The Future of Law Reporting

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Tēnā koutou, tēnā koutou, tēnā koutou katoa

1. I have been invited to offer some remarks tonight on the future of law reporting. I can only compliment the organisers for their sense of adventure in extending that invitation to me. Or their eccentricity in choosing a Judge with a particular interest in legal history; one who is distinctive for using a fountain pen and notebook in court, rather than tapping away on his computer.

2. So, not a natural futurist, but here I am, fountain pen at the ready, to talk to you about the future of law reporting. Still, punditry is best done with one eye on the past, enabling a trajectory to be charted. So perhaps I do have something to say, and perhaps it may even prove right.

Court in Covid

3. Assuming this invitation is not some gigantic mistake, I can only assume it is the product of my starring on-line appearances in the Covid years when I presided over the Court of Appeal from my library at home, seated in front of a set of fluted library shelves neatly displaying my set of English Reports.

4. They made a better backdrop than most I saw during those many on-line appearances. In one case, kicking off at 10 am, counsel had a number of half-empty bottles of red wine on display. Perhaps he couldn't work his virtual backgrounds. At least he wasn't a cat.

5. The English Reports may make a pretty backdrop for a judge, but they are not universally pretty reading. Some of the English Reports were famously unreliable. Espinasse, who reported Nisi Prius cases between 1793 and 1807, was deaf and was said to have "only heard half of what went on and reported the other half".[2] Siderfin's King's Bench Reports were fit only to be burned, according to Dolben J.[3] Serjeant Barnardiston, who reported both Chancery and King's Bench, would fall asleep in Court, and his reports contain ephemera inserted by "wags"—as Lord Lyndhurst LC put it.[4]

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1 Judge of the Supreme Court of New Zealand. Thanks to George Sabonadière and Amelia De Lorenzo for all their assistance. Usual disclaimers apply.

2 See *Warren v Keen* [1954] 1 QB 15 at 21 per Denning LJ.

3 *Huggins v Bambridge* (1740) Willes 241 at 245. The judgment seems a little harsh: compare Sir William Holdsworth *A History of English Law* (vol 5, Methuen, 1924) at 367.

4 John William Wallace *The Reporters* (4th ed, Soule and Bugbee, 1882) at 424–425.

6. Other reporters were of course of a quite different order. Edmund Plowden, whose statue at the foot of Middle Temple Hall I bowed to in June when made a Bencher, was the most learned lawyer of the generation preceding Coke, and his *Commentaries* (published between 1571 and 1579) had a huge impact on the expression and development of the common law. Plowden's *Commentaries* invented the headnote (later improved even further by James Burrow in the mid-18th Century). They summarised the facts, arguments and judgments and offered a commentary explaining where the case fitted within the framework of the law. Something of a combined report and textbook. Coke himself described them as "exquisite and elaborate".[5]

7. But Plowden and Burrow were exceptions, just as much as Espinasse and Siderfin were at the other end of the scale. By 1863 there were sixteen series of authorised law reports—causing a Chancery silk, William Daniel QC, to write to the Solicitor-General to complain that these simply reported 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".

8. Looking at today's landscape, one might be forgiven for thinking history is to some extent being repeated.

Why have law reports at all?

9. Why, then, have law reports at all? The answer lies, as usual, in history: in an age of information overload—even in the mid-19th Century—we need to move beyond an unsystematic, indiscriminate series of poorly edited reports, to something that is selective, systematic, representative and reliable.

10. Law reporting began in this country in 1861 with Mr Macassey's reports—fully two decades after a Supreme Court was established here. As the Chief Justice has noted, that means we are missing case law from the early legal experience of this nation, when the indigenous and settler communities first interacted juridically.[6] Macassey's Reports were confined to Otago and Southland where he practised, along with some Court of Appeal decisions. They ceased in 1872. Other private series, such as the Johnston Reports (the editor being a Supreme Court judge), the New Zealand Jurist Reports and the Colonial Law Journal Reports were published fitfully in the middle century, until in 1882 a Council of Law Reporting was founded to bring system and continuity to the exercise. The first volume of the New Zealand Law Reports emerged in 1883.[7]

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5 AWB Simpson *Biographical Dictionary of the Common Law* (Butterworth & Co, 1984) at 415–418.

