



What is information technology doing to the common law?

*The Hon Justice Stephen Gageler**

This article explores the impact of information technology on the judicial development of the common law. Central to the common law system is the doctrine of precedent, and central to that doctrine is the concept of an 'authority'. The concept of an 'authority' has historically been, and continues to be, shaped by technological developments. This article focuses in particular on two relatively recent technological developments — the internet and word-processing systems — and explores how they are reshaping our concept of an 'authority' and the subsequent effect of this shift on the common law system itself.

Introduction

My topic lies at the intersection of legal practice and legal thinking. It is concerned with the impact of information technology on the judicial development of the law within a common law system. I start by explaining what I mean when I refer to a common law system, and to the judicial development of the law within a common law system.

A common law system

A common law system is a system of law which derives historically from the system of law which began to develop in England around the twelfth century and which had come to exist in its early modern form in the United Kingdom by the last quarter of the eighteenth century: the beginning of the industrial revolution, the time of the American and French political revolutions, and the beginning of European settlement in Australia and New Zealand. It is a system which is founded on the existence of some degree of structural separation between the legislative function of laying down general rules and the judicial function of deciding individual cases. It is a system in which the exercise of the judicial function of deciding an individual case is characteristically accompanied by the judicial elaboration of reasons for the decision made in that case.

A common law system posits the existence of two principal kinds of authoritative legal texts: those produced by the legislature in the form of statutes; and those produced by the courts in the form of reasons for judgment in decided cases. Those two principal kinds of authoritative legal texts can loosely be described as 'statute law' and 'case law'. It would be wrong to take from that loose description that they exist as two distinct bodies of law. They

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overlap and are intertwined. Statutes are enacted against the background of earlier decided cases and in the expectation that they will be applied in deciding later cases. There are many substantive fields of law in which statutes have wholly displaced earlier case law and there are few, if any, substantive fields of law into which statutes have not made at least significant inroads. Statutes need to be interpreted to be applied. Courts interpret them in the course of deciding cases. The contents of statutory texts come in that way to be authoritatively explained in the reasons for judgment of courts in later decided cases. The result is that, at any given time, the law in almost any substantive field is able to be discerned and applied only with statute law in one hand and case law in the other.

The main difference between the two principal kinds of authoritative legal texts lies in the nature of the authority which they carry. The coercive authority of the state makes a statute binding on all of those to whom the statute is addressed. The coercive authority of the state similarly makes binding the actual judgment or order made by a court in a decided case, albeit, that the judgment or order is ordinarily binding only on those who are actually in dispute in that case. The authority accorded to the reasons for judgment in a decided case is of a different nature.

The authority accorded to reasons for judgment in a decided case derives from the method of reasoning which courts in a common law system employ to decide individual cases. That method of reasoning is one that permits, and often requires, reasons for judgment in an earlier decided case to be taken into consideration by a court deciding a subsequent case. Just why reasons for judgment in an earlier case should be taken into consideration by a court deciding a subsequent case can be justified in a number of overlapping and complementary ways. It can be justified in terms of promoting fairness or equality before the law (ensuring so far as possible that like cases are decided alike). It can be justified in terms of efficiency (avoiding having to recreate the wheel in every case). It can be justified as contributing to coherence, stability and predictability. Whatever the justification, the practice of courts deciding subsequent cases according some measure of authoritative status to the reasons for judgment in earlier decided cases is one of the defining features of a common law system. It is often referred to as the feature which is most significant in distinguishing the functioning of a common law system from the functioning of civil law systems in which case law is not generally acknowledged to have the same authoritative status.

Courts in a common law system routinely refer to reasons for judgment in earlier decided cases as 'authorities'. They also routinely distinguish between authorities that are 'binding' and authorities that are 'persuasive'. When a court in a common law system refers to reasons for judgment in an earlier decided case as a binding authority, it refers to reasons for judgment which it must apply — or 'follow' — in deciding the case at hand unless those reasons can be 'distinguished'. When a court in a common law system refers to reasons for judgment in an earlier decided case as a persuasive authority, it refers to reasons for judgment which it may choose to follow in deciding the case at hand, not because it is bound to do so but because it is persuaded by those reasons.

The status of an authority, either as binding or as persuasive, turns on the

applicable rules of precedent operating within a particular judicial hierarchy. While those rules differ in their detail from one judicial hierarchy to another, they turn for the most part on the relationship between the courts in question.

