

# **Lord Neuberger, President of The Supreme Court**

## **First annual BAILII Lecture**

### **No Judgment – No Justice**

**20 November 2012**

#### **(1) Introduction<sup>1</sup>**

1. It is an honour to have been asked to deliver this, the first, annual Bailii lecture. It is also a source of pleasure that, in doing so, I am able to so show my support for the British and Irish Legal Information Institute (to set out its full, if rarely used, name) and the work it does providing access to judgments. Access to Judgments carries with it access to law and access to justice, for lawyers, judges, academics and litigants, and all others interested in or concerned with any aspect of the law. Bailii, which also gives access to statutes, provides a unique and constitutionally vital service for UK citizens and others, which as the number of self-represented litigants, as litigants-in-person are now known, inevitably increases, will become even more important.
2. Judgments are the means through which the judges address the litigants and the public at large, and explain their reasons for reaching their conclusions. Judges are required to exercise judgement – and it is clear that without such judgement we would not have a justice system worthy of the name – and they give their individual judgement expression through their Judgments. Without judgement there would be no justice. And without Judgments there would be no justice, because decisions without reasons are certainly not justice: indeed, they are scarcely decisions at all. It is therefore an absolute necessity that

---

<sup>1</sup> I wish to thank John Sorabji for all his help in preparing this lecture.

Judgments are readily accessible. Such accessibility is part and parcel of what it means for us to ensure that justice is seen to be done, to borrow from Lord Hewart CJ's famous phrase<sup>2</sup>.

3. With that in mind, I want to focus on the importance of two fundamental requirements of any justice system worthy of the name, and the role they play in securing effective access to justice. Those requirements are (i) judges giving publicly available, reasoned Judgments and (ii) the reliable dissemination and reporting of Judgments. I propose to start by looking at the importance of Judgments themselves, after which I will discuss the nature and importance of disseminating and reporting.

## **(2) The importance of clear written judgments**

4. My starting point is not a Judgment, but an academic study. As far as I am aware, it is the first of its kind. At least that is what the author, Joseph Kimble, claims, and I have no reason to doubt him. It is an empirical study, which does not break new ground, but rather confirms something which, as it acknowledges, most judges and lawyers already suspected.
5. The study involved sending two versions of a court Judgment to 700 randomly selected lawyers who practised in and around Michigan. One was the original Judgment. The other was a re-writing of the Judgment by Joseph Kimble. Let me give you a flavour of the two versions by setting out the first paragraph of each.

---

<sup>2</sup> *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259, '... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

6. The opening paragraph of version A was as follows:

**‘Plaintiff Robert Wills filed a declaratory judgment against defendant State Farm Insurance Company to determine whether defendant has a duty to pay benefits under the uninsured motorist provisions found in plaintiff’s policy with defendant. Pursuant to the parties’ stipulated statement of facts, the trial court granted summary disposition in plaintiff’s favor upon finding coverage where gunshots fired from an unidentified automobile passing plaintiff’s vehicle caused plaintiff to drive off the road and suffer injuries. Defendant appeals as of right. We reverse and remand.’<sup>3</sup>**

The opening paragraph of version B was as follows:

**‘Robert Wills was injured when someone drove by him and fired shots toward his car, causing him to swerve into a tree. He filed a declaratory-judgment action to determine whether State Farm had to pay him uninsured-motorist benefits. The issue is whether there was a ‘substantial physical nexus’ between the unidentified car and Wills’s car. The trial court answered yes and granted a summary disposition for Wills. We disagree and reverse. We do not find a substantial physical nexus between the two cars, because the bullets were not projected by the unidentified car itself.’**

7. Version A is obscure, hard to follow, ungrammatical in parts, and it has Proustian length sentences without Proust’s literary merit. And it gives you no idea why the court reached the decision it did. In stark contrast, version B is clear and accessible, with good grammar and clear style. You only have to read version B once to know exactly what the claim was about, what the result was, and, although only eleven words longer than version A, it explains why the court arrived at its decision. Sadly, if unsurprisingly (or perhaps I should have said ‘sadly unsurprisingly’?), version A is the real judgment, and it was picked not because it was especially bad but because it was average<sup>4</sup>. Version B is Joseph Kimble’s revised version.

---

<sup>3</sup> J. Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 *Scribes Journal of Legal Writing* 1 (2003) at 9

<sup>4</sup> J. Kimble, *ibid* at 2.

