

BRAVE NEW WORLD: TECHNOLOGY AND TORT PRACTICE

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I am a civil procedure person, not an official torts person, but fairly often torts and civil procedure seem to be joined at the hip. And that seems particularly true with regard to the effects of technological change on tort litigation practice. I've been working on the Federal Rules of Civil Procedure for more than twenty years and find that it's usually the torts cases that are the focus of the most intense disputes regarding procedure issues. For this Symposium, I intend to focus on five topics, but the last one is mainly an advertisement for the second panel at the Symposium:

- (1) E-Discovery
- (2) The more general impact of technology on torts practice
- (3) The growing importance of technology on manner of proof
- (4) The MDL "boom"
- (5) TPLF -- third party litigation funding

I. E-DISCOVERY

For me, the E-Discovery story began in January 1997, when the Advisory Committee on Civil Rules convened a mini-conference at Hastings to discuss a number of topics it was examining as possible rule amendments.¹

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1. For background, see Richard 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 15 ELECTRONIC TECHNOLOGY AND CIVIL PROCEDURE: NEW PATHS TO JUSTICE FROM AROUND THE WORLD 29 (M. Kengyel & Z. Nemessányi eds., 2012); Richard L. Marcus, *Extremism in the Pursuit of Truth Is Our 'Virtue'*:

The very experienced lawyers invited to the mini-conference had varying reactions to the various topics on our list, but there was almost universal agreement among the lawyers that these amendment ideas were backward looking—we were “fighting the last war.” Instead, what most of them said was “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 Fed. R. Civ. P. 37(e) on sanctions for spoliation of ESI.

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 twelve years old.

I am sure that nobody in the legal world in 1997 could have imagined the prevalence of social media today. Enormous detail is now available in electronic form about people’s activities 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.”²

Recent work by experienced lawyers suggests that the importance of E-Discovery is growing. For example, the February 2020 issue of *Trial Magazine* is 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.³ Using “Alpha” as such a company, an experienced plaintiff lawyer had the following advice:

Ask for all of 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.

The American Infatuation with Broad Discovery, in TRUTH AND EFFICIENCY IN CIVIL LITIGATION 165 (A. Uzelac & C.H. van Rhee eds., 2012); Richard Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321 (2008); Richard L. Marcus, *E-Discovery and Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633 (2006), https://repository.uchastings.edu/faculty_scholarship/442/; Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

2. Peter Geier, *A Defense Win in the Heart of 'Enron Country'*, NAT. L.J. (Jan. 23, 2006), <https://advance.lexis.com/api/permalink/77fbc4fd-f5a1-4138-a9e0-4bb853a1bbbd/?context=1000516>.

3. Edward Ciarimboli, *It's All About Control*, TRIAL, Feb. 2020, at *20, *21, 56-FEB TRIAL.

When making discovery requests for such information, it is critical to determine whether the cellphone or tablet app is used for routing and dispatching drivers.⁴

At virtually the same time the above article was published, 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 not have any 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 where 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,” referring to Internet-connected gizmos like Fitbits, auto computers, and even refrigerators.⁸ A 2015 article forecast that by 2020 there

4. *Id.* at *23.

5. Jonathan Hurwitz, *Structured Data Illuminates Facts Like Never Before*, LEXBLOG (Jan. 31, 2020), <https://www.lexblog.com/2020/01/31/structured-data-illuminates-facts-like-never-before/#more-1298678>.

6. Heidi L. Wickstrom, *Know the Networks*, TRIAL, Dec. 2019, at *21.

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*, LAW.COM: LEGALTECH NEWS (Feb. 1, 2015), <https://advance.lexis.com/api/permalink/0fc6c2c3-990b-4df0-a316-5878c29d422a/?context=1000516>.

would be 75 billion such devices in operation, which the author called a “defining moment in technology history.”⁹

II. TECHNOLOGY MORE GENERALLY

In 2000, a British law professor predicted that IT and the Internet would “fundamentally, irreversibly and comprehensively change legal practice,” producing “a complete shift in the legal paradigm.”¹⁰ I think that overstated the impact of computers.¹¹ But this year an article asserted, at least as to corporate clients, that “The conventional attorney-client engagement model is moving toward extinction.”¹²

There is no denying that the growth of online activity has profoundly affected the practice of law, 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 do that, or (alternatively) preventing their clients from protecting what they filled on the lawyer’s website from discovery by a defendant in an eventual lawsuit.

Technology also 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 Magazine* emphasized that a new service enables lawyers to streamline juror research from publicly available online data and also to use artificial intelligence to obtain a behavioral analysis of that online information, all in seconds.¹³

The Advisory Committee has also 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.