A common law system typically provides for a judicial hierarchy which can be described in functional terms and for most practical purposes as consisting of three tiers: one or more trial courts, one or more intermediate appellate courts, and an ultimate appellate court. An authority which emanated from a higher court in the same judicial hierarchy is always binding. An authority which emanated from a lower court in the same judicial hierarchy is always at best persuasive. An authority which emanated from a court outside the judicial hierarchy is similarly always at best persuasive.

Within some judicial hierarchies, an authority which emanated from a court of coordinate status in the same judicial hierarchy (another trial court or another intermediate appellate court) is treated as presumptively persuasive. Within other judicial hierarchies an authority which emanated from a court of coordinate status is treated as presumptively binding, in the sense that it is to be followed in the absence of exceptionally strong reasons being shown for departing from it. Within most judicial hierarchies, an earlier authority of the same court (including an earlier authority of an ultimate appellate court when it comes to be considered again by that ultimate appellate court) is ordinarily similarly treated as presumptively binding, in the sense that it is to be followed in the absence of exceptionally strong reasons being shown for overruling it.

The judicial development of the law within a common law system

The judicial development of the law within a common law system occurs through the dynamic iteration and reiteration of the content of the law in reasons for decision in decided cases. The content of the law to be applied by a court in deciding a particular case is found in, or is at least informed by, the court's consideration of reasons for judgment given in similar cases which have been decided by courts in the past. It is so found or informed by looking back to those reasons for judgment and extracting by induction the content of the law sufficient to decide the case at hand. The content of the law, as so found or informed, is then applied by the court to judge the case at hand through a process of reasoning that is in broad terms one of deduction: applying the law to the facts of the case at hand to reach a conclusion that is expressed in the form of a judgment.

The extent to which inductive reasoning from earlier case law constrains the judgment to be made by a court in the case at hand and how much room it legitimately leaves for other considerations to inform the decision-making process is the stuff of controversy between legal philosophers, and occasionally surfaces in complaints in the popular press about courts being either 'activist' (when they allow other considerations to bear on the decision-making process) or 'out of touch' (when they don't). The degree of constraint imposed by authority in the form of case law in fact varies in practice from court to court, from time to time, and from case to case.

Whatever the latitude for other considerations to bear on the decision-making process of a particular court in a particular case, the case at

hand will always be concluded by judgment and reasons for that judgment will always be given. Those reasons for judgment will always explain the reasoning that the court has applied, including the use it has made of those authorities it has considered. They will sometimes distinguish authorities which are binding. Where permitted by the applicable rules of precedent, they will sometimes overrule or depart from authorities which are presumptively binding. But irrespective of the way they deal with earlier authorities, the reasons for judgment in the case at hand will become themselves an authority. That new authority will then be added to the authorities permitted or required to be taken into account by a court deciding a subsequent case. So the fabric of the law in a common law system is consistently woven, picked at, patched and re-woven.

If only because they are bound less and bind more, courts situated higher in a particular judicial hierarchy are generally in a position to contribute more to the judicial development of the law than courts that are lower in that judicial hierarchy. For the same reasons, ultimate appellate courts are generally in a position to contribute more to that development than intermediate appellate courts.

In the case of ultimate courts of appeal, there are typically other institutional factors which contribute to both their ability to develop the law and to the expectation on the part of other courts as well as other arms of government that they will perform that function. Ultimate appellate courts typically decide fewer cases with the benefit of more extensive argument than do intermediate appellate courts, and they are, in consequence, typically able to produce more elaborate reasons for judgment in those fewer cases that they do decide. Their ability to bring that focus is typically facilitated by an ability to control the number and subject-matter of the appeals that come before them.

In the case of the High Court of Australia, for example, its capacity to develop the law in reasons for judgment in a relatively small number of appeals is enhanced by the structural requirement which permits an appeal to be brought to it from an Australian intermediate court of appeal only by special leave granted by the High Court itself on application by a party to the proceedings in which the judgment sought to be appealed has been given. The legislative expectation that the High Court will perform the function of developing the law within Australia is highlighted by the existence of non-exhaustive statutory criteria informing the exercise of discretion to grant special leave expressed in terms of whether the proceedings in which the judgment to which the application relates involve a question of law that is of public importance or in respect of which a decision of the High Court, as the final appellate court for Australia, is required to resolve differences of opinion between different Australian courts, or within the one court, as to the state of the law.¹

Intermediate courts of appeal in Australia have much less ability to control the number and subject-matter of appeals coming before them and whose greater case-load typically leaves less time for reflection on reasons for

¹ Judiciary Act 1903 (Cth) s 35A.

judgment in earlier cases and less scope for detailed elaboration of reasons for judgment in the cases they determine.

