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Henry Brooke

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THE LEGAL AND POLICY IMPLICATIONS OF COURTROOM TECHNOLOGY: THE EMERGING ENGLISH EXPERIENCE

Henry Brooke*

I opened my first law book at the age of twenty-five. Now at the age of sixty-seven, as Vice-President of the English Court of Appeal, I am nearing the end of a professional lifetime at the coalface of courtroom litigation. In the last forty-two years I have watched litigation practice alter in this jurisdiction from a culture of orality to a culture that relies much more heavily on the written word. I have watched changes in which English lawyers and judges have reluctantly compelled themselves to learn about the importance of managing litigation. They have now taken on board the message that justice becomes injustice if it is too slow and expensive to achieve. And I have watched the very slow process by which our judges, lawyers and court administrators have come to realise that applications of modern technology offer real benefits in the world of litigation.

I have written elsewhere¹ of the process by which those who were fast asleep in the summer of 1985 as to the possible advantages of information and communications technology (ICT) in the courts of England and Wales have now become half awake. The land whose industrial revolution changed the world in the eighteenth and nineteenth centuries was slow to embrace ICT into its legal and judicial culture. When I was invited to contribute to this volume, I was hesitant due to the lack of practical experience with technology in the United Kingdom. Knowing this, the organizers of this symposium nonetheless asked for my thoughts on the fundamental fairness issues that ICT raises from the perspective of a technologically aware United Kingdom jurist. In order to effectively do this, it is first necessary to sketch the relevant landscape of the United Kingdom.

There are about fifty million people in England and Wales. Scotland retained its own judicial system by the Act of Union in 1707. Although the law in Northern Ireland is more recognisable to an English observer, it too has a separate judicial system. While there has been a measure of devolution to the new Welsh Assembly, England and Wales can be seen as an undivided whole for the purposes of court and judicial administration. South of the Scottish border, therefore, we do not have a federal structure: we can plan centrally for the whole country.

* Lord Justice Brooke is Vice-President of the Court of Appeal of England and Wales. He has been a judge for sixteen years, and has been involved in issues concerned with technology and the law since 1985.

¹ Henry Brooke, *Technology and the Judicial Process*, in *ESSAYS IN HONOUR OF SIR BRIAN NEILL: THE QUINTESSENTIAL JUDGE* (Mark Oliver Saville & Richard E. Susskind eds., LexisNexis UK 2003).

The last three years have seen attention focused on plans for court modernisation as never before. Since early 2000 I have represented the judiciary on the Court Service Board, which runs the modernisation programme. In January 2001, I was appointed by Lord Woolf, the Lord Chief Justice, to lead the judges' involvement in the modernisation programme. I have the authority to commit the entire judiciary to the evolving plans. We have spent much of the intervening period planning and consulting, but we are now implementing.

It may be useful to compare the English court scene in April 2000 with what we hope to see in April 2006. In April 2000, there were back-office networks in each of our 220 county court centres and our ninety Crown Court centres. By a convenient, although not 100% accurate, shorthand, the former housed our civil and family courts, and the latter housed our major criminal courts.² Their Oracle 7I databases each represented an independent oasis. Their back-office staff used "dumb" terminals. They could produce standard form documents from templates that had to be changed separately at every court when alterations were needed. The technology they used, and still use, was the technology of the early 1990s. We now have to upgrade to a properly integrated Oracle 9I database (as a start) for the whole country, and introduce judges and court staff who are used to today's applications to court-based systems they might be able to recognise.

The Royal Courts of Justice (RCJ), where I sit as a judge, were left out of all this. The central blocks constitute a group of uneconomic Victorian-heritage buildings. They boast acres of unused and unusable circulation space. The heavily contested litigation that goes on here never attracted much support from hard-pressed administrators who had to demonstrate quick financial returns for the limited ICT investment they were allowed to make. Diverse information technology (IT) systems therefore proliferated in different corners of the complex, with different suppliers supporting different software programs. Only the Court of Appeal, where I sit, has a system that is really fit for today's needs, if not tomorrow's. Apart from a few local area networks linked to dumb terminals, networking was also unknown here. The judges used free-standing laptops for their IT needs.

