

# ATITUDINI

## Social Media and the Electronic “New World” of Judges

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**Abstract:** *Courts in Australia not only have social media policies to control social media use in the courtroom, but are starting to use social media to publish judgments and court-related information. How will the interactive nature of social media affect the discourse between the court and litigants? Will social media require courts to take court “user” satisfaction into account in the provision of justice, and how is the dissemination of judgments on social media affecting public perceptions of traditional rules such as the doctrine of precedent? This discussion paper examines the future of courts in a social media world where the “like” button, and not just the legislature or stare decisis, may play an increasingly powerful role in shaping both the content of the law and the way in which courts administer justice.*

**Rezumat:** *Instanțele din Australia nu numai că dispun de politici media pentru a controla utilizarea mediului de socializare online în sala de judecată, dar încep să folosească mijloacele de socializare pentru a publica hotărârile judecătorești și informații legate de instanțe. Cum va afecta natura interactivă a mediului de socializare online dialogul dintre instanță și justițiabili? Va solicita mediul online instanțelor judecătorești să ia în considerare nivelul de satisfacție în ceea ce privește furnizarea serviciilor de justiție și cum va afecta răspândirea hotărârilor judecătorești în mediul online percepția publică asupra regulilor tradiționale, cum ar fi doctrina precedentului judiciar? Această lucrare analizează viitorul instanțelor într-o lume a mass-mediei sociale, în care butonul “like”, iar nu doar legislativul sau precedentul judiciar, poate juca un rol din ce în ce mai puternic în modelarea atât a conținutului legii, cât și a modului în care instanțele administrează justiția.*

**Keywords:** social media interactions, courts, judges, doctrine of precedent.

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<sup>1</sup> Judge, District Court of New South Wales, 2001. This is a revised version of a presentation for the 23<sup>rd</sup> Biennial Conference of District and County Court Judges of Australia and New Zealand, 8 – 11

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## 1. Introduction

Social media use by judges, court administrators, and courts, although viewed with concern only a few years ago,<sup>2</sup> is now hailed as an “exhilarating opportunity for the Courts to tell the public we serve who we are”<sup>3</sup>. Over the past three years, courts in Australia and in New Zealand have set up social media accounts<sup>4</sup>, allowed social media reports of court proceedings and dealt with the tender of social media evidence in a wide range of civil and criminal proceedings.

However, acceptance of technological change (and not just in relation to social media) by the courts in Australia has been uneven and at times resisted.<sup>5</sup> Although social media use is commonplace in business and homes, many judges<sup>6</sup> and court administrator<sup>7</sup> have raised questions about its impact on judicial independence and the desirability of judicial or court use of this informal, public, form of communication. Longstanding unease about the adequacy of media



court reporting has also played a part.<sup>8</sup> Their fear is that social media is not a “new world”, but the end of the world, hence the humorous title given by the Hon. T F Bathurst AC to his 2012 Warrane Lecture speech: “Social Media: The End of Civilisation?”<sup>9</sup>

There is good reason for caution about social media use by courts and judges, both for work and private purposes. Even ardent proponents of social media acknowledge that, while the judiciary must confront changing public expectations of judicial engagement and communication, the courts must still preserve the fundamental elements of the rule of law.<sup>10</sup>

<sup>2</sup> Lucy Reed, “Judiciary silenced out of court”, *the Guardian*, 15 August 2012; “Judges banned from blogging or tweeting about cases”, *the Telegraph*, 15 October 2012. The NSW Attorney-General, Mr Greg Smith SC MLA, considered banning social media reporting from the courts in 2012: New South Wales, Parliamentary Debates, Legislative Assembly, 21 December 2012.

<sup>3</sup> The Hon. Marilyn Warren AC, Chief Justice of Victoria, 2013 Redmond Barry Lecture, “Open Justice in the Electronic Age”, 21 October 2013 stated: “Technology and social media present an exhilarating opportunity for the Courts to tell the public we serve who we are, what we do, how we do it and why the rule of law matters.”

<sup>4</sup> See the list of courts with social media accounts set out below.

<sup>5</sup> Chris Paver, “The Courts versus Twitter” (2013) 32 *Communications Law Bulletin* 6 reports attempts in Australia and the United Kingdom to ban Twitter use in court. Concern about social media use in the United States resulted in bans in some States; later, Formal Opinion 462 from the American Bar Association (February 21, 2013) recommended “judicious [sic] use” of social media by judges.

<sup>6</sup> M Krawitz, “Can Australian judges keep their ‘friends’ close and their ethical obligations closer? An analysis of the issues regarding Australian

judges’ use of social media”, (2013) 23(1) 23 *JJA* 14 – 34.

<sup>7</sup> M Krawitz, “Summoned by social media: why Australian courts should have social media accounts”, (2014) 23 23(1) *JJA* 182 – 198. However, Pamela D Schultz warned of the need for courts and judiciary to maintain their integrity and independence while attempting to become more “media savvy”: “Trial by Tweet? Social media innovation or degradation? The future and challenge of change for courts”, (2012) 21(1) *JJA* 29 – 36.

<sup>8</sup> See for example Pamela D Schulz and Andrew J Cannon, “Public Opinion, Media, Judges and the Discourse of Time”, (2011) 21(1) *Journal of Judicial Administration* 8–18.

<sup>9</sup> Warrane Lecture, University of New South Wales, 21 November 2012.

