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Tort Litigation: Brave New World: Technology and Tort Practice

Richard Marcus

Tort Litigation

Brave New World: Technology and Tort Practice

Richard Marcus[1]

I am a civil procedure person, not an official torts person, but often torts and civil procedure seem to be joined at the hip. And that seems particularly true regarding the effects of technological change on tort litigation practice. I've been working on the Federal Rules of Civil Procedure for more than 20 years, and I find that the torts cases are usually the focus of the most intense disputes regarding procedure issues. I intend in this chapter to focus on six topics: (1) e-discovery, (2) the general impact of technology on torts practice, (3) the growing importance of technology on manner of proof, (4) the MDL "boom," (5) third-party litigation funding (TPLF), and (6) the COVID-19 technology accelerator.

E-Discovery

For me, the e-discovery story began in January 1997, when the Advisory Committee on Civil Rules convened a mini-conference at UC Hastings Law to discuss some topics it was examining as possible rule amendments.[2]

The very experienced lawyers invited to the mini-conference had varied reactions to the various topics on our list, but there was

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[1] Excerpted and adapted from Richard Marcus, *Brave New World: Technology and Tort Practice*, 49 SW. L. REV. 455 (2021).

[2] For background, see Richard L. Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691 (2014); Richard L. Marcus, *The Impact of Digital Information on American Evidence-Gathering and Trial—The Straw That Breaks the Camel's Back?*, *in* ELECTRONIC TECHNOLOGY AND CIVIL PROCEDURE: NEW PATHS TO JUSTICE FROM AROUND THE WORLD 29 (Miklós Kengyal & Zoltán Nemessányi eds. 2012); Richard L. Marcus, *Extremism in the Pursuit of Truth is Our 'Virtue': The American Infatuation With Broad Discovery*, *in* TRUTH AND EFFICIENCY IN CIVIL LITIGATION 165 (Alan Uzelac & C.H. van Rhee eds. 2012); Richard Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321 (2008); Richard Marcus, *E-Discovery and Beyond: Toward* Brave New World *or* 1984*?*, 236 F.R.D. 598 (2006); Richard Marcus, *Only Yesterday: Reflections on Rulemaking Response to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

almost universal agreement among the lawyers that these amendment ideas were backward looking—we were "fighting the last war." Instead, most of them said: "Our big headache is email. You should do something about that."

The problem was that nobody knew quite what to do, and it was almost ten years before the "e-discovery" amendments of 2006 went into effect. In 2015, further discovery amendments went into effect, including a new Rule 37(e) on sanctions for spoliation of electronically stored information.

The current reality seems to be that e-discovery is the centerpiece of tort litigation. Technological innovation has moved things in directions that could not have been imagined (at least by lawyers) when that first session occurred in January 1997. To illustrate, I have a trivia question: What was Mark Zuckerberg doing in January 1997? I'm not sure, but I can report that he was then 12 years old.

I am sure that nobody in the legal world in 1997 could have imagined the prevalence of social media today. Enormous detail about people's activities is now available in electronic form that was simply not available when I was practicing law in the 1970s. That is not necessarily entirely a good thing. It may be a good thing when the "truth will out" because of email or something like that. As a noted litigator said in 2006, "What I've found is that when you've got the e-mails, people remember lots and lots of things."[3]

Recent work by experienced lawyers suggests that the importance of e-discovery is growing. For example, the February 2020 issue of *Trial Magazine* was all about transportation litigation, and one of the articles is about efforts by trucking companies to use subsidiaries to avoid liability for crashes on the ground that the driver was not their employee. Using "Alpha" as such a company, an experienced plaintiff lawyer had the following advice:

> Ask for all the data, metadata, and audit trails associated with the app. Data such as onboard recording devices and electronic logs will help show that Alpha is the entity pulling all the levers in this specific transaction. When making discovery requests for

[3] Peter Geier, *A Defense Win in "Enron Country*," NAT. L.J. (Jan. 23, 2006).