In April 2006, in contrast, the 150 leading court centres in England and Wales will possess a modern IT infrastructure. The programme will embrace the whole of the criminal business of our higher courts, and seventy-eight percent of their civil and family business. The specification for the Crown Courts will be superior to that for the county courts, because investment in criminal courts finds more favour politically. But in practical terms, nearly all the professional judiciary and the staff

² Here I am concerned only with the court centres staffed by professional judges, which have been administered since 1995 by the Court Service Agency. I will refer below to the challenges posed by the incorporation of our magistrates' courts into a unified court system through the Courts Act of 2003, which has just become law.

who serve them will be networked, within a secure intranet, for the first time. Different plans, which ran into heavy time and cost overruns, have now resulted in the networking of most of our magistrates' courts, the lowest tier of criminal courts, which also possess significant family law jurisdiction.

Valiant efforts are now being made to improve the facilities that will be available to those judges and staff who will be left outside this programme (either because there is not enough money to go round, or because certain courts are so seldom used that the introduction of a network could not be justified). In particular, a new Unified Courts policy, which recently received Parliamentary sanction, is enabling us to explore the possibility of deploying under-used magistrates' courts for civil and family court business in a way that was previously unachievable.

By April 2006, therefore, we will have installed the "plumbing." We will have a communications network based on Microsoft Outlook. We will be able to use fairly modern Microsoft Office software. I hope we may have a modern, properly integrated court database. And we will be creeping forward with different types of applications with which to exploit the new network. But modern court-based case-handling systems of the type that are increasingly common overseas will not be achieved or achievable within the current spending round.³

There are two other developments that I need to notice. The first, on which I have already touched, is the creation of a new Unified Court Agency. This will take over the running of all our courts, including our magistrates' courts, in April 2005. Its first chief executive has just been appointed. Although the Lord Chancellor's Department (or, now, Department of Constitutional Affairs (DCA))⁴ used to have a number of responsibilities in relation to our magistrates' courts, they were administered locally by a large number of different magistrates' courts committees, usually representing a county or metropolitan area. In the future, all of these courts will be administered centrally, with a network of forty-two local boards possessing advisory rather than executive functions, and a level of regional supervision that will result in arrangements similar to those currently achieved by the circuit system.⁵

³ In July 2002, the Government announced its spending plans for the April 2003–2006 period. Our needs were most clearly articulated in a report prepared by a group of English judges two years ago in "Modernising the Civil Courts: the Judges' Requirements" (Lord Chancellor's Department, August 2001). They envisaged four interlocking systems: a "court record" system feeding in turn an electronic diary/listing system; an electronic case management system fit for both court staff and procedural judges; and an electronic court file for use by judges conducting defended hearings.

⁴ Legislation will be introduced in the 2003–2004 session of Parliament to abolish the role of the Lord Chancellor. The newly named DCA has already inherited responsibility for the administration of our courts.

⁵ Each is managed by a circuit administrator, who liaises with two High Court judges serving for four years as presiding judge of the circuit, spending half their judicial year on their appointed circuit. The chief executive of the Court Service Agency similarly performs

The second development deserving attention is the implementation of the new Tribunals for Users Programme, anticipated for April 2008. At present the DCA administers about twelve groups of administrative tribunals, and the rest are administered by a number of different Government departments.⁶ These are all to be brought under DCA's administration. With a long lead-in planning period,⁷ the planners of new IT systems for our tribunals should work in close collaboration with those conducting the planning of our new court systems.

I have every reason to suppose that this collaboration will occur. It should be facilitated by the fact that the Department has recently created a new E-Delivery Division. This division will be responsible for providing for the ICT needs of all the different organisations that look to the Department for administrative support (not least the judges).

Having mapped out the landscape, we can now turn our attention to the challenges facing England and Wales. It is already apparent that our lawyers are generally not ready for what lies ahead. Of course, there are some who are very technologically adept, and who cannot wait for modern technology to be introduced into the courts. The large international firms of City solicitors and the "blue-chip" barristers' chambers already have great experience of the use of IT. Once the courts are fully networked, and we have also managed to introduce systems that are truly fit for the purpose of heavy litigation, lawyers from this elite sector of the market should take to the new courtroom environment like ducks to water.

This is why we decided to allocate, out of a very limited budget for modernising our civil courts, enough money to launch a small pilot project in the Commercial Court, being the place to where a lot of very heavy commercial litigation naturally drifts. Up to twelve highly specialised judges are assigned to that court, and six of them will be sitting there at any one time. The plan for this pilot project is that the court will be able to store files electronically; the parties will be able to file and store documents electronically; and the system will enable judges to perform their customary highly proactive case management function with IT support. There will also be an e-diary linked to automatic listing.

his job in close liaison with the Senior Presiding judge, who is a Court of Appeal judge based in London. Under the new unified court arrangements, London will constitute a region of its own.