<sup>10</sup> A Blackman & G Williams, “Australian Courts and Social Media” (2013) 38 *Alternative Law Journal* 170 at 170 – 1 note concerns expressed by Australian courts about court use of social media, such as the “collaborative and participatory” nature of social media, which is “antithetical to traditional judicial processes”. See also S Rodrick, “Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public” (2013) 19 *Deakin L Rev* 123.

Some commentators warn that the shady (indeed illegal) nature of the businesses which created social media (as well as most other 20th century communications developments),<sup>11</sup> the security risks<sup>12</sup> and the interactive nature of social media<sup>13</sup> render its use by courts, and in particular by judges, a two-edged sword.

Whether courts and judges use social media or not, social media has “utterly transformed”<sup>14</sup> the way people communicate and business is done. The Hon. Marilyn Warren AC, in her recent speech to the Federal and Supreme Court Commercial Seminar,<sup>15</sup> explains this change as part of the necessary development of Australia as “a national and regional commercial hub”, in which technological innovation will play a vital role. Courts are one of those businesses.

This “commercial” view of court services is probably just as controversial as the uses of social media, which are bringing these changes into play. Social media will require courts to reconsider

traditional views about court services and, in particular, what constitutes satisfactory case management in the eyes of court users rather than courts, as well as communication with the public generally. Social media’s impact on the court is not simply as a new means for publishing judgments and information, but also on how judges and courts perform their activities in an electronically-connected community where the users of the system can, and will, respond directly to how justice is being administered.

## 2. Social Media Place in the Technological Revolution

It is important to see social media in its proper context as one of a series of interrelated technological innovations that will fundamentally alter all aspects of how courts carry out their functions, ranging from research to e-courts. These developments are:

- Mobile computing and wireless technology.<sup>16</sup>

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<sup>11</sup> In other words, the porn business, which is the market force behind nearly all 20<sup>th</sup> century communications developments, including camcorders, VHS video, pay-per-view cable and satellite and hotel-based cable: Feona Attwood, “Porn.Com: Making Sense of Online Pornography”, New York, Peter Lang, 2010, p. 236. John Arlidge (“The dirty secret that drives new technology: it’s porn”, *the Guardian*, March 2002) noted that by 2002 there were already 80,000 ‘adult’ and prostitution sites with total profits of more than £1 billion – more than any other e-commerce sector at that time. Many of the first social networks were, however, not pornographic but dating and chat sites, such as IRC (developed in 1988), ICQ and other messaging programs.

<sup>12</sup> S Paquette, “Identifying the security risks associated with government use of cloud computing” (2010) *Government Information Quarterly* 245.

<sup>13</sup> Wu He, “A review of social media security risks and mitigation techniques” (2012) 14 *Journal of Systems and Information Technology* 171; S Machkovetch, “Hacked French network exposed its own passwords during TV interview”, *Ars Technica*, 11 April 2015.

<sup>14</sup> P Keyzer, “Who Should Speak for the Courts and How? The Courts and the Media Today”, “The courts and the Media: Challenges in the Era of Digital and Social Media”, P Keyzer, J Johnston and M Pearson (eds), p. 6; the emphasis on “utterly” is his, not mine.

<sup>15</sup> The Hon Marilyn Warren AC, Chief Justice of Victoria, “Australia – a vital commercial hub in the Asia Pacific region: Victoria – a commercial hub”, at the Federal Court and Supreme Court Commercial Seminar, 25 February 2015. The full speech is available on the court website: <http://www.supremecourt.vic.gov.au/home/contact+us/speeches/australia+a+vital+commercial+hub+in+the+asia+pacfic+region+victoria+a+commercial+hub>.

<sup>16</sup> Many courts have committees to deal with the impact of wireless technology and social media on courts. One of many in the United States is the Arizona Judicial Branch, established on 7 March 2012 to advise the court on rule changes and ethical issues arising from social media and Internet use, and to report to the Judicial Council. These judges’ insightful report (and arresting front page artwork) can be found at <http://www.azcourts.gov/Portals/74/WIRE/FinalWirelessReportRED.pdf>.

- Interconnectivity, notably 'the Internet of Things'<sup>17</sup> and cloud computing.
- "Big data" analysis (e.g. the use of "predictive coding"<sup>18</sup> in discovery).
- Electronic records management systems ("ERMS") for retention of electronically stored information ("ESI").
- Social media's interaction with these new forms of technology.<sup>19</sup>

Social media is, above all, one of a series of technological innovations used for communication and for doing business. The real issue underlying the court social media controversy is whether courts "do business" with "customers" (i.e. court users) in an interactive way, and whether the administration of justice is a process in which being "liked", responded to or retweeted by these court users should form any part of the courts' function (or that of a judge, even in his/her private capacity).

Setting up Court Twitter/Facebook account seems straightforward; what sort of organization would refuse to be part of

a means of communication used by everyone else? But it leads to the next issue the courts must determine, namely whether managerial techniques appropriate to other parts of the public sector are appropriate for courts. Are the judgments of courts part of the community's business and social activities in which the service user has a say, or is the court's role "part of a broader discourse by which a society and polity affirm its core values, apply them and adapt them to changing circumstances"<sup>20</sup> in a manner which is without parallel to other parts of the public sector?

