Advocacy challenges in the 21st century: online technology and the courts – brave new world?

Gillian Coumbe QC
New Zealand

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Introduction

1. According to a recent survey, most New Zealand lawyers are under the age of 45.[1] Certainly our conference photographs are. For those of us of more advanced years, our main challenge in the 21st century may be how much of it we get to experience. Keith Richards' quip at a recent Rolling Stones concert seems apposite: "I'm so happy to be here. I'm just happy to be anywhere".

2. Four major trends are likely to drive rapid change in the way we practise as advocates:[2]

   - technology;
   - globalisation;
   - changing client expectations; and
   - the spiralling cost of access to justice.

3. The first of these, technology, is my focus today. Technology continues to advance at a dazzling pace. We have become a culture obsessed by the internet and our smartphones. We are permanently plugged in, and tuned out. Recent futuristic movies such as "Her", Spike Jonze's cautionary tale of electronic seduction (where sad sack Theodore dates his computer operating system), present a chilling glimpse of where we may be heading.

4. I am going to discuss two aspects of online technology, each of which will pose continuing challenges for advocates:

   (a) The increasing frequency of remote appearances in the courtroom. Will fully online civil hearings eventually become the norm, as our Solicitor-General has recently predicted? Virtual justice? Where should the digital line be drawn?

   (b) The growing social media beast. Online media has spawned increasingly rancorous personal attacks on judges and lawyers. This has implications for the Bench and Bar relationship, the dignity of the courts, and the rule of law.

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1 Data prepared by Statistics New Zealand for the New Zealand Law Society: https://www.lawsociety.org.nz/news-and-communications/news/august-2014/majority-of-lawyers-aged-under-44.

2 See, for example, the Canadian Bar Association, *Futures: Transforming the Delivery of Legal Services in Canada*, August 2014; Richard Susskind, *Tomorrow's Lawyers. An Introduction to Your Future*, Oxford University Press, 2013.

5. Technology brings huge advantages, but recent controversial events in New Zealand illustrate its accompanying risks. I am referring to the hacking of private emails and Facebook messages by "Whaledump" (aka "Rawshark"), and their publication in the book *Dirty Politics*[3] and online.[4] The hacked material has also exposed the manipulative use of social media by political attack bloggers such as Cameron Slater.[5]

Virtual reality in the civil courtroom

6. New Zealand courts, like those in Australia, Canada and the UK, are embracing 21st century technology, as they must. This will escalate, and we can expect to see growing use of electronic tools such as e-filing, real time transcription, multi-media briefs and submissions, portable court records, and online case management systems. The Supreme Court of Victoria (the poster e-court in Australasia) is already piloting paperless electronic trials in large commercial cases, and is aiming to become paperless by 2016.[6] In New Zealand many advocates still trundle up to court with trolleys of documents, while others are weighed down only by their ipads. Change is not as rapid here, largely due to constraints on the funding and resourcing of the courts. The courts need the technology to keep up with the commercial world. Advocates will, in turn, need to bolster their technical skills to keep up with the courts.

7. Remote or virtual appearances, where some of the participants – counsel, witnesses or judges – appear by video link, in both criminal and civil cases – have been commonplace for many years, especially in Australia and Canada where there are geographic constraints. Video link is also increasingly being used at all levels of the New Zealand courts. Usually one or more judges still sit in a conventional public courtroom. Its great utility in appropriate cases is clear, although investment in upgrading the current technology is needed.

8. Whilst the selective use of video link has obvious advantages of convenience, the big question is where is the line ultimately to be drawn? We are already abandoning the common law tradition of a continuous public oral trial. As we continue further along that path, we must at least reflect on what we are doing.[7]

9. Technology will soon provide the capability for the entire hearing to be moved from the physical courtroom into the online world. Justice by skype? Our Solicitor-General has predicted that within our lifetime fully online hearings (preliminary and final) will become the norm in civil litigation, and that in person hearings will be rare. Online dispute resolution (ODR), such as e-mediation, already exists.[8] There is a ready

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3 Nick Hager, *Dirty Politics. How attack politics is poisoning New Zealand's Political Environment*, Craig Potton Publishing, August 2014.

4 The publication of the hacked communications has so far, in a few short weeks, lead to a government inquiry, the resignation of a Minister, and an inquiry by the Inspector-General of Intelligence and Security.

5 An application by Mr Slater for an interim injunction to stop the further publication of information hacked from his computer was heard by the Auckland High Court yesterday, 5 September 2014. The application was only partially successful. The interim injunction prevents an unnamed fourth defendant, the hacker Whaledump, from publishing any further hacked material. It does not apply to the *Dirty Politics* book, or to hacked information already held by the other defendants, three media outlets.

6 The Hon Justice Marilyn Warren A C, Chief Justice of Victoria, "Open Justice in the Technological Age", speech on the occasion of the 2013 Redmond Barry Lecture, 21 October 2013.