⁶ For example, the Department of Trade and Industry currently administers the Employment Tribunals and the Employment Appeals Tribunal, which are concerned with a huge range of disputes in the employment field. The Department of Work and Pensions administers the Appeals Service, which is concerned with an even larger volume of appeals in the field of social security benefits of one kind or another.

⁷ The planning period is prolonged because the Department wisely decided not to embark on this programme concurrently with the massive administrative upheaval associated with creating the new unified courts administration.

On the whole, the battles in the Commercial Court are conducted between equals.⁸ More than half of those who conduct their litigation in this court have no connection with the United Kingdom, but they and their advisers are accustomed to IT applications in their businesses. This will make the conduct of the project easier because no allowances will have to be made for the fact that one party has significantly smaller resources than the other.

In the conduct of heavy criminal cases, this is a matter that has always given the judiciary cause for concern. The recent Government Inquiry conducted by Lord Hutton, a serving law lord, captured international attention, not least because of the quality of the court technology he had at his disposal. He used a courtroom on the second floor of the East Block of the Royal Courts of Justice, where I customarily sit. That courtroom accommodated about eighty people at any one time, and the proceedings were also broadcast to a courtroom next door, where another eighty people could watch the proceedings through video links. Down in the quadrangle outside my room, for the whole of the courts' long summer vacation, there was a large tent for the news media, accommodating a further 200 people, to whom the proceedings were similarly brought by video link.

All the documents in the inquiry were scanned, and then brought up when needed from their electronic database onto the monitor screens in the courtroom.⁹ The judge, the witnesses, counsel and solicitors all had a monitor screen in front of them, and all who watched the proceedings, either in the judge's courtroom or over a video link, could see the documents on a large video screen at the same time as they were shown to a witness. At the same time they could also see the LiveNote transcript scrolling up on another screen very soon after the witness had spoken the words being recorded.¹⁰

There was one entirely new feature of this inquiry. For some time our major public inquiries have possessed their own Web site, so that the calendar of the

⁸ There has to be at least £50,000 at issue for an action to commence in the Commercial Court, but the normal range of litigation there is concerned with much greater sums.

⁹ These facilities will be used next for the purposes of the massive litigation between the liquidators of Bank of Credit and Commerce International and the Bank of England. The trial is due to start in January 2004 before Mr. Justice Tomlinson and is scheduled to last for at least a year. The liquidators are charging the Bank of England with misfeasance in public office in relation to the way its officers performed their regulatory responsibilities in connection with the bank's operations.

¹⁰ The technology did not always operate to 100% efficiency. My thirty-year-old daughter decided to join the queue at 6:30 a.m. for the precious seats available to the public in the overflow courtroom on the day when the Prime Minister gave evidence to Lord Hutton: those at the front of the queue had queued all night and obtained one of the eight seats available for the public in Lord Hutton's courtroom itself. In the overflow courtroom, the watchers could see the LiveNote transcript and watch the Prime Minister's face for the first ten minutes of the proceedings, but they could not hear a word of what was being said. Fortunately, the audio-link gremlins went elsewhere for the rest of the day.

inquiry, the transcripts of evidence, and other useful information relating to the inquiry can be published to all. Lord Hutton also directed that every single document submitted to the Inquiry, apart from a very few that were withheld for reasons of personal confidentiality, were published on the Inquiry Web site. Because a number of these documents had a security classification, they would normally not have been released by Government for thirty years. Now, they all cascaded into the public view at once. Even the most seasoned inquiry-watcher was overwhelmed by their volume.

One restriction Lord Hutton imposed may appear strange to American observers. At the request of the family of Dr. David Kelly, the Government scientist into whose death he was inquiring, Lord Hutton kept the television cameras away except for the opening and closing sessions of the inquiry, which involved no witnesses. He also banned radio recording. Lord Hutton took the view that the burden of giving evidence to an inquiry like his would be greatly increased if every witness knew that there would be a live recording of his or her evidence on television screens throughout the world, and that the quality of their evidence might suffer as a result. On the other hand, he permitted members of Dr. Kelly's family and certain members of our security services, for differing reasons, to give evidence to the Inquiry over a video link and not from the witness box in his courtroom.