The topic refined

My concern with the impact of information technology on the judicial development of the law within a common law system is a concern mainly, but not exclusively, with the development of the law by appellate courts. My interest, in part, is in exploring the way in which developments in information technology over the last 30 years have come to affect the broadly inductive process by which courts consider what are, or might be argued before them to be, binding or persuasive authorities. It is also in part an interest in exploring the way in which developments in information technology over the same period have come to affect how courts express their reasons for decision which then take their own place as authorities sometimes binding and always at least potentially persuasive.

To be more specific and slightly more concrete, my concern is with exploring the following questions. To what extent is the publication of case law on the internet affecting the way in which courts reason from authority? To what extent is word processing affecting the way in which courts express their reasons for judgment which themselves become authorities? How, if at all, are those technological developments changing the process of legal reasoning? How, if at all, is that change in the process of legal reasoning, changing the content of the law itself?

Lessons from history

There is some benefit in commencing exploration of the topic by stepping back from the technological advances of the last 30 years and adopting a somewhat longer term perspective. The explanation I have given of a common law system and of the judicial development of the law within a common law system is broadly descriptive of the systems of law which had come to exist by the last quarter of the twentieth century in the United Kingdom, the United States, Canada, Australia, New Zealand and most of the other countries which then formed part of the Commonwealth of Nations. With some modifications to the structure of appeals and with some variations to the circumstances in which reasons for judgment were to be treated as binding or presumptive authorities, the description I have given is broadly descriptive of the systems of law as they had existed in those countries for roughly a century before.

It had not always been so. The whole notion of the authority of case law is technologically dependent. It is first and foremost dependent on reasons for judgment in a decided case being physically available to be taken into account by a court deciding a subsequent case. Physical availability to be taken into account depends on those reasons for judgment having been recorded at the time they are given and then having been published in a form accessible to the court deciding the subsequent case.

Only a century earlier, when Sir William Blackstone was writing his influential treatise on the laws of England and when Lord Mansfield presided over the Court of Kings Bench in England, the position was quite different. Then, as for centuries before, reasons for judgment in decided cases were

delivered orally and were rarely recorded. Where they were recorded and published, it was generally by individual lawyers who operated privately and for profit and the reliability of whose reports varied enormously. Lord Mansfield's contemporary, Justice Buller, is reported to have referred to an earlier case as having been 'miserably reported in the printed book'.² One of his predecessors, Sir John Holt, is reported to have said of one of the lower quality reports of cases current in his day (ambitiously called the 'Modern Reports') that 'they will make us appear to posterity for a parcel of blockheads'.³

Reasons for judgment in decided cases, to the extent they were available to courts deciding subsequent cases, were then generally regarded not as authoritative legal texts in their own right but as evidence (of variable veracity) as to the way in which the content of the law existing in custom and reason had been elaborated and applied in other cases. Professor Gerald Postema has explained that the view of precedent which prevailed in common law courts at that time had three salient features:

First, past judicial decisions claim[ed] judicial respect and attention not in virtue of merely having been decided — laid down or posited — but in virtue of having been taken up by subsequent courts and thereby having found a place within that body of common experience. . . . Secondly, while individual cases [were] not regarded as establishing authoritative rules, they are taken to illustrate the operation of proper legal reasoning, to exemplify the process of reasoning within the body of experience. Thirdly, past cases [did] not preclude deliberation and reasoning in subsequent cases but rather they invited and focused that reasoning.⁴

According to Blackstone, the common law was 'unwritten law', the decisions of courts were evidence of that unwritten law, and '*the law and the opinion of the Judge*, [were] not convertible terms, or one and the same thing; since it may happen that the Judge may *mistake* the law'.⁵ According to Lord Mansfield, '[t]he law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases',⁶ 'precedent, though it be evidence of the law, is not the law itself, much less the whole law',⁷ rather '[t]he reason and the spirit of cases make law; not the letter of particular precedents'.⁸

Legal historians have noted that the notion of reasons for judgment in decided cases becoming authoritative legal texts because of what they decided came to prominence in the course of the nineteenth century in tandem with a significant growth in the availability of law reports produced by professional reporters from the end of the eighteenth century. The notion became more

² *Lickbarrow v Mason* (1793) 6 East 27, note; 102 ER 1192 at 1197.