6 Helen Winkelmann "Picking up The Threads: The Story of the Common Law in Aotearoa New Zealand" (2021) NZJPIL 1, 6-7. Fortunately, there was good newspaper reporting of the Courts at the time, and subsequently the New Zealand's Lost Cases Project has collected cases heard by the Supreme Court and Court of Appeal from 1842 to 1869: www.wgtn.ac.nz/law/nzlostcases.

7 Hugh C Jenkins "The History of Law Reporting in New Zealand" [1926] Butterworth's Fortnightly Notes 291.

11. Its establishment replicated, on a more modest scale, the United Kingdom's Incorporated Council of Law Reporting—founded in 1865 by the same William Daniel mentioned above, and who had written so trenchantly to the Solicitor-General two years earlier.

12. Nathaniel Lindley's[8] selection system underlay the new official reports published by the Council—and still does. It set four criteria for a case being reported (at least one of which had to apply):

    (a) The (apparent) introduction of a new principle or rule;

    (b) A material modification of an existing principle or rule;

    (c) Settling a question on which the law was doubtful (or materially tending to do so); or

    (d) For any other reason "particularly instructive".

13. These criteria created difficulty. Well, of course they would. "Material modification" of a rule or principle was especially difficult: No litigator ever seems to have "groundhog days" which repeat the day before. Every day is different, and every case seems so too. Appellate decisions are especially hard. Even if settled principles are expounded, the illustration of the principle in action adds a little to the principle.

14. As soon as you select, you create the impulse for a parallel, unofficial reporting system to include the cases that almost made it. But selection is important, because you cannot swim in a tsunami. In a common law system that is not obsessed with civil codes, you need a representative body of law that you can study, analyse and present as the country's law—or its common law at least. That, after all, was one of the reasons the Official Reports were established in 1865.

15. This came home powerfully to me in a study my last Court of Appeal clerk, Diana Qiu, and I did on citation trends.[9] What we set out to do was interrogate a suspicion I had that we did not cite Australian decisions much in New Zealand, never had and that not much had changed. A simple word search for Australian reports or Courts in the digital unreported judgments would give you a gross number, and you could do the same for New Zealand reports and courts, and English reports and courts, and get a comparison. But we wanted a long-term analysis, for full decades (rather than potentially unrepresentative individual years) going back to the 1950s—which pre-dated any sort of digital archive of unreported decisions.[10]

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8 Later author of two great texts on partnership and company law, QC, Master of the Rolls and Lord of Appeal in Ordinary.

9 Stephen Kós and Diana Qiu "Parallel Universes: The Curious Dearth of Trans-Tasman Citation" [2023] NZLRev 61.

10 Neutral citations only emerged in Australia in 1998, and in the New Zealand and the United Kingdom in 2001.

16. So what we did was search an historical *representative* system: we searched the New Zealand Law Reports for the whole of the 1950s, 1970s, 1990s and 2010s for New Zealand, Australian and United Kingdom citations. Searching whole databases on a consistent basis was impossible, so we used this representative methodology of the law reports.

17. The results were fascinating. In short, in the NZLR-reported cases, New Zealand and United Kingdom citations did a straight swap. In the 1950s, about 60 per cent of the NZLR citations were English. In the 2010s about 60 per cent of the citations were to New Zealand cases. Over the 60-year span of the study, English cases fell from 60 per cent to 25. New Zealand cases rose from 35 per cent to 60. And Australia: a bit like the very small snail, James, in AA Milne's poem *The Four Friends,* Australia went on a journey and got to the end of its brick after 60 years, with little discernible change—6 per cent in the 1950s; 8 per cent in the 2010s.

18. While we need at some point to debate *why* that is the case, the point for tonight's purposes is that only the Law Reports enabled a consistent, long-run study like that to be undertaken. Selection and representation is important to scholarship.

