff and adjudicators make their own assessment as to whether there are sufficient grounds to consider the appeal. TPT data shows that in 2020, 38 per cent of appellants indicated that they were not sure of the ground and a further three per cent indicated that there were compelling reasons why their case should be considered.[65] The 'I don't know ground' was most commonly used in appeals against bus lane or parking PCNs, where its use was frequently in excess of 50 per cent of cases. Significantly, 60 per cent of those who make use of this option have their appeal allowed. Another example of the ways in which the system is designed from the lay user perspective is the inclusion of an option of indicating 'I think I have compelling reasons' in the list of the grounds. While not a ground of appeal, at the adjudicators' suggestion the Traffic Management Act 2004 regulations imposed a mandatory duty on authorities to consider any compelling reasons why a PCN should not be enforced.

A number of other features also provide evidence of a user led approach to design. Instant messaging and Live Chat with TPT staff is available during business hours throughout

[64] See for example H. Genn, *Judging civil justice*. 2009 Cambridge University Press and M Galanter, The vanishing trial: An examination of trials and related matters in federal and state courts, 2004 *Journal of Empirical Legal Studies*, *1*(3), pp.459-570.

[65] Appellants are able to cite more than one ground meaning that this was a multicode answer.

appeals, allowing appellants to ask questions and seek. The TPT service is free and does not require appellants to attend meetings in person, thereby reducing the costs and inconvenience of travelling to a hearing. If a hearing is considered necessary, it commonly occurs via audio or video using Microsoft Teams, with a council representative also attending online, should they choose to. The opportunity to opt for a face-to-face hearing was actually removed from the list of option on FOAM some time before the pandemic and this facility is now reserved for cases involving a broader public interest. Data on appellant preferences supplied by the TPT shows that in the period between March 2016 and August 2021, the vast majority (93%) of appellants opted for an e-decision without a hearing, based on the evidence uploaded by the appellant and authority, as well as any associated messaging. Just six per cent indicated a preference for a telephone or video hearing. These data could easily be seen as examples of appellants attempting to do what dispute resolution experts call fitting the forum to the fuss.

A criticism of many online dispute resolution systems is that they remain inaccessible to the digitally disadvantaged. The connection between digital disadvantage and other forms of poverty has been highlighted in numerous studies. The digitally impoverished are more likely to be older, less well educated, unemployed, disabled and socially isolated than the norm. The number of adults who have either never used the internet or have not used it in the last three months has been declining over recent years, and has almost halved since 2011, but there are still 5.3 million adults in the UK, or ten per cent of the adult UK population, in this situation.[66] The TPT does not collect much demographic information of value in this context, but it is clear that TPT staff have been attuned to the needs of prospective appellants who find it difficult to access or navigate online processes. This is reflected in the fact that TPT offers a 'proxy' service for appellants who prefer to send their appeal by post, email or over the phone.[67] If this option is taken up the appeal is entered into the online system by the TPT customer liaison team, who then communicate with the appellant through their chosen channel be it post, email or phone.

[66] E. Helsper and C. Reisdorf, "The Emergence of a 'Digital Underclass' in Great Britain and Sweden: Changing Reasons for Digital Exclusion" (2017) 19 New Media & Society 1253; AUTHOR

[67] The TPT has reported that postcode areas with the highest number of TPT proxy appellants are located in some of the most 'digitally excluded' regions in the UK according to ONS data. Traffic Penalty Tribunal, Dispute resolution through the Fast Online Appeals Management (FOAM) system, 2021, https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2021/11/Traffic-Penalty-Tribunal-Paper_Fast-Online-Appeals-Management-FOAM-System-and-Key-Principles_221121.pdf. Last accessed September 2023.

