

Courtroom Video Conferencing in a Small Jurisdiction: a Case Study

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Abstract. The concept of using video conferencing equipment in a court setting to allow remote participation in judicial proceedings is not new. With the passage of time, the audio and video quality of these systems has improved immensely, such that virtual presence in the courtroom is now possible. This paper will examine recent research by the Jersey Legal Information Board into the impact of video conferencing on the ceremonial of justice, what the drivers are for remote appearances, how court video conferencing equipment can be upgraded, and how it can be used to support the principles of open and accessible justice. This will also take account of how the equipment should be operated and the importance of the adoption of true-to-life principles.

Keywords: Jersey, small jurisdiction, video conferencing, open justice, human rights, true-to-life.

1. Introduction

Jersey is the largest of the Channel Islands, with a population of 100,000. The Island covers an area of 45 square miles, is 85 miles south of the English coast and 14 miles from France. Jersey is a British Crown Dependency, but is neither a colony nor a dominion. It is not represented in the United Kingdom parliament and UK legislation applies to Jersey only if the Island expressly agrees that it should do so. The Island has its own legal system and courts of law.

The Jersey Legal Information Board (JLIB) was established in 1999 under the chairmanship of the Island's Chief Justice. As a direct provider of legal information, JLIB is one of very few in the world in being a government sponsored agency. JLIB was incorporated under a law passed by the States Assembly (the Island's parliament) in 2004, and its vision is for Jersey's legal system "to be, and be recognised as, the global best for a small jurisdiction". JLIB's strategy is based on the following elements:

- To support Jersey's position as a leading business centre.
- To make the law and legal processes more accessible.
- To promote the better co-ordination of Jersey's justice system.

Historically, JLIB has acted as the research and development arm of the courts, undertaking a variety of projects and pilots (varying in scope from the introduction of digital audio recording for courts, to the establishment of an Institute of Law) which have led to improvements in the

efficiency and effectiveness of the legal system. JLIB has also played a major role in ensuring that the Island's legal materials have been made available online through its website¹. More recently, there has been a strategic shift towards making the law more widely and freely accessible to all, and to support this process, JLIB joined the Free Access to Law Movement² in 2008.

The website, JLIB's flagship project, provides online access to all of the Island's legislation (including subordinate legislation), relevant Orders in Council, Practice Directions, and all judgments of the courts. In addition, there is an online library of legal books and texts, links to legal advice for citizens, annotated versions of selected legislation containing commentaries and hyperlinks to relevant cases, and a plethora of guidance on court procedures, all made accessible through a powerful search engine.

Whilst the website has been the principal focus of JLIB's contribution to free access to law for the people of Jersey, JLIB has continued to busy itself with other projects. These projects may not contribute directly to free access to law, but are generally intended to support the principles of open and accessible justice, in accordance with the strategic objectives referred to above. One such project relates to the use of video conferencing and the associated research into the impact that this technology has on access to justice.

2. Video conferencing – background

The Island's judicial system essentially comprises the Magistrate's Court, the Royal Court and the Court of Appeal (in addition, there are various Tribunals and a Family Court), all of which are located in the Island's capital, St Helier. The Island's prison, with a capacity for 268 prisoners, is located 7 miles to the west of St Helier. In due course, all of these venues will benefit from the developments envisaged by this project.

The courts in Jersey have had access to video conferencing equipment since 1999. Although this equipment has been refreshed on a number of occasions, it has never been permanently fitted to any court and has always been available to be moved from one court to another, as dictated by demand. This is time consuming, expensive in terms of input from technicians, an inefficient use of resources and disruptive to the courts while equipment is being installed and recovered. Notwithstanding this, amongst other purposes, it has been used for remote examination of witnesses (expert, vulnerable or other), hearings involving prisoners detained in UK prisons, and delivery of reserved judgments from the UK by the Court of Appeal (Court of Appeal judges in Jersey are mostly appointed from the UK).

The decision to upgrade the video conferencing equipment and provide dedicated facilities for all courtrooms was taken two years ago. JLIB was requested to investigate how this could be achieved, to research the potential impact on court proceedings and to implement a pilot based on a limited budget. After reviewing a number of technical solutions, JLIB is now entering final negotiations with a possible supplier.

