Legal Information Management, 19 (2019), pp. 224–229

doi:10.1017/S1472669619000537

Law Reporting and Public Access in the Courts: Is Too Much a Good Thing?

Part 1: The English Experience

Abstract: This article by Paul Magrath considers the role of law reporting not only as a service in support of the administration of justice and legal education, but also in the wider context of open justice, transparency and public legal information. It traces the history of law reporting and considers the pros and cons of the more comprehensive publication of judgments of the senior courts made possible by digitisation and the internet, in comparison with the more selective approach adopted in the past. The article is loosely based on a presentation given at the annual conference of the British and Irish Association of Law Librarians held in Bournemouth in June 2019.
Keywords: public access; law reporting; legal history; English law

INTRODUCTION

Law reporting performs an essential function in a common law jurisdiction, where case law is one of the primary sources of law. In the past the cases selected for reporting were those that mattered – the ones that laid down new legal principles or in some other way changed or clarified the law. The need for selection was dictated in part by the limited resources available. In the digital age, the resources permit much more comprehensive publication of case law. Is that a good thing? Or has the wider availability of judgments on digital databases led to over-citation of authority and a devaluation of the principle of *stare decisis*?

Leaving aside the question of its effect on the administration of justice, can wider publication of judgments serve other purposes, such as improving public understanding of the courts' work and promoting open justice, transparency and public legal education at a time when traditional court reporting by the press has long been in decline?

This article examines these developments and attempts to answer these questions by reference to a necessarily brisk overview of the history and development of law reporting in England and Wales, the foundation of the Incorporated Council of Law Reporting in 1865, and modern trends prompted by digitisation and the internet.

CASES AS A SOURCE OF LAW

In a common law jurisdiction such as that of England and Wales, case law constitutes one of the two primary sources of law. The other, of course, is legislation.

In making legislation, Parliament cannot bind its successors. By contrast the higher courts do generally bind their successors, and any lower courts.

The common law, which is said to date back to the reforms introduced in the reign of King Henry II in the 12th century, is based on the notion that the law should be applied by the king's judges in the same way across the entire kingdom. While that meant local custom should give way to what we might think of as harmonised national rules, it did not mean the law stood still. As Lord Nicholls of Birkenhead observed in *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 AC 680, para 32:

> *The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. … Had the judges not discharged this responsibility the common law would be the same now as it was in the reign of King Henry II.*

The judges made law not in the sense of legislating in the abstract, but rather by divining what the rule of law was or should be in a given situation – the case before the court. Declaring the rule relevant to the case established a principle which, according to the doctrine of *stare decisis*, meant that when in future a similar case came before the courts, the same rule had to be applied. That meant the precedent case had to be known to the court, which in turn meant it had to have been remembered and recorded. As Slapper and Kelly[1], point out:

> *…the operation of binding precedent is reliant upon the existence of an extensive reporting service to provide access to previous judicial decisions.*

In other words, the common law is reported law. But it took some time to develop the practice of law reporting as we know it today. We are used to the idea of law reports as neatly packaged documents containing a headnote, index headings, lists of cases, a transcript of the judgment, with everything checked and annotated and approved by the court. In days of yore, both the substance and practice of law reporting were very different.

EARLY REPORTING

Law reporting began with the notes of cases written up in Anglo-Norman by apprentices to the law (junior barristers) and recorded in the plea rolls from the 12th century onwards. They were less concerned with the substance of the law than with its procedure. Precedent in the sense of a template or formula for the commencement of a legal process remains a feature of legal practice today, in the age of *Atkins Court Forms Online* and the Practical Law Company. In medieval times it was important to match up the writ to the remedy.

The hand-written plea rolls were eventually printed along with other forms of reporting in the Year Books, running from 1285 to 1537. Reports at this time were generally written in a mixture of Latin and Anglo-Norman, or 'law French'. Indeed, it was not until the 17th century that lawyers seemed able to accept that English cases could be written up in the English language, and some continued to be published in law French and Latin until the beginning of the 18th century. No doubt this was partly a matter of tradition and linguistic precedent. As Lord Neuberger of Abbotsbury PSC observed:[2]

> *I do not think it was mere tradition which drove the retention of Latin and Norman French. In a common law system, where judges decide much of the law, so that lawyers and judges habitually refer to what was said in earlier judgments and legal arguments, it was presumably convenient to stick to the language in which those judgments and arguments were expressed.*

For some reason, when it comes to abstract principles or maxims, the 'mot juste' is always in Latin or law-French. For examples of the former, think of *'Contra proferentem', 'Nemo debit bis vexari'* and *'De minimis non curat lex'*. Examples of the latter might be *'Profits à prendre', 'Autrefoit acquit'* and the mongrel mix of a *'chose in action'*.