8. The feedback from the respondent lawyers was, as one would expect, a ‘*strong preference*’ for the revised version B<sup>5</sup>. The study goes on to outline why respondents preferred one version over the other. Those who preferred version A did so, in the main, because they considered it better organized and found it more helpful because it cited more cases. Those who preferred version B did so primarily because it had a summary at the beginning, left out unnecessary detail, and was more concise<sup>6</sup>.
9. There is nothing surprising in any of this. Nor, I think, did the study’s author expect to unearth any great revelation. There is however real merit in establishing through empirical analysis whether or not our common sense assumptions are correct. More specifically, there is merit in identifying clearly where judges are thought to go wrong in their judgment-writing and what improvements they could make.
10. Some might object on the ground that, from the perspective of a lawyer, judge or academic, the differences between the two versions are neither here nor there. They are all trained to read judgments, to analyse them, to pick out the *ratio* from the *obiter dicta*. This objection misses the point in two ways. First, the fact that legal professionals are trained to read Judgments is no excuse for poor Judgment-writing. It is like suggesting that statutes don’t need to be well-drafted because lawyers and judges are adept at interpreting them. The fact that the system can rectify or ameliorate defects is no excuse for having the defects in the first place. Secondly, reference to lawyers, judges and academics is myopic. They are only part of the audience. Perhaps somewhat idealistically, it can be said that they are not even the most important part of the audience.

---

<sup>5</sup> J. Kimble, *ibid* at 4.

<sup>6</sup> J. Kimble, *ibid* at 7.

The public are the real audience, even if the public seems happily indifferent about almost all court Judgments.

11. Judgments must speak as clearly as possible to the public. This is not to suggest that Judgments could, or even should, aim to be bestsellers. Chance would be a fine thing. But 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. Non-lawyers may not be able to grasp the finer details of the legal issues, because such understanding often can only come from many years of legal education and practice. They should however be able to understand what the case was about, even if they are unable to appreciate all the intricacies of the more abstruse legal principles.
12. It might be asked why this is important. If there is never going to be a rush of general interest in court Judgments, why should judges strive to render their Judgments accessible? There are two answers to that: one general and one particular. And both these answers rest on our commitment to open justice which underpins the rule of law.
13. . The particular reason is the right to a fair trial in each individual case. The need, the duty, to provide a reasoned Judgment is a well-established '*function of due process, and therefore of justice.*<sup>7</sup>' A clearly reasoned Judgment enables the litigants to understand why the court arrived at its decision. As for the general reason, a clearly reasoned Judgment enables the public to understand the law and to see what is being done and said

---

<sup>7</sup> *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381-2.

by the judges in the courts, to see how justice is being dispensed. Accordingly publicly pronounced Judgments represent an important means through which public confidence in, and understanding of, the courts, and therefore in the rule of law, can be secured.

14. Both the general reason and the particular reason for open and clear judgments may be highlighted by reference to a particular type of litigant – the self-represented litigant, or as he or she used to be (and still often is) known, the litigant-in-person. The Civil Justice Council recently conducted a comprehensive study concerning access to justice for such litigants<sup>8</sup>. It is an impressively detailed piece of work, which repays consideration, and I am glad to say that its recommendations are being taken seriously and, in the main, are being implemented. For tonight’s purposes, I want to focus on one of its points, namely:

**‘Every informed prediction is that, by reason of the forthcoming reductions and changes in legal aid, the number of self-represented litigants will increase, and on a considerable scale. Such litigants will be the rule rather than the exception.’<sup>9</sup>**

The Report goes on, amongst other things, to note a response it received from an organisation, Help4LIPs. That response was as follows,

**“[They] are starting litigation wholly inexperienced in litigious matters. ... Too frequently, due to this inexperience, [they] are failing in court. This can lead to resentment and polarisation of issues by [them]. They frequently feel the whole process is against them. ... [They] need to recognise at the earliest possible time that the system, the judiciary and the Courts Service attempt to be transparently even handed. However [they] also need to recognise that the opposition is taught to be adversarial in order to win.”<sup>10</sup>**

---

<sup>8</sup> Knowles et al (ed), *Access to Justice for Litigants-in-Person (or self-represented litigants)* (Civil Justice Council) (November 2011)

[<http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fCJC+papers%2fCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+\(or+self-represented+lit\)](http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fCJC+papers%2fCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+(or+self-represented+lit))

<sup>9</sup> Knowles et al, *ibid* at 8.