¹ See <http://www.jerseylaw.je>

² See *Montreal Declaration on Free Access to Law* at http://www.worldlii.org/worldlii/declaration/montreal_en.html.

3. Video conferencing – virtues and vices

3.1 Impact on ceremonial justice

In the post-modern era, it has been said that the design of courthouses, the introduction of technology and the decline of ritual have all led to increased transparency in the justice system. Marrani³, in his discussion on post-modern evolution of places of justice, refers to the fact that the design of court buildings has transformed from designs which signified “be careful when you enter here” to a post-modern office design that signals “don’t worry.” This, in turn, leads to open justice, improved access to justice and (arguably) an attenuation of the ceremonial of justice. Providing video conferencing as part of the mainstream activities in the judicial process will create opportunities for virtual courtroom presence which fundamentally alter the old order of doing things. However, ceremony has not yet disappeared in Jersey’s legal system, whose roots go back to Norman times. With the exception of the lower courts, the estate is very traditional, or even old fashioned (not a whiff of post-modernism here). There will, for example, be significant obstacles to be overcome in adapting the Royal Court to accept video conferencing, due to the historical nature of the building and its listed architectural features.

Katsh⁴, in his description of how Gutenberg and the medium of print transformed the law, refers to the need for stability: “The purpose of maintaining links with the past is to restrict the pace of change and to provide citizens with a sense of regularity and stability. This is considered to be at least as important a goal as some of the law’s other major functions, such as the achievement of justice or the settling of disputes.” As new technologies take on some of the tasks performed by print, one of the consequences will be to upset this stability. However, Dator⁵ presents an inevitable view that: “Law in the future will eventually not be expressed by words at all, but as dynamic 3-D audio/visual/tactile/olfactory simulations in cyberspace of proscribed or required behaviours.” It can therefore be concluded that introducing video conferencing to the mainstream in Jersey will be disruptive, but is inescapable.

Mulcahy⁶ refers to the importance of creating a sense of special place through ceremony, but to what extent does video conferencing (or other forms of technology) erode this sense of specialness? She argues that “..... legal rituals, traditionally seen as critical to the trial, [are] marginalised as the physical boundaries of the courtroom are increasingly being violated by new information highways.” Removal of walls leads to the space of justice being re-defined and begs the question: is justice a place? By bringing a witness into court via a video link, it can be argued that the right of the defendant to a fair trial is diminished. For example, how does the positioning of the witness at the far end affect the conduct of the trial? (A discussion of true-to-life principles appears later in this paper.)

³ Marrani D in Breda V & Rodak L (eds) (2016) *Diverse Narratives of Legal Objectivity*, Peter Lang, p. 208.

⁴ Katsh E (1989) *Electronic Media and the Transformation of Law*, Oxford University Press, p. 18.

⁵ Dator J (2000) *When courts are overgrown with grass: the role of courts in the 21st Century*, Futures 32 (2000), p. 192.

⁶ Mulcahy L (2011) *Legal Architecture: Justice, due process and the place of law*, Routledge, p. 21.

3.2 Impact on human rights

The European Convention on Human Rights (ECHR) was embodied in Jersey's domestic law under the Human Rights (Jersey) Law 2000. Article 6 protects the right to a fair trial. It states that, in a civil or criminal case, everyone is entitled to a fair and public hearing, within a reasonable time by an independent and impartial tribunal established by law. Judgments should be given in public, except under certain conditions which prevent this. It also establishes the presumption of innocence until proven guilty and rights to examine witnesses, have legal representation, have access to an interpreter, and have adequate time to prepare a defence.