In my view, developments like these are almost always likely to be benign, if they enable a much wider cross-section of the public to understand what is going on in their name (and at their expense) in complex inquiries. I believe that the televising of proceedings in our appeal courts and in those courts, like the Administrative Court, which do not receive live evidence from witnesses, cannot be very far away.¹¹ Whether it would have been much more difficult for the three members of the Court of Appeal, of whom I was one, to conduct the Conjoined Twins appeal three years ago if we had been exposed to live television broadcasting, is hard to assess. But it would certainly have brought home to a mass audience the complexity of the issues we were facing.

Another development in a contemporary public inquiry has been entirely benign (cost apart). This is the portrayal of "virtual Londonderry," compiled from maps and plans and photographs and people's memories as a virtual recreation of the critical parts of Londonderry on Bloody Sunday, which occurred more than thirty years ago.¹² Any witness in the Bloody Sunday Inquiry will be shown on screen

¹¹ In the criminal trial of *The Queen v. Huntley & Carr*, conducted by Mr. Justice Moses and a jury at the Central Criminal Court between October and December 2003, the court transcripts were released to the media very soon after the relevant words were spoken in court. Actors played the parts of witnesses, counsel, and the judge in almost contemporaneous re-creations of the proceedings in court.

¹² Lord Saville, who is a serving law lord, has for the last five years been conducting an inquiry into the events of a single day in the sad history of Northern Ireland, when English troops killed a number of the citizens of Londonderry towards the end of a protest march

where he or she was when relevant events occurred that day, and will be able to describe his or her line of vision, even though buildings have been demolished and others erected in the intervening period. When the Inquiry chairman, Lord Saville, and his Senior Inquiry Manager demonstrated it at one of the plenary sessions of the 2000 American Bar Association conference in London, even hardened American litigators could scarce forbear to cheer.

Some of the technology I have described has also been a feature of some of the major criminal trials conducted in England and Wales over the last ten years. Experience has shown that the combination of a LiveNote transcript and electronic presentation of evidence (EPE) has significantly reduced the length of these trials, and made the tasks of judges, lawyers, witnesses and, above all, juries, correspondingly easier. Over the last three years we have equipped one courtroom at nine different Crown Court centres with the cabling and hardware needed for EPE, and the evaluation report on this experiment showed that this technology is here to stay.¹³

So far, so good; but there are storm clouds over the horizon. The defence in these cases is almost always supported by public funds, and public funds for this purpose are being increasingly squeezed as a result of projected expenditure greatly exceeding available budgeted resources. At the same time, prosecutors are keen to explore the possibilities of expanding the electronic presentation of evidence to more and more cases, conscious as they are of the truism (so often denied by the courtroom community), that the eye absorbs information much more rapidly than the ear. Short-term funding difficulties mean that for the time being, parties wishing to use EPE equipment in court will have to install their own for the duration of the trial.

How fair will it be when the prosecution is able, in an increasing range of cases, to display attractive graphs and scan their documents and reproduce them on a courtroom screen, to produce computerised reconstructions of critical events, and to call in aid other resources of modern technology in the visual presentation of their case, when comparable resources are not available to the defendant and his or her advisers? At what stage must the judge say: "There is not a level playing field. This trial will be unfair unless you take all these gadgets away." And if the national

through the streets of that city. Two senior judges from common law jurisdictions make up the Inquiry panel.

¹³ When I visited one of these courtrooms in 2002, at Blackfriars Crown Court in Central London, everyone seemed to be delighted with the equipment. There was a scanner in court, so that new documents could be immediately added to the database. A welcome (and novel) feature of this fraud trial was that the defendant himself could see on his monitor screen in the dock the evidence that was being presented to the jury on screen by prosecution and defence alike.

judge does not say it, what of the European Court of Human Rights at Strasbourg?¹⁴ Similar problems may well arise when some of our major insurance companies start investing in computerised graphic reconstructions of accident scenes, with which the claimant's resources cannot compete. At present, in my jurisdiction, those of us with eyes to see only see problems. We do not yet see the solutions.