<sup>10</sup> HELP4LIP cited in Knowles et al, *ibid* at 20.

15. Those observations underline the need for clearly expressed judgments. Self-represented litigants faced with the opposing party's authorities or looking for authorities to support their case, need Judgments which they can understand. Respect for, and confidence in, the rule of law will suffer, and understandably suffer, if we judges fail on this score. In some cases, such as those involving technicalities of science or technology (as in the Technology and Construction or the Patents Courts), or of financial instruments, company law or reinsurance (as in the Chancery Division or Commercial Court), the facts and factual issues cannot be explained very simply. Similarly, some issues of law are intricate, complex and hard to express simply. But that is no excuse for judges not expressing themselves as clearly and simply as possible. As the CJC states in its Report, with the cutting of legal aid, we are going to see an increase in self-represented litigants on a considerable scale. This represents a good impetus for us judges to reconsider the way in which we present our Judgments. A number of suggestions spring to mind.

### **(3) Two small proposals for improving clarity in judgments**

16. The first arises from Kimble's study, namely that it is good to have a short summary at the start of the judgment. Judgment summaries are well known to all of us here: we have them in the form of headnotes to reported judgments. Anyone looking through the Law Reports can easily gain an understanding of what the cases are about from their headnotes. But by no means all judgments are accessible through the professionally published law reports with headnotes, a point easily demonstrated by even only a cursory visit to the Bailii website.

17. Further, many self-represented litigants will not have ready access to the professionally published law reports, although, if they have access to the web, they can visit the Bailii website, and the ICLR's database of judgment summaries<sup>11</sup>. That in itself is a significant step in the right direction. Nonetheless, in the absence of a Judgment summary produced by the ICLR, a self-represented litigant is likely to be at a disadvantage. This drawback could be easily remedied by each Judgment setting out, in its opening paragraph, a short summary. It would not be as long as a law report headnote, or as one of the press summaries prepared by the Supreme Court, which are not placed on Bailii (although it might be of benefit of they were). But it should be sufficient to enable a non-lawyer to know the facts, the issues, and how and why they were resolved.

18. A second small change worth considering would be for more judges to give better guidance to the structure and contents of their longer Judgments. Some judges already provide a clear framework, sometimes with a table of contents, a roadmap, at the beginning, and often with appropriate headings, signposts, throughout the Judgment. Kimble's study confirms that this is not just a good discipline but it is what the legal professional readers want, and, if it is what lawyers want, it is *a fortiori* what non-lawyers will want. A clear structure aids accessibility.

#### **(4) Two more controversial suggestions to improve clarity**

19. Two other suggestions might not be as easy to achieve, not least because they go to judicial self-restraint and may be seen by some to impinge on judicial independence. The concern here lies with complexity. Particularly in our common law system dependent on

---

<sup>11</sup> <<http://www.bailii.org/bailii/iclr/>>



the doctrine of precedent, it is fundamentally important that Judgments properly explain the law in a consistent way, and coherently develop the law not least to take account of societal changes. For both purposes, exposition of the law and development of the law, clear and authoritative Judgments are required.

20. The first of these more controversial suggestions is that judges could take a more rigorous approach to cutting the length of their Judgments. I am not thereby suggesting that we follow the lead of Judge Murdoch, a judge of the US Tax Court. Justice Roslyn Atkinson of the Supreme Court of Queensland described an example of his approach.

**‘It is reputed that a taxpayer testified, “As God is my judge, I do not owe this tax”.  
Judge Murdoch replied, “He is not, I am; you do”.<sup>12</sup>**

21. I cannot imagine such an approach ever catching on here, nor should it. Brevity is a virtue, but, like all virtues, it should not be taken to excess. Judges should weed out the otiose. We should, for instance, remove unnecessary displays of learning<sup>13</sup>, or what the Lord Chief Justice, Lord Judge, recalls his history teacher marking on his essay, APK, anxious parade of knowledge. The leading or majority judgment should clearly set out the ratio – enabling both professional and lay reader to readily discern the reasons for the decision and the relevant principle or principles of law. No doubt, law students would also benefit from such an approach. Although perhaps not university examiners who would lose the opportunity to set questions around an analysis of the differences between multiple appellate judgments all of which purport to make the same points in slightly different ways.