The classic and oft-quoted example of law French in a law report is actually an annotation found in Sir James Dyer's King's Bench Reports (1688), known today as the 'Brickbat' quotation:

> *Richardson Chief Justice de Common Banc al assises al Salisbury in Summer 1631 fuit assault per prisoner la condemne pur felony, que puis son condemnation ject an brickbat a le dit justice, que narrowly mist, et pur ceo immediately fuit indictment drawn per Noy envers le prisoner, et son dexter manus ampute et fix al gibbet, sur que luy mesme immediatement hange in presence de court.*

To get the best sense of this, one could try reading it out in the exasperated voice of the traditional Englishman on holiday in France, attempting to make himself understood in that parody mashup known as Franglais. It recounts the somewhat savage penalty imposed for a pretty outrageous contempt of court. Upon being condemned (to death) for a felony, the prisoner assaulted Chief Justice Richardson at the assizes in Salisbury by throwing a brick (other reports suggest a flint stone) at him, which narrowly missed. The Chief Justice immediately had an indictment drawn up (by Noy, whoever he was), mandating the amputation of the prisoner's right hand, which was fixed to the gibbet, upon which the rest of the prisoner was then hanged in the presence of the court.[3]

NOMINATE REPORTS

By the late 16th century individual reporters were publishing volumes or series of case reports under their own names, often based on their notebooks or recollection of cases witnessed or heard about. They included Edmund Plowden, whose Commentaries were published in the 1570s; Sir James Dyer, whose notebooks dating from the 1530s were posthumously published in the 1580s; and Sir Edward Coke (who was also, until his fallout with the king in 1616, Lord Chief Justice).

The nominate reporters were a mixed blessing, varying considerably in their reliability and usefulness. Among the good ones were James Burrow, credited with the invention of the modern headnote, whose King's Bench Reports 1756 to 1772 were the first to summarise facts and arguments before recording the judgment; Durnford & East whose Term Reports from 1785 were the first to be published contemporaneously in serial parts; and Campbell, whose Nisi Prius Reports from 1808 to 1816 included solicitors' names for first time (apparently in the hope of attracting more business).

Unfortunately, there were also some duds among the Nominates, whose reputations have not survived the savage put-downs meted out by exasperated judges. It was said of Espinasse, whose six volumes cover from 1793 to 1807, that he was deaf and that he "heard one half of a case and reported the other." Lord Denman CJ was later

> *tempted to remark for the benefit of the profession that Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known*

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than it is now, were never quoted without doubt and hesitation…

Lord Mansfield absolutely forbade the citing of Barnardiston's Reports in Chancery (1726-35),

for it would only be misleading students, to put them upon reading it. He said, it was marvellous however, to such as knew the serjeant in his manner of taking notes, that he should so often stumble upon what was right: but yet, that there was not one case in his book, which was so throughout.

In the Modern Reports, covering 1669 to 1732, Pollock CB declared, "You will find authority … for many propositions that are not law." One report in volume 8 was described by Lord Kenyon CJ as "totally mistaken there, as indeed are nine cases out of ten in that book."

The nominate reporters (many of whom, along with a selection of the Year Books, were later reprinted in the English Reports) continued to dominate the scene until the mid-19th century, when a combination of professional dissatisfaction and Victorian reforming zeal led to the formation of what eventually became the ICLR.

A COUNCIL OF LAW REPORTING

In 1849 a report of the Law Amendment Society complained that although the decisions of the courts and tribunals were "the formal constituents of the common law," they were in no respect officially promulgated. The report observed that:

It has long been considered a practicable scheme for any barrister and bookseller who unite together with a view to notoriety or profit, to add to the existing list of law reports.

The result was that

even if all the reports which are published were correct and given by competent persons, they are now so numerous that they cannot be known to one tithe of the practitioners of the law. They are beyond the reach not only of the public, but of the great body of the profession.

By 1863 it was apparent that there was widespread dissatisfaction with the system. WTS Daniel QC, in a letter to the Solicitor-General, Sir Roundell Palmer, said that there were no fewer than sixteen series of authorised reports. He complained of their "enormous expense, prolixity, delay and irregularity in publication," and of their "imperfection as a record, for want of continuity." He also objected to their habit of

reporting cases indiscriminately and without reference to their fitness or usefulness as precedents, merely because, having been reported by rivals, the omission of them might prejudice circulation and consequently diminish profit.