The role of the courts in the public sector, and their accountability in terms of delivering justice efficiently, have been matters for debate since the issue of effective case management was first raised in the late 1980s and 1990s.<sup>21</sup> Court "productivity" in Australia is generally determined by how quickly the courts complete proceedings<sup>22</sup> rather than by business-related methods used

<sup>17</sup> Gregory J Millman explains this in "Cyber Cavalry rides to the rescue of the Internet of Things", *Wall Street Journal*, May 5, 2014. Transmissions from one device to another can occur involuntarily, but fears that electronic equipment spies on its users (G Adams, "Is your TV spying on YOU?" *Daily Mail*, 26 November 2013) appear unfounded: *Download this Show*, Australian Broadcasting Corporation, 14 February 2015.

<sup>18</sup> Predictive coding enables identification of relevant documents in large e-discoveries; see S Nance-Nash, "Predictive coding and emerging e-discovery rules", *Corporate Secretary*, 14 August 2013.

<sup>19</sup> I have based this on a similar list given by Norman H Meyer, Jr in "Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators", (2014) 6(1) *International Journal for Court Administration*, p. 2 ("Norman Meyer").

<sup>20</sup> The Hon. James Spigelman AC "Judicial Accountability and Performance Indicators", 10 May 2001 (2002) 21 *Civil Justice Quarterly* 18), rejecting the concept of the court as a "publicly funded disputes resolution centre", and as a place for business-style "managerial techniques".

<sup>21</sup> Although some commentators have claimed that case management has always existed (e.g. the

Hon. J R T Wood, "The Changing Face of Case Management - The New South Wales Experience" (1995) 4(3) *JJA* 121, cited in T Sourdin, "Judicial Management", (1996) 14 *Aust Bar Rev* 185), case management rules were not generally a feature of court management until the 1980s. Case management initially consisted of sending cases to mediation (see for example the provisions for mediation in the *Federal Court of Australia Act* 1991 (Cth)). The 1996 report from Coopers & Lybrand, commissioned by the NSW Government, significantly changed this view, as did statistics from the District Court of NSW revealing that cases were taking up to 15 years to resolve. The report divided the delays into two groups (system delays and party delays) and recommended areas for reform, all of which are still relevant today. Court inefficiency issues included inadequate computer facilities, "reluctance or lack of power of judges" to take a more active role in pre-trial proceedings, and the inherent weaknesses of the adversarial system: H Figgis, "Dealing with Court Delay in New South Wales", Briefing Paper No 31/96, NSW Parliamentary Library, 1996.

<sup>22</sup> See the 2015 Productivity Commission report online at: <http://www.pc.gov.au/research/recurring/report-on-government-services/2015/justice/courts/rogs-2015-volume-c-chapter7.pdf>.

**The principal problem for courts is not the technology of social media, but how the powerful tools it offers are redefining interactive communications between courts and the public.**

in business, such as consumer feedback. The traditional view of the court's role has been that it is not providing business, or even government, services, but explaining and dispensing justice<sup>23</sup>.

The World Bank's annual "Doing Business" reports<sup>24</sup> emphasize the role courts play in ensuring economic efficiency in business and government. The World Bank measures court and legal system efficiency differently, by emphasizing low-cost, one-stop-shop streamlining of services and the use of specialist courts. The World Bank's reports then apply a "ratings" system given by court users, resulting in a "grading" of each country's legal system. For the World Bank, the delivery of services to the satisfaction of court users is a central feature, contrary to the more traditional views expressed by many judges, such as those of the Hon. James Spigelman AC that are set out above<sup>25</sup>.

The nettle has been firmly grasped by the Hon. Marilyn Warren AC,<sup>26</sup> who has warned that "Australia's continued development as a national and regional commercial hub will require a collaborative and co-operative effort by the judiciary, the bar and the profession". Her Honor noted that "[T]he potential is there: the thriving economies of the Asia-Pacific region continue to provide exciting opportunities for Australian practitioners and courts", and that "support by Australia's superior courts of commercial litigation and arbitration will be crucial". In other words, Australian courts need to satisfy court users that they are efficient and understand business needs.

If courts are to satisfy court users (especially businesses), the questions are what these court users want, whether those needs are being met, and what can be improved – just as any other business entity would. When courts set up a Twitter/Facebook feed to publish judgments and announcements, they are participating in an interactive form of communication, where the public will be able to respond – by personal message, "like" button, emoji or some other public response. This will indeed be a "new world" of interactive communication.

The next major way in which social media will change the court system will relate to its impact on court procedure and the law. Electronically-based commu-

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<sup>23</sup> See, for example, the views of the Hon. James Spigelman AC (footnote 20), who states: "The judgments of courts are part of a broader discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This...has no relevant parallel in many other spheres of public expenditure. Managerial techniques appropriate for one part of the public sector are not necessarily applicable to another".

<sup>24</sup> The World Bank "Doing Business Reports", which commenced from 2004, may be accessed at the World Bank's website at [www.doingbusiness.org](http://www.doingbusiness.org).

<sup>25</sup> The Hon. James Spigelman AC, "Judicial Accountability and Performance Indicators" (footnote 20).

<sup>26</sup> Australia – a vital commercial hub in the Asia Pacific region: Victoria – a commercial hub", The Hon Marilyn Warren AC, Chief Justice of Victoria, at the Federal Court and Supreme Court Commercial Seminar: <http://www.supremecourt.vic.gov.au/home/contact+us/speeches/australia+a+vital+commercial+hub+in+the+asia+pacific+region+victoria+a+commercial+hub> (25 February 2015).

nication will not only affect how proceedings are case managed and run; it also will have an impact on judgment style and publishing, as judgments become available to a global social media audience. Judges will have to exercise caution in what they say on social media to avoid apprehensions of bias. Social media also may foster changes in certain legal principles and causes of action. There will be new crimes and torts, discovery and court management issues, and new courtroom set-ups – perhaps even “virtual” ones.