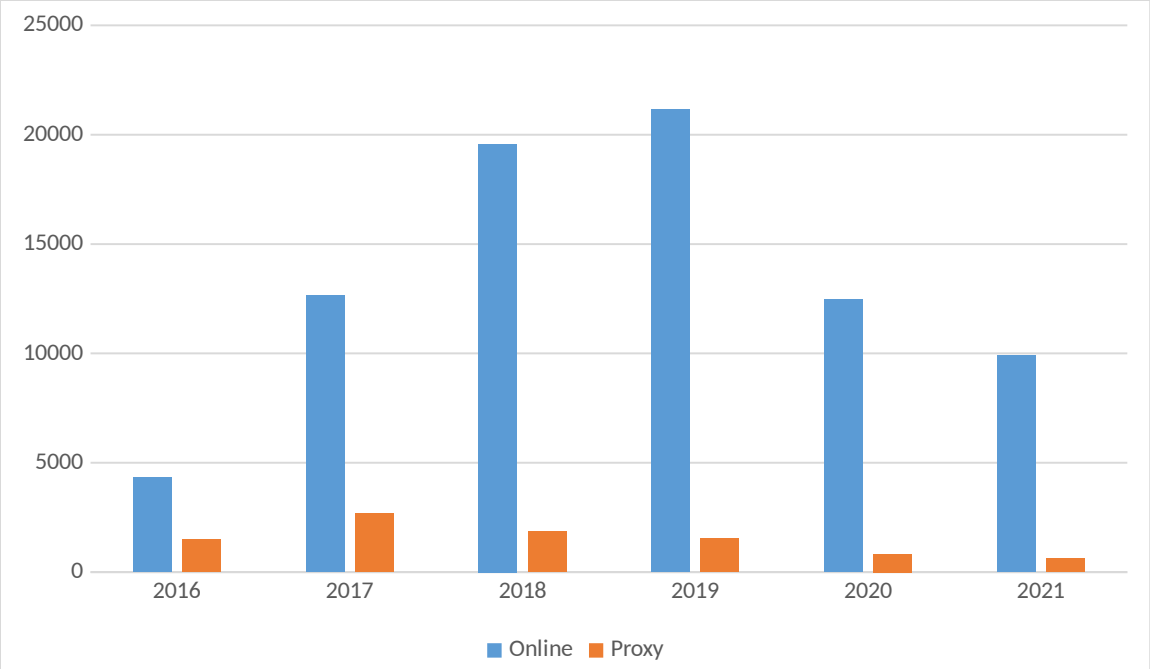

Chart Three: Use of the proxy by post appeal option 2016-2021 n = 89,351

Data supplied by TPT and presented in chart three shows that in a dataset of over 90,000 appellants, ten per cent made use of the proxy option between 2016-2021. However, the proportion of appeals processed in this way has declined from 35 per cent in 2016 to six per cent in 2021. It is hard to know the exact cause of this reduction but it is worthy of note that the FOAM system in 2016 was more user-friendly than any of the earlier iterations of the TPT online dispute resolution system. It is impossible to know how many potential appellants are deterred from using the system as a result of lack of equipment, skills or confidence but the the TPT has argued that, the advent of FOAM has freed up the customer services team from routine administrative tasks involved and allowed them to offer enhanced Assisted Digital support for those who need it.[68]

Continuous hearings, abandoning cases without merit and supervised settlement

The temporal dynamics of the appeal system has also disrupted traditional notions of how and when disputes can be managed. The possibility of constant flows of information between appellant, respondent, the adjudicator and TPT staff justify the FOAM system being seen as a form of 'continuous hearing'[69]. The ability of the adjudicator to ask additional questions through the online portal as evidence unfolds means that the need for pre-hearings, case management meetings or judicial directions are rendered redundant, and traditional notions of linear timelines unsettled. For Caroline Sheppard this reflects the use of digital processes predicated on a new business model which focus on a purposive interpretation of the procedural rules and unsettles a drafting legacy which revolved around the production of paper records, wet signatures and the speed with which documents could be delivered

[68] Traffic Penalty Tribunal, Revolutionising a Service, 2019. Available at: https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Revolutionising-a-Service_2020.pdf. Last accessed September 2023.

[69] Ryder, E., 2016. *5th Annual Ryder Lecture: the University of Bolton. 'The Modernisation of Access to Justice in Times of Austerity'*., and it is available in full here: https://www.judiciary.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf

through the postal service. This is suggestive of the ways in which digital transformation calls for a fundamental shift in thinking about litigation milestones and timetables.