The result of all this lobbying was the adoption, at a general meeting of the Bar held at Lincoln's Inn on 28 November 1864, of a scheme to publish the decisions of the superior courts of law and equity under the management of a Council composed of members of the Inns of Court and of the Incorporated Law Society.

The Council of Law Reporting was duly constituted in 1865, and was incorporated as a company limited by guarantee in 1867. Its memorandum of association included the following objects:

1. The preparation and publication, in a convenient form, at a moderate price, and under gratuitous professional control, of Reports of Judicial Decisions of the Superior and Appellate Courts in England.

2. The issue, periodically or occasionally, of any subsidiary or other publications relating to legal subjects which it may be considered expedient to combine with the publication of such Reports, including the Statutes of the Realm …

The Council's first law reports were published in November 1865, at subscription of 5 guineas per year. They were divided into eleven different series, covering the then myriad divisions of the courts, but already reduced from the antecedent sixteen. Most of the authorised reporters for these courts, who had previously published under their own names, were now engaged by the Council.

A decade later these eleven series were consolidated into six, following the reorganisation of the courts of law and equity effected by the Judicature Acts 1873–75. These continued until 1890, when the Council introduced the simplified arrangement of dated annual volumes in four series which continues today, comprising Appeal Cases (covering the House of Lords – now the UK Supreme Court – and the Privy Council) and separate volumes for the Chancery, Queen's (or King's) Bench, and Family (formerly Probate, Divorce and Admiralty) Divisions of the High Court and appeals or references therefrom. The standard abbreviations for these are well known: AC, Ch, QB (or KB) and Fam (formerly P, reduced from PDA. Whatever may have been the reason for lumping Probate, Divorce and Admiralty together in a single High Court division, it was popularly referred to as 'Wills, Wives and Wrecks'.)

SELECTION OF REPORTS: A GATEKEEPER ROLE

The ICLR's original mission was to reduce the confusion and duplication of existing coverage to an orderly and reliable process. From the start, it had a clear policy on

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which cases should be reported, derived from a paper by one of its founders, Sir Nathaniel Lindley QC (later Lord Lindley MR). In his *Paper on Legal Reporting* (1863) he set out first which cases should *not* be reported, namely (1) "Those cases which pass without discussion or consideration, and which are valueless as precedents", and (2) "Those cases which are substantially repetitions of what is reported already".

Figure 1: Portrait of Sir Nathaniel Lindley as Lord Lindley MR painted by Sir George Reid RA, in Middle Temple.

On the other hand, he said, care should be taken to *include* all cases which: (1) introduce a new principle or rule of law; (2) materially modify an existing principle or rule; (3) settle a question upon which the law is doubtful; or (4) for any reason are 'peculiarly instructive'.

The intention may have been to avoid the padding of volumes with makeweight cases of no precedential value. But the ICLR has never enjoyed a monopoly, and more commercially minded rival publishers have always been able to supplement the official coverage with additional, sometimes more specialist content. Nevertheless, the cases selected for reporting have always been a tiny proportion of the total number decided.

Today, out of around 10,000 decisions of the Senior Courts each year, the ICLR selects around 500 cases for the Weekly Law Reports. Of these, about 120 will subsequently be published in one of the four divisions of The Law Reports. The three specialist series (the Industrial Cases Reports, Business Law Reports and Public and Third Sector Reports) add a further 200 or so to the tally.

The selective approach that the ICLR still adopts, albeit perhaps more flexibly than in earlier times, is less consequential than it used to be. Before the ready availability of unreported judgments on BAILII (the British and Irish Legal Information Institute to give it its full title), and the various commercial databases (LexisNexis, Westlaw, Justis, Informa, etc), the editors of the established law reporting series occupied a sort of gatekeeper role. Law reporters may have been Heralds of the Law (as the title of one book about them put it), Guardians of Precedent or, as Lord Denning MR once put it, Watchdogs of Justice; but they were also the main arbiters of what could or could not be seen. If a case was not picked out of the slush pile by the ICLR, Butterworths, Sweet & Maxwell, Lloyd's or one of the other publishers, then it ceased to be available for public and professional scrutiny and citation. There has never been any convention, let alone rule or statutory provision, conferring the decision as to reportability on the courts, as in some other jurisdictions.

