Workshop on computers and the law

2 May 2025

Royal College of Physicians, 10am–4pm

From Stephen Mason

Harold Thimbleby invited me to this event. I am not able to attend. Harold asked if I would send a photograph and a few words to share with participants.

Those attending will probably be aware of the open-source practitioner text for judges, lawyers, and legal academics that I edit with Professor Daniel Seng:

> *Electronic Evidence and Electronic Signatures* (5th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2021)
>
> https://uolpress.co.uk/book/electronic-evidence-and-electronic-signatures/

Photograph taken by Dafinka Stoilova as part of the one-day seminar I gave at the National Institute of Justice (Sophia, Bulgaria, 25 February 2014) entitled 'Digital evidence: an introduction', for judges of the Supreme Court of Cassation and Appellate Court of Sofia, as part of the training programme for the training of judges in the context of full membership of the European Union, given on behalf of the European Commission

Beginning with the second edition of *Electronic Evidence* (2010), I set out to demonstrate that the presumption that computers are reliable is false.

This research began as a direct result of the case of *Job v Halifax PLC* (not reported) Case number 7BQ00307, 6 *Digital Evidence and Electronic Signature Law Review* (2009) 235-245. I was instructed by the Bar Pro Bono Unit to represent Mr Job, and the presumption was raised in closing speeches, for which see [21], https://journals.sas.ac.uk/deeslr/article/view/1905.

James Christie subsequently demonstrated that those responsible in the Law Commission have a great deal to answer for when recommending the repeal of section 69 of PACE 1984 and replacing it with the presumption that computers are reliable: James Christie, 'The Law Commission and section 69 of the Police and Criminal Evidence Act 1984', 20 *Digital Evidence and Electronic Signature Law Review* (2023) 62-69, https://journals.sas.ac.uk/deeslr/article/view/5642.

I appreciate that my use of the phrase regarding the reliability of computers is technically more nuanced than the bold assertion that they cannot be reliable.

The Law Commission did not appreciate this nuance in 1997 (or if it did, it ignored it), when it decided to introduce the common law (rebuttable) presumption that computers producing evidence were operating correctly at the material time.

I have tried for over decade to argue this point. Unfortunately, it took the prosecutions of hundreds of subpostmasters and subpostmistress by the Post Office before this presumption was finally exposed as being fundamentally unfair and wrong.

I expressed my concern in the 5th edition of our text, at page xv:

> The failure to deal with these two issues by the legal profession has finally led me to adopt the view taken by

Bertolt Brecht in the following lines from his poem ‘An die Nachgeborenen’ (To those born after), where he writes, from the translation by Tom Kuhn and David Constantine, with the assistance of Charlotte Ryland, *The Collected Poems of Bertolt Brecht* (Liveright Publishing Corporation, 2015):

> Auch der Zorn über das Unrecht
>
> Macht die Stimme heiser.
>
> Anger, even at injustice
>
> Makes your voice hoarse.

I suspect, but will never be able to prove, that the reason for the presumption is the cost of disclosure of evidence in electronic form, as I set out in the vignette ‘Software is reliable and robust’ in the 5th edition, ending with the following exchange, at page xiv:

> ‘Well, Sergeant Chaucer’ the judge replied, ‘we are told that the disclosure exercise you are requesting is very expensive.’
>
> ‘So my learned friends contends, your Lordship and, if I may say, without any evidence to support the claim that the exercise is expensive. In fact, the requests for disclosure are nothing more than should be expected to be produced from an efficient and well-run system such as EarthSkyMeet. The claimant spent vast amounts of money on a complex computer system that purports to be more efficient and, no doubt, with the intention of increasing profits. Given this, your Lordship, it is my submission that they must face the foreseeable consequences of being required to deliver up relevant evidence in the event of litigation. The claimant is an organization of some size. They have a department that works on litigation continuously. Litigation is a normal part of their business. It is a poor excuse for a powerful organization to allege that the expense of providing routine information relating to the IT system they use is disproportionate to the fairness of legal proceedings.’

Let us hope the Ministry of Justice call for evidence on the presumption that began on 21 January 2025 and ended on 15 April 2025 will result in a rational and realistic response.

Finally, I thank every technical person I have approached over the last two decades for taking the time and trouble to respond to my technical questions over software; for writing articles in the *Digital Evidence and Electronic Signature Law Review* at my request, and to all those who have kindly reviewed chapter 5 on this topic in various editions of our text to correct my inaccuracies when illustrating the failure of software.