Additionally, courts have already had to accommodate changes to how those in court-related activities carry out their tasks if they use social media to do so, such as journalists<sup>27</sup> and “citizen journalists”<sup>28</sup> tweeting from court, trial publicity and directions to jurors. This includes having effective court social media policies for court employees and the public, as well as for judges themselves. These are problems that first became apparent with the impact of the Internet on traditional legal principles, law research and case management.

### 3. Current Use of Social Media by Australian Courts and Judges

Courts in only three States of Australia currently use social media. Judges do not have official social media accounts, although some judges (such as Justice Lasry (@Lasry08) in the Victorian

Supreme Court) identify themselves as judges in their Twitter or Facebook accounts.

In May 2011, the Supreme Court of Victoria became the first court in Australia to set up a Twitter account (@SCVSupremeCourt)<sup>29</sup> and now has a Facebook account as well. The County Court (@CCVMedia) soon followed and the Magistrates Court set up a Twitter account in July 2012. Both courts publish a wide range of public announcements as well as links to judgments and sentencing remarks.

The Supreme Court of New South Wales joined Twitter in September 2013 and has published significant judgments, a video and links to speeches. The New South Wales Civil and Administrative Tribunal joined Twitter at the beginning of 2014 and the District Court of NSW on May 13, 2015. The Judicial Commission of NSW has a YouTube site.

The Supreme Court of Tasmania published its first tweet on June 17, 2014. Other State courts do not have social media accounts, although the South Australian Supreme Court was the first court to have its own YouTube site. Queensland was the first State to develop the “eTrial”.<sup>30</sup> Practice Direction 8 of 2014, which clarifies which electronic devices may be used in courtrooms, refers to social media use in courts.

The Family Court has conducted a Twitter site (@FamilyCourtAU) since

<sup>27</sup> The first hearing to have tweeting journalists in court was *Roadshow Films Pty Ltd v iiNet Limited* (No 3) (2010) 263 ALR 215, as Cowdroy J noted in the Abstract at the commencement of the judgment.

<sup>28</sup> L J Moran explains this term in “Mass-mediated ‘open justice’: court and judicial reports in the Press in England and Wales” [2013] 34(1) *Legal Studies* 143. See also “Trial by Tweet? Findings on Facebook? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts” P Schulz and A J Cannon (2013) 5(1) *International Journal for Court Administration* at footnote 23. As Joan Evatt points out in *No Fibs*

(<http://nofibs.com.au/2013/08/08/bloggers-beware-social-media-and-the-courts/>), the definition of “journalist” in court access legislation probably excludes citizen journalists.

<sup>29</sup> For analysis of the Victorian Supreme Court Twitter followers, see A Blackham and G Williams, “Courts and social media: opportunities, challenges and impact” (2014) 17(9) *INTLB* 210

<sup>30</sup> The Hon. Paul de Jersey AC, ‘The courts and the media in the digital era’, Speech delivered at Bond University, 12 February 2011, at <http://archive.sclqld.org.au/judgepub/2011/dj120211.pdf>.

October 2012, as well as a YouTube account, and it is the only court with “Live chat”. The Federal Court of Australia uploaded a video to YouTube in October 2014 (“Mediation in the Federal Court of Australia”), but closed its inactive Twitter handle some time in 2014. The Federal Circuit Court has a Twitter account (@CircuitCourtAU9) which has not been used to send tweets.

In New Zealand, following the Media Review Panel’s report to the Chief Justice on in-court media recommendation [64] that social media “must be recognized”,<sup>31</sup> the New Zealand courts set up a Twitter account in June 2015.

The gradual spread of social media use, and the period of time over which it has been used, indicates that Australian courts are increasingly accepting that a social media presence for courts is an important part of their public functions. How will the use of social media impact on the court system?

#### **4. Social Media’s Impact on the Court System**

Social media, in the form of publication of many previously unavailable judgments, will impact the court system in four major areas – the form and content of judgments, court case management and structure, legislation and trial procedure.

##### **4.1. Changes to Judgment-Writing – Precedent, Form and Style**

Guides to good judicial writing<sup>32</sup> stress the importance of judges understanding the audience for whom they write. If

judgments are published on social media to a potentially global audience, what will be the result? Should judges simplify, or jazz up, their language for this new audience?

A recent Canadian decision may demonstrate how legal language is changing. Nakatsuru J, the sentencing judge in *R v Armitage* (2015) ONCJ 64 (CanLII), wrote the whole of his sentencing remarks in plain language, stating: “Judges write not only for the parties before them. Judges write to other readers of the law. Lawyers. Other judges. The community”.<sup>33</sup>

Nakatsuru J’s judgment is of interest not only because of its communicative qualities. Online judgment reporting makes previously unavailable judicial determinations, such as sentencing remarks and other trial-level judgments, available worldwide; the authorised reports which previously dictated what decisions were important are no longer wheeled into court on trolleys. Judges at intermediate and local level can see how other judges are judging. What will happen when parties and the court are faced with an unattractive or out-of-date appellate decision, as opposed to an alluring first-instance alternative, perhaps even from another country?