While the law reporters had a good nose for a reportable case, they undoubtedly overlooked some important cases. Moreover, there is anecdotal evidence (robing room talk, as I were) of reporters deliberately deciding to exclude from the canon a case in which they felt the judge had simply not got it right, particularly if there was no prospect of correction on appeal.

All that went with the advent of digitisation and the internet.

ADVENT OF THE LIIS

This year (2019) marks the 20th anniversary of the formation of BAILII, a legal information database inspired by and modelled on earlier free law projects such as the original LII at Cornell, covering federal American materials, and AustLII, covering Australasian legal materials from its base in New South Wales. Soon afterwards, a host of other LIIs were established around the world, providing free access to case law and other legal materials.

One of BAILII's founders and the first chair of its trustees, Sir Henry Brooke, was a judge with a particular interest in the use of information technology in the courts.[4] He was also one of the architects of the rationalisation of the style of presentation and citation of judgments designed for digital publication. Henceforth, numbered paragraphs would replace the use of marginal letters on numbered pages, and neutral citations (or medium-neutral citations as they are sometimes known) using a court abbreviation and case number would replace a publisher reference and page number. These changes means that a case or a quoted passage from it could be easily located regardless of the means of publication. Subsequent practice directions from the courts, while preserving the priority of official series such as The

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Law Reports, require the standard use of neutral citations as a primary reference.[5]

From the start, the ready availability of ever-larger numbers of unreported judgments on BAILII created a tension with the established publishers of law reports, particularly those whose commercial competitiveness depended on providing access to content not available in the public domain. ICLR eventually recognised a mutuality of aims with its fellow charity and developed a linking protocol with BAILII enabling users of either service to enjoy the free benefits of both (judgments on BAILII and case summaries on ICLR).[6]

In any case, law reporting and judgment publication are not the same thing. While law reporting was, in the past, the principal method of judgment dissemination, it was by no means the only way of preserving a record of the courts' activity. Courts such as the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council have always kept archives of their cases, including both the printed record (case papers) and the judgments. For some decades the Court of Appeal (Civil Division) used to keep a copy of all its judgment transcripts in bound volumes in what became the Judges' Library in the Royal Courts of Justice. And raw transcripts were available from Lexis via a telex-like service long before the World Wide Web made public databases like BAILII feasible.

What internet publication has shown is not just that there are other ways of making judgments available to a wider audience, than by way of their selection as legal precedents, but also that there are other reasons for doing so. These include not just academic and statistical research, which has been transformed by digitisation, but also public legal education.

OPEN JUSTICE, TRANSPARENCY AND PUBLIC LEGAL EDUCATION

In the oft-coined observation of Lord Hewart CJ in *R v Sussex Justice, Ex parte McCarthy* [1924] 1 KB 256, 259, "justice should not only be done, but should manifestly and undoubtedly be seen to be done." And as Lord Atkinson pointed out in what is still, more than a century later, the leading case on open justice, *Scott v Scott* [1913] AC 417, 463:

> *The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. (emphasis added.)*

The publication of judgments provides a public record of what the courts have done in the public's name, and enables the public to consult one of the two primary sources of law. In this sense, publication not only supports but is a fundamental aspect of open justice.

How far this also constitutes transparency depends on whether, by publication alone, the material enhances public understanding. Often it does not. As Lord Neuberger pointed out in 'No Judgment, No Justice', the first BAILII lecture, in November 2012[7], judgments have to speak to the public, as well as to the lawyers and litigants. The public are in a sense the real audience, and for that reason:

> *every Judgment should be sufficiently well-written to enable interested and reasonably intelligent non-lawyers to understand who the parties were, what the case was about, what the disputed issues were, what decision the judge reached, and why that decision was reached.*

In cases of major public interest, including all those in the Supreme Court, a press summary is published alongside the court's judgment, explaining the case in non-legalistic terms for the press and public to understand. This practice recognises that the press does necessarily employ commentators (as they once did) capable of decoding the technical explanations in the judgment for the benefit of the public reader, and that many lay readers are now adept at using the internet to search for the original source of a story which may have been distorted or sensationalised by the media. It is for this reason that the Transparency Project (among others) has long campaigned for the inclusion of hyperlinks (eg to BAILII) in any press report of a published judgment.

The decline of press coverage of the courts, particularly at the local level, was highlighted in the report, earlier this year, of the Cairncross Review[8]. While that coverage dealt mainly with first instance criminal cases, its decline has reduced still further the opportunity for the public to understand how the courts work. The publication of sentencing remarks and judgments would go some way towards making up the deficiency, as would the extension of the local democracy reporting scheme to court reporting.[9]

The need for public access to primary legal materials has become more critical after the legal aid cuts implemented under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The number of litigants in person (LIPs) has vastly increased, creating unintended consequences in terms of additional strain on judicial and court resources. LIPs not only need access to the law, but they need to be able to understand it.

