



PRESS RELEASE  
October 2009

## Lord Judge's Speech from the ICLR DVD Launch

I am happy to launch this DVD. When I asked my clerk to type it she wrote down "always excited and ...", a Freudian slip for "Always Cited in Preference".

I am just going to read out a few words, and I shall then ask you to imagine, when you think these words were first spoken.

So, when do you think these words were first spoken?

"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"

Well it was 1849: if you were within 5 years you are marked Alpha Plus.

One of our problems today and I am not the first and suspect I shall not be the last judge to make this point is that modern technology has made available for use in court virtually every word spoken by any High Court or for that matter Lord or Lady Justice of Appeal. Even those judgments which are totally fact specific: even those judgments which have been dashed off at the end of the day to give the parties the answers they desperately need: even those judgments which you would wish to recall and confine to your own dustbin. In other words what I shall describe as the email judgments.

And yet it still remains the case that the only decisions which should be regarded as authoritative are those which fulfil the criteria of the Paper on Legal Reports written in 1863 by the future Master of the Rolls and Law Lord Nathaniel Lindley QC.

Those cases to be used in a law report are those which

"...introduce or appear to introduce, a new principle or a new rule.

...which materially modify an existing principle or rule.

...which settle, or materially tend to settle, a question upon which the law is doubtful.

...which for any reason are peculiarly instructive."

Such cases can be treated as authorities.

In particular in cases which should not be included in a law report are those which "pass without discussion or consideration, or which are valueless as precedents" or "which are substantially repetitious of what is reported already."

So Mr Lindley thought what should be omitted was no less important than that which should be included. And what deserved to be omitted were the fact specific decisions made on the basis of principles already found in the authorities.

The history of law reporting is fascinating in its own right, and the story of the Incorporated Council of Law Reporting Established in 1865 is of interest itself. Its objective was

"Preparation and publication, in a convenient form, at a moderate price, and under gratuitous professional control of the Reports of judicial decisions of the Superior and Appellate Courts in England and Wales".

Law reports are fun. At least they are for me. I have always enjoyed dipping into those dusty volumes. And the tradition of law reporting is ancient, coming down to us from our medieval ancestors. I cannot remember which yearbook it was, but we are somewhere in the middle of the 15th century when Mr Justice Yelverton, a great pal of the Paston family, made a comment – a mere dictum of course – in that wonderful Latin Norman French about the right to kill someone who “va molesté votre très chere compaignon” and there is an accompanying observation from a law reporter about how the judge smiled as he thought of his wife, his very dear companion. How wonderfully evocative, the affection coming down the ages through the old law reports. Sadly, as with the *Espinasse*, *Barnardiston*, and *Kelynge* – does that not sound like a remarkably tough front row from France – I cannot offer you the name or the reference to the authority. It’s just that the picture of the judge’s reaction as he thought of his wife has lived with me ever since I read it. So, the law reports are to be enjoyed.

I suspect that I am not the only judge whose judgments have been improved by the law reporters. Howlers respectfully highlighted, my non sequiturs logified, which is ancient English cobbled together in 2009 for being made logical and given clarity, split infinitives unsplit, and full stops or commas, or colons or semicolons as grammatically correct, supplied.

I am, grateful, and no doubt many practitioners as well as my brother and sister judges are deeply grateful too for the improvements effected by the law reporters.

We have a not dissimilar problem now to the problem which faced our predecessors. We are no longer exclusively entertained or enlightened by citation from the law reports or for that matter the specialist reports which are now available. We are now instead led into areas where the prospect is dull and the yoke is heavy.

I am not the first and I very much doubt if I shall be the last judge to complain about the use in citation of authority of unreported judgments. If I may use the language to express the opinion which I used in the recent case of *Erskine and Williams*:

“The essential starting point ...is that, adopting the well known aphorism of Viscount Falkland in 1641: if it is not necessary to refer to a previous decision of the court, it is necessary not to refer to it. Similarly, if it is not necessary to include a previous decision in the bundle of authorities, it is necessary to exclude it”.

The point always is to distinguish between an authority which is a decision of the court which comes within the guiding principles identified so long ago by Mr Lindley and the decision which was equally well identified by him all that time ago, which is simply fact specific, adds nothing of any principle, and in relation to principle does no more than “substantially” repeat what can already be found in the authorities. Authorities matter: fact specific decisions are no more than that.

Law Reporters distinguish between the two: advocates often do not. It is the Law Reporters who are providing a valuable service. I cannot think of a single occasion when a case reported in the Law Reports could be described as a decision rather than an authority. That is because a great deal of care and time is taken to ensure that only the decisions which are truly authoritative are reported.

All of us who practice the law are indebted to our Law Reporters and to the Incorporated Council for their remarkable contribution to the administration of justice in England and Wales.

This DVD will introduce students to the history of the law reports, and remind practitioners that the best available version of a leading case should always be cited in preference to any other report.