We are also beginning to see the glimmerings of shoals ahead as we turn to the use of technology in aid of civil and family litigation. The most obvious lies in the disparity in IT resources between the very rich and the very poor. The very rich can search legal information databases for that "knock-out" authority that will bring their opponents to their knees; can scan all their documents into their firm's database and create electronic links with their own counsel and expert witnesses who have access to the same treasure-chamber; and can communicate effortlessly to and from court, to summon up research aid at the click of a mouse as soon as it is needed.¹⁵ The very poor, publicly funded or with their lawyers providing their services free on a "no win, no fee" basis, through one of the newly sanctioned conditional fee agreements, will have none of these advantages. David slew Goliath with a stone from his sling, but heavily contested civil litigation in the future is likely to be even more one-sided.

For the next three years our courts will have little to offer in the way of electronic case management systems or electronic filing systems. I am carefully watching the way in which overseas jurisdictions are moving forward in these fields. It is unrealistic to suppose, however, that a jurisdiction as large and unregimented (and unregimentable) as ours will be able to move smoothly into the dirigiste world of the courts of Singapore, where electronic filing is mandatory, and litigants in person and small firms use the services of bureaus set up for the purpose of aiding their efforts to cope with the requirements of the electronic courthouse.

From a court or judicial perspective, the advantages of electronic filing are obvious. In April 2003, I traveled to Singapore where a registrar of the district court showed me how he could access every document in every court file electronically. I went on to Melbourne, where the advantages of e-filing, on a voluntary basis at present, are already proving themselves, as local lawyers can

¹⁴ There is a steadily increasing volume of Strasbourg jurisprudence on the "fair trial" requirements of Article 6 of the European Convention on Human Rights. Since October 2000, English judges, too, have had to take account of the provisions of this Convention, pursuant to their obligations set out in the Human Rights Act of 1998.

¹⁵ In January 2004, there will be an experiment in the use of "wireless hotspots" at the Royal Courts of Justice and a few other court centres. This is an attempt to mitigate the problems caused by the fact that the data points being installed in the courts lead only to the Government Secure Intranet, which lawyers in private practice may not penetrate. Growing understanding of wireless technology may make it easier to enable the use of modern technology in some of our oldest court buildings, where the defenders of our heritage view the installation of cabling with a good deal of disfavour.

search the court's database online to see if the opposing party's documents have yet been filed. But what of the litigant or lawyer who is unable to take part in these new, more efficient ways of doing things?

At present we are on the nursery slopes, and only the brave or the financially well-endowed are essaying electronic contact with the courts. On the criminal justice side of things, the new Government Criminal Justice IT unit (CJIT) is developing a Criminal Justice Exchange system, coupled with new secure e-mail facilities for barristers and solicitors in private practice whose systems necessarily form no part of the new Government Secure Intranet.¹⁶

These are early days, but so far the take-up of secure e-mail facilities among solicitors' firms has been extremely slow. Many of them are dependent on support from the taxpayer through the award of legal aid to their clients, and legal aid funds are severely stretched just now. Spending decisions on IT within a firm are often delegated to the firm's IT managers (if any), and IT managers are often very slow to detect externally imposed changes in business practices that the firm's fee earners understand very well. The task of satisfying the strict internal security requirements imposed by CJIT's secure e-mail bureaucracy is not at all straightforward for a small firm not yet used to the electronic age. At a recent presentation of secure e-mail in Chelmsford, a county town not far from London, whose court centre is blazing a trail in these matters, only one local solicitors' firm was represented.

If solutions cannot be found to lawyers' apathy or unwillingness to invest, one might have to envisage criminal trials being conducted at two different speeds. Defendant One is represented by lawyers who have taken easily to the new electronic environment in which documents whizz about and do not get lost in the post or arrive after the need for them is long since over. The lawyers for Defendant Two live in the "snail mail" age, in which deadlines get missed, files get lost, and judges get irascible because of lawyers' unwillingness or inability to keep up with the much speedier processes of the modern courtroom scene. Is this justice?

