Trial technology

In the first part of a new series Michael Fletcher & Helen Pugh roadtest technology at trial

IN BRIEF

- Technological advances are changing the way in which trials are conducted.
- Real-time transcription is particularly well-established and is an invaluable tool.
- E-bundles and the electronic presentation of evidence have the biggest potential.

It is impossible to ignore the impact of technology on modern life. The disruptive change which technology has brought to many industries such as the taxi and minicab industry has often occurred swiftly. So too the benefits to consumers: ten years ago, no lawyer could have arrived at court via Uber, because the company did not exist.

In contrast, the pace of technological change in the court room has been slow. The concept of 'paperless trials' has been around for many years, but they are (at best) rare at county court level. It is only in this decade that significant High Court trials have, sometimes, started to use electronic bundles. While the Rolls Building in London was opened in 2011 with the technology to host paperless trials, invariably lever-arch files still appear on the shelves in its court rooms. Nearby, in the Royal Courts of Justice, which were opened by Queen Victoria in 1882, the digital age can feel eons away.

A legal community which works almost entirely electronically still conducts trials in a surprisingly paper-based way. In our view, the technology available is being underused and there remains untapped potential.

The technology

In addition to the trusty pen and paper, there are four principal strands of court-room technology available for use at trial: real-time transcription; electronic trial bundles; video-link evidence; and electronic presentation of evidence (EPE). In the High Court at least, it will now be very rare for any trial to be conducted without some or all of these technologies being used or considered.

Real-time transcription

Real-time transcription is well-established and is the most commonly used technology in High Court trials. The transcript appears on court-room monitors only a second or two after the words have been spoken, and can be scrolled through by solicitors and counsel. For better or worse, the legal team can now find a very quick answer to the disbelieving question, 'Did my witness really just say that?' simply by looking at the screen in front of them.

Given the pressure on counsel to prepare for re-examination while the witness's cross-examination is ongoing, this ability to double check the exact words spoken is potentially invaluable. In addition, the annotation of the live transcript can be particularly helpful to counsel. It is considerably more efficient to mark-up the transcript as you go, rather than relying on partial notes and recollection at the end of a long day. The ability to conduct a word-search of the real-time transcripts can also save valuable time at all stages of the trial.

But in some ways real-time transcription is of greatest benefit to those who are not present in the courtroom. A foreign-based client can follow proceedings from afar, an ill client can tune in from the comfort of their home and a busy expert can follow the evidence and provide contemporaneous commentary from their office. Solicitors back in the office can be directed to the live transcript by their colleagues in the court room itself, and asked to undertake urgent follow-up tasks; for example, to review the disclosure urgently in light of something that has just been said.

The ability to exchange messages through instant messaging can also be an advantage. Yet in practice, our experience is that a judicious whisper, nudge or post-it note are still the best ways to get the attention of counsel. Longer messages can then be exchanged through the software.

Used alongside traditional paper bundles, real-time transcription provides these clear benefits, and for those reasons alone it is commonplace in High Court trials. When used in conjunction with an electronic trial bundle, the use of hyperlinking can add real benefit – transcripts can manually be hyperlinked to the documents which were referred to in cross-examination. If this manual hyperlinking is conducted, it can be particularly useful for counsel when preparing closing submissions.

Video-link evidence

Video-link evidence can assist with the taking of evidence from witnesses, particularly where they are overseas. However, the process of obtaining permission to use video-link evidence can be complex, and local advice can be necessary to ensure that the laws of the overseas jurisdiction are followed.

The advantage of the video-link is obvious; it may permit evidence to be given by a witness who could not otherwise be present at court, and it can also reduce the cost and inconvenience of calling evidence from foreign-based witnesses in particular. The use of an electronic trial bundle can also assist, because it avoids the need to courier hard copy bundles overseas and the court can have greater confidence that the witness is looking at the correct document (and, where necessary, the translation of the correct document). While there is the inherent risk of a technical issue with the link, that risk should be low if the facilities are tried and tested. Much depends on the quality of the connection where the witness is based.

Notwithstanding the myriad of benefits, it remains the case that video-link evidence is generally seen as undesirable because the witness is not 'in the room'. Judges and counsel like to be able to see witnesses; assessing a witness's credibility involves subconscious assessments of tone and body

language as well as assessing the content of their evidence. The witness will also have a better sense of the proceedings, and the context of their evidence, when sat in a court room rather than in a far-off meeting room. The preference for live evidence, rather than video-link evidence, is therefore likely to persist.

E-bundles

Electronic trial bundles ('E-bundles') have been increasingly used in the English High Court in the past few years, notably in the well-publicised trial of *Berezovsky v Abramovich* in 2011.