---

<sup>12</sup> R. Atkinson, *Judgement Writing*, (AIJA Conference, Brisbane) (13 September 2002) at 5 <<http://www.aija.org.au/Mag02/Roslyn%20Atkinson.pdf>>.

<sup>13</sup> Fox *ibid* at 107.

22. My second more controversial suggestion concerns concurring and dissenting Judgments.

The Hon Russell Fox AC QC, a former judge of the Federal Court of Australia, observed,

**‘It can be quite a business arriving at a conclusion as to what an appellate court actually decided, as a matter of principle. There will often be more than one set of reasons, and conflicts and differences occur. A minority opinion may contain views supporting as well as opposing what is said in a majority opinion. Some cases do not produce a binding precedent at all. . . <sup>14</sup>**

The same point was made by Lord Carnwath, when he was in the Court of Appeal in a judgment of the court of which I was also a member<sup>15</sup>. He said this

**Before leaving this appeal we feel it right to comment on an issue of more general concern. Was it necessary for the opinions of the House to have come to us in the form of six substantive speeches, which we have had to subject to laborious comparative analysis to arrive at a conclusion? Could not a single majority speech have provided clear and straightforward guidance, which we could then have applied directly to the case before us?**

I am glad to say that when the issue with which the case was concerned was finally put to rest, the Supreme Court, despite sitting nine Justices, gave only one judgment.<sup>16</sup> If it is difficult for other senior judges to ascertain the exact ratio of appellate decisions it is not difficult to imagine the problem a lawyer sitting in her office or chambers, let alone a lay person, would face.

23. I am not suggesting that we should abolish concurring Judgments, let alone dissenting judgments. A dissenting judgment, properly identified as such, can be of immense value.

I am sure the following judicial observation sounds familiar,

**“. . . whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with**

---

<sup>14</sup> R. Fox, *Justice in the Twenty-First century*, (Cavendish) (2000) at 107.

<sup>15</sup> *Doherty v Birmingham City Council* [2006] EWCA Civ 1739, [2011] 2 AC 104, [2007] HLR 32, para 62

<sup>16</sup> *Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 WLR 220

**regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.**<sup>17</sup>

Most lawyers would guess that it comes from Lord Atkin's famous judgment in *Donoghue v Stevenson*<sup>18</sup> in 1932. It is actually taken from Sir Balliol Brett MR's dissenting judgment in the Court of Appeal in *Heaven v Pender* in 1883. Today's dissent can often be tomorrow's authority.

24. And concurring judgments, when they agree for different reasons, can also be very valuable. Particularly if an appellate court is considering developing or changing what was generally thought to be the common law, for instance in relation to the tortious duty of care (as in *Donoghue*), it may be too constraining to have one single judgment. In other words, there are occasions when the benefit of judicial clarity is trumped by the need for judicial dialogue.
25. Given the value which concurring and dissenting judgments can have in developing the law, and in giving academics something to get their teeth – and in some cases their claws – into, I am not suggesting we should move to a compulsory single judgment of the court, bereft of character or imagination. One only has to look at some of the Judgments of the CJEU in Luxembourg to see how compulsory unanimity can result in decisions which (i) are incomprehensible, (ii) have internally inconsistent reasoning, (iii) do not answer the issue that has been referred, or (iv) manage to enjoy all these three regrettable characteristics. (And in these Euro-sensitive times, let me add that there are also some very good judgments emanating from Luxembourg, which are all the more impressive because of the straightjacket imposed by the requirement of compulsory unanimity).

---

<sup>17</sup> *Heaven v Pender* (1883) L.R. 11 Q.B.D. 503 at 509.

<sup>18</sup> Or more accurately, *M'Alister (Donoghue) v Stevenson* [1932] AC 562.

26. However, a compulsory single Judgment in this country is not quite as revolutionary an idea in this jurisdiction as it may sound: dissenting and concurring judgments are conventionally excluded in the Court of Appeal Criminal Division. Nonetheless, in some cases, a single Judgment, followed by two or four (or even six or eight) simple agreements may give the impression that only one of the three or five (seven or nine) judges has really thought about the case. Hence, it is thought by some judges, the benefit of a judgment of the court “to which all members of the court have made [substantial] contributions”. And sometimes when the court is split, the judge with the casting vote feels that he or she must give reasons for the benefit of the losing party. These points are not without force.