The scale of the challenges we face can be illustrated by the reports of two recent pilot projects. They were both designed to improve the efficiency of case-management processes before the start of a criminal trial. In the first, which was conducted at the Minshull Street Crown Court in Manchester, staff were experimenting with a "virtual plea and directions hearing." Every case committed to that court centre from the Stockport magistrates' courts formed part of this experiment, whereby the lawyers in the case had access to a secure Web site through which they could file information about their information needs, refine the issues, provide their availability dates, estimate the likely length of the trial, and exchange information securely with the other parties in the case. Eventually, at a

¹⁶ This secure intranet embraces all the other players on the criminal justice scene — police, prosecutors, prisons, probation service, the judges, the courts, etc. These all have the resources of the state directly behind them.

preset time and date, the judge would survey the information on the site and give his directions electronically, without the need for a court hearing.¹⁷

Fortunately the project's funding permitted the project manager to go to the offices of the solicitors and barristers who were participating in it in order to teach them how to use a closed Web site. Experience of this kind is very limited at present, and there would have been no hope of taking the project forward at all but for this hands-on help, coupled with the driving enthusiasm of the judge at the centre of it.

The second project was based on three other Crown Courts. It represented an attempt to eliminate or to scale down the pretrial case-management hearing by compelling the lawyers to concentrate on the real issues in the case at a much earlier stage than usual by completing detailed questionnaires, drawn up in a structured way to elicit the information the judge would need. This was not a success. The staff in the lawyers' firms did not always cope with this new method of conducting court business, counsel who would be eventually instructed at the trial were often too busy to participate, and there were and are still a significant number of judges who feel that case management should play no proper part in the judicial function. Neither of these experiments are likely to provide long term answers.¹⁸ We still have a lot to learn.

Turning once more to civil and family litigation, I remember that at a plenary session at the Seventh National Court Technology Conference in Baltimore in August 2001, a Harvard law professor spoke of the disempowering effect that the widespread use of court technology might have for the already disempowered, in which broad category he placed many African and Hispanic Americans. It is important to consider ways to avoid such a trend.

In the field of debt-collection litigation we are now making a slow start. The Court Service's Money Claim Online (MCOL) system went live in early 2002. A claimant can now issue a money claim for up to £100,000 against not more than two defendants by using a system on the Court Service Web site, and paying the court fee by credit card in a closed area of the site. Today, more money claims are issued through this facility, mainly by litigants in person or small businesses, than through the largest urban county court centre. In early 2003 MCOL's facilities were

¹⁷ I believe that in one case he gave directions while on holiday in Florida.

¹⁸ Some of the cultural problems we face stem from practices established in bygone years, which have never been properly overhauled. Modern legislation gives a defendant particular credit for pleading guilty as early as possible in the court processes. The arrangements for paying barristers from public funds, however, are still "back-end loaded" and do not provide adequate remuneration for participation in pretrial case management. The inevitable result: pretrial case management is inadequately conducted, defendants do not receive realistic advice until the eve of the trial, and there is a haemorrhaging of public money when trials go on and on, or have to be adjourned or aborted when the well-known consequences of poor pretrial management occur.

enlarged to allow defendants to respond to a claim online, and there has been a surprisingly large uptake for this facility.¹⁹

A Court Service team is now developing a Possessions Claim Online system, operating on similar principles, which should go live during 2005. Although by necessity this service will initially be popular with property owners — such as local authorities, building societies, or finance house mortgagees seeking to regain ownership of their property for nonpayment of rent or mortgage installments — the facility of responding to the claim online is likely to be a boon to many defendants, once they understand how the system works and have access to it. In this context discussions are ongoing between Court Service managers and senior staff from the various networks of legal advice agencies.

Progress is also being made within an Online Forms project to enable litigants to download familiar court forms electronically, complete them on screen, and then send them to court with a credit card payment if a fee is payable. Visitors to our Court Service Web site in 2004²⁰ will see that there are currently only six courts designated to receive e-business, and only if no fee is payable when the relevant document is filed. We hope to expand this service greatly over the next two years and to solve the fee problem at the same time.

Provision for the lay users of a court is also being enhanced by the XHIBIT system — an information system being developed for use in our Crown Courts. An early version of XHIBIT has been running for nearly two years at Chelmsford and two other small court centres in Essex. A clerk in the courtroom records the different stages of a Crown Court case — prosecution opening speech, first prosecution witness, first police witness, defence opening speech, defendant giving evidence, summing up, verdict, etc. This information immediately appears on screens in public places throughout the courthouse, and on a Web site to which interested parties (such as the police, the probation service, the local prosecutors, local lawyers, the local prison, etc.,) have access. It is now being developed at the Snaresbrook Crown Court, a very much larger centre in North-East London with about twenty courtrooms, in conjunction with the Criminal Justice Exchange system. Once it is up and running and is rolled out nationally, it should provide a great boon for anyone having business at the Crown Court.