Other Articles of the ECHR (principally 8 and 10) impact on the concept of open justice, balancing the need for judicial accountability with the need for the privacy of the individual. The stated view of Jersey's judiciary and over-riding principle is that justice must be seen to be done. Public trust and confidence in the justice system would be jeopardised if judicial hearings were routinely held in private. There is also a need for open and public hearings to satisfy the public or community catharsis. Justice being seen to be done is perceived by the public as a need for criminals to be punished for their acts, otherwise retribution and vigilantism by the public will prevail. As Bentham asserted: "Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial."⁷ It could be argued that, making video conferencing a habitual practice of the courts and the presence of cameras in courts, is a first step towards the televising and live broadcasting of proceedings, having a profound effect on the justice system and society. As Hutton⁸ concludes: "The use of cameras within the courtroom directly influences sociological and behavioural aspects of members within the community as well as members associated with the criminal justice system." Whilst televising of proceedings is commonplace in some jurisdictions, it is still early days in the UK (proceedings in the Supreme Court have been televised since it was established in 2009, and filming has been possible in the Court of Appeal since 2013).

In providing dedicated facilities for video conferencing and taking more progressive steps towards the use of technology in judicial proceedings, the courts in Jersey need to take account of the possible impact on the human rights of defendants and witnesses. To do otherwise would result in a sharp increase in appeals against decisions of the courts. A significant number of violations of Article 6 (in the European context) concern the right to examine witnesses or have them examined. In this respect, problems of compliance may arise when witness evidence is taken remotely from absent, anonymous or vulnerable people by video link, even when applicable legislation permits this (though the author is unaware of any case law arising from an Article 6 violation caused by video conferencing). Other violations concern the "reasonable time" requirement; arguably, video conferencing can help in meeting this objective.

The principal legislative instruments in Jersey (all of which are available via the JLJB website⁹) governing the use of video conferencing in court proceedings are:

⁷ Bowling J (ed) (1843) *The Works of Jeremy Bentham*, vol. 4, pp. 316-317.

⁸ Hutton E (2009) *Cameras in the Courtroom: a Comprehensive Examination*, Primary Research Paper, Internet Journal of Criminology, p. 9.

⁹ See <http://www.jerseylaw.je>

- Criminal Justice (Evidence and Procedure) (Jersey) Law 1998 (deals with witness evidence via video link).
- Evidence (Television and Video Recordings) Rules 2006 (deals with evidence of children via video link).
- Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 (deals with appearances of the accused for bail and pre-trial hearings via video link).

Article 6 of the last of these laws makes it a requirement for the accused to be "..... able to see and hear the Court and also to be seen and heard by the Court." Whilst this requirement is simply and clearly stated, it may, in practice, be more difficult to achieve, if the requirements of Article 6 of the European Convention on Human Rights are to be respected.

It seems clear that, in adopting more widespread use of video conferencing, the Jersey judiciary will need to change the way the courts operate. The legislation may enable video conferencing to take place in certain circumstances, but it does not provide the detail about the procedures that will be needed to make it successful. There will be a real need to innovate, rather than use the equipment simply to automate existing practices. The logistics of organising a court diary that will still need to contain a mix of conventional and video enabled hearings is an obvious example.

4. Video conferencing – drivers and the politics of presence

Why are courts driven to make use of video conferencing? Is it to protect the vulnerable, or is it to achieve efficiencies and cost savings?

There is a growing concern about the requirement for the victims of crime to be physically present in the courtroom, confronted by the unfamiliar legal rituals and the presence of the person against whom they are about to testify, and the impact which all of this has on the victim's mental state. This has led to an increase in, for example, the video recording of child witness testimony and witness presence from another part of the building via closed circuit television (which could be described as "short range" video conferencing). The rising cost of getting people to court (prisoners, witnesses and expert witnesses) and the rising number of hearings has driven an increase in the use of video conferencing.

In considering the drivers for this technology, it is also helpful to balance these views with some of the restraining influences which make it less attractive. For example, although the quality of video conferencing systems has improved immeasurably over the last 20 years, they are still subject to technology mediated vulnerabilities (breaks in connection, low picture quality, poor synchronisation of video and audio, to name but a few). A particular case in point was the murder trial, *State of Florida v George Zimmerman*. During the trial, an expert witness was examined remotely via video conference. When the line failed, the parties agreed to continue the examination using Skype. As the questioning continued, the Skype call was increasingly interrupted, or "bombed", by other Skype users to the point of saturation (the trial was being broadcast live on national television)¹⁰. This resulted in the court resorting to completing the examination of the witness using a conference telephone. This

¹⁰ See https://www.youtube.com/watch?v=Pq_WaA5Vneg

illustrates perfectly how easy it is to be wrong-footed by technology and the importance of avoiding sub-optimal solutions.