27. And individual judges have their own views which have to be respected: judges are not automatons or clones: they are selected in order to give their views fearlessly and independently. A presiding judge or the head of a court has no right to insist on a colleague not giving a judgment or not saying something he or she wants to say in a judgment: that is an important aspect of judicial independence. Nonetheless self-restraint is generally a judicial virtue, and, if a judge wants to concur or dissent, the consequent judgment should almost always be short.

28. Accordingly, while I am emphatically not suggesting banning dissenting judgments, it may be that we could have fewer of them, and they could be shorter. Lord Ackner was supposed to have observed that one only dissents when one’s sense of outrage at the majority decision outweighs one’s natural indolence<sup>19</sup>, so it could be said that I am

---

<sup>19</sup> Quoted by Prof Alan Patterson in *Lawyers and the Public Good: Democracy in Action?* (2011) at 99.

recommending more indolence. Perhaps a judge who is considering dissenting should ask himself whether (i) he feels strongly enough, (ii) the point is important enough, (iii) it would help the development of the law, and (iv) it would help the understanding of the law, if there was a dissenting Judgment.

29. As for concurring Judgments, they can, as I have observed, be useful in some types of case – e.g. when the law is being taken forward in a difficult area. However, they often risk introducing confusion – the concurring will always use different words from the leader, and this frequently gives legal practitioners and academics the opening for debating what the reasoning really was. And a concurring judgment always means that there is more, often much more, to read before the effect of the decision can be fully appreciated. Basically, concurring Judgments should only be written where they really add (or, I suppose, subtract) something to (or from) the leading judgment. On the whole, there is much to be said for giving a concurring judgment only where the topic really would benefit from judicial dialogue.

**(5) But don't be unrealistic when it comes to clarity**

30. I return to the essential point, namely that Judgments must be as accessible as possible, and not just to lawyers but to the parties to the case, to the public, and to future potential litigants (and their advisers). Our judicial approach to Judgments has historically tended to be one where our contemplated readership consisted solely of professional and academic lawyers and fellow judges. The fact that it crucially includes the parties to the litigation and future litigants (who will often be self-represented) and (when they are not)

their advisers, emphasises the need for courts at all levels to explain as clearly and as shortly as possible, the facts, issues, outcome and reasons.

31. It is not realistic to expect that every Judgment could be understood by everyone: human nature, the complexities of modern life, and the intricacies of the law do not permit that. However if we are to maintain public confidence in the justice system, judges must make their Judgments as accessible as possible, particularly to members of the public and litigants-in-person. The steps to increased clarity are not difficult, albeit ingrained habit may take some effort to break. . By rendering our Judgements as clear, as accessible, and as comprehensible, as possible we place that which is of value in them in sharper focus: rather than diminishing our Judgments, it would enhance them.

32. Such changes are only part of the process of ensuring that Judgments are properly accessible to the widest possible audience. The other part lies with lay reporting; to which I now turn.

### **(6) Two types of law reporting**

33. There are two types of law reporting. On the one hand there is what can be described as Judgment-dissemination: providing the public with easy and full access to all Judgments. This is what Bailii does and does so very well. And then there is what can be described as Judgment-enhancement: classic and scholarly law reporting. This is what is done so well by, pre-eminently, the Incorporated Council of Law Reporting through the traditional reports, that is the Official Reports (the LR), the Weekly Law Reports (the WLR), and LexisNexis Butterworths through the All England Law Reports (the All ER).

34. Both forms of law reporting, Judgment-dissemination and Judgment-enhancement, are fundamentally important. Both support the public interest as they help ensure that the administration of justice is carried out in public. They do so because they ensure that Judgments, and the points which they decide, are made available to lawyers, academics, law students, and the public. Thereby, both forms of law reporting support the rule of law. Judgments not only pronounce and develop the common law, they also interpret statute law – whether created by Parliament or the EU – and they apply or take account of the rulings of the CJEU in Luxembourg and the ECtHR in Strasbourg. Ensuring those Judgments are accessible and understandable ensures the law is accessible. In a democratic society committed to the rule of law it is essential that that is the case. The two forms of law reporting carry out this function in different, complementary, ways.