Digitalised process can alter *how* things are done, as well as *what* is done. While there are variations between the different types of cases handled by the TPT, overall about 70 per cent of cases are seen by an adjudicator at some point. Chart four shows suggests that just over half (55 per cent) progress to determination to be 'allowed' or 'dismissed' by an adjudicator; a figure which is much higher than the very small percentage of cases that reach a final hearing in the civil litigation system. This may well reflect ease of process, the relatively low cost of adjudication and speed; all of which are likely to reduce the usual burden of litigation fatigue or the ability to hear cases. But the high proportion of cases that are not contested or are settled before appeal (45 per cent) is also worthy of note, especially as the authorities involved will very recently have rejected the representations made by appellants at the local stage of the challenge procedure.[70] This raise important questions about what prompts settlement negotiations so soon after a rejection of the appellants case?

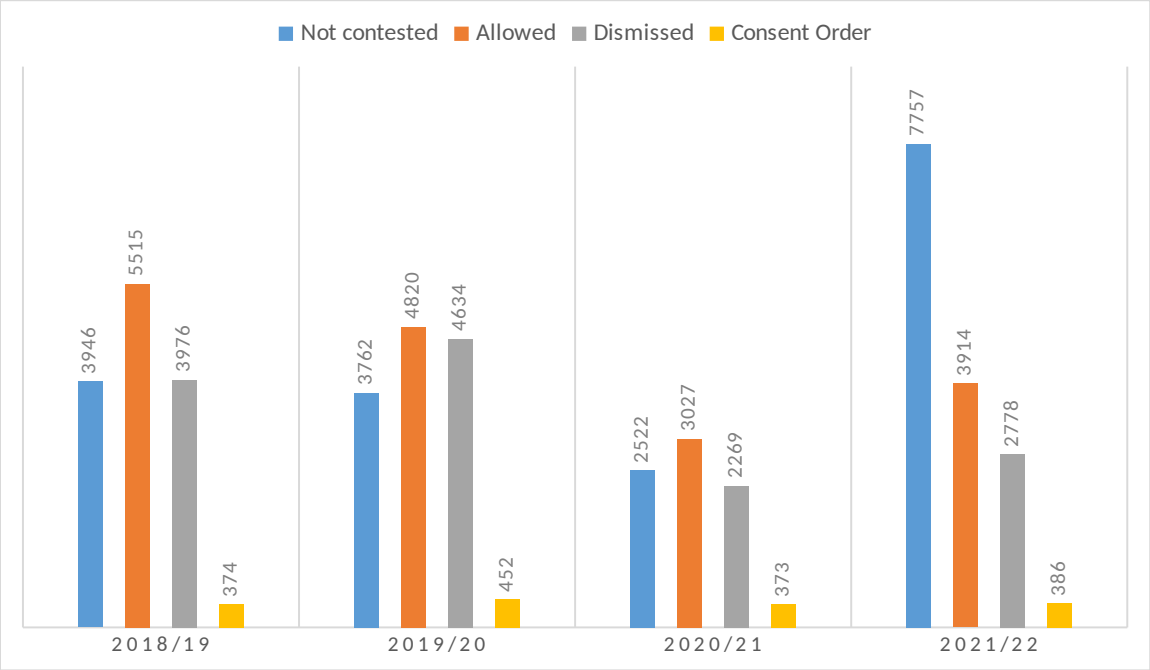

Chart four to show the outcome of appeals to the TPT 2017-2022[71]

Dispute resolution specialists have drawn our attention to the importance of new information being injected into the dispute resolution process if negotiation is to be encouraged an impasse avoided.[72] It has been argued that the ease and speed of information exchange in the FOAM system prompts regular reflection on the strength of the case being made or defended and builds settlement momentum. The opportunity to live 'chat', message the adjudicator or

[70] The pandemic cases inevitably involved unusual circumstances and resulted in the councils, often at the adjudicator's suggestion, ceasing to contest a higher proportion.
[71] Source: https://www.trafficpenaltytribunal.gov.uk/appeals-data/detailed-overview/. Not allowed by adjudicator statistics include withdrawal by appellant and out of time cases. Data for the years 2020-21 reflect reduced car usage while COVID lockdown regulations were in place. In addition to reduced car usage the TPT encouraged authorities to adopt a sympathetic attitude to motorists in light of the many compelling reasons for parking violations.
[72] For the classic exposition of this view see P. Gulliver. Disputes and negotiations: A cross-cultural perspective, 1979, New York: Academic Press.