> such information, it is critical to determine whether the cellphone or tablet apps is used for routing and dispatching drivers.[4]

Around the same time, a journal for corporate counsel emphasized how e-discovery was somewhat evening the playing field between defendants and plaintiffs:

> In the past, electronic discovery has been fairly one-sided. It was the corporation that had a lot of data, and the individual usually didn't. . . . But with the new structured data approach, both sides have a duty to preserve electronic data that's likely relevant. Most individuals have smartphones that are going to track a lot of their activity—social media accounts, email accounts, etc. It's very common now for individuals to have large amounts of data, even if they're not aware of it. So we find ourselves in a situation where it's not just one side that has the duty to preserve information and be worried about spoliation.[5]

Nowadays, plaintiff-side lawyers must begin to worry that some of those things will hurt the plaintiff's case. That presents plaintiff lawyers in tort cases with an immediate education task, as an article in the December 2019 issue of *Trial Magazine* stressed:

> [P]eople should have no expectation of privacy on the public portions of social media sites. Furthermore, publicly available social media information generally is not subject to claims of privilege. Stress this to your clients as soon as possible. Also tell them that any public posts by a spouse, child, or even a friend may be viewed by anyone, including defense counsel, especially if the client is tagged.[6]

As an experienced litigator said in 2011, "Every litigator has probably experienced firsthand or at least heard about a situation

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[4] Edward Ciariamboli, *It's All About Control*, TRIAL (Feb. 2020).
[5] Jonathan Hurwitz, *Structured Data Illuminates Facts Like Never Before*, CORP. COUNSEL BUS. J. (Jan./Feb. 2020).
[6] Heidi L. Wickstrom, *Know the Networks*, TRIAL (Dec. 2019).

in which information from a social media site played a significant role in a case."[7]

And the range of sources will only grow, as we move into the age of the "Internet of Things," a phrase that refers to Internet-connected gizmos like Fitbits, auto computers, and even refrigerators. A 2015 article forecast that by 2020 there would be 75 billion such devices in operation, which the author called a "defining moment in technology history."[8]

Technology Generally

In 2000, a British law professor predicted that technology and the Internet would "fundamentally, irreversibly, and comprehensively change legal practice," producing "a complete shift in the legal paradigm."[9] I think that overstated the impact of computers.[10] But in 2020, an article asserted, at least as to corporate clients, that "[t]he conventional attorney-client engagement model is moving toward extinction."[11]

There is no denying that the growth of online activity has profoundly affected law practice, particularly tort practice. Lawyers may now seek clients through online outreach. They may need to be extremely careful about how they interact with these prospective clients online to avoid either creating an attorney-client relationship when they don't mean to, or (alternatively) preventing their clients from protecting what they filled on the lawyer's website from discovery by the defendant in an eventual lawsuit.

Technology offers trial lawyers new methods of creating dramatic demonstrative evidence. It can also help in other ways. For example, an article in the September 2019 issue of *Trial*

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[7] Christopher J. Akin, *How To Discover and Use Social Media-Related Evidence*, 37 LITIG. 32, 32 (2011).
[8] Erik Post, *The Internet of Things*, LEGALTECH NEWS (Feb. 1, 2015).
[9] RICHARD SUSSKIND, TRANSFORMING THE LAW viii–ix (2000).
[10] *See* Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263 (2009); Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827 (2008).
[11] Elizabeth Smith & Roger Garceau, *Law Firms Must Innovate to Keep Up with Alternative Service Providers*, BLOOMBERG LAW NEWS (Jan. 28, 2020).

Magazine emphasized that a new service enables lawyers to streamline juror research from publicly available online data and use artificial intelligence to obtain a behavioral analysis of that online information, all in seconds.[12] Meanwhile, the Advisory Committee has been told that online outreach by "claims generators" has an impact on MDL and other mass-tort litigation, prompting some to use the slogan "find a name and make a claim" to explain the proliferation of claims in some mass-tort litigations that turn out not to be supportable.

Manner of Proof

The remarkable tools of American discovery have enabled tort lawyers to amass much more evidence than previously was possible. To take an example, consider smart speakers like Alexa. A July 2019 article in *Legaltech News* asked "Alexa, Can You Be Used Against Me in Court?"[13] Given the proliferation of such devices, it seems reasonable to answer yes: tort lawyers (on both sides) will seek to use them in court. For example, consider the chit chat among engineers in the rooms at Boeing while the 737 Max was being developed. Wouldn't that be interesting to those asserting claims arising out of the two recent horrendous crashes?[14] Consider that the *New York Times* reported recently about a home-security camera at the home of a murder victim that helped convict the culprit.[15]

The "death of privacy" implies the accessibility of digital information concerning a huge swath of human behavior. As privacy advocates argue, "we are being tracked everywhere online" and may even be "stunned at the intimate level of data"

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[12] Carol L. Bauss, *Streamlining Juror Research*, TRIAL (Sept. 2019).