9. *Id.*

10. RICHARD SUSSKIND, *TRANSFORMING THE LAW* viii-ix (Oxford Univ. Press Inc. ed., 2000).

11. See Richard L. Marcus, *The Electronic Lawyer*, 58 *DEPAUL L. REV.* 263, 265, 275, 276-78 (2009); Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 *NW. L. REV.* 1827, 1829-30, 1857-59 (2008).

12. Elizabeth Smith & Roger Garceau, *INSIGHT: Law Firms Must Innovate to Keep Up with Alternative Service Providers*, *BLOOMBERG LAW: NEWS* (Jan. 28, 2020, 1:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-law-firms-must-innovate-to-keep-up-with-alternative-service-providers>.

13. Carol L. Bauss, *Streamlining Juror Research*, *TRIAL* Sept. 2019, at *58-59.

III. 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?”¹⁴ Given the proliferation of such devices, it seems reasonable to conclude that 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?¹⁵ 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.¹⁶

The “death of privacy” implies the accessibility of digital information concerning a huge swath of human behavior. As privacy advocates argue, “we’re being tracked everywhere online” and may even be “stunned at the intimate level of data that was being collected.”¹⁷ Reporters are beginning to exploit this information. The *Times* reports that “thanks to the rise of digital technology, and the easy availability of data that has gone with it, reporters have more ways to get stories than ever before.”¹⁸ 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.¹⁹

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.

14. Brian Schrader, *Alexa, Can You Be Used Against Me in Court?*, LAW.COM: LEGALTECH NEWS (July 10, 2019, 7:00 AM), <https://www.law.com/legaltechnews/2019/07/10/alexa-can-you-be-used-against-me-in-court/>.

15. I note that there is litigation pending in the N.D. Ill. 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 JOURNAL (Mar. 14, 2019, 2:53 PM), <https://www.abajournal.com/news/article/boeing-may-face-more-legal-woes-after-737-max-grounding>.

16. Jacey Fortin, *Man Captured on Doorbell Camera Footage Confessing to Murder*, N.Y. TIMES (Jan. 2, 2020), <https://nyti.ms/35hkGt8>.

17. Tim Herrera, *Take Some Steps to Protect Your Privacy*, N.Y. TIMES (Dec. 2, 2019), <https://advance.lexis.com/api/permalink/9cb95bf1-2fb3-4c77-83de-53813234617c/?context=1000516>.

18. Marc Tracy, *These Reporters Rely on Public Data, Rather Than Secret Sources*, N.Y. TIMES (Dec. 1, 2019), <https://nyti.ms/37RpDuZ>.

19. Kenneth Chang, *Finding India’s Crashed Moon Lander*, N.Y. TIMES (Dec. 7, 2019), <https://www.nytimes.com/2019/12/06/science/india-moon-mission-vikram-found.html>.

IV. 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.²⁰

The tide has certainly turned on that front. As class certification in mass torts became more difficult, tort lawyers began to look to MDL as a way 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.”²¹ 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 MDL Panel.²²

Not everyone is happy with this situation. From the plaintiff side, some worry that individual claims get lost in the mass. When the Judicial Panel 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.”²³ It may be that some thought they did get lost in the massive litigation in Philadelphia.

Another source of potential 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.

From the defense side, as the Advisory Committee has regularly been told, there is also much unhappiness, 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

20. 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, 901 (1995).

21. Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TULANE L. REV. 2245, 2249-50 (2008).

22. Since 2014, according to statistics provided to the Advisory Committee, the proportion of cases subject to an MDL transfer order has increased. See Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 341 (2014).

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

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, actually MDL proceedings are 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 emerge that responds to any of these areas of concern, but they are clearly central to a very important sector of modern tort litigation.

V. TPLF

There can be little doubt that funding modern mass tort litigation, and exploiting the technological possibilities sketched above, can cost a lot of money. It’s also clear (consider the ongoing Roundup litigation situation) that such litigation can yield huge payouts on occasion. So, there is high risk and big potential gains. Litigation funding has emerged in the last few years as one response to this situation, and that is suitably the topic of the next panel at this Symposium. From the Advisory Committee perspective, we have also seen proposals for rules directed to TPLF, and still have the subject under study. I am therefore looking forward to the next panel, which includes leading experts on these subjects.

CONCLUSION

This paper has only scratched the surface of the changes that have occurred and are now underway that will affect tort litigation in the future. 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. Whether one thinks these are good things or bad things, they will not go away.

24. For a very thorough presentation of this view, see ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 187 (2019).