A witness at the trial, for instance, can be provided with a text-messaging system that will tell him or her when to arrive at court with a good chance of not having to wait too long to give evidence. A local reception prison can learn the

¹⁹ As things now stand, once the defendant responds, the data has to be printed out and posted in hard copy to the appropriate local county court for handling as a defended action, but at least the early skirmishes can be easily conducted from someone's home or office (or a public advice agency, such as a Citizen's Advice Bureau), without any need for the intervention of a lawyer.

²⁰ To access the Court Service Web site, see [http:// www.courtservice.gov.uk](http://www.courtservice.gov.uk).

identities of those being committed to its charge long before the security van unloads new prospective inmates, often, under present arrangements, without any accompanying papers. Jurors in waiting can see the progress of the trials in the various courts, often being released on the basis that they will return when summoned back by a text message. All this seems completely benign (so long as it works).

Benign, too, are the arrangements for video links between criminal courts and prisons, which are now being taken forward very quickly. In the last two or three years, 170 magistrates' court centres and nearly thirty Crown Court centres have been equipped with this facility. This summer the Central Criminal Court in London ("the Old Bailey") was closed for four weeks while all the necessary works were installed, both for video links and for the new IT infrastructure.

The facility is proving popular with the judges because it enables them to manage their lists more easily without being held up because security vans arrive late, or not at all.²¹ It is popular with the police who are saved the expense and risk involved in accompanying high-security prisoners to court for short pretrial hearings.²² And it is popular with prisoners, because they do not have to get up very early, hang about at a court an interminable length of time for a very short hearing, and return to prison late, only to find that all their possessions have been turned out of their cells to make way for a new inmate. It is less popular with lawyers, and we still have a good deal to learn before we can be sure that the lawyer-client interface is not being dangerously impaired in the quest for economy and efficiency.

Between August and December 2003, this equipment was installed at twenty-seven major Crown Court centres.²³ Awareness events were held for judges and lawyers at each of these centres. They opened lawyers' eyes not only to the skills they would need for the conduct of video link hearings, but also to the other

²¹ When the Lord Chief Justice visited Winchester recently, he conducted a short criminal trial that had a very late start because the private security company failed to deliver the defendant to court on time. This is a serious contemporary problem that the use of modern technology will help to mitigate.

²² At the first pretrial hearing arising out of the murder of two young girls at Soham, a village in Cambridgeshire, angry crowds thronged the streets outside Peterborough Magistrates' Court, awaiting the arrival of the second defendant Maxine Carr, who was being driven 100 miles from Holloway Prison in North London for the short hearing. Because the security van travelled through different police areas, a new police escort had to await it at each county boundary. The case was transferred immediately to the Crown Court and for the second and subsequent hearings, the judge crossed the road to the magistrates' court to take advantage of the video link with Holloway Prison, arrangements that combined efficiency with economy and fairness.

²³ The reason why twenty-nine were not available before Christmas was because the project staff at one centre encountered asbestos problems, and another got temporarily becalmed by planning objections on heritage grounds.

possible advantages of the new technological facilities for the way they conduct their practices.²⁴

Video technology has been a familiar sight in our criminal courts for more than ten years, although by statute its use has been limited to receiving the evidence of children and young persons, and the evidence of overseas witnesses in criminal fraud trials. New legislation, which came into force in July 2002, extended its use in order to allow the evidence of vulnerable or intimidated witnesses to be given by this means. There is obvious value in saving a certain category of witnesses the embarrassment or strain involved in giving evidence in open court, and it is better to receive evidence from an overseas witness by video link than to receive no evidence at all. Experience has shown, however, that this evidence lacks the immediacy of live evidence, particularly given the inferior quality of the equipment traditionally supplied to the courts. Many Crown Court judges believe that the members of the jury have acquitted in cases where they might well have convicted if they had been able to establish the same rapport with a live prosecution witness in the witness-box as they established with the defence witnesses.²⁵

As I have said, significant funding is now only available for criminal justice ICT. A small experiment involving the use of video technology in civil and family courts was started three years ago, and enough was learned to make us want to extend its use in the future once we have found our way through the funding maze. At present, these facilities are available at about ten court centres. They are invaluable in cases where distances or disability make travelling to court disproportionately expensive or impractical. They are used frequently in civil cases for evidence by prisoners, or by witnesses abroad, or in family cases by a witness who cannot bear to be in the same city, let alone the same courtroom, as her former spouse. Equipment of a superior quality was installed in Courtroom 38 at the Royal Courts of Justice and is frequently used.²⁶ Once again, the use of this technology

²⁴ At a book launch I attended at a leading set of London barristers' chambers before Christmas, people were chattering about the desirability of installing video equipment in chambers to enable them to conduct conferences with their clients in prison under far more satisfactory conditions than are currently available at a typical conference in a prison; and about using PowerPoint presentations of the salient features of their case to a jury, now that the courts could accommodate the technology.

