

British Irish Commercial Bar Association Law Forum

Technology and the Law. Closing Keynote Address

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Introductory

1. I am not unaccustomed to giving keynote addresses, but so far they have normally been at the start of a conference – the key of the keynote has been to unlock or open the conference. On this occasion, I was not sure whether I was giving the keynote speech for the end of the conference or the keynote speech for the start of dinner.
2. Initially, I thought it was the closing keynote speech for the end of the conference. I briefly flattered myself that it was based on the organisers thinking that I would say everything that could be said on the topic of technology and the law, so that the conference would end with all participants thinking that there was no more that could be said on the topic. But then I realised that Lord Kerr was closely involved in this conference, and he would have left the organisers in no doubt as to his poor view of my ability when it comes to technology – and indeed his poor view of my ability when it comes to law.
3. So I then thought that I was being asked to give the opening keynote speech for the start of dinner. Well, that is something of a hospital pass, because standing between a lawyer and his or her food and drink, especially his drink, is not a good thing to do. It is a bit like getting between a hippopotamus and the water, and with potentially equally unfortunate consequences. And, at least if you speak after dinner, your audience is mellower and more tolerant.
4. In the end, however, I have concluded that, because the programme records the day's sessions including dinner, my key both locks the door to close the conference and unlocks the door to open the dinner. So, despite Lord Kerr's views, I will talk about technology and the law, and in doing so I will do my best not to live down to his understandably and regrettably low expectations. And, I might add, just before we sat down, he did his best to add to my discomfort by saying "All the talks have been very good – *so far*".

5. Your conference organisers have, very sensibly, divided the subject of technology and the law into three main areas – technology in the courtroom, technology in the litigation process, and technology as a generator of substantive rights. I would like to talk about some aspects of each of those important and fast moving topics, although the precise demarcation between the first two areas is not always easy to define.

Technology in the courtroom

6. The principle of open justice is a topic on which judges wax lyrical – and rightly so. If it is to command public respect and confidence, justice must be seen to be done, and if trials and judicial decisions were not routinely performed in public, suspicions would soon arise that judges were developing bad habits, and such is human nature that there is a real risk that we would get into bad habits. So, save to the extent that it is necessary to have secrecy (protection of children, national security, trade secrets for example), the public must have the right to see and hear what happens in court. So, too, we must allow journalists to attend hearings and be free to report what happens in court. So far so uncontroversial.
7. But technology gives rise to the possibility of a significant development, which may seem to many people, at least at first sight, to be an obviously logical step, but which, in the eyes of many other people, is more controversial. If the public has the right to see, and to be told about, what goes on in the courts, why should we not allow cameras into the courts, so that the public can watch court hearings as they happen streamed into their living rooms or offices? It could be said with some force that this is merely the techno-logical extension of the traditional public right to come into court physically. I see no satisfactory answer to this argument so far as hearings without witnesses and juries are concerned.
8. Indeed, we have such streamed versions of our hearings in the UK Supreme Court – and now you can get archive footage of hearings that have taken place within the last twelve months. And, on top of producing a two-page summary of our hearings and, later, a two-page summary of our judgments, we televise a brief oral summary of each of our judgments read out by one of the Justices, which is available for TV news channels. But even this is not quite as simple as it might seem. The Supreme Court has to have control over its filming, which inevitably has a cost, and this might lead to difficulties if it was extended to other courts, although the Court of Appeal in London sometimes films hearings including the judgment in the very recent *PJS v News Group Newspapers* case, of which a little more anon. And I suppose that we would have to think again if

the service was misused in a way which brought us unfairly into disrepute, not that there has been the slightest suggestion of that.