##### ***Precedent and the Common Law in the Age of Social Media***

Judges have not always wanted their judgments recorded for posterity<sup>34</sup> but, once accustomed to it, they expected only the best to be published in authorised law reports. This has meant that, over the ensuing centuries, only a limited number

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<sup>31</sup> Recommendation [64]; the report may be accessed at: <http://www.courtsofnz.govt.nz/In-Court-Media-Review/Report%20to%20Chief%20Justice%20-%203%203%2015.pdf>.

<sup>32</sup> R Sheard (ed), “A Matter of Judgment: Judicial Decision-Making and Judgment Writing”,

Judicial Commission of NSW (2003); M Kirby, “On the writing of judgments” (1990) 64 ALJ 691.

<sup>33</sup> For the response to this decision in Canadian legal circles: see “CanLII Connects”, 6 March, 2015: <http://canliiconnects.org/en/commentaries/36210>.

<sup>34</sup> Lord Cockburn, “Memorials of his Time” (1909) at p.158.

of judgments, generally at appellate level, were able to shape the law.

Until courts began publishing online, precedent principles were reinforced by the selective basis upon which only a limited number of such judgments was made available for publication in authorised reports. Some jurists, such as the Hon. Sir Anthony Mason AC, considered this imposed undue rigidity on the development of the law.<sup>35</sup>

Although the terms “precedent” and “common law” seem interchangeable, this is not in fact the case.<sup>36</sup> The doctrine of precedent is of recent origin and has undergone significant change since its acceptance in 1898.<sup>37</sup> The identification of precedent is not static, as the changes to appeal rights to the Privy Council (*A A Tegel Pty Ltd v Madden* (1985) 2 NSWLR 591 at 601, 608 and 615 – 6) and views on the status of interstate appellate court judgments<sup>38</sup> demonstrate.

However, despite criticism from academics<sup>39</sup> and even judges,<sup>40</sup> precedent law continues to dominate the common law system.

Should courts tweet first-instance judgments at all? Such decisions are not binding as precedent, and they may detract from the traditional role of the appellate court in determining precedent, especially if the first-instance judgment raises a novel or compelling issue of law for which the appellate courts are not yet

ready (as was the case following publication of *Bleyer v Google Inc* [2014] NSWSC 897, where a first-instance judge struck out proceedings on the basis of lack of proportionality). This could cause confusion and uncertainty. The Hon. Michael Kirby AC, speaking at the 2006 International Association of Comparative Law conference,<sup>41</sup> warned:

“One development which has had an enormous, and yet largely ignored, effect on the use of precedent in Australia is the Internet...The challenge for lawyers and judges in common law countries is how best to use the increasing accessibility of precedent to strengthen legal analysis and the just development of the law, without being swamped by the sheer quantity of legal information that is now at our finger-tips.”

However, the most significant changes caused by social media will occur in the area of court policy, case management and the conduct of trials.

#### 4.2. Social Media, Court Policy and Case Management

Courts are only one of a series of governmental bodies which must show openness in terms of making electronic information available to the public. The “transparency” effect of social media will be a significant issue. For example, court document retention policies will need to include social media,<sup>42</sup> and it may be wise

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<sup>35</sup> This extra-curial statement comes from a speech quoted by Tony Blackshield in “Judicial Reasoning”, a chapter in Blackshield, Coper & Williams (eds.), “The Oxford Companion to the High Court of Australia”, online edition 2007, at p. 373.

<sup>36</sup> Ewoud Hondius (ed), *Precedent and the Law*, Reports to the XVIIth Congress, International Academy of Comparative Law (2006), Bruylant, 2007, p. 9.

<sup>37</sup> *London Tramways Co v London County Council* [1898] AC 375.

<sup>38</sup> The Hon. Mark Leeming, “*Farah* and its progeny: comity among intermediate appellate courts” (2015) 12 *TJR* 165.

<sup>39</sup> For early examples, see Peter Wesley-Smith, “Theories of Adjudication and the Status of Stare

Decisis”, L Goldstein (ed.), *Precedent in Law*, Clarendon Press, 1987, pp. 67 - 68; more recently, see the critiques by N Garoupa and C G Liguette, “The Syndrome of the Efficiency of Common Law” (2011) 29(2) *Boston University Law Journal* 287.

<sup>40</sup> Lord Wright, “Precedents” (1943) 8(2) *Camb L J* 118, criticizing the (now relinquished) rule that the House of Lords was bound by its own decisions.

<sup>41</sup> Ewoud Hondius (ed.), *loc. cit.*, footnote 67, p. 82.

<sup>42</sup> Paul T Jaeger, J C Bertot, “Transparency and technological change: Ensuring equal and sustained public access to government information” (2010) 27 *Government Information Quarterly* 371 at [http://late-dpedago.urv.cat/site\\_media/papers/science\\_2.pdf](http://late-dpedago.urv.cat/site_media/papers/science_2.pdf).



for courts to consider using locked or secure accounts to which only those authorized may respond.

Courts of the future will need to consider new rules for electronic publications (including social media) and use of modern technology to permit remote-access appearances. Thanks to the interactive nature and extensive publication range of social media, court users will quickly learn what is available in other courts and can use social media to complain if dissatisfied. Courts will need to develop policies to cope with adverse criticism of courts and judges on social media.