³ *Slater v May* (1704) 2 Ld Raym 1071; 92 ER 210.

⁴ G J Postema, 'Philosophy of the Common Law' in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, J L Coleman and S J Shapiro (Eds), Oxford University Press, Oxford, 2002, p 588 at p 597.

⁵ W Blackstone, *Commentaries on the Laws of England*, Vol 1, Clarendon Press, Oxford, 1765, pp 63, 71.

⁶ *R v Bembridge* (1783) 3 Douglas 327 at 332.

⁷ *Jones v Randall* (1774) Loffit 383 at 385.

⁸ *Fisher v Prince* (1762) 3 Burrow 1363 at 1364. See also A W B Simpson, 'The Common Law and Legal Theory' in *Oxford Essays in Jurisprudence*, A W B Simpson (Ed), Clarendon Press, Oxford, 1973, p 77.

marked as the standard of law reporting improved not merely because reporting became professionalised but also because the development of the Pitman shorthand system in the 1830s made it possible for reporters to reproduce in a more or less verbatim form the reasons for judgment which were still then generally orally delivered.⁹

Legal historians have also noted how the common law system as it came to exist by the last quarter of the twentieth century in the United Kingdom owed almost as much to the establishment in 1865 of an Incorporated Council of Law Reporting as it did to the establishment in 1875 of a clear cut three tier structure in the courts at Westminster providing for appeals from the various divisions of the newly created High Court of Justice to a newly established Court of Appeal with the possibility of further appeals to a newly established Judicial Committee of the House of Lords.¹⁰ Similar institutions came to exist within the next couple of decades in the colonies that were to become Australian states, as in many of the countries to which I have referred in which there emerged in the last quarter of the nineteenth century what are, by contemporary standards, recognisable common law systems.¹¹

So began the age of authorised law reporting, epitomised in the United Kingdom by what are colloquially known as the 'rainbow reports' faithfully produced by the Incorporated Council of Law Reporting in colour-coded bound annual volumes each year since 1875 and which typically adorn the walls of most judges' chambers in the United Kingdom and until quite recently also in many other common law countries. Authorised law reporting is epitomised in Australia by the publication in numbered volumes: of the Commonwealth Law Reports recording decisions of the High Court since its establishment in 1903, of the Federal Court Reports recording decisions of the Federal Court of Australia since its establishment in 1977, and by various State Reports recording decisions of the Supreme Courts of each state including decisions of its Court of Appeal or Court of Criminal Appeal.

As explained by Justice Geoff Lindsay of the NSW Supreme Court:

The concept of an 'authorised' law report is a construct of the age of print. It is associated with the idea that law can be found in volumes of printed text; published with the approval, if not under the authority of judges; dedicated to the dissemination of edited reports of reasons for judgment; selected by an editor in whose judgment the legal community reposes trust.¹²

Authorised law reporting contributed to the authority accorded to case law and to the working out of modern common law methodology in three principal respects. First, it served as a de facto system of quality and volume control, separating the wheat from the chaff by distinguishing reportable reasons for

9 N Duxbury, *The Nature and Authority of Precedent*, Cambridge University Press, Cambridge, 2008, p 55.

10 Ibid, p 56; P M Tiersma, 'The Textualisation of Precedent' (2007) 82 *Notre Dame Law Review* 1188 at 1204-9; W D Popkin, *Evolution of the Judicial Opinion*, New York University Press, New York, 2007, pp 17-23.

11 Federal courts in the United States were an exception. See Popkin, *ibid*, pp 80-107. For a brief history see B F Martin, 'In Defense of Unpublished Opinions' (1999) 60 *Ohio SLJ* 177 at 183-5.