9. Where witnesses or juries are involved, the issue is obviously more difficult. Vulnerable, even shy or nervous, people may not be prepared to give evidence, or may not give a good account of themselves if they are being filmed. And there is a risk of some witnesses, or even some lawyers (but not I should add, judges), playing to the gallery. Furthermore, in some cases filming may increase the risk of witness or jury intimidation.
10. Turning now to the trial process, conducting a hearing purely by reference to electronic records, without hard copies of any documents seems to me to be likely to become the norm, maybe even the invariable practice, in due course. Precisely when more trials are conducted purely by reference to electronic documents rather than by reference to hard copies is a difficult question to answer, but I think that there can be little doubt that that is the way in which the trend is going. And it would be disappointing if it was earlier than the date on which more appeals are conducted electronically than by reference to hard copies. In the Supreme Court, we have some judges who work purely from hard copies, some judges who work from a mixture of hard and electronic copies, and one judge who works exclusively from electronic copies. Who is the hero? Well, it's Lord Kerr of course.
11. It would be inappropriate for me to discuss the finer details of the use of electronic equipment and electronic techniques at hearings: most of you, quite possibly all of you, will know more than I do about the topic. But one aspect which may be worth raising is hearings with video links. Having judged cases at first instance with expert witnesses giving evidence by video, I am unconvinced that evidence by video-link puts anybody at much of a disadvantage at least in a civil case, provided that it is properly supervised. Certainly in a case without witnesses, it is hard to think it would make much difference. It is of particular interest to me in my capacity as a member of the Judicial Committee of the Privy Council. Especially in smaller value appeals with advocates from the local jurisdiction, the hearings would cost far less if the advocates (and sometimes the solicitors and clients) did not have to come to London. And, in criminal cases, there must be a powerful case for saying that it should be routine for people in custody pending trial to appear via video-link from prison on interlocutory matters, as now often happens.
12. Telephonic directions hearings were starting to be a mildly familiar feature in some courts in 1996, when I became a judge, and now electronic discussions about directions are presumably becoming more common, as in most arbitrations.

13. An interesting, difficult and important question is the extent to which IT-based developments in the court room will affect substantive law and justice. It seems to me unlikely that there will be no effect. As any lawyer knows, procedural and substantive law mutually interrelate just as any student of English literature knows that style and substance cannot be treated in wholly separate compartments. And, so far as being filmed is concerned, the observer effect theory is a well-established phenomenon in quantum physics: the theory establishes that, by observing an event or object, you affect the event or object. Having said that, I honestly believe that my behaviour in court has not changed on moving from the unfiled Court of Appeal to the filmed Supreme Court – but I would say that wouldn't I? And, in this context, I believe that there is some worrying evidence, which may not be statistically wholly reliable, which suggests that juries may be less likely to convict on the basis of evidence given by video than on the basis of live evidence.

14. An interesting question, which I note you have been discussing at your conference, is whether increased use of IT in (and out of) court will result in the decline of oral argument. As already mentioned, I have little doubt but that IT will affect aspects of oral argument. The introduction of written arguments at all court levels has, unsurprisingly, affected oral argument, and in particular it has cut down the length of oral discussion, and therefore the length of hearings. I remain a very strong supporter of oral argument. In my experience, it is only very rarely indeed that I have heard a case where I have not benefitted from listening to the oral argument, even if it only serves to verify, clarify or focus my preliminary opinion. And in many cases oral argument has caused me to refocus my thinking, sometimes substantially. Indeed, the give and take of oral discussion not infrequently has resulted in my reconsidering and even changing my mind – sometimes more than once.

15. Further, oral argument sometimes can result in the emergence of entirely new points. It is not entirely clear to me quite why oral argument is of such benefit, given that we so often have first class written arguments, but it clearly must be something to do with the way the mind works – the human mind, not just judicial mind. I accept that the use of IT might conceivably render oral argument redundant, presumably by changing our ways of thinking. However, I hope and expect that oral argument will remain an essential and fundamental part of dispute resolution, although I accept that there is at least a powerful argument for saying that there are many cases where it will be disproportionate or unnecessary.