add a comment next to evidence provided by others at will and free of the usual formality associated with tribunals that is especially important in this context. Examples drawn from the TPT database include photographs taken on a phone of the site of an alleged offence, indicating the angle and conditions of signs, which demonstrated the lack of notice provided on entering a charging zone. In another instance, an appellant was able to respond to the photograph of their car taken by a camera in a charging area with the simple comment that the photograph showed bare winter trees, when the alleged contravention was said to have taken place in the summer when the leaves covered the road sign. Caroline Sheppard reflected on this process in interview and also drew attention to the inquisitorial approach adopted by adjudicators:

> The clarity of the evidence presentation and message function allow hearing type questions to be asked in advance of a hearing, often resulting in the case being resolved without the need for one. The design of the system means most appellants skip a hearing because they can add their comments to individual evidence items. Moving the question of whether someone wants a hearing from the start of the appeal to after the authority has submitted evidence has also had two positive impacts. First, the hearing question doesn't arise if the authority decides not to contest the case, which makes planning easier; secondly, where the council evidence is uploaded, the appellant can see it, comment on it, or recognise that they are unlikely to win, so a hearing is a waste of time. Only about ten per cent of appellants now ask for a hearing. If the assigned adjudicator then messages a question to both parties, explaining why it matters, the parties usually reply in twenty-four hours, often enabling the case to be resolved without a hearing. You are unable to have that sort of speedy exchange with paper appeals. People either won't respond or take too long if they do. The messaging facility has improved fact finding and is a very powerful tool. It is so easy for an adjudicator to ask for clarification, without the rigmarole of drafting directions, and the parties understand the key issue in the case. [73]

The digital interactions being described are also significant because of their potential to introduce systems of supervised settlement into the civil litigation system in cases involving adults.[74] Academics have have long argued over the efficacy of bi-lateral settlement between the parties to litigation when conducted away from public or judicial view. Empirical research has suggested that the experienced litigator, stronger party or repeat player is much more likely to benefit from such 'out of court' settlements.[75] The system designed by the TPT has made a modest contribution to subjecting such negotiations to the scrutiny of an independent third party. The fact that adjudicators are normally assigned at an early stage of proceedings and that all messaging between the parties can be seen by them, means that they are able to oversee the conduct of negotiations in ways that remain highly unusual in the civil and administrative justice systems. Data on messaging activity for the TPT demonstrates that in the period between 2016-2021, adjudicators were responsible for 26 per cent of messaging activity. Unfortunately, no data was made available on the nature of their input. Despite this,

[73] Interview with Author (2021).

[74] Judicial interrogation of negotiated settlements is already required in cases involving children. See also: *https://www.judiciary.uk/wp-content/uploads/2017/09/guidance-for-professional-parties-v2.pdf.*

[75] M. Galanter, "Why the 'Haves' Come out Ahead: Speculation on the Limits of Legal Change" (1974) 9 Law & Society Review 95; O.M. Fiss, "Against Settlement" (1984) 93 The Yale Law Journal 1073; H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford: Clarendon Press, 1987).

the provision of a window on settlement negotiations normally conducted by litigants in private make it possible for adjudicators to alter the outcome of a dispute. This might involve remaining inactive where the parties seem to be moving towards a fair resolution, or intervening to arrange a hearing or steer the conversation where the adjudicator is concerned about the likelihood of an unfair outcome being negotiated. Reflecting on this development, Caroline Sheppard has argued that this was a rather unintended consequence of digitalisation, but that appellants like to 'have the ear' of the adjudicator, who can access all communications, even if they do not contribute to them.

Systemic Change

A final way in which the technology employed by the TPT can be said to be disruptive is in its willingness and enhanced capacity to promote systemic change. There are those who would argue that this has always been a function of courts in common law jurisdictions. It is now well established that judicial precedents can send out important messages about how rules should be interpreted and allow potential litigants to bargain in the shadow of the law. Analysis of litigation trends demonstrates the ebb and flow of particular types of cases as authoritative answers on moot points are provided by the judiciary.[76]

A similar dynamic between adjudicators and those defending appeals can be seen in the work of the TPT. By way of example data on bridge charging schemes (Dart Charge and Merseyflow) in Chart five shows the rapid reduction in appeals two years after the Merseyflow scheme was introduced in 2017. TPT staff explained this as an example of a new system bedding in and authorities responding to early decisions by adjudicator which made clear the scope of regulations.