7 The Hon Justice Michael Kirby, "The future of the courts – do they have one?" (1998) 9(2) Journal of Law, Information and Science 141.

8 Susskind, *Tomorrow's Lawyers*, above, n 2, pp 101-102, 115-116.

justification for online court hearings in international or regional courts, and in multi-jurisdictional cases. Perhaps also for non-contentious interlocutory hearings. But if this were to become the norm for substantive hearings in domestic civil cases it would have significant implications for the status of the courts, and for the way advocates work. The courts' civil jurisdiction, equally with the criminal jurisdiction, underpins the rule of law. We should not unquestioningly follow the lead of technology:

(a) The hearing in a physical courtroom is an important symbol of our society's commitment to open justice, public accountability, and democracy. Moving entirely into the online world may risk diminishing the solemnity and status of the courts as a branch of government.

(b) Online hearings may be seen as threatening the fundamental right to a fair and public hearing.[9] Participants may feel short-changed by the lack of a physical meeting with the judge and opponents. Perceptions of the reliability and credibility of evidence may be affected. Witnesses, counsel and judges may each feel disadvantaged by a sense of disconnection and lack of immediacy. Technology can introduce distortion and remove some of the non-verbal and visual cues that are often relied upon in the courtroom. These concerns would all need to be explored.

(c) For advocates, online hearings would add yet another layer of impersonality to our already digitally controlled lives. Will working days spent peering at a screen become the new norm? In person hearings foster a collegiate spirit among advocates, and between Bench and Bar. That will be more difficult to achieve in an online setting. As Boris Johnson once said, people like to see other people up close. Furthermore, the tradition and art of oral advocacy, already eroded by the rise of written submissions and briefs, and by shortened hearing times, will be further diminished if counsel's role is reduced to that of a mere online presenter.

(d) What will happen when there is a catastrophic technical malfunction, or a security failure? Again, recent events demonstrate that the internet, like the Titanic, is not invulnerable.

10. Unplugging is clearly not an option. Technology has too much to offer for us to go completely Luddite. But as the courts continue to adopt new technology, we need to assess the implications, so that change occurs in a manner harmonious with the courts' basic mission.

The social media beast

11. The explosive increase in the use of social media, such as Facebook, Twitter and blogs, pose new challenges. These online platforms bring significant benefits, but they also have a downside. In New Zealand and Australia they have driven a huge increase in unfair and highly personal criticism of the judges. Advocates too, especially those appearing in high profile cases, are more frequently subjected to personal attack. When I

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[9] Susskind, *Tomorrow's Lawyers*, above n 2, pp 102-105. Susskind argues that, on the face of it, there are no "knockdown objections" that should call a halt to the ongoing and advanced computerization of the courts, although he accepts that "more empirical research and analysis are needed." His view is also based on an assumption (p 103) that virtual courts and online hearings will be confined to preliminary hearings, and that most final trials will be conducted in the traditional manner.

began to practise law in the 1980s this kind of public disparagement was rare. Criticising a judgment is of course a perfectly legitimate expression of freedom of speech. But the splenetic online tirades go well beyond that. This trend has been fuelled by the decline of specialist court reporters, and the rise of citizen 'journalists' and bloggers who are not bound by the standards of the professional media.

12. Personal attacks assume new proportions in an online setting, because of the following:

- Anonymity. This tends to bring out the worst in people.

- Ease of access to technology. The *New Zealand Herald* reported this week that mobile device use has skyrocketed. Now 75% of New Zealanders own a smartphone, and 50% have a tablet. We are connected 24/7.

- The risk of going viral. A few days ago, when President Obama debuted his new tan suit, Twitter erupted in condemnation. Over 4,000 tweets were posted during his press conference: hashtags #yeswetan and #theaudacityoftaupe. Fortunately he had refused to wear the matching hat.

  And when Dr Clare Hogan executed that heroic bungy jump from the Kawarau Bridge last night, the Twittersphere in Dublin was doubtless in a frenzy within seconds. (Hashtag #waleoilbefecked?)

- Permanence. Online comments, once out there, are difficult to police and remove.

13. Rogue blogs have sprung up, here and in Australia, dedicated to lashing out at judges, especially in the areas of sentencing and family law. Some of these bloggers are also well known obsessive litigants. Their extreme comments are highly derogatory. In addition, political attack blogs, like Cameron Slater's "Whale Oil Beef Hooked", frequently contain "screaming headlines"[10] assailing the judiciary. To get the flavour, it is unfortunately necessary to refer to one or two. Slater's recent post headed "Another Dud Judge" is an offensive diatribe claiming that our judiciary "think crims need a hug instead of a good long stretch".[11] There is much worse out there.

14. In the face of these unabating outpourings, the judges stoically say that they uphold the right of the public to comment, and to participate in debate. Just yesterday one of the judges here said that such attacks "come with the territory". But it is likely that most judges who experience this kind of highly publicised personal criticism would feel it keenly, as would their families.[12]

15. What is the answer? In New Zealand our harassment, contempt and media laws are under review by the Law Commission[13], and will need to be boosted to address the digital age.