Some judges have deliberately written judgments or accompanying summaries in a particularly clear, simple way to promote understanding. Mr Justice Peter Jackson was widely praised for writing in simple language for the benefit of a mother with learning difficulties and her children, even incorporating emoji smiley faces when discussing a quoted note: see *Lancashire County Council v M*

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[2016] EWFC 9, para 27(13). Lucy Reed, sitting as a deputy district judge, adopted a similar approach in another case in involving a family with learning difficulties, *Jack (A Child : care and placement orders)* [2018] EWFC B12. These judgments may not set precedents in the legal sense, but they pave the way for a more inclusive approach to judgment writing and demonstrate an awareness of the wider value of publication.[10] That may not have been envisaged by Lord Lindley in his paper on legal reporting, but it makes sense in the modern world.

CONCLUSION

The reporting of court cases over eight centuries of the common law has evidently changed a good deal, but the idea of the administration of justice as a public service for which judges are accountable has endured. Publication of judgments of the higher courts serves a number of purposes, of which the recording of precedent is only one, albeit a critical one. Courts may deprecate the over-citation of authority, but there is no reason why the extravagance of counsel (or their nervousness at leaving any stone unturned) should be blamed on the publishers. The official reporters can continue to select what appear to be precedents and allow access to other cases for other purposes.

That, at any rate, has been the experience in England and Wales. It is instructive to consider, for comparison, the approach in another jurisdiction, as Dewey Cole will now explain.

Footnotes

[1] The English Legal System, 14th ed (2013-2014), p 121, para 3.6.2.

[2] Foreword to Adler & Perry, *Clarity for Lawyers* (The Law Society, 2017).

[3] I'm grateful to Guy Holborn, former Librarian of Lincoln's Inn, for this anecdote, which he discusses more fully in his essay in the volume compiled to mark ICLR's 150th anniversary in 2015: see 'The Old Law Reporters' in Magrath (ed), *The Law Reports 1865-2015 Anniversary Edition* (ICLR, 2015)

[4] See, for example, 'Publishing the courts: Judgments and public information on the Internet – Lord Justice Brooke' (2003), from National Archives collection of judicial speeches, reproduced via ICLR at https://www.iclr.co.uk/blog/archive/publishing-the-courts-judgments-and-public-information-on-the-internet-lord-justice-brooke-2003/ (accessed 11 September 2019).

[5] See *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194 and *Practice Direction (Judgments: Neutral Citations)* [2002] 1 WLR 346.

[6] See 'ICLR links up with BAILII' (2012) via ICLR https://www.iclr.co.uk/blog/archive/iclr-links-up-with-bailii/ (accessed 11 September 2019).

[7] https://www.supremecourt.uk/docs/speech-121120.pdf (accessed 11 September 2019).

[8] The Cairncross Review: a sustainable future for journalism (February 2019) available online via Gov.uk https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf (accessed 13 September 2019).

[9] See, for example, Judith Townend, Could Cairncross help public interest law reporting? Via The Justice Gap https://www.thejusticegap.com/could-the-cairncross-recommendations-help-public-interest-law-reporting/ (accessed 13 September 2019) and the comments by Mark Hanna in 'A Byline Festival conversation about Truth, Trust and Transparency in the Courts' via Transparency Project http://www.transparencyproject.org.uk/a-byline-festival-conversation-about-truth-trust-and-transparency-in-the-courts/ (accessed 13 September 2019).

[10] The promotion of public awareness of the work of the family courts, whose cases are mainly heard in private, was a major impetus behind the transparency agenda pursued by Sir James Munby as President of the Family Division: see Practice Guidance: Transparency in the Family Courts: Publication of Judgments [2014] EWHC B3 (Fam); [2014] 1 WLR 230.

Biography

Paul Magrath is Head of Product Development at ICLR and editor of their blog, where he writes the Weekly Notes roundup of legal news and commentary. He has been reporting and writing about case law in a variety of publications for most of his adult life. He is also a founding member and trustee of the Transparency Project, whose objects include the promotion of open justice and public legal education, particularly in relation to family law. He is the co-author, with Julie Doughty and Lucy Reed, of Transparency in the Family Courts – publicity and privacy in practice (Bloomsbury Professional, 2018).

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