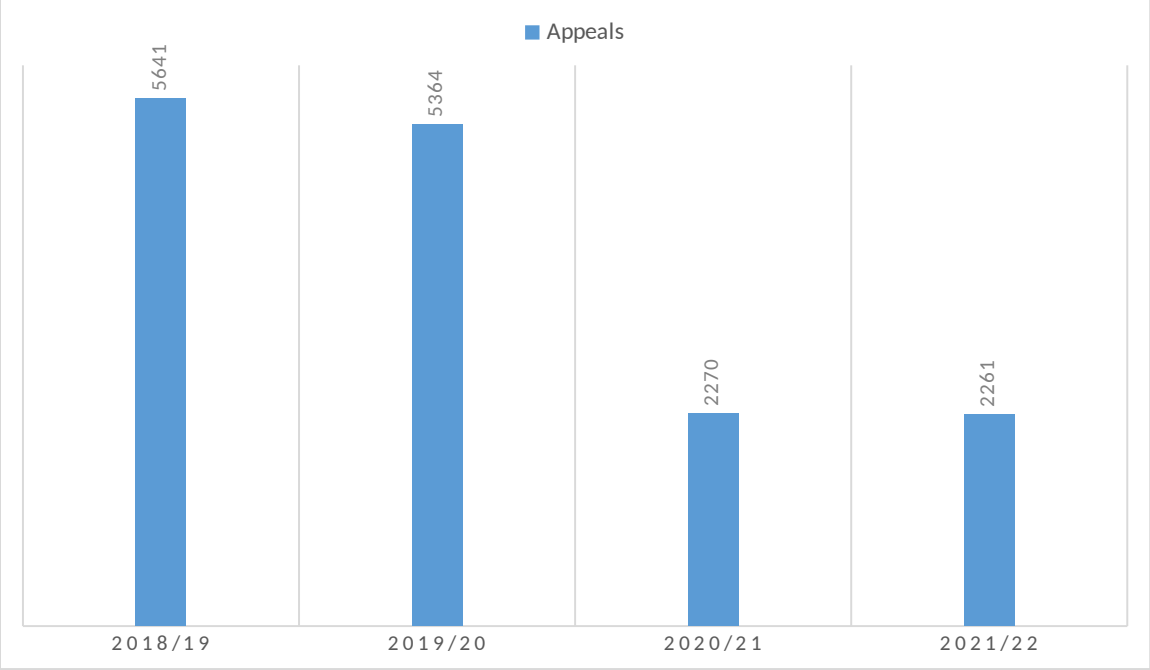

Chart Five: The outcome of bridge crossing road user charging scheme cases 2018-2022

The Bath Clean Air Zone scheme is used by TPT staff as a particularly good example of a charging authority recognising the organic nature of their relationship with the TPT. Bath

[76] AUTHOR

local authority chose to contest one test case in order to establish a fair precedent, after which they implemented a policy of not contesting subsequent appeals on the same point.

What renders the TPT different from the courts is the scale of engagement with defendant activity and possibility of direct dialogue between a small number of adjudicators and repeat player authorities. Rather than having to wait many years for a precedent setting case to reach a court or a current precedent to be re-considered, the TPT is dealing with large numbers of cases in relation to the operation of a limited number of schemes on a daily basis. Large caseloads combined with the digitalisation of the dispute resolution system also facilitates the creation and analysis of large datasets on the characteristics of cases, the parties, adjudicators and outcomes which facilitates searches for patterns of behaviour which are largely unimaginable at present in other courts in the civil justice system.[77] In the words of Rabinovich-Einy and Katsh:

> The growth in use of [online dispute resolution] can therefore be expected to shine more light on the variables that underlie the emergence of conflicts and lead to efforts to respond to causes of problems, thereby blurring conceptual, and not only physical boundaries. The separation of dispute prevention and dispute resolution, which seems natural in a world that did not stress the sharing of information, begins to feel unnatural in an environment that revolves around processing and communicating data.[78]

In the private sector, the online dispute resolution systems introduced by eBay are considered paradigmatic in using data from past disputes to prevent disputes in the future. There are some precedents for this proactive approach to dispute prevention in the English civil justice system. The Faculty of Learning by NHS Resolution, which defends clinical negligence claims on behalf of the NHS, produces a repository of educational learning products drawing on litigated cases which supports organisational learning.[79] But examples of such practices are at rare, not least because members of the judiciary might see active approaches to systemic change as beyond their remit and responsibility, or even as steering too close to the remit of the Executive.