#### **(7) Scholarly law reporting, Judgment enhancement**

35. Scholarly law reporting, judgment enhancement, is of particular importance because of the role it plays in developing the corpus of law. This is especially true of the common law, which is of course judge-made law. The common law develops gradually through precedent, which is of course contained in Judgments, and precedent is refined over time. It changes as society changes; principles are adapted and applied. The common law could not do this without scholarly law reporting. It would not have developed very far if we had not moved beyond the nominate reports – those prepared between the 15<sup>th</sup> and 19<sup>th</sup> centuries by named individual barristers – and their, at best, patchy quality. Chief Justice Holt referring to the nominate reports once famously warned that

**‘these scrambling reports . . . will make us [judges] appear to posterity for a parcel of blockheads.’<sup>20</sup>**

The mediocre and differing quality of these old law reports risked leaving society with the belief that the quality of judges, and hence justice and the law itself, was mediocre. That would have undermined the development of the common law: how could lawyers and judges have depended on the law if Judgments were themselves unreliable? How could the public have ordered their affairs properly if the law was not clear from reported Judgments?

36. The great benefit which the traditional law reports, the Official Law Reports from the 1870s, the WLR from the 1950s and the All ER from the 1930s, have brought is reliability as a result of what the late much lamented Lord Bingham described as, ‘*scholarship*’ and ‘*amazingly high standards of accuracy*.’<sup>21</sup> Reliability and accuracy is essential. But so is selection. Great care and skill is needed in deciding which cases to report.

37. Of course, the judicious selection by the traditional law reports is based on the most important cases across an ever-growing legal terrain, ever-growing in both the number of judgments and the number of topics. There has been a marked increase in important cases since 1960. And the last fifty years have seen significant societal, technical and political developments resulting in the explosion of JR, and the growth of new topics such as human rights, EU law, internet and other IT and electronic-related law, and DNA-based patent law, to name but a few. This renders the selection of cases by the traditional law reports increasingly difficult, important and skilled.

---

<sup>20</sup> *Slater v May* (1704) 2 Ld Raym 1071 at 1072.

<sup>21</sup> Lord Bingham cited in *Law Reporting and the Doctrine of Precedent* in *Halsbury’s Laws of England Centenary Essays 2007* (LexisNexis) (2007) at 71.



38. The increase in important cases and number of different topics, coupled with two related developments, namely increased specialisation among lawyers and increased ease of publication by electronic means, has resulted in the appearance of specialist law reports devoted to specific areas of law. The reporters working for these specialist reports have a similar, but by no means identical, role to that of the traditional law reporters. Most, but by no means all, of their cases self-select, but, like the specialist lawyers they serve, the reporters must have a more in-depth appreciation of the specialist area they cover, but they do not need such a deep and wide appreciation of the law as the traditional law reporters.

39. If the selection of cases for reporting, whether by the traditional, or by the specialist, law reporters is haphazard, idiosyncratic or arbitrary, the common law will not develop properly. That is because Judgments, which develop the law or establish new precedents, will be lost. Where this happens the law is diminished as is the rule of law. A recent instance where this occurred was noted by Lord Justice Lloyd in *Swain-Mason v Mills & Reeve LLP* [2011] 1 WLR 2735. Discussing a number of important early decisions on the operation of the CPR he remarked that counsel had produced ‘*a decision of the Court of Appeal, powerfully constituted by Lord Bingham LCJ, Peter Gibson LJ and Waller LJ, in Worldwide Corporation Ltd v GPT Ltd, [1998] EWCA Civ 1894, decided on 2 December 1998.*’ It was, he went on to conclude, *unfortunate and surprising that this case features neither in any report nor in the notes to the White Book.*<sup>22</sup>

---

<sup>22</sup> *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 at [68].

40. An important development in the court's approach to the application of the CPR had effectively been lost, and the law and its development were consequently diminished. What is true of procedural law is true of substantive law. I learnt this early in my career in 1975, when I was still a pupil, in a case called *Sierex Ltd v Ottermill Ltd*. The case was argued before Templeman J, who, during my pupil master's argument, referred to the "terrible power of the law reporters". He was a bit cross because he had been referred to a reported decision of Goff J<sup>23</sup> on a point which he, Templeman J, had decided differently in a case which had not been reported. There is a certain irony in the fact that his subsequent decision in *Sierex* itself was not reported and I can find no trace of it anywhere. The importance then of selecting cases to report properly cannot be underestimated. In a common law system effective selection is as important as accurate and reliable scholarly reporting.