[13] Brian Schrader, *Alexa, Can You Be Used Against Me in Court?*, LEGALTECH NEWS (July 10, 2019).

[14] I note that there is litigation pending in the Northern District of Illinois against Boeing, asserting claims growing out of the crash in Ethiopia. The theory is that, after the earlier crash, Boeing should have grounded the planes rather than await the second tragedy. *See* Amanda Robert, *Boeing's Legal Troubles Over Airplane Grounding Could Just Be Taking Off*, ABA J. (Mar. 14, 2019).

[15] Jacey Frotin, *Front-Door Camera at Victim's House Captures a Grinning Man's Confession*, N.Y. TIMES (Jan. 3, 2020).

collected.[16] Reporters are beginning to exploit this information. The *Times* reports that "[t]hanks to the rise of digital technology, and the easy availability of data that has come with it, reporters have more ways to get stories than ever before."[17] Tort lawyers can do that, too. Indeed, that sort of sleuthing can even ferret out extraterrestrial information; when the Indian moon probe went missing, an amateur astronomer in India located it on the moon.[18]

Putting together the capacity of digital investigation to develop evidence and the capacity of technology to create demonstrative evidence could enable the modern tort lawyer truly to move beyond the tort trial of the past.

The MDL "Boom"

The Judicial Panel on Multidistrict Litigation came into existence rather quietly in 1968. For a long time thereafter, the class action received an enormous amount of attention, while MDL litigation was somewhat of a backwater.[19]

The tide has certainly turned on that front. As class certification in mass torts became more difficult, tort lawyers began to look to MDL to aggregate cases. In 2008, I asked whether "maximalist use" of MDL might prove to be a "cure-all for an era of dispersed litigation."[20] Something like that has seemingly happened. The number of claims now involved in MDL proceedings has grown enormously; as of now something like 40% of all pending civil cases in the federal court system have been centralized by the JPML.[21] Meanwhile several states,

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[16] Tim Herrera, *Take Some Steps to Protect Your Privacy*, N.Y. TIMES (Dec. 2. 2019).

[17] Marc Tracy, *These Reporters Rely on Public Data Rather Than Sources*, N.Y. TIMES (Dec. 2, 2019).

[18] Kenneth Chang, *Finding India's Crashed Moon Lander*, N.Y. TIMES (Dec. 7, 2019).

[19] For one example, dealing with mass torts, see Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995)

[20] Richard L. Marcus, *Cure-All For An Era of Dispersed Litigation: Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 62 TULANE L. REV. 2245 (2008).

[21] *See* Jaime Dodge, *Facilitative Judging: Organizational Design in Mass Multidistrict Litigation*, 64 EMORY L.J. 329 (2014). Since 2014,

including California, have state procedures that might be called "mini MDLs" that aggregate and centralize cases pending in their state courts.

Not everyone is happy with this situation. Some on the plaintiff side worry that individual claims get lost in the mass. When the JPML created the first big mass-tort MDL in 1991, centralizing all federal personal-injury asbestos cases, it promised plaintiffs that its order would not "result in their actions entering some black hole, never to be seen again."[22] It may be that some thought they did get lost in the massive litigation in Philadelphia.

Another source of plaintiff-side ire is that MDL transferee judges often appoint lead counsel, who wield broad authority over the cases, leaving individually represented plaintiffs' attorneys (sometimes called IRPAs) with a limited role to play. And sometimes those judges also "tax" the attorney fees of these IRPAs to pay lead counsel for the "common benefit" work they do. The judges may also cap the IRPA's fees at a lower percentage than provided in their retention agreements. These aspects of MDL litigation arouse the ire of some IRPAs.[23]

Some on the defense side, the Advisory Committee has regularly been told, are also unhappy, at least in a significant number of mass-tort MDLs. Big pharmaceutical and medical-products companies have pushed for rule changes (and legislative changes) to respond to the current reality of MDL mass-tort litigation, which they claim is extracting huge amounts of money from them for dubious claims.

Legal academics, meanwhile, have awakened to the current importance of MDL tort practice, and some make an argument that seems precisely the reverse of the arguments of defendants who say they are almost being extorted by MDL mass-tort proceedings. According to this academic view, MDL proceedings are actually

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according to statistics provided to the Advisory Committee, the proportion of cases subject to an MDL transfer order has increased.