The capacity to chart trends has not been lost on the charging authorities. As the FOAM system developed authorities became interested in data about their activities but also wanted to be able to judge how their performance deviated from the norm. As a result, a portion of the data collected by TPT is now available on open access on the TPT website and shows the number of PCNs issued and appeals data by penalty type, authority and outcomes of appeals from 2013 to the present. This allows authorities to use the TPT website to compare their performance with overall trends, particular authorities and to reflect on the extent to which they are outliers. Workshops with charging authorities organized by the TPT council stakeholder manager also provide the TPT to nudge as well as judge charging authorities. Bringing authorities together in TPT organised events provides important opportunities to discuss different approaches to issuing PCNs, interpreting regulations and defending appeals.

Conclusion

[77] Byrom, *Digital Justice: HMCTS Data Strategy and Delivering Access to Justice*.
[78] Rabinovich-Einy and Katsh, "Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment", 27.
[79] See https://resolution.nhs.uk/faculty-of-learning/

The work of the TPT can easily be dismissed as operating at the lowest level of the civil, dealing with a mass of appeals about relatively unimportant matters, involving minimal penalties.[80] But in many ways the assumption that the TPT is unimportant, which this article has sought to challenge, has also been its strength. The shift of attention from the disputes the Tribunal manages to the processes has meant that it has been allowed to experiment and perfect its end-to-end digital model away from the eyes of policy makers and critics of the modernisation programme. Further work of the kind undertaken by John Raine and colleagues[81] could usefully explore the user experience of the system and the ways in which the needs of the digitally disadvantaged can continue to be responded to. But this article's in-depth examination of the TPT's work makes evident the significant benefits to citizens of an approach that embraces user-led design and takes us beyond the rather unimaginative substitution model that generally dominates public debate about civil justice reform. Possibly the most important lesson that can be drawn is that substitution is only really acceptable when what we start with is serving the needs of all its users.

Future research could usefully test the claims about system design made by the TPT with charging authorities and appellants and even compare user experiences with recollections of how minor parking infringements were managed in the Magistrates court. Further research might usefully explore the fact that the work of the TPT and the way in which it operates in a digital age is not without its controversy. Considerations around open justice have also yet to be resolved by the Tribunal. While staff have indicated their willingness to make the small number of formal in-person or virtual hearings open to anyone who cares to attend them, instructions on how to do this or indeed the possibility of doing so is not indicated on the website. The removal of the option to have an in-person hearing is also highly significant in this context. These practices clearly facilitate a lack of transparency and the sort of public scrutiny we usually expect of State justice. These are clearly problems which have been encouraged by the shift towards digitalisation, though the open justice criticism would not be difficult to resolve if e-judgements were published and members of the public better briefed about their right to 'attend' an online tribunal hearing. The TPT is not immune to such criticism and at the time of publication, the Tribunal is developing a new website that will publish 'Key Cases', curated due to the common facts, issues and points of law they feature, in order to provide a reference for motorists and other interested parties.

What remains most important about the case study examined here is its disruptive potential in which the process of resolving disputes is an iterative one that stretches over a number of linked stages that do not have to take place in separate hearings, one building or face to face. The approach adopted is an inquisitorial and problem-solving one in which the parties are guided to explain and understand their respective positions and offer up evidence as it becomes relevant rather than at a pre-determined deadline. This approach will not necessarily be appropriate for all types of dispute but I conclude by arguing that its focus on the needs of users should be.

[80] The majority of PCNs appealed involve small amounts of money, half of which are around £70, with the maximum amount at stake being £120.

[81] Raine et al, "To Appeal or Not to Appeal? Motorists' Awareness and Experience of The Traffic Penalty Tribunal: A Research Report".