12 Justice G Lindsay, 'The Future of Authorised Law Reporting in Australia', Paper presented to the Australian Law Librarians Association, 11 June 2013, at [7].

judgment (considered by the reporters to add in some meaningful way to the content of the law) from unreportable reasons for judgment. Some reasons for judgment of trial courts were considered reportable, more reasons for judgment of intermediate appellate courts were considered reportable and many (but by no means all) reasons for judgment of ultimate appellate courts were considered reportable. Of the 125 reasons for judgment delivered by the High Court of Australia in the calendar year 1960, for example, 96 were reported in the Commonwealth Law Reports and 29 were not.¹³ Of those 29 unreported reasons for judgment, two were reported in the unauthorised Australian Law Journal Reports. The rest were simply archived; published at the time of judgment to the parties in dispute and perhaps mentioned in newspaper articles but not circulated in full more widely. Together with hundreds of other unreported decisions of the High Court over the course of the twentieth century, they were archived and are only now in the process of becoming publicly accessible by being uploaded onto a database soon to be accessible by the internet.

The significance of the filtration or narrowing function served by authorised law reporting was highlighted by the English Law Lord Patrick Devlin when he wrote in 1981:

in England case law is not something which is made by judges alone. Judges spin and others weave. Each time a judge gives a reasoned judgment he spins a thread. It is for the law reporters to decide in the first instance whether the thread can be woven into the law. They have a vital and underestimated part to play in the making of the law, for it is their reports which provide the material for the textbooks and in the lower courts it is the law in the textbooks that is usually applied.¹⁴

Second, authorised law reporting contributed to the crystallisation of authority in that the reporting of each judgment considered to be reportable was invariably accompanied by the meticulous preparation and publication of a carefully crafted headnote which summarised with conspicuous clarity (often but not always with the approval of the court concerned) the proposition or propositions of law on which the judgment in the case turned. The proposition or propositions of law for which reasons for judgment in a reported case stood as authority was thereby immediately apparent on the face of the report.

Third, authorised law reporting contributed to the taxonomy of authority in that each reported set of reasons for judgment was indexed according to a standard system of classification and numbers of those indexes were compiled more generally into digests of case law arranged conceptually. Reasons for judgment in a particular reported case were thereby at least provisionally assigned to a particular location within what was conceived and presented as a structured system.

Those features of authorised law reporting — selectivity, and the clarification and taxonomy of authority — combined to contribute significantly to the apparent coherence of case law for more than a century. The authorised law reports within a judicial hierarchy served as repositories of its case law. They were readily accessible in printed volumes, not to the public, but to courts and legal practitioners within that judicial hierarchy. The

¹³ 'Unreported Appeals and Applications' (1960) 104 CLR 665.

¹⁴ P Devlin, *The Judge*, Oxford University Press, Oxford, 1981, p 180.

authorised law reports were supplemented by various commercially produced unauthorised reports of cases, similarly summarised and indexed, and also similarly accessible. The multifarious less important or lower quality unreported judgments within that judicial hierarchy, in contrast, were for practical purposes non-existent. Authorities of appellate courts which were unreported remained theoretically binding on lower courts but they could not be binding in practice if they could not be found. The availability of potentially persuasive authorities published in the law reports of courts outside the judicial hierarchy was limited by practical limitations on access to the printed volumes of those reports which were both costly and bulky. Outside a small number of relatively well-stocked institutional libraries, the availability of those other printed volumes of reports was very limited. In the 1980s, for example, it was quite standard for a court or legal practitioner in Australia to have ready access to the Commonwealth Law Reports, the reports of the practitioner's own state and the rainbow reports. It was unusual for them to have ready access even to the reports of other states and it was almost unheard of for them to have access to the reports of other countries.

The internet: A plethora of authorities

That was before the internet. Many courts in many common law systems started to upload many of their reasons for judgment in a form freely accessible to users of the internet around the turn of this century.¹⁵ Increasingly since then there has been an uploading not only of currently generated reasons for judgment but also of previously unreported or poorly reported reasons for judgment stretching back for centuries.

The result has been that, relatively suddenly, there has become and is still becoming available to courts, legal practitioners and the public within each particular judicial hierarchy, in an unfiltered, undigested, unclassified but fully word-searchable form, all of the binding authority and potentially persuasive authority ever produced by courts within that judicial hierarchy, as well as a vast amount of potentially persuasive authority emanating from courts outside that judicial hierarchy.