[22] *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 423 n.10 (J.P.M.L. 1991).

[23] For a very thoughtful discussion of the challenges of designing a fair common fund setup, see *In re* Roundup Prod. Liab. Litig., 544 F. Supp. 3d 950 (N.D. Cal. 2021) (discussing contending interests of "lead counsel" and other counsel involved in litigation about injuries allegedly caused by herbicide).

short-changing the claimants while benefiting the "in group" of lead counsel who profit handsomely.[24]

There is no way to say at present whether rule changes or legislation will respond to any of these concerns, but they are clearly central to a very important sector of modern tort litigation.[25]

TPLF

Funding modern mass-tort litigation, and exploiting the technological possibilities sketched above, can cost a lot of money. Such litigation also can yield huge payouts on occasion (consider the ongoing Roundup litigation). So there is both high risk and high reward. Third-party litigation funding has emerged in the last few years as one response to this situation, and that is suitably the topic of current and future discussions. The Advisory Committee has seen proposals for rules directed to TPLF and still has the subject under study.

The COVID-19 Technology Accelerator

The lockdown of much litigation activity in this country has forced lawyers and courts to experiment with new ways of doing old things. As my colleague Scott Dodson put it, what has happened in the last two years is the "Zooming" of civil litigation.[26] This disruption brought home the need to fashion new ways of exploiting technology to handle civil litigation. One way of looking at this development, then, is to regard this shock to the system as precipitating rapid change that was already happening more gradually. Although the future impact of the COVID-19

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[24] For a very thorough presentation of this view, see ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019).

[25] Even in mid-2022, the question whether any rules will emerge remains uncertain.

[26] *See* Scott Dodson, Lee H. Rosenthal & Christopher L. Dodson, *The Zooming of Federal Litigation*, 104 JUDICATURE 13 (2021). For a report on the responses to the lockdown in 23 countries (including the United States), see CIVIL COURTS COPING WITH COVID-19 (Bart Krans & Anna Nylund eds. 2021).

shock remains uncertain, experience already shows there are several focal points.

A. Court hearings via Zoom

Since time immemorial, court hearings have been in-person affairs, conducted in traditional courtrooms. The increased focus on the pretrial process, and the simultaneously increased emphasis on judicial management of litigation, made the great majority of these in-court hearings nothing like the U.S. trial of Hollywood fame. Instead, they usually consisted of "status conferences" with the judge or dry hearings on pretrial motions. Those motions, in turn, were almost always based on written (now digital) submissions to the court, and if something akin to witness testimony was needed to resolve the matters before the court, that material was presented by affidavit, deposition transcript, or deposition video.

For lawyers, the in-court aspect of these events could seem largely to be a waste of time, particularly if the lawyer's office was located far from the courthouse. A common sentiment was: "I really don't want to travel all the way across the country for a 15-minute pretrial hearing before the judge." In recognition of this reaction, many American courts—particularly appellate courts—have for some years permitted lawyers to argue their cases via telephone. But that seemed to put the lawyers "appearing" remotely at a disadvantage in terms of dealing with the judge, whose facial expressions and body language may matter to the lawyers.

Suddenly, starting in March 2020, these sorts of in-court events could no longer occur safely. But it soon became clear that pretrial activity—motion proceedings and discovery—could not simply halt until things returned to "normal." Turning on a dime, the courts shifted to online hearings in civil cases. And that transformation was facilitated by a recent technological development—the emergence of Zoom and other providers of videoconference services as a method for what might be called a faux in-court hearing in which the lawyers could see and hear the judge and each other, and the judge could see and hear the lawyers. Thus did motion practice, pretrial conferences, and all the other activities of American civil litigation continue through the ensuing lockdown periods.

As pandemic constraints loosen, it remains to be seen whether American lawyers and judges return to in-person hearings as before. There is considerable reason to think that they will not. In mid-2020, for example, the Chief Justice of the Texas Supreme Court forecast that "[w]e're going to be doing court business remotely forever."[27] Later in 2020, *Legaltech News* published an article entitled "Despite Budget Cuts, Courts Can't Imagine Life Without Zoom."[28]

For many lawyers, the improved potential for picking up cues from the judge with in-person hearings may incline them to return to the courtroom as soon as possible. For many clients, however, the additional cost of having lawyers attend in-person hearings (particularly from thousands of miles away) may not seem worth it. And for judges, the flexibility of scheduling and conducting online hearings may make exploiting technology in this manner considerably more attractive now that the online methods have become familiar terrain. Holding such online proceedings could also offer an extra benefit in transparency—the media and public can "attend" online hearings from the comfort of home or office. Time will tell whether these changes become a new normal.