²⁵ An additional problem has been created by the modern practice of allowing the child's evidence-in-chief to be given by showing a prerecorded video. This means that when taken to court to give evidence at the trial through a video link, the child is confronted immediately on screen by the antagonistic questioning of the defendant's advocate, without first being given a chance to settle down in the new unfamiliar environment by answering questions from the advocate for the Crown.

²⁶ The equipment was most notably used in a "right to die" case in early 2002, in which the President of the Family Division received the claimant's evidence, watched by the public and the news media in court over a video link, from her hospital room; received the rest of the evidence and counsel's submissions in court, watched by the claimant from her bed; and then gave judgment from Birmingham, just before Easter, on a three-way link.

seems to be almost entirely benign. In 2004, it will be possible to receive submissions in the Court of Appeal over a video link in appropriate cases.²⁷

So far, so good. And yet . . . how can we take forward this revolution in an orderly way so that people's expectations can be managed effectively, the courts do not become flooded with electronic material with which they cannot cope, and those who are already excluded in many ways do not feel even more excluded?

My main concerns today centre round the handling of defended business in all our courts, and the fact that our organisational structures are not fit for their purpose in an electronic age. Couple this with the budgetary constraints faced by publicly funded litigants, and all the multitudinous constraints faced by litigants in person, and one has the makings of a smorgasbord of electronic chaos and possible injustice, unless we develop better management and funding structures.

One of the great advantages we have in England and Wales stems from the fact that we do not possess a federal system. We have a single court system and a single set of procedural rules, and once a new application of court technology has been tried and tested, it is available for roll-out across the entire country, with all the advantages of economies of scale this brings with it. Wisely, the Court Service has proceeded slowly. Some pilot projects showed inherent weaknesses, and have been dropped. Others showed evident promise, and point the way forward to the future. Sometimes ministers have given a green light to a national roll-out, provided the project passes its preliminary stages with flying colours. Sometimes there is a red light (for a period measurable in years rather than months) because funding cannot be made available for everything at once.²⁸

It is understandable that we cannot proceed everywhere at once, and it is already apparent that it would have been a mistake to propel lawyers, court staff, and judges too fast into an electronic future before they had first learned to swim.²⁹

²⁷ This is particularly important in a jurisdiction where there is a single Court of Appeal for the entire country and the cost of traveling to London and paying for accommodations there is disproportionately high in the context of a short preappeal hearing in which the litigant lives 250 miles away.

²⁸ In the Government's SR 2002 Spending Review, which covered the years 2003–2006, it was made clear that there would be no central funding available for digital audio recording, electronic presentation of evidence, or videoconferencing (apart from projects that had already been approved). Nor would central funding be available for "enabling applications," so that the English courts would have to make do with their current, inadequate, case-handling software for a further four years.

²⁹ A Training Needs Analysis conducted by the Judicial Studies Board in 2002 showed that about one-third of our full-time judges possessed IT competences that could fairly be described as rudimentary. A programme of residential training courses was mounted during 2003 to address this deficit, and the position will be reviewed in April 2004. In the meantime, a questionnaire addressed to all the part-time judges on the North–Eastern circuit during 2003 revealed that those approaching the full-time judiciary already possess a significantly higher proportion of IT skills.

We have learned a lot in the last four years, and my trips abroad — including a trip to Courtroom 21 in Williamsburg, Virginia in 1998 — have shown me how much we all need to learn from each other if we are to finish up with the optimal solution in our own jurisdiction. My strong suspicion is that we will need to experiment much more with different forms of public-private partnerships, as are becoming increasingly common overseas, if we are to resolve the funding difficulties that are hampering real progress outside the criminal courts at the moment. Having said this, at the centre of every system of justice are the human beings that are the important players in it. Leave them behind, and one might as well leave justice behind, too.