The immediate result for lower courts within any given judicial hierarchy has been an increase in complexity. They have found themselves faced daily with more potentially binding authorities emanating from appellate courts within their own judicial hierarchy. While lower courts might sometimes find those authorities for themselves from their own internet searches, they are much more likely to have those authorities cited to them by legal practitioners or by unrepresented litigants appearing before them. Often they are downloaded, printed in full on A4 sized paper, photocopied and handed about in the course of argument. Unsummarised, as well as unfiltered and unclassified, they are authorities which those courts are forced themselves to digest and to classify, then to apply or distinguish in deciding the cases before them.

¹⁵ For the history in Australia, see P Kinder, 'The Adoption and Use of Computerised Legal Research Information in Australia' (2005) 30 *Can L Libr Rev* 68. For a brief history in the United States, see A O Larsen, 'Factual Precedents' (2013) 162 *U Pa L Rev* 59 at 74–6.

The immediate result for higher courts within a judicial hierarchy has been an increase in complexity of a different order. Their place in the judicial hierarchy means that authorities potentially binding them are relatively fewer than those potentially binding lower courts. They have, on the other hand, found themselves faced with a plethora of potentially persuasive authorities emanating from lower courts within the judicial hierarchy as well as from courts outside the judicial hierarchy. No longer arranged and retrieved through the application of commonly accepted legal taxonomy, authorities are available to support increasingly divergent strands of reasoning. They have also found themselves able quite readily to search the depths of legal history. Research so painstaking that it wouldn't even have been attempted 30 years ago (such as determining whether a particular authority had ever been cited in a particular court) can now be undertaken with the press of a button in the twinkling of an eye.

One tendency of appellate courts which has been digitally enhanced has been increasing reference to the case law of other countries. That is sometimes, but rarely, in the form of what a scientist might call meta-analysis: a comprehensive comparative survey of case law in an attempt to discern patterns or common trends or themes. More frequently, it is in the form of selective citation or quotation of particular foreign cases seen to contain reasoning in support of the reasoning adopted by the appellate court in deciding the case at hand; a practice colourfully described by Justice Antonin Scalia of the US Supreme Court as equivalent to looking over a crowded room at a party to pick out your friends.

Another observable trend within appellate courts which has been digitally enhanced has been the embracing of a new form of historicism. In the late nineteenth century and throughout the twentieth century the judicial development of the law could be seen, by and large, as an incremental development from reported case to reported case. Except in circumstances of overt overruling or departure from it, the last reported decision of an appellate court in a developing field of law tended to be treated not only as the last word on the law in that field but also as the starting point for any consideration of the law in the case at hand. To attempt to trace the legal rule applied in that decision to its historical roots was an extremely labour-intensive manual exercise which was generally seen to be of limited utility. Where the law was consciously and deliberately developed, it was ordinarily developed by reconsideration of the legal rule in the contemporary circumstances of the case at hand. It is now possible for a clever and industrious appellate court, with relative ease, to trace a proposition of law back through the decided cases to a point of obscurity, to examine and explain its origins, and then to reinterpret the decided cases within a broad historical narrative unlikely to have been apparent to the courts deciding them.

Yet another observable tendency within all courts at all levels of most judicial hierarchies has been the picking up from earlier reasons for judgment words and phrases that have been used to embody ideas or concepts. The suggestion has been made with some force that 'just as television created "sound bite" journalism, so does computerized legal research create

“law-byte” reasoning’.¹⁶ Typically, the electronic researcher goes about the research task by typing a key word or phrase into a search box. The database then responds by mapping the relevant word or phrase to the documents stored, and subsequently displays chunks of texts, in which the word or phrase appears. The method emphasises words, rather than legal principles, language rather than ideas.

Whereas in the past the proposition for which an authority stood might have been expected to have been assimilated by a court and restated in its own words in its own reasons for judgment, propositions of law are coming increasingly to be transmitted from case to case in the form of ‘word concepts’ which are constantly restated but the meaning of which is rarely unpacked. The more often they are repeated, the more they can take on a crystalline, almost mystical, even cabalistic, quality.