Specialist reports

19. A few words now on the unofficial, specialist reports. I am talking here of reports like the Criminal Reports, Employment Reports, Environmental Reports, Family Reports, Procedure Reports, New Zealand Conveyancing and Property Reports and the New Zealand Company and Commercial Reports—published by Thomson Reuters, LexisNexis and Wolters Kluwer.

20. In contrast perhaps to the reports Daniel complained of in 1863, these reports serve a vital purpose. First of all, the volume of production of judgments has greatly exceeded the number of available pages in the NZLRs. Let us just take the Court of Appeal: in its first year as a permanent court it delivered 104 judgments. Twenty-five years later, in 1983, 372 judgments. In 2017, 630 judgments. In judgment numbers, that is a 500 per cent increase—ignoring the fact that judgments today are typically much lengthier than they were in 1958.

21. Now let us compare the NZLR pages. In 1958, they totalled 1,247 pages. In 2017, they were 2,867—just a 130 per cent increase, compared to a 500 per cent increase in Court of Appeal judgment numbers. And that takes no account of the fact that we should really ignore volume one of the NZLRs—the Supreme Court judgments—because the Supreme Court hears cases the Privy Council never considered, particularly ones involving crime, criminal justice and broader public law, and it does so at far greater length. If we exclude volume one of the 2017 NZLRs for a truer comparison, the page increase from 1958 is only 40 per cent.

22. It is unsurprising that there were far more judgments in 2017 than 1958. In those six decades:

(a) Our population increased about 100 per cent;[11]

(b) Our senior judicial population rose 260 per cent;[12]

(c) The number of Court of Appeal judgments increased by 500 per cent;[13]

(d) The NZLR pages increased, as just noted, by 40 per cent (or 130 per cent, depending how you look at it).

So, a smaller proportion of judgments in the Court of Appeal and High Court are making it into the NZLRs these days. I will come back to that in a moment.

23. Secondly, the specialist reports are the ones that best carry the reports that miss Lindley's second criterion: material modification of an existing principle or rule. These are the "illustrated reports"—or at least the ones that illustrate principle, if not exhibiting great shifts. And they will, therefore, be of great value to specialist practitioners who need something between the limited representation the NZLRs give their area, and the great tsunami of unreported judgments.

Unreported judgments: disappearing ink that proved indelible

24. Next, I touch on unreported judgments. They have become the tsunami at our door, as they have become so easily accessible via NZLII, Judicial Decisions Online (JDO), Lexis Advance and Westlaw. There was a time when the United Kingdom courts and some United States jurisdictions prohibited their citation. As a result, unreported judgments became known as "disappearing ink".

25. In 1983, for instance, the House of Lords issued a practice direction prohibiting the citation of unreported civil judgments—which had become more readily available "in the computerised data base known as Lexis"—from being cited without leave.[14] That practice note was revoked in 2012, the current version merely stating that "an unreported case should not usually be cited unless it contains a relevant statement of legal principle not found in reported authority".[15]

26. Here in New Zealand, we do not have unreported judgment non-citation rules. The closest we get to it is entirely status-neutral: the Court of Appeal Civil Appeals

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11 From 2.3 million to 4.7 million.

12 From 15 senior court judges to 54.

13 See above at [20].

14 *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 (HL) at 200–203 per Lord Diplock; and see NH Andrews "Reporting Case Law: Unreported Cases, the Definition of a Ratio and the Criteria for Reporting Decisions" (1985) 5 LS 205.

15 *Practice Direction (Citation of Authorities) (Sen Cts)* [2012] 1 WLR 780 at [10].

Practice Note 2022 says, laconically: "eschew needless citation of authorities—one usually suffices".[16]

Judges as law reporters

27. One consequence of the proliferation of reports, but even more, the fact that unreported judgments have ceased to be "disappearing ink", is that judges write with a slightly greater eye to posterity than they did. I have taught judgment writing at Te Kura Kaiwhakawa, the Institute of Judicial Studies for a decade, and I know this to be fact. Their work is for ever on display.