The typical E-bundle solution is cloud-based, and provided by a specialist supplier. Documents may be uploaded into it and arranged in sub-bundles which reflect the typical structure of a trial bundle, eg a pleadings file, a witness statements file, and so on. Each document will carry a unique ID number and page numbering, so that documents and pages can easily be referenced in submissions.

This reflects the basic features of a hard copy trial bundle, with the obvious advantage of portability; it can be accessed anywhere with a WiFi connection, without lawyers needing to transport boxes of documents around.

However, the software comes with significant added functionality:

- Cross-references can be hyperlinked so that, for example, each exhibit reference in a witness statement contains a link to the actual exhibit.
- Key-word searches can be conducted across the bundle.
- Duplicate documents within the trial bundle may be identified and removed.
- Updates to the bundle may be added easily, simply by being provided to the trial bundle solution provider who will upload the updates centrally (rather than hard-copy updates being delivered separately to counsel, opponents and the court).
- Customised bundles can easily be created, for example allowing counsel, with a simple click, to add to cross-examination bundles or to identify documents they may wish to refer to in submissions. Alternatively, solicitors can create bundles within the solution for counsel, without the delays and cost of photocopying and couriers.
- Legal teams can collaborate, annotating documents and sharing comments on documents within the bundle, without their opponents or the court having any access to their work. Sections of documents can be highlighted, comments can be added to the evidence, and accordingly the work product of the team can be combined in a single, easily accessible bundle. Solicitors and barristers can look at the same document at the same time, even if working from home. A note made by one can be marked private or seen by others and is retained on the bundle for the whole team to see.

This functionality offers a real potential benefit in any case where teams of lawyers and counsel need to collaborate, or where there is a significant volume of documents in the trial bundle.

Electronic presentation of evidence (EPE)

EPE involves, at a basic level, documents being shown on monitors or projection screens to the court. In the court room, monitors can be placed before the judge, witnesses, lawyers and clients. Where the facilities permit, a full size projection screen may also be considered.

This allows everyone to see the same page at the same time, with a number of inherent advantages:

- It speeds up the process, compared to several people all searching through paper files for the same document at once. Over the course of a trial, this can create a tangible time-saving, which in turn allows the parties to use their allotted court-time more productively.
- It potentially reduces stress for witnesses and experts, who simply have a document shown to them rather than having to search for it in bundles.
- It gives the court and counsel certainty that everyone is looking at the correct document.
- It can be useful where displaying documents that are not static; for example, the formulae behind an Excel spreadsheet may be relevant, and may be best shown in native format. Complex project planning documents may also be better shown on EPE, and it can be used for video footage.

EPE also means that evidence can be presented in more innovative ways. As an example, in a complex construction case, it may allow an expert witness to use a visual presentation of how a certain structural defect developed over time, and caused wider damage. This may be far more effective than seeking to explain the point in words alone. Lawyers should therefore think laterally when preparing for trial or arbitration; is there an issue which can better be explained visually?

Looking ahead, virtual reality may allow the recreation of particular events, for example allowing court rooms to visit the scene of the crime. The technology should already exist to permit this, and the court rooms of the future are likely to see more virtual reality. However, an obvious stumbling block may be the inherent subjectivity behind virtual reality; it has to be created by someone, and so any court will need to be satisfied that it reflects actual reality. Costs may also prove a barrier.

At present, the main difficulty with EPE can be that individuals still prefer paper. Under pressure, witnesses may feel more comfortable with it, and it allows them to see the document as a whole so that they can understand the context of the particular page they are being asked to consider. Legal teams may also end up looking at their own trial bundles; in part for the same reason as the witnesses, so that they can review the full document rather than simply the page on the EPE screens. Also, it is only by opening a document in an electronic trial bundle that a lawyer can check whether they have already made notes on that document.

> *"Used alongside traditional paper bundles, real-time transcription provides these clear benefits, & for those reasons alone it is commonplace in High Court trials"*

In practice, our experience is that EPE screens can be something that is looked at by lawyers in conjunction with their own bundles, rather than in isolation. For that reason, to avoid a proliferation of computer screens in the court room, it is sensible for each team to consider carefully how many EPE screens they actually require.

Summary

Many litigators will be familiar with real-time transcription and video-link evidence, but the bigger technological innovation lies in E-bundles and, potentially, EPE. It is in these two areas the court rooms are likely to change most in the years to come. Next time, we consider the barriers to the use of further technology in trials, including cost, and whether the courts could become truly paperless. **NLJ**

Michael Fletcher, Legal Director, Pinsent Masons LLP (*www.pinsentmasons.com*). **Helen Pugh**, barrister, 3 Hare Court (*www.3harecourt.com*).