Word processing: Reasons reserved and revised

The very modern phenomenon of digitally enhanced access to reasons for judgment in decided cases has overlapped with the only slightly less modern phenomenon of digitally enhanced production of reasons for judgment in deciding cases. That phenomenon itself is the culmination of a much longer term trend to which attention was drawn in 2002, by Scottish born member of the House of Lords, Lord Alan Rodger, when he observed that judicial opinions in the United Kingdom were evolving from a form of communication that was normally oral to a form of communication that was normally written.¹⁷

The delivery of written reasons for judgment has been the practice of appellate courts in the United States and Australia for somewhat longer than it has been the practice of appellate courts in the United Kingdom. Yet while it has proceeded at different paces in different courts in different countries, over the last 200 years reasons for judgment delivered by appellate courts have changed: from normally being delivered orally immediately after the conclusion of a hearing (when they were very short); to normally being reserved and delivered orally some time later (generally having been written out long-hand); to normally being reserved and delivered in written form. For much of the twentieth century, reasons for judgment delivered in written form had generally been type-written and minimally revised. For the last 30 years or so, reasons for judgment delivered in written form have almost invariably been composed with the benefit of a word processor and subjected in that process to multiple revisions.

Lord Rodger observed in 2002 that the evolution was resulting in appellate reasons for judgment becoming longer, more elaborate and less immediately responsive to the issues raised in the case at hand. To those observations, it might fairly be added that appellate reasons for judgment are becoming less the exposure of the reasoning actually followed by a court to reach a conclusion than they are the marshalling of the best arguments in favour of the conclusion that the court has reached. That is to say, they have tended to become more statements explaining and justifying the position to which the

¹⁶ Larsen, above n 15, at 76.

¹⁷ A Rodger, ‘The Form and Language of Judicial Opinions’ (2002) 118 *LQR* 226 at 230

appellate court is persuaded than travelogues of the intellectual journey by which the appellate court has come to be persuaded to that position. With that change, they have tended to become more emphatic (even combative).

Two particular by-products of word-processing deserve special mention. One is the proliferation of footnotes. The other is the proliferation of quotations from and citations of earlier reasons for judgment, as well as academic legal articles and out-of-print legal treaties themselves now becoming increasingly accessible on the internet.

The first footnote appeared in reasons for judgment of the High Court of Australia in 1990. It was preceded by correspondence between Sir Anthony Mason who was then Chief Justice and Mr James Merralls QC who was then and remains the long-term editor of the Commonwealth Law Reports. Otherwise, the occasion passed unremarked and the use of footnotes in appellate judgments rapidly became the norm in Australia.

The first footnote to appear in the reasons for judgment of an appellate court in the United Kingdom was not until 2006 when Lord Justice Stephen Sedley inserted 11 footnotes into his reasons for judgment in the otherwise unremarkable decision of the English Court of Appeal in *Corr v IBC Vehicles*.¹⁸ The occasion provoked the publication that year of an article in an English journal likening an English judgment with footnotes to a fish with feathers.¹⁹ Beyond the eccentricity, the article made a serious point: the introduction of the footnote, the writer suggested, was symptomatic of a methodological shift in judgment writing away from the elaboration of reasoning to a conclusion and towards the display of the fruits of the judgment writer's own research, towards the defence of the judgment writer's concluded position and towards the attacking of alternative points of view. The writer of the article quoted Lord Rodger's slightly earlier description of the role of footnotes in contemporary judgments in the United States:

The footnotes are used — exactly like footnotes in academic books and journals — to carry out raids on enemy territory and to mount rearguard defences of the author's own dearly loved, if shaky, opinions.²⁰

Footnotes themselves add yet another layer of complexity to the already complex task of attempting to digest cases. Abner Mikva, when a judge of the US Court of Appeals for the District of Columbia, captured the judicial reader's frustration well when he made the following confession:

I hate to read footnotes. I always lose my place in the text and lose my train of thought the author is trying to get me on. But I am afraid that the footnote I fail to read is the key to the whole thing, and so I sneak a peek at some but not all . . . I feel very guilty about the ones that I skip over.²¹

To Judge Mikva:

18 [2007] 1 QB 46; [2006] 2 All ER 929; [2006] 3 WLR 395; [2006] EWCA Civ 331.