B. Remote Depositions

Until March 2020, a deposition would ordinarily occur in a law office's conference room. The witness, the witness's lawyer, and the questioning lawyer would be present, along with a court reporter. Sometimes, in a multiparty case, each party's lawyer would attend. The lawyers might travel to the deposition site from around the country. The deposition might last for up to seven hours a day, all in a relatively small conference room that probably would not be particularly well ventilated.

Starting in March 2020, depositions could not continue in that manner. Spending many hours cloistered with a bunch of lawyers from around the country and a witness and court reporter would violate many of the norms of pandemic safety. According to reports from plaintiff lawyers, some defense-side lawyers

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[27] Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG LAW NEWS (July 30, 2020).

[28] *Despite Budget Cuts Courts Can't Imagine Life Without Zoom*, LEGALTECH NEWS (Oct. 20, 2020).

proposed in March and April of 2020 that all depositions simply be postponed until it became possible to return to the old way of doing them. Many plaintiff-side lawyers regarded this reaction as a stalling tactic. There is something to be said for the view that, from the perspective of the witness and the lawyer representing the witness, in-person depositions are intrinsically preferable. And for the interrogating lawyer, the problem of showing exhibits to the witness could be challenging if done remotely.

The Federal Rules have long recognized that remote depositions could be held by agreement or court order.[29] By May 2020 it was reported that "because of COVID, 100% of depositions are being conducted remotely."[30] Already in April 2020, a federal judge had rejected defense objections to remote depositions, noting that "[t]here are numerous resources and training opportunities available through the legal community to assist [defendant's] counsel in the operation and utilization of the new technology."[31]

Sometimes the possibility of remote depositions can give rise to disputes in high-profile cases. For example, in litigation against the Kingdom of Saudi Arabia brought by victims of the September 11, 2001, terrorist attacks, an American judge held, before the pandemic hit, that the plaintiffs were entitled to take the depositions of high Saudi officials, including members of the royal family, in the United States. After the lockdowns began, the defense urged that the depositions be taken remotely instead of in person, arguing that remote depositions "are the new normal for pandemic-era litigation."[32] The plaintiffs objected that remote depositions risked witness tampering and would not adequately enable them to observe the demeanor of the witnesses.[33] Stressing the health risks that travel to the United States and an in-person deposition would produce, however, the judge granted the motion and ordered the depositions to proceed by remote means.

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[29] *See* FED. R. CIV. P. 30(b)(4) (permitting a deposition "by telephone or other remote means").

[30] Stephanie Russell-Kraft, *Depositions Go Virtual During Pandemic; May Remain that Way*, BLOOMBERG LAW NEWS (May 22, 2020).

[31] Grano v. Sodexo Mgmt., Inc., 335 F.R.D. 411, 415 (S.D. Cal. 2020).

[32] *In re* Terrorist Attacks on Sept. 11, 2001, 337 F.R.D. 575, 577 (S.D.N.Y. 2020).

[33] *Id.* at 578–79.

The question of the hour is whether things will go back to the old way when the personal-safety issues abate or disappear. At least one American judge thinks things have changed for good:

> Clearly, some of the distancing practices now in vogue will change as the world gradually comes alive again. There is every reason to hope, however, that some of the lessons learned during the pandemic will invoke changes of practice which, in addition to being healthy habits, also make economic and practical sense in the post-pandemic and even post-COVID-19-vaccine world. One of those current practices that may need re-evaluation is the practice of flying attorneys, clients, and deponents around the country or the world just to take a deposition.[34]

Only time will tell whether the judge's forecast proves true.

C. Remote Trials

If witnesses could testify remotely at deposition, perhaps they could also testify remotely at trial. The Federal Rules have for some time recognized this possibility, but they also say that witness testimony must be taken "in open court" unless "compelling circumstances" justify remote testimony, and then only with "appropriate safeguards."[35] As with deposition testimony, the concerns are witness demeanor and witness coaching.