41. Where proper selection, accurate and scholarly reporting is married with a well-written headnote and, in the case of the Official Reports, an accurate summary of the advocates' arguments, scholarly law reporting plays a proper and vital role in the development of the common law. It is a skill which we cannot afford to lose. Scholarly law reporting not only selects the most important Judgments, but it ensures that they are available in the most authoritative form, and provides what one might call vital further information – that is, details which are often of great importance in future cases. Thus, a traditional law report will set out the history of the proceedings, identify the cases which were cited, and provide an authoritative summary of the decision, written by a reporter, expert in the law, in writing and in explaining. In the most important cases, the reporter in the Official Law

---

<sup>23</sup> *Accuba v Shoe Repairs Ltd* [1975] 1 WLR 1559

Reports will also set out the arguments advanced by the advocates, showing how they put their case, what points were taken, and what concessions were made.

42. It is one of the weaknesses of our time that newspapers no longer report legal proceedings as fully or extensively as they once did. The days of the dedicated legal correspondent are behind us. The growth of legal blogging and tweeting has come into its own in recent years, but few if any legal bloggers report from court as well or as fully as press reporters once did. As a society I think we are worse off as a result of the decline of media court reporter, but, for today's purposes, this change serves to reinforce the importance of retaining skilled and dedicated law reporters to enhance the value of the Judgments which they report.

#### **(8) The importance and challenges of Judgment-dissemination**

43. The extent and the speed of the revolution represented by the Bailii website is hard to articulate. That is partly because, in such a short time, it has become an indispensable and comprehensive source of information, both generally as to what is going on in various courts, and specifically if one is trying to find relevant court decisions. Within just a couple of years of its birth on 2001, Bailii was being paid the ultimate compliment by practising lawyers, academics and judges: it was being taken for granted. As a quick, user-friendly, and reliable way of finding a particular case, cases on a particular topic, cases dealing involving a particular judge, or any more esoteric search, it is remarkably well organised, comprehensive, and practical.

44. It represents a challenge as well as a benefit. The cost of legal advice and representation will increase if advisers and advocates have to trawl through Bailii and other websites to make sure they have missed no Judgment which may be relevant to their case. I am sure that the enormous increase in the size of bundles of authorities at court hearings is in part due to the existence of Bailii and other electronic reports. I think that the judiciary could take a lead by taking a stronger line than is currently being taken on discouraging the extensive citation of cases arising from the fact that virtually every UK court and tribunal decision, and indeed every Luxembourg and Strasbourg court decision, is available at the touch of a button or the click of a mouse.

45. Like e-disclosure, this plethora of law reports is a particular challenge for a common law system thrown up by the momentous and headlong developments in electronic technology. No doubt, we will cope with both challenges, but both the judiciary and the legal profession have a duty to ensure that we do so, both effectively and quickly. It is extraordinary how quickly we have moved from the problems of lost important documents on disclosure, and unreported important cases, still with us twenty years ago, to the present problems of a plethora of potentially relevant, but ultimately irrelevant, electronic documents, and a plethora of apparently relevant, but ultimately unimportant, reported cases.

**(9) Is judgment-dissemination a threat to the survival of Judgment-enhancement?**

46. It might be said though that with the growth of Bailii that scholarly law reporting is to a certain extent no longer necessary. This view would see Judgment-enhancement and Judgment-dissemination as competitors, with the latter driving out the former. I disagree

with this view. The two types of law reporting complement each other; a truth acknowledged by the recent partnership which has been entered into between Bailii and the ICLR.

47. Bailii renders Judgments immediately accessible as they are handed down. It makes them available via the internet to anyone with access to the internet, quickly, easily and at no expense. It provides an essential service to the public. On the other hand, scholarly reporting is less concerned with immediacy and more directed to summarising the effect of Judgments and giving the vital details identified above. It is aimed more at a specialist market, and provides a service which is comprehensive and reliable, and as speedy and accessible as is consistent with those aims.