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[10] The Hon Justice Michael Kirby, "Improving the discourse between courts and the media", address at the presentation of the Victorian Legal Reporting Awards, 8 May 2008, pp 4-5.

[11] Even in the mainstream media, the *New Zealand Herald*, there is a shabby 'legal' gossip column, called "Caseload". Recently Caseload contained a bilious personal attack on a judge, whose judgments were described as "Strike one" to "Strike four".

[12] The Hon Justice Grant Hammond, Judge of the Court of Appeal of New Zealand, expressed a similar view in his paper "Judges and Free Speech in New Zealand", 11 March 2010, pp 22-23.

[13] Refer Law Commission Issues Paper 36, *Contempt in Modern New Zealand*, May 2014; Law Commission Report 128, *The News Media Meets the 'New Media'. Rights, Responsibilities and Reputation in the Digital Age*, 26 March 2013.

The Harmful Digital Communications Bill is currently before Parliament. But how effectual will these measures be? The initiation of legal action may simply escalate the publicity, and provide the bloggers with a further platform to vent. Better institutional responses may be needed.

16. Advocates increasingly will need to manage their own online reputations. Judges, by convention, are not free to defend themselves or their decisions. But there is a growing case for the judiciary to become more vocal -- to speak more to the public, albeit within limits. In Australia and the UK, the courts are countering the misinformation and unfair criticism with their own informative and sophisticated websites. The Heads of Bench also give press conferences and television interviews. And the courts are beginning to engage directly with the public on social media.[14] The UK Supreme Court has joined Twitter, Youtube and flickr.[15] The Supreme Court of Victoria is on Facebook, Twitter, LinkedIn and Youtube.[16] It now has 3,612 Twitter followers. The purpose is to promote openness and communicate accurate information in an unmediated form.

17. It remains to be seen how effective these online initiatives will be, and whether the New Zealand courts will follow suit and engage on social media. There is a risk that doing so will devalue the dignity of the courts. But it is probably a risk worth taking. The reality is that a vast number of people, especially young people, now communicate and seek news online. That is where to reach them. Newspapers and television have been eclipsed by the smartphone.

18. The relationship between Bench and Bar is of fundamental importance. Because the judges themselves have limited ability to respond to personal attacks, senior counsel have traditionally had a special responsibility to support the judiciary.[17] The rule of law depends on public confidence in the courts. And as officers of the court counsel have a duty to uphold the rule of law. As the influence of the online media continues to grow, the Independent Bar will increasingly need to speak up for the judges and the courts.

Conclusion

19. Technology will continue to surge forward and bring many advantages, but it will also continue to create new headaches. The recent hacking efforts by Whaledump, and the ensuing mayhem, have highlighted some of the vulnerabilities of the online world. Will there eventually be a backlash? Will some of the vintage technology become the new technology? Apparently, in Germany and Russia paranoia about digital leaks and online snooping has recently driven a typewriter revival.[18] And a few weeks ago, in *LawTalk*, New Zealand lawyers were urged to store important, sensitive information in a physical

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[14] Some of these initiatives are discussed by the Rt Honourable Dame Sian Elias, Chief Justice of New Zealand, in "Contemporary issues for courts – demystifying the judicial process", address to the 15th Conference of Chief Justices of Asia and the Pacific, Singapore, 29 October 2013, pp 7-8. See also the Hon Justice Marilyn Warren A C, Chief Justice of Victoria, "Open Justice in the Technological Age", n 6 above.

[15] The UK Supreme Court also has an elegant, interactive website, with RSS feeds. There are now recordings of judgment summaries on Youtube. Its hearings can be watched live online, on SkyNews.

[16] The Supreme Court of Victoria also plans to recruit a retired judge to blog for the Court, to explain contentious judgments. The NSW Supreme Court is on Twitter and Facebook.

[17] The Hon Justice Grant Hammond, n 12 above, pp 13-15. His Honour noted that the profession "is not often heard from".

[18] http://www.dailymail.co.uk/news/article-2701392/Typewriter-sales-boom-Germany-thousands-basics-bid-avoid-U-S-spies-wake-NSA-allegations.html .

safe rather than a digital space.[19] Although computer hacking skills are on the rise, apparently the art of safe-breaking is in decline. A case of back to the future?

20. Cleaver Greene, of the Australian television legal drama "Rake", may have been a tad defeatist when he lamented: "bring back paper, quills and carrier pigeons". But whilst shining new technology can be seductive, it is not an end in itself. We should always ask the question: where is this innovation taking us, and is it in harmony with the essential mission of our courts and of our system of justice.

[19] Rachael Breckon, "Encryption – Look before you leap", *LawTalk*, 15 August 2014, p 13.