In theory, a video trial might be preferred. Indeed, in the 1990s, Dean Carrington even ventured a proposal to shift to video trials routinely in civil litigation.[36] But the remote-testimony option was rarely used, partly due to the "compelling circumstances" requirement and partly due to the technical difficulty of reliable transmission. The COVID-19 lockdown seemed to provide compelling circumstances to justify allowing witnesses to testify live but remotely at trial, particularly for

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[34] Brooks v. Pikes Peak Hospice, 497 F. Supp. 3d 985 (D. Colo. 2020).
[35] FED. R. CIV. P. 43(a).
[36] Paul L. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516 (1998) (advocating that all evidence be videotaped and played for a jury after appellate review of the sufficiency of the evidence).

witnesses located far from the court and for those with medical conditions that made them vulnerable to severe illness if they contracted COVID-19. As with the 9/11 suit against the Saudi defendants,[37] courts were loath to demand that such witnesses travel long distances or testify in court. The technology behind Zoom, meanwhile, went far to deal with the transmission challenges. As with discovery, it might be that defendants would be content to put off trial until in-person events were again possible. But that could require a long delay, exacerbated by the priority given to backlogged criminal trials.

Not surprisingly, lawyers soon started urging courts to use videoconferencing technology to hold bench trials.[38] Several such remote bench trials were held. That did not mean that lawyers handling such trials had an easy time of it. To the contrary, lawyers found that the virtual testimony format "shifts more control to the witness" and could facilitate "improper witness and attorney interaction" including "what notes or other materials are within reach and/or in view of a remote witness."[39] But those concerns often did not outweigh the desire to get to trial—or at least some sort of trial. As lawyers writing about virtual civil trials said, "nothing resolves a case faster than a court date."[40]

Virtual jury trials posed much greater challenges, largely because it was necessary to impanel a jury of ordinary citizens. Many people might reasonably resist the risks of jury duty, and some raised concerns about the greater difficulty of impaneling a jury that truly represented a cross-section of the community. For example, would a jury with nobody over age 60 be satisfactory? How could the jurors deliberate, given that the jury rooms in which such deliberation was usually done are commonly small and windowless spaces? But even if remote testimony could be accommodated, a "remote" jury trial would present difficulties.

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[37] *See supra* text accompanying notes 32–33.

[38] See R. Robin McDonald, *Georgia Lawyers Largely Back Civil Video Trials*, LEGALTECH NEWS (May 22, 2020) (describing reactions to a proposal for the state courts in Georgia to begin video court trials).

[39] Daniel B. McLane & Michael P. Best, *Avoid Losing Control of a Remote Witness: Some Suggestions*, BLOOMBERG LAW NEWS (Nov. 9, 2020).

[40] Christopher Green & Sara Fish, *Weighing the Virtual Courtroom Option in Civil Cases*, LAW 360 (Aug. 20, 2020).

For example, how would the judge ensure that the jurors were even watching the testimony? The courts have accordingly been much more cautious about holding jury trials during the pandemic. Yet despite these difficulties, by November 2020, the leading plaintiff-side lawyer organization in the United States was reporting that "[j]ury trials are happening all over the country."[41]

Going forward, it may be that remote testimony will become a hallmark of court trials. But it seems much less likely that jury trials will proceed in a remote environment—even if some witnesses in those cases testify remotely—absent compelling circumstances. The whole process of jury deliberation relies on person-to-person interaction that would be difficult or impossible to recreate in a virtual world. And many judges worry about jurors sitting outside of the courtroom getting distracted from close attention to the evidence inside the courtroom. So even if something like Dean Carrington's speculation could come to pass in some bench trials, it is not likely to occur in jury trials.

This is not to say that technology has left the trial untouched. To the contrary, myriad devices and gizmos that did not exist a generation ago are now part of the trial lawyer's tool kit. In terms of procedure, however, jury trials are likely to continue in essentially the format of the past.

Conclusion

This chapter has only scratched the surface of the changes that have occurred and are now underway that will affect tort litigation in the future. It may be, on this front, that the COVID-19 pandemic will prove to be a watershed event. One thing seems clear to me—tort litigation will remain tethered to procedural developments for the foreseeable future. And both will have to respond to ongoing technological developments. Regardless of whether one thinks these are good things or bad things, they will not go away.

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[41] Nov. 29, 2020, online advertisement from American Association for Justice (on file with author). *But cf.* Madison Alder & Allie Reed, *U.S. Courts Close Doors, Cancel Juries as Virus Surges*, BLOOMBERG LAW NEWS (Nov. 20, 2020).