19 R Munday, 'Fish with Feathers: English Judgments with Footnotes' (2006) 170 *Justice of the Peace* 444.

20 Rodger, above n 17, at 230.

21 A Mikva, 'Goodbye to Footnotes' (1985) 56 *U Colo L Rev* 647 at 653.

If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane.²²

Quotations, like those quotations from Lord Rodger and Judge Mikva, are expressions of ideas in the words of others. They can be powerful rhetorical tools if used sparingly. Used less discriminatingly, and particularly when cut and pasted with mouse in hand, the danger that lies in quotations is that they can be a substitute for independent thought: indicating not digestion but indigestion, data without processing, adding to bulk and detracting from focus.

Citations have increased dramatically in number. Whereas in the past it was common to cite in support of a proposition of law only the leading authority, there is increasing tendency to string citations of decisions in which the proposition has been mentioned and applied or distinguished without necessarily subjecting the reasoning in each cited decision to independent critical analysis. The difficulty then is that citation itself can be seen to add to the authority of a cited authority even when the cited authority has not been the subject of analysis by the citing court.

A worked example

The increase in complexity to which I have referred can be illustrated by reference to two cases decided by the High Court on the same issue 13 years apart. One was *Nolan v Minister for Immigration and Ethnic Affairs*, decided in 1988.²³ The other was *Re Patterson; Ex parte Taylor* decided in 2001.²⁴ The issue was whether a British subject who was a long-term resident of Australia could be an ‘alien’ within the meaning of a provision of the Australian Constitution so as to be subject to deportation under national migration law. In both cases, the High Court was constituted by seven justices and the decision was split. The actual judgments were conflicting, the second overruling the first only to be overruled itself a few years later. But that is not to the point. It is the contrasts in the reasons for judgment that is of present interest.

In terms of the number of words, the decision in *Re Patterson*, is over seven times as long as the decision in *Nolan*; and in terms of footnotes, *Re Patterson* contains approximately 50 substantive footnotes whereas *Nolan* contains not a single one. *Nolan* contains about a dozen quotations; *Re Patterson* almost 100. Less than 20 cases are cited in *Nolan*, of which just over half are Australian authorities; the remainder being English cases along with a single US case. *Re Patterson* cites over 120 Australian authorities alone, and in addition cites cases from England, the United States, Canada and New Zealand. The only material other than case law or legislation found in *Nolan*, are limited references to English legal treatises. In *Re Patterson*, references to

²² Ibid, at 648.

²³ (1988) 165 CLR 178; 80 ALR 561; 62 ALJR 539; BC8802624

²⁴ (2001) 207 CLR 391; 182 ALR 657; [2001] HCA 51; BC200105242

books, journal articles, and committee reports are scattered throughout the judgment.²⁵

Where is it all going?

Where is the technological revolution taking the judicial development of the law in a common law system? There is some risk, albeit slight, that an overload of information might cause the system to collapse under its own weight.

It may be that some other forms of filtration and classification systems will emerge to take the place of authorised law reporting. One possibility is that courts deciding cases might themselves find some way of distinguishing between those reasons for judgment that are and are not worthy of consideration by courts deciding subsequent cases. The experiment in some Australian states of producing 'guideline judgments' in some sentencing matters might perhaps be extended to other areas of law.

Another possibility is that courts deciding subsequent cases might attempt to find some way of limiting the number or provenance of authorities that they might need to consider. There have already been attempts by some Australian courts to do so by issuing practice directions limiting the scope and provenance of 'lists of authorities' to be used in argument.

There is some likelihood that the technological revolution will lead to reasons for judgment in decided cases being approached somewhat differently: to a change in the nature of the authority of an authority. It may perhaps even involve some partial return to the view of reasons for judgment in decided cases which prevailed at the time of Blackstone and Mansfield: by which some or all of them might come again to be seen not as repositories of law but as illustrations of legal principle. Justice Lindsay has suggested that it is possible that we may see principles of law being publicly disseminated in some form of 'authorised' publication representing a cross between a legislative code and reasons for judgment. He points to the various 'Restatements' of the law on various topics published from time to time by the American Law Institute as a model which might be emulated elsewhere: adding structure to the law while at the same time accommodating the widespread availability of reasons for judgment.²⁶

For now it may not be possible to take the topic further than to adopt the words attributed to Zhou Enlai when asked about the consequences of the French Revolution. 'It is too early to tell.'

²⁵ Similar trends have been observed in US Supreme Court opinions, which over time have become longer, include more citations, and increasingly refer to material other than traditional primary legal sources: Larsen, above n 15, at 61.

²⁶ Lindsay, above n 12, at [87].