Technology in the litigation process

16. I shall spend rather less time on this aspect because I was last involved in a trial as a judge in December 2004 and as an advocate in June 1996. The changes in litigation rules and procedures, partly but not solely thanks to developments in IT, over the past twenty years, have been astonishing by the standards of the past. For someone to say in 1996 that he could not talk with any authority about the trial process because he had not been a barrister since 1976 would have been received with incredulity or puzzlement.
17. That is a measure of what a relatively fast moving world we all inhabit. Discovery has not merely been renamed disclosure, at least in England and Wales, but it is becoming a very different exercise in the electronic world from what it was in the world of hard copies. In the brave new world of IT, multiple drafts and emails have increased the cost and effort required in the disclosure exercise, and the retrieval capability when it comes to deleted documents renders the exercise all the more potentially difficult. Initially, at any rate, it seemed to add fuel to the fire of those, such as myself from time to time, who questioned the viability of the discovery/disclosure process in the modern age. However, new techniques enabling efficient electronic searching of documents means that the influence of IT on the exercise of disclosure may not be all bad.
18. Similarly, filing of documents electronically should lead to efficiency and costs-saving, and electronic court rooms where all the documents in a case are filed should become the order of the day, at least in big cases.
19. Online dispute resolution, familiar to the users of eBay, is being actively considered as a means of determining small value disputes in England and Wales. It is discussed in the report prepared by the Civil Justice Council committee chaired by Professor Richard Susskind and the report on Chancery litigation produced by Lord Justice Briggs. With the high cost of traditional litigation and the shrinking of legal aid for civil cases, it may be the only realistic and proportionate way of achieving access to justice for ordinary people with moderately sized claims. However, in the search for an alternative, the Bar Council of England and Wales has set up a committee to look at ways of maintaining a hearing system for moderate claims, which is traditional in nature, but is nonetheless sufficiently streamlined to be effective and proportionate. If the committee find ways of achieving that, well done them - and, if they do so, it will nonetheless be a victory for technology for two reasons, First, there will, I am sure, be an IT involvement in any such solution. Secondly, it appears that it was, at least in part, the threat of an ODR system which prodded the Bar Council into appreciating that they had better do something.

20. Another project in the courts of England and Wales, is the replacement and harmonisation of IT systems in the courts, which is long overdue. Judges are provided with good IT, but the court service has a large number of different and antiquated systems which do not speak to each other. Criminal court IT is generally ahead of civil court IT and some of the Tribunals have relatively impressive IT systems. However, there is much to be done to bring the courts and tribunals into the 21st century, and this project, which is being combined with a rationalisation of court building in England and Wales, is both ambitious and much-needed.
21. Again, there must be a question as to how these developments will affect substantive law. Before I turn to the third aspect considered in this seminar, it is, I think, appropriate to mention *The Future of the Professions* by the aforesaid Richard Susskind and his son Daniel. That book predicts that, as a result of electronic developments, the professions will change more in the next twenty years than in the last two hundred years, and that the public will not need lawyers to work as they did in the last century. The Susskinds suggest that, notwithstanding sceptics' doubts, much professional work which appears to involve expertise, creativity and interpersonal skills will be capable of being done by robots or AI. That would seem at least capable of extending to the work of litigation lawyers, advocates – and, dare I say it, judges. The recent electronic victories over humans in chess, quiz games and Go all tend to suggest that this may not be an entirely fanciful notion. Indeed, there are reports of systems that can outperform US lawyers in predicting the outcome of patent litigation. Whether or not they are right remains to be seen, but the implication of their book is that AI could threaten the most fundamental functions of lawyers.

Technology and substantive rights

22. There is no doubt that IT has created new rights, and that it has altered and threatened old rights. The centrally relevant, and strongly overlapping, rights in issue, privacy and data protection, are relatively new to common lawyers, but their novelty is not, at least directly, attributable to IT but to the Human Rights Act 1998 and EU Directives respectively.
23. Privacy has, I think, two principal aspects – first, preventing personal information from dissemination and, secondly, being left alone. It is the first component which the digital age primarily brings into question. We are consistently at risk of having our privacy being invaded by the media, by commercial organisations and by governments. As data protection legislation makes clear, the right to privacy includes the right to prevent anyone from misusing (ie accessing, retaining, using or disseminating) personal information.