#### ***A Court Social Media Compliance and Security Program***

Whether or not a court sets up a social media site, it will have to acknowledge that many of the court staff (and judges) use social media, and set up a compliance programme. Courts should also be consulted about whether staff restrictions on the use of social media applicable to other public servants, are appropriate for court staff (e.g. associates) as they increasingly use social media in their work. Security will be a vital issue, requiring constant vigilance, and employees must be made aware of this.<sup>43</sup>

#### ***E-courts, e-Filing, e-Case Management and e-Apearances***

Social media's impact on the court administrative system is part of the

electronic world. In that world, is the courtroom a service, or a place? Will a social media address be sufficient address for service? Will social media platforms such as Skype and Twitter Periscope replace the physical courtroom entirely? This is the question posed by Richard Susskind in his analysis of the courtroom of the future,<sup>44</sup> which he foresees being not only paper-free but place-free. He warns:

“For tomorrow's lawyers, appearance in physical courtrooms may become a rarity. Virtual appearances will become the norm, and new presentational and advocacy skills will be required.”<sup>45</sup>

#### **5. Changes to Research Methods and to Court Libraries**

“Future libraries will be valued more for services than for book collections.” – David Lankes<sup>46</sup>

The role of the court library will change from book provider to services adviser. This will include not only research advice<sup>47</sup> but new services such as “e-lending”.<sup>48</sup> As the worlds occupied by academics and judges grow closer, judges will find social media site searches particularly useful for finding just-published articles, by checking or following court judgment sites, BAILII and/or other judges. There are also many law “apps”.<sup>49</sup> YouTube, the second biggest search engine in the world, is also a useful resource.<sup>50</sup>

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<sup>43</sup> Wu He, *loc. cit.*, at p. 176 – 7.

<sup>44</sup> Richard Susskind, “Tomorrow's Lawyers”, Oxford University Press, 2013. Quotations are taken from the extract published in *the Guardian* on 29 January 2013.

<sup>45</sup> Richard Susskind, *loc. cit.*

<sup>46</sup> The Future of the Library and Information Science Profession”, ALIA, 2014, p. 5.

<sup>47</sup> See C A Levitt and M E Rosch, “The Cyber

Sleuth's Guide to the Internet”, 13<sup>th</sup> ed., MCLE, New England, or the free resources from Pace Law Library at <http://libraryguides.law.pace.edu/free>.

<sup>48</sup> [http://alla2014.com.au/files/4114/1499/5441/Thursday\\_1130\\_Anderson\\_Cohen.pdf](http://alla2014.com.au/files/4114/1499/5441/Thursday_1130_Anderson_Cohen.pdf).

<sup>49</sup> See the Monash University app guide at <http://guides.lib.monash.edu/law/apps>.

<sup>50</sup> There are entire university online courses, such as Harvard University's Chinese history course

## 6. Social Media and the Trial Process

The potential for manipulation of court proceedings, inflammatory court statements or pleadings and grandstanding long predates social media.<sup>51</sup> The problem is that social media could make it easier to disrupt case management, or for the proceedings to be hijacked by unscrupulous (or simply indignant) litigants and/or their lawyers. Recent examples in the United Kingdom include the naming of persons covered by suppression orders, publishing material about innocence (or guilt) and contamination of identification evidence. The potential for misuse of case management of the litigation by Internet publicity, including publications on social media, will be a significant issue for courts of the future, in addition to the many other impacts that social media may have on the conduct of proceedings.

### 6.1 Evidence Issues

To date, “practitioners in the Australian jurisdiction appear to have been slower than practitioners in other jurisdictions to embrace the use of social media content in litigation”.<sup>52</sup> This is particularly evident in civil proceedings, where the tender of social media evidence, requests for service by social media, and requests for it to be discovered are still relatively uncommon.

How does social media fit into the existing procedural and evidentiary rules, and what ethical issues do the gathering of information about an opponent through

social media raise? To date there has been little judicial consideration, as social media has been admitted into evidence without discussion of these issues in personal injury cases.<sup>53</sup>

There are three potential problem areas: adapting existing discovery rules to deal with electronically stored information (ESI) and social media; dealing with failure to produce social media records; and tender of social media records.

### *Managing ESI and Social Media in Discovery*

The sheer volume of ESI has added to the burden of discovery generally. Australian courts have struggled for some time to keep discovery manageable; they have moved away from the “culture of discovery”, preferring limited discovery relevant to issues (*Liesfield v SPI Electricity Pty Ltd* [2013] VSC 634 at [29], citing Victorian Law Reform Commission, Civil Justice Review, Report No 14 (2008) at Part 5) or the more stringent “necessity” test.

Voluminous e-discovery is now commonplace – soon courts will even stop referring to the term “e-discovery” with an “e” in front at all. The discoverability of social media will add to that burden in the following ways:<sup>54</sup>

- There will be a significant increase in the number of applications for preliminary discovery requiring production of social media records or, because of their ephemeral nature, for the preservation of social media records.<sup>55</sup>

<sup>51</sup> See, for example, the concerns of Flick J about submissions designed as “media releases” in *Fraser-Kirk v David Jones Ltd* (2010) FCR 325 at [4].

<sup>52</sup> P George (ed.), “Social Media and the Law”, *loc cit.*, p. 311.

<sup>53</sup> Social media entries have been successfully used to challenge plaintiff’s accounts of their ongoing disabilities in *Frost v Kourouche* (2014) 86 NSWLR 214 and *Munday v Court* (2013) 65 MVR 251.