Due to the fact that Jersey is an international business centre, and that it attracts immigrants from a wide number of European countries (and further afield), there is an increasing number of transnational judicial cases. The use of video conferencing to deal with cross-border disputes is of great advantage to reduce travel costs, save time and protect vulnerable people. For it to be successful, each participant in the proceedings (whether present in the courtroom or not) must be comfortable with the system in order to perform their job. Whether for cross-border communication or something more local, and in simple terms, the system must provide facilities at both ends which:

- Have a high quality, uninterrupted connection between the two video conferencing facilities.
- Capture good quality video and audio for transmission to the remote site.
- Reproduce the image and sound exactly as received from the remote site.

The weakest link will determine the quality (as referred to above in relation to the Zimmerman trial). Achieving good quality is fundamental to meeting the true-to-life principles.

Regardless of the quality, there is still, however, debate to be had about physical presence. Mulcahy¹¹ argues that “.....we are in danger of forgetting that requiring the physical presence of people in a special building continues to have considerable cultural resonance.” She goes on to state that the physical surroundings in which evidence is given play a critical role in reinforcing the importance of the trial. There is little doubt that, even given the state of the art of video conferencing today, physical presence makes it easier to evaluate the nuances of body language and demeanour of a witness. For example, professional interpreters are known to dislike video conferencing, due to the lack of eye contact with the defendant. It is also important not to under-estimate the important social component of the “day in court”. As a counter to these arguments, it is a matter of record that the use of video conferencing has been exercised successfully in a wide variety of settings. In a 2005 House of Lords judgment¹², Baroness Hale stated that “..... VCF [video conferencing] is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone.”

There are other benefits (or drivers) which may not immediately be apparent and have not been referred to above:

- Eliminating unnecessary prisoner movements can increase safety and reduce risks associated with high risk prisoners in the courthouse or during transfers (prisoner handling facilities in Jersey’s Royal Court, due to its age, are considered as poor).
- Video conferencing can improve cost effectiveness in a number of ways. Time spent logging prisoners in and out of prison can be reduced (in Jersey, risk assessments are undertaken for both transferring the defendant to court, and handling the defendant

¹¹ Mulcahy L (2011) *Legal Architecture: Justice, due process and the place of law*, Routledge, p. 163.

¹² See <http://www.bailii.org/uk/cases/UKHL/2005/10.html>

within the court building). The cost of prisoner transfers can be reduced. Witness appearances can occur at reduced cost.

- An analysis of recent cases in Jersey showed that 16 court appearances averaged just three minutes in the dock, but required those concerned to spend a total of 74 hours in custody outside the prison. It is also a frequent occurrence for prisoners to be brought from the prison for a two minute custody hearing, only to have to wait for four hours before being taken back. Research in the UK suggests that remand prisoners resent missing meals, recreation, exercise and visits due to long waits to be returned to prison.
- Improved access to justice can be achieved by cutting down on travel, reducing obstacles to case completion and providing better protection for vulnerable witnesses. Hearings in the Family Court in Jersey frequently involve parties or witnesses who live overseas; it is not always possible or affordable for them to travel to the Island, meaning that they are effectively denied a voice in the hearing.

Susskind¹³ makes a prediction about virtual hearings, based on the fact that policymakers and opinion formers of today do not hail from the Internet generation, and for whom virtual trials may seem alien or outlandish: “Future generations, for whom working and socialising online will be second nature, may feel very differently. Indeed, for tomorrow’s clients, virtual hearings may improve access to justice.”

