EDITORIAL

Trying to persuade lawyers that they need to keep up-to-date with technology is far from new. In 1904, judges and lawyers were urged to make themselves aware of photography because 'they might otherwise accept what appears to be pure untouched work as reliable which was all the time outrageously worked on',[1] and in 1959 Winsor C. Moore noted that 'hundreds of important cases involving disputed typewriting have been tried but there are still lawyers here and there who apparently have never heard of them and courthouses where a disputed typewriting has never been considered. Although written in 1929, the statement is undoubtedly still true today.'[2]

Yet there is abundant evidence that new forms of evidence were readily accepted into in legal proceedings, a striking example being the case of *Boyne City, G. & A.R. Co. v. Anderson*[3] in an appeal before the Supreme Court of Michigan on 7 November 1906. Blair J explained the facts behind one of the grounds of appeal at paragraph 2 (330-331):

> A phonograph was permitted to be operated in presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to respondent's hotel. With proper proofs, such as were fully given in this case, to justify the introduction of the instrument as a substantially accurate and trustworthy reproducer of the sounds actually made and testified to, we think its use legitimate. Communications conducted through the medium of the telephone are held to be admissible, at least in cases where there is testimony that the voice was recognized. 27 Am. & Eng. Ency. of Law (2d Ed.) 1091, and cases cited; Wigmore on Evidence, §§ 669, 2155. The ground for receiving the testimony of the phonograph would seem to be stronger, since in its case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves. Even if it should be held that it was error to permit the use of the machine, its mild reproduction of sounds could not have so seriously prejudiced petitioner as to require a reversal of the case upon that ground.

In this instance, the correspondent in the *Albany Law Journal*[4] was very enthusiastic:

> That the law is a progressive science, is again demonstrated in the introduction of the phonograph in court. The novel incident occurred during the trial of a damage suit against an elevated railroad company in the United States Court at Boston, the object of the introduction of the recording instrument being to demonstrate to the court the deafening noise made by the elevated cars. Of course, the introduction of this evidence was strenuously objected to by the counsel for the defendant, but it was allowed by the court, and, we think, quite properly.

Although the complexity of the recording in 1906 pales into insignificance in comparison to the intricacy of evidence in digital format, nevertheless lawyers had to become familiar with new forms of evidence. That it should have taken so long in respect of the forensic issues relating to typewriters is an appalling indictment on the legal profession. Unfortunately, legal professions across the globe are not responding to evidence in electronic format fast enough – to the detriment, it is respectfully suggested, of the lay clients.

This is especially poignant in the light of the underlying rationale of *A Philosophy of Evidence Law Justice in the Search for Truth* (Oxford University Press, 2008) by Professor Hock Lai Ho, in which he demonstrates that the finder of fact acts as a moral agent, and central to this is that the findings by a court must be justifiable, and meet the demands of rationality and ethics. In this text, Ho analyses the debate on the claim that the trial process seeks the truth, exploring the connection between truth and justice. When read in the light of the unique characteristics of digital evidence, the text, stimulating and interesting as it is, takes on an even more relevant role – a role that the author might not have contemplated. This is because the factors and subsequent analysis have an added poignancy when taking into account the complexity of digital evidence, the potential volumes of evidence, the difficulty of finding evidence, persuading

1 *Albany Law Journal, (1904) vol LXVI, p 17.*
2 *Winsor C. Moore, ' The Questioned Typewritten Document' , Minnesota Law Review 43 (1959), 727-743, at fn 3, pp 727-728.*
3 *146 Mich. 328, 109 N.W. 429, 8 L.R.A.N.S. 306, 117 Am.St.Rep. 642, 10 Am.Ann.Cas. 283.*
4 *Albany Law Journal, (1906) vol LXVIII, pp 67-68 – this was replicated in the Law Journal, vol 41, 26 May 1906, p 357.*

the judge to order additional searches, the ease by which digital evidence can be destroyed, the costs of such exercises and the lawyer's lack of knowledge when dealing with this form of evidence. In this respect, the inadequacy of the procedure leading to trial may cause unfairness, and Ho takes the comments of Lord Wilberforce and Viscount Kilmuir, and those of Lord Devlin to task, where they equate justice with fair process (pp 64-65). Ho suggests that the parties may be rightly aggrieved if concerns of procedure and costs override the search for truth. Of increasing concern in modern cases is the cost of finding and submitting digital evidence – and in addition, the resistance, especially of banks, to submit proper evidence to support their assertions, in particular with respect to phantom withdrawals from ATMs and on-line banking disputes. The consequences that inevitably flow from a decision means that it is linked to claims of morality, and a judgment cannot be supported where it is reached in a cavalier manner.

Finally, on 4 June 2010 an application was made that the journal be included in the Scopus database. The title was accepted on 7 May 2012. The comments of the reviewer were included in the response:

> 'The lack of citations to papers published here is disturbing, but there is no disputation that the subject matter is of immense and increasing social, political and legal significance. To those who follow technology, even at some distance, these papers are fascinating and, at times, frightening. But now that super-sophisticated IT technology is carried around in the hip pockets of teenagers around the world, it is safe to say that nearly everyone will be affected, sooner or later, by one or more of the issues discussed in this journal, and if inclusion in Scopus helps to spread the word and increase the world's legal sophistication when it comes to IT matters, all very much to the good! Welcome to Scopus.'

The editor thanks all those that have helped make this journal a critical success.