<sup>54</sup> For other predictions see:

<http://autonomy.corporatecounsel.law.com/10-predictions-for-2015-e-discovery/>; [http://www.arikaplanadvisors.com/wp-content/uploads/2014/03/AriKaplan\\_Advice\\_From\\_Counsel\\_2013.pdf](http://www.arikaplanadvisors.com/wp-content/uploads/2014/03/AriKaplan_Advice_From_Counsel_2013.pdf) (a useful survey of 30 corporate counsel from Fortune 1000 corporations who used e-discovery in litigation).

<sup>55</sup> See *Sakr v Australian Broadcasting Corporation* [2015] NSWDC 25.

- Predictive coding will be introduced to enable the reading of mass discovery documents, including hundreds of pages of social media records.
- Information governance strategy for electronic records generally (not just social media) will be a big issue (as the phone hacking prosecutions have shown).
- Anonymous social media apps will complicate discovery, and courts will struggle to control production of evanescent records such as those originating on mobile phones.
- Will there be legislation to protect privacy in relation to social media content, or will the Australian courts follow the lead of US courts,<sup>56</sup> and develop privacy rules to protect overzealous requests for confidential material from third parties?
- Records may be held outside Australia. Many companies outsource archive retention, but doing so may be risky. News Limited, in the phone-hacking prosecutions, at one stage blamed its Indian outsourcer for its loss of millions of email and other electronically archived records.

#### ***Destruction of social media evidence***

Do the same discovery rules apply to social media at all? Some judges in the United States have taken the view that the ephemeral nature of social media is such that it should be expected for at least some to be destroyed. However, the contrary view has been taken in Australia: *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523, where the plaintiff's claim was struck out when she

produced her computer and Facebook records but not her actual mobile phones, which she admitted she had destroyed (see also *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264).

The obligation to retain relevant ESI, even in litigation such as personal injury, is a significant issue in other common-law jurisdictions, and spoliation claims are increasingly common. In *Brookshire Brothers Ltd v Aldridge* 438 S W 3d 9 57 (Tex 2014) at 22, Lehrman J of the Texas Supreme Court noted that:

“Because of the prevalence of discoverable electronic data and the uncertainties associated with preserving that data, sanctions concerning the spoliation of electronic information have reached an all-time high: Dan H Willoughby Jr et al., “Sanctions for E-discovery Violations: By the Numbers”, 60 *Duke L J* 789 at 790 (2010).”

#### ***Tender of Social Media Records***

The opposing party's social media records do not fall into the same category as surveillance video. It is an interesting question whether obligations to disclose such material prior to trial (in New South Wales, under the *Uniform Civil Procedure Rules*, Pt 31 r 10) would apply.

### **6.2 Social Media and Criminal Offences**

The uncensored, non-geographic and interactive nature of social media can be expected to increase the existing “tidal wave”<sup>57</sup> of child pornography. Existing crimes, such as hate crimes, will find wider audiences; social media is also a powerful weapon for hate crimes,

<sup>56</sup> A typical recent case is *Bakhit & Miles v Safety Marking, Inc.*, District Court of Connecticut, 26 June 2014 (Holly B Fitzsimmons, Magistrate, dealing with Rule 26(b)(1) and 34(a) *Federal Rules of Civil Procedure*, and applying the US Supreme Court's decision *Riley v California* 573 US Ct 2473 (2014).

<sup>57</sup> *R v Sharpe* [2001] 1 SCR 45 at [166]; see P Mizzi, T Gotsis and P Poletti, “Sentencing offenders convicted of child pornography and child abuse material offences”, Judicial Commission of NSW, Monograph 34, September 2010 at pp. 5 - 8.

<sup>58</sup> “Can Virtual Crimes be Punished under Australian Law?” (2010) 13(4) INTLB 70.

cyberstalking (already a feature of domestic violence) and graphic posts by terrorist organisations. New cybercrimes, such as “virtual crime”<sup>58</sup> will require new legislation,<sup>59</sup> drafted by legislators who understand the complexities of the new technologies being used to commit these crimes. This is a vast topic; all that can be done here is to note that the potential for misuse of social media will be one of the most serious problems for legislatures and courts of the future.

### ***The Criminal Trials of the Future***

There are many problems confronting criminal trial conduct arising from social media issues. I will briefly note some of those most commonly discussed:

- The impact of social media publicity on the role of the jury, which has been extensively discussed elsewhere.<sup>60</sup>
- How material should be presented to a jury, where their levels of technology knowledge widely differ and where

evidence is technical, has been a source of concern for some years,<sup>61</sup> as has the question of jury warnings and directions concerning use by individual jurors of social media or other research during the trial.

- Pre-trial publicity on social media<sup>62</sup> may require a complete reconsideration of the law of contempt,<sup>63</sup> and problems with suppression orders<sup>64</sup> will continue.

- As Peek J points out in *Strauss v Police* [2013]115 SASR 90 at [12] – [37] (headed “Part 2: Identification evidence in the age of Facebook”), social media will have a significant impact on the law of identification due to the substantial risk of contamination and the temptation for private investigation.

- Crossover problems where both civil and criminal law issues arise, such as misuse of private information.<sup>65</sup> This will include disclosure of private sexual information, particularly if that included conduct of a criminal nature.<sup>66</sup>

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<sup>59</sup> For a list of problem areas see Louise Fairbairn, “Hi tech laws needed for hi tech crimes: Cyberstalking” (2014) 17(10) *INTLB* 222.