5. Open justice and true-to-life principles

The evolution of video conferencing has led to what is now referred to by some as “telepresence”. Telepresence shows every meeting participant in true-to-life dimensions to the point that even the body language of the participants can be read. Each connected location has duplicate furnishings and colour schemes, such that the sensation is created that all of the participants are seated round the same table. In a discussion on “immersive telepresence”, Susskind¹⁴ goes as far as saying that “..... the gravity of proceedings, as well as the gravitas of the judge, could to a large extent be conveyed and maintained in the new environment.” An important point to note is that, regardless of the type of video conferencing system being deployed, the audio quality is critical to its success; video can embellish the audio conversation but cannot replace it. Taking a similar approach, courts can develop a true-to-life approach in the design of courtroom video conferencing facilities, such that they become a fair alternative to face-to-face for all parties in the proceedings, providing a naturalistic setting for human interaction and enhancing access to justice.

There are, however, circumstances in which true-to-life could have an adverse effect on participants, specifically victims and vulnerable witnesses. Such a person may be afraid to confront the offender or be involved in a court proceeding, and may be far from home and on their own; and yet the same person may be willing to testify and exercise their right to speak in court through a video conference. Testimony via video conference allows the victim to exercise their right to be heard in a less stressful way, in a safe environment, close to home, and in the company of a lawyer or trusted person. There may even be occasions when

¹³ Susskind R (2013) *Tomorrow’s Lawyers*, Oxford University Press, p. 104.

¹⁴ Susskind R (2008) *The End of Lawyers?*, Oxford University Press, p. 213.

measures are needed to deviate from true-to-life during a video-conference (to protect the identity of the victim), for example by one way video conferencing, voice distortion or image distortion.

As part of the solution to Jersey's video conferencing needs, a partnership approach is being developed with the supplier to ensure that there is a focus on open justice and true-to-life principles, making court proceedings transparent and accessible. Open justice will be supported as a consequence of:

- All court participants (present or remote) being able to see all other participants at all times.
- Public and press being able to see all court participants and being able to follow proceedings.
- Both audio and video of court proceedings being capable of being recorded and made available as required.

True-to-life means that for all participants, the experience of being in court should be as near as possible to actually being there. This requirement arises, as much as anything else, from Article 6 of the ECHR and leads to seven fundamental starting points underpinning the design of the solution, as described below.

5.1 Image and sound quality

In order to safeguard the interests of each person involved, the video and audio quality should be such that all have a realistic and clear view of what is happening at the other location. It is essential that sight-lines and positioning of equipment is carefully planned and accommodated. Where the equipment can be fitted permanently, this will be relatively easy to achieve; where the equipment has to be removable (as in the Royal Court) this will be less easy.

5.2 Personal interactions

Interactions between participants (how they react or respond to each other) should be clearly noticeable. It is important to be able to interpret witness demeanour and reactions. Anecdotally, it has often been stated that the emotional distance provided by a video link makes it easier to lie.

5.3 Voice-activation

Voice-activated switching of camera shots should be avoided as much as possible (if used at all). The argument that technological "wizardry" will enhance the proceedings should be resisted.

5.4 Zooming and panning

The view should not be manipulated by zooming or panning of cameras to focus on certain characteristics of a person. Mulcahy¹⁵ argues that “..... the choice of camera angle and number of cameras create a ‘fictionalisation’ of what occurs in the separate but related space of the live link video suite.” There is a danger that an overly artistic approach to the use of cameras will create unwanted exaggeration of the action.

5.5 Visual detail

Looks, facial expression, mouth movements, direction of view, gestures, and posture of each person involved should be clearly perceptible. There is a risk that a low quality video conference will be devoid of human connection, with physical or emotional reactions being less potent. This would result in the importance of the trial as a social ritual being lessened.

5.6 Representation

Each person should be represented in the same way to each other person, and each person should have the same perception of eye contact with all other persons. Care needs to be taken to design the system in such a way to ensure that the details of the participants always remain “in shot”. It would be all too easy for participants to move at a critical moment in the proceedings, thereby removing themselves (visually) from the action.

5.7 Influence of technology

The principal tasks and roles of the court participants should not be negatively influenced by the appliance of technology. The dynamics of the traditional, adversarial court proceeding might have benefits; going to court is, after all, a serious business. However, the use of video conferencing may help to reduce fears and inhibitions, and is more likely to reflect contemporary aspirations for access to justice.