24. Simply knowing that one's actions and words are, or even may be, heard or seen by others affects what one says and does. Indeed, the tension between privacy and freedom of expression means that we sometimes overlook the fact that, in many ways, the right to privacy is an aspect of freedom of expression. Most people would feel very constrained about what they felt free to say or do on social, family or even many business occasions if they knew that their words or actions would or even might be broadcast generally. Indeed, that is a very good example of the observer effect to which I have already referred.
25. Governments must, of course, gather information to protect national security and to deter and detect crime, but they also collect much personal data for tax, health and other purposes. Personal information is also collected every time someone visits a website, shops online, or sends a digital message or an email. And only some of that information is knowingly provided; much of it is deduced from various actions or characteristics, as a consequence of cookies, metadata and the like, and then "jig-sawing" the information. Public attitudes may be lagging behind these shifts in practices by governments and companies, partly because of the invisibility of the processes in question and partly because of a lack of awareness of how much information is being collected.
26. There are a number of new points which arise from the existence of a right to privacy in the age of IT. Thus, in the case of the traditional IP law of confidence, the position is normally binary: information loses its confidential status once it is in the public domain, even only to a very limited extent. The position is very different in relation to privacy. The fact that information about an individual is in the public arena does not necessarily prevent that individual from challenging its dissemination more widely, more intensely or more permanently.
27. And in the traditional world of hard copy, most information would be difficult to access a year later. Yesterday's newspaper would be today's fish and chip wrapping, and tomorrow's waste material. However, in the brave new world of webpages, yesterday's news will be accessible not merely next year but next century, and it is relatively easily findable through a search engine. Hence the development of the so-called "right to be forgotten, as developed by the Luxembourg court in the *Google Spain* case, as a result of which search engine companies have accede to requests to remove outdated, embarrassing stories from their websites. Quite how far this decision, which nowhere considers freedom of expression, goes remains to be seen.
28. Jurisdictional and similar issues are also thrown up by brave new world of instant global communication. Given that internet communications can give rise to claims for breach of IP

rights, breach of contract, breach of privacy, and many other types of claim, there can obviously be debates as to which state's courts a complainant can or should bring any claim and which substantive law should apply to the proceedings. Other problems arise. For instance, should a US court agree to enforce in the US a judgment against Yahoo issued by a French court and based on Yahoo's advertising of Nazi memorabilia contrary to French law? And should a Canadian court grant a world-wide injunction restraining Google worldwide from marketing goods which infringe a Canadian company's IP rights in Canada? The answer in both cases is, at least according to the North American court concerned, "yes".

29. It should be added that some of the difficulties of enforcing claims on the so-called "Wild West" of the internet can be exaggerated. Thus, the internet has to be fed by and controlled by computers, and they are physical objects which have to be located somewhere. Also, anyone who has an IP address will be recorded appropriately in a publicly accessible register. From the point of view of complying with territorially-based legal requirements (as of course most statutory stipulations and court orders are), there is sophisticated geo-location technology. This technology, which was developed to maximise the efficacy of internet advertising, can be used to block websites being accessed from specified territories.
30. Turning to government surveillance, it is clearly needed in order to prevent terrorism and to combat crime. Such surveillance is carried out in all sorts of ways – CCTV, satellite monitoring, bugging devices, interception of communications when transmitted or stored, hacking, and data sharing.
31. The Strasbourg Court accepts that individual states should be entitled to carry out such surveillance, but insists that it is carried out "in accordance with the law" (ie the power must be contained in clear, appropriate and accessible laws which operate foreseeably), and that it is "in pursuit of a legitimate aim" and "proportionate". However, the Strasbourg Court has held that UK legislation did not satisfy the requirement of lawfulness as it did not give "the public any indication of the procedure to be followed for selecting for examination, sharing, storing and destroying intercepted material".
32. A similar criticism was made of the EU's own 2005 Data Retention Directive by the Luxembourg Court in the *Digital Rights Ireland* case. Recently, the Court of Appeal in London referred a number of the features of Data Retention and Investigatory Powers Act 2014 to the Luxembourg Court to determine their compatibility with the law following that decision.