<sup>60</sup> M Krawitz, “Guilty as Tweeted”, University of Western Australia Faculty of Law Research Paper 2012. For a commentary from the United States, see Meghan Dunn, “Jurors’ Use of Social Media During Trials and Deliberations”, Federal Judicial Center, 2011; her survey of 508 US judges also sets out sample jury instructions some participating judges have given in court.

<sup>61</sup> See, for example, L Hewson and J Goodman-Delahunty, “Using multimedia to support jury understanding of DNA profiling evidence” (2008) 40(1) *Australian Journal of Forensic Sciences* 55.

<sup>62</sup> “Pre-Trial Publicity, Social Media and the ‘Fair Trial’” (2013) 33 *Qld Lawyer* 38.

<sup>63</sup> In November 2011, Magistrate Peter Mealy complained that tweeting “will be contempt if it does occur from this court” after discovering a freelance journalist from *Crikey* sending live tweets from the courtroom where a committal was under way; taken from P Akerman, “Magistrate hearing evidence against Simon Artz bans Twitter from court”, *The Australian*, 4 November 2011.

<sup>64</sup> David Barnfield, “Effectiveness of

Suppression Orders in the Face of Social Media” (2011) 33(4) *LSB* 16; B Fitzgerald and C Foong, “Suppression orders after *Fairfax v Ibrahim*: Implications for Internet Publications” (2013) 37 *Aust Bar Rev* 175.

<sup>65</sup> Many commentators have pointed to the overlapping civil/criminal problems arising from stolen or misused private information: S Heindel, WIPO, “Nude celebrity hacking scandal further exposes online privacy issues” 17(10) (2014) *INTLB* 241, notes the “lax attitude” of ISPs such as Apple to iCloud user privacy which caused US lawyers to go into “overdrive” in civil suits. See the September 2014 Australian Law Reform Commission Report, “Serious Invasions of Privacy in the Digital Era” (ALRC 123).

<sup>66</sup> Privacy issues arising from modern technology have been the subject of extensive discussion; see for example Malcolm Crompton, “Biometrics and Privacy: The End of the World as We Know It, or the White Knight of Privacy?” (2004) 36(2) *Australian Journal of Forensic Sciences* 49. One of his concerns was the fingerprint PIN, now commonly available on smartphones. See also A Duncan, “Precognition – predicting the future: biotechnology and policing in 2020” (2008) 40(1) *Australian Journal of Forensic Sciences* 25.

- Computer security, and not just court security, will be a significant issue. Unlike other parts of the public service, courts regularly have to deal with persons accused of crime. The anonymity of cyberspace may be an incentive for those persons to troll or attack court computer records, or to use social media to attack it.

## 7. Conclusions

Although social media is a “new world” for courts and judges, dealing with technological change is nothing new for court systems, as US Supreme Court Justice Roberts’ entertaining 2014 Annual Report (comparing the electronic courtroom in 2014 to an earlier technological communication miracle, the installation of the pneumatic tube in 1893) demonstrates.<sup>67</sup>

The principal problem for courts is not the technology of social media, but (i) how the powerful tools it offers are redefining interactive communications between courts and the public, and (ii) how most courts, apart from those few on the cutting edge, are being compelled to respond to this constantly evolving electronic interactive communications platform, sometimes against their will. It is a new paradigm for older generation judges and

administrators accustomed to a lengthy tradition of largely one-way communication from court to litigant. Under this new paradigm, litigants already accustomed to interacting electronically with and even questioning the professional judgments of government officials and medical practitioners, for example, will adopt similar interactive models, querying Google’s enormous legal resources and documenting their scepticism in response to court-imposed judgments and services. Already this is a contributing factor in dramatic increases in self-representation on both the trial and appellate levels and, in response, the establishment of “self-help centres”<sup>68</sup> in courts in the United States in response to these perceived needs. Dealing with these challenges to judicial authority, where an increasing number of litigants will expect a greater say in all areas of case management and conduct of the trial, will be a challenge that today’s courts will be compelled to deal with in the full glare of the new social media world.<sup>69</sup>

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<sup>67</sup> <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf>. Chief Justice Roberts’ speech was such a hit in China that it was translated and published on its own Supreme Court website, where it was read by “tens of thousands” of Chinese lawyers and judges, according to *Supreme Court Monitor* editor Susan Finder (9 January 2015):

<http://supremepeoplescourtmonitor.com/2015/01/19/a-new-audience-for-us-supreme-court-chief-justice-roberts-2014-year-end-report/>. This is a good example of the court-to-court extra-curial exchange which modern technology, including social media, now permits.

<sup>68</sup> Meyer, *loc. cit.*, pp. 4 – 5. Meyer also comments that DIY-style litigants “will likely expect the judiciary to offer social media to them as part of their interactions with the courts”.

<sup>69</sup> Thanks to the Hon. Michael Rozenes AO QC, former Chief Judge of the County Court of Victoria, and to the Biennial Conference Organising Committee. I also thank the Hon. Peter Applegarth (Queensland Supreme Court), Pauline Buckland (Judicial Commission of NSW), my associate Vincent Mok and Bridget Armstrong, tipstaff to the Hon. Derek Price AM, Chief Judge of the District Court of New South Wales for their assistance.