6. A solution for Jersey

It would not be appropriate here to provide in depth technical detail about the forthcoming, intended solution to provide a bespoke video conferencing system for all of the courts in Jersey. However, it may be useful to provide a high level overview of some of the operating principles and features.

The system is based on proven concepts which have been in use for some time in the courts in the Netherlands. It is based on a managed technical service which allows court participants to focus on their prime responsibilities. The service is delivered from the cloud (with appropriate security certification) by the supplier, without the need for JLJB to invest in a centralised video infrastructure. The service is essentially comprised of three core elements:

¹⁵ Mulcahy L (2011) *Legal Architecture: Justice, due process and the place of law*, Routledge, p. 177.

- Managed video service, delivering secure video links to remote locations.
- Operator assistance, to provide assistance for court staff to connect a video link to external locations.
- In-court audio visual equipment.

A managed service provides ease of use for court staff, without the need for an understanding of the underlying technology, as well as a reduction in capital expenditure in comparison to a locally provided infrastructure. Outsourcing the responsibility for technical issues (making the video connections and troubleshooting any problems) also makes using the system less stressful for court staff. The in-court audio visual equipment, apart from being used for video conferencing, will additionally be available for electronic presentation of evidence.

JLIB has established a working group to work with the supplier to deliver a pilot service; representatives on the group include the Deputy Chief Justice, court staff (a senior clerk and the Chief Usher) and technical staff who will be responsible for the in-court equipment. Although the system has been demonstrated to a wider audience, it would probably be appropriate also to involve representatives from the prison, the local bar and the probation service. In addition, it is intended that there will be a link to the customs detention facility (for remote appearance of detainees suspected of drug smuggling) and the police station (for remote appearance of police officers giving evidence or for offenders in police cells). Prior to launch of the system, it will be necessary to provide training to all participants, including the opportunity to practise using the equipment and participating in mock hearings.

7. Conclusion

Young¹⁶ believes that there are three principles which could improve the design and integration of video conferencing technology in courtrooms:

- Inspire: Future virtual courts work should involve all court users in generating ideas to improve stakeholders' user experience and integrate new technologies such as video.
- Prototype: These ideas should be rapidly tested with court users, prior to pilots, to reduce the risk of failure further down the line, as well as suggesting more ideas to improve other parts of the system.
- Execute: Criminal justice agencies should consider how to embed design thinking¹⁷ as an approach to innovation into their organisation's culture.

This approach would be well suited to Jersey's project to implement video conferencing in its judicial processes. There are still some participants that need to be converted to the idea that this will be a step forward. There is a mindset in Jersey that thinks that, because it is a small

¹⁶ Young J (2011) *A virtual day in court: design thinking and virtual courts*, RSA Projects, p. 3.

¹⁷ A discipline that uses the designer's sensibility and methods to match people's needs with what is technologically feasible and what a viable business strategy can convert into customer value and market opportunity.

island (only 7 miles from the courts to the prison), there are not the efficiencies to be gained that there are in a larger jurisdiction; or, that the inconvenience of attending a court hearing in person confers attending with importance (a remote witness might not pick up on the seriousness of the occasion); or, that video conferencing is even a threat to traditional court hearings where people are physically present in the courtroom.

Van den Hoogen¹⁸ believes that, in the years to come, the administration of justice will change drastically as the result of the possibilities afforded by technology: “These possibilities will have to be used as much as possible, with a view to the conservation and improvement of the legal quality of court procedures.” An alternative expression of this idea is that technology should enhance access to justice, not hinder it or impact on the quality of the judicial decision making process. In any event, upholding the guarantees enshrined in Article 6 of the European Convention on Human Rights will be of overriding importance.

Implementing an all embracing video conferencing solution in Jersey is a complex combination of legal, social, cultural and technological challenges. It has been said that justice requires a specific space, and that words take their meaning solely because of a specific ceremonial; video conferencing will confront these assertions and develop a new dimension for access to justice.

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¹⁸ Van den Hoogen R (2007) *E-Justice: Principles of a fair electronic trial*, SDU Uitgevers, p. 151.