33. While the enormous growth in electronic communications renders electronic surveillance all the more necessary to combat terrorism and crime, it also risks rendering such surveillance all the more potentially intrusive. The balancing exercise is really hard, due to the sheer quantity of information, the developments in technology, the room for reasonable disagreement and the potential for almost literally infinite variation in the facts.
34. The UK does not currently impose a requirement for prior judicial authorisation to conduct surveillance. However, we have three specific sources of domestic legal protection. First, the Investigatory Powers Tribunal, IPT, in which anyone can bring proceedings if they feel that their privacy rights have been infringed by government surveillance. In 2015, the IPT ruled that information received by GCHQ from the US government had not, at least initially, been obtained “in accordance with the law”, and it also ruled that material intercepted by GCHQ was protected by legal privilege. Secondly, there is the Independent Reviewer of Terrorist Legislation, currently the highly respected David Anderson QC. He regularly produces very informative, even-handed and thoughtful reports, which provide a very full and balanced picture of what is going on in the security world, what the risks and problems are, and how security does, can and should interact with privacy. Thirdly, there is a cadre of retired senior judges who oversee and report on the surveillance activities of the UK law enforcement and security services. David Anderson has recommended a requirement of prior judicial approval (as well as a widening of the ambit of the commissioners’ role).
35. On the broader policy front in the UK, the Government has placed an Investigatory Powers Bill before Parliament with a view to modernising our law in this area. In particular, it would provide for prior judicial approval for warrants issued by ministers permitting invasion of privacy for security purposes, at least in some cases. However, the Intelligence and Security Committee of Parliament reported a couple of months ago that “the privacy protections are inconsistent and ... need strengthening”, that many key provisions “are too broad and lack sufficient clarity”, and that “there are a number of more detailed matters requiring specific amendments”.
36. Turning from government surveillance, some of the most important players in the privacy debate today are private companies who use private information to generate profit. Google’s business model, for example, depends on information about its users to support a targeted advertisement platform. Just over 90% of Google’s revenue, \$74.5 billion in 2015, was from advertising revenue. This shows that personal information can be immensely profitable. It is therefore important that there are clear principles for ascertaining at what point information about a person can lawfully be used by a third party for that third party’s commercial benefit.

37. The EU is seeking to systemise and establish a robust legal framework for privacy in the internet age. Compared with the EU, the US has relatively weak and patchy legislation protecting data protection. I think that reflects three differences between the US and Europe. First, Europe generally has more faith in regulations whereas the US tends to favour market-based solutions. Secondly, Europe, with its recent history of totalitarian governments, protects privacy rather more than the US, with its commitment to the First Amendment. Thirdly, it is in the US that most IT applications are first developed or implemented, so commercial pressures, particularly with the sophisticated lobbying in the US, are inevitably greater there than in Europe.
38. In the landmark *Schrems* decision last October, the Luxembourg Court concluded that the US laws protecting personal data were at least arguably inadequate by EU standards, and accordingly it was open to a national court (in that case the Irish courts) to rule that data gathered within the EU could not be transferred to the USA. In early February, the European Commission and the United States agreed on a new framework for transatlantic data flows, the 'EU-US Privacy Shield'. This is an unsurprising indication how developments in IT are encouraging a more global approach to law-making and legal rules.
39. Finally, there is the issue of privacy and the media. The ease with which information, whether in words or pictures, can be disseminated very widely, without delay, and across the world has created a veritable global village. It has an inevitable effect on the traditional media, in particular the newspapers, as well as on the right to privacy, and it may well come to have an effect on our moral or social culture. A highly contemporary example of this sort of development is apparent from the application we heard this morning in the Supreme Court, *PJS v News Group Newspapers Ltd*. Because we are still considering that decision, I do not think that it would be sensible to say any more about it. In any event, I fear that I have already kept you from your dinner long enough.

David Neuberger

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