48. Just as the traditional law reports cannot provided the comprehensive and same-day service offered by Bailii, so Bailii does not offer the benefits provided by the scholarly law reports, such as an expert and judicious selection of the most important cases, with headnotes and other valuable details which I have discussed,

49. While there is a theoretical risk that Bailii could undermine scholarly law reporting I do not think it is a real one. The risk, if there is one, would arise from a combination of Bailii's comprehensive, speedy coverage at no cost, as against the law reports' more selective and much fuller coverage at a price. In my view, the sheer quantity of decisions which Bailii properly reports, coupled with the absence of headnotes, list of cases cited, procedural history, and, in the leading cases, a detailed treatment of the advocates' arguments, should ensure that Bailii and scholarly law reporting cannot be said to be in competition with each other. Equally, the role which scholarly law reports play in helping

to disseminate precedent and authority also demonstrates how the two cannot be said to be genuine competitors.

50. It seems to me that the relationship which Bailii and the ICLR have just entered into demonstrates clearly the symbiotic relationship that exists between the two types of law reporting. One is compendious and readily and speedily accessible to all. The other is selective, fundamental to the development of the law, and primarily directed to legal academics and professionals. This is not intended to diminish my earlier call for greater accessibility of judgments to members of the public. Bailii goes as far as we can, through a free medium, to provide access to judgments and, thereby, access to justice. It is to be applauded for that and deserves unstinting support.

#### **(10) Improving Bailii**

51. We might ask ourselves however what we can do to make judgments on Bailii more accessible to the general public. At the moment, people who click onto its website are faced with a sea of Judgments. How do they know one from another? How do they know the subject matter? How do they know which Judgments establish or clarify the law? The provision of a link to an ICLR summary, which is now available in some cases reported on Bailii is a very beneficial first step; not least because the summary provides a clear and readily understandable outline of the case. But is there anything more that the judges can do?

52. In this connection, I wonder if it is worth addressing an idea first mooted, I believe, by Sir Henry Brooke, that they adopt the practise common to the Immigration and Asylum Chamber of the Upper Tribunal of producing starred determinations. This would involve

the court identifying, when a Judgment is handed down, whether it is important because it clarifies the law or establishes a new principal, or whether it is, by contrast, unimportant. This at least would enable members of the public to narrow down any search they were making of recent cases. I have my concerns about this idea. Will it encourage judges to ignore legal principles to achieve a desired result, and avoid the consequences for the law by not starring the case? And if the judge who decides on starring is the judge who decides the case, starring is likely to be inconsistent, as some judges are modest and others are not. Whereas I would be uncomfortable about another judge marking a colleague's work.

53. No doubt, detailed consideration could come up with more ideas. I am sure though that with the support of the judges, members of the legal profession, and legal academics, and through the nascent collaboration between Bailii and the ICLR – two charities – more and better ideas to enable greater dissemination and understanding of Judgments can be identified and introduced.

## (11) Conclusion

54. I would like to finish this lecture with a comment made by Nathaniel Lindley, last serjeant-at-law, and thereafter Chancery Judge, Master of the Rolls and Law Lord. In an article published in the Law Quarterly Review in 1885 he said this,

**‘The Law Reports . . . are so extremely important to all branches of the Legal Profession, they are so valuable, not only to legal practitioners but to all persons who care for English Law as a scientific study or who take an interest in its development and improvement, that every member of the Profession ought to the best of his ability to assist in supporting and perfecting them.’<sup>24</sup>**

---

<sup>24</sup> N. Lindley, *The History of the Law Reports*, (1885)1 LQR 137, 149.

55. That truth remains as valid now as it was then. It does not just apply to the Law Reports though. It applies to the provision of Judgments by Bailii. Securing the provision of Judgments, written with judgement, is not just extremely important to all branches of the legal profession, to those who take an academic interest in English law or to those who are interested in its development and improvement. In this Lord Lindley's truth reflected the view that Judgments speak to an audience, which is made up of those who have a professional interest in the law and its development.

56. By today's standards, however, Lord Lindley's truth is only partial. Judgments must speak now not just to a professional audience, but they must also be capable of speaking clearly to a lay audience, prospective self-represented litigants and citizens generally. The rule of law requires it. The complementary roles which scholarly law reporting and judgment-dissemination play ensure that both professional and lay audience can gain proper access to the law as the courts develop it. They both play an essential role in supporting the rule of law. As such we should support both forms of law reporting. In particular, though, we should support Bailii. Through its contribution to law reporting, access to Judgments is something which is for the public, for the litigant-in-person, just a click away.

57. Thank you.

David Neuberger

20 November 2012