28. When I first became a High Court Judge in 2011, I started to include quite detailed summaries of what I was holding—prompting the editor of the NZLRs to say I was doing his job for him (I wasn't sure whether he was pleased, or not). Other judges do the same thing —though there is a debate about whether the summary should come at the beginning (e.g. Collins and Palmer JJ) or the end.

29. Partly for posterity, partly for accuracy, and partly because the judgments can be complex, with the ratio difficult to discern, Supreme Court decisions often contain a "Summary of Reasons" at the start of the judgment.[17] So, in a sense, judges have started to become their own law reporters.

The future of law reporting

30. So what do I think the future holds for law reporting in New Zealand? With some trepidation, here are four predictions.

31. First, I think the future is a bright one. In many ways, the tsunami of digitised access replicates the chaotic conditions in 1865 which gave rise to a more selective, representative system of official law reporting. We still need representative reports, with headnotes of the highest quality.[18] Indeed, we need them more than ever. So, I think predictions of the demise of current law reporting are misplaced. What *is* surely certain, however, is that law reporting will adjust and change—as it always has.

32. Secondly, I am less sure what impact artificial intelligence (AI) will have on law reporting. The fact that it enlarges access doesn't necessarily alter things; the fact that it may offer some additional form of selection and commentary will change things. We can expect these functions to increase in reliability as time goes on, although dangers of misinformation seem endless.[19]

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16 *Civil Appeals Practice Note 2022* (Court of Appeal, Wellington, 1 March 2022) at [4](k).

17 See for example *Burke v R* [2024] NZSC 37, [2024] 1 NZLR 1 at [1]–[6].

18 A point also made by Lord Neuberger, then-President of the Supreme Court of the United Kingdom, in his 2015 ICLR Lecture "Reflections on the ICLR Top Fifteen Cases: A Talk to Commemorate the ICLR's 150th Anniversary" (Lincoln's Inn, London, 6 October 2015) at [5].

19 See for example *Zhang v Chen* 2024 BCSC 285, in which the Supreme Court of British Columbia held a lawyer personally liable for costs to compensate for the time wasted by opposing counsel attempting to verify the lawyer's citations to fictional cases generated by the artificial intelligence tool ChatGPT.

33. But it strikes me that AI may provide a really valuable adjunct to law reporting, because in a way that is what Plowden's commentaries did in the 1570s. He brought a more comprehensive analysis to a scattered resource. In doing so he improved and influenced the common law almost immeasurably. AI offers some similar prospects. We are already seeing this via products like Case Genie, offered by the ICLR. These services identify and summarise judgments in a way a Google search just can't do.

34. I sense that law reporting will start to shift to a greater system of commentary and digest provision—which the United States key citation system has offered for years (and which is being enlarged and enhanced using AI).[20] These still depend on the underlying reports, but enhance them (at a cost).

35. Thirdly, I think we will see the enlargement of the NZLRs, at least to a fourth annual volume. The study Diana Qiu and I did last year demonstrated a dramatic increase in New Zealand self-citation. We are now more reliant on our own decisions than those of other jurisdictions. Yet, as my analysis tonight shows, a lower proportion of material from the Court of Appeal and High Court makes it into the NZLRs now than in the 1950s. This at the very time we are evidently more reliant on their judgments. This disparity makes us more dependent on the unofficial reports, and unreported judgments. This is not a criticism of the NZLRs, which are excellent and have a remarkable editor in Professor Geoff McLay, but it is worth thinking about.

36. Fourthly, I suspect this raises interesting questions about money, and that raises another question. An increasing number of cases now are run by litigants in person. So I imagined being one—a prisoner in Remutaka Prison or an iwi leader in Levin. And I wondered how I would access the NZLRs? Well, the local prison or public libraries don't have them.[21] Enquiries of Corrections elicited the information that prisoners don't have electronic access to the NZLRs, although they can access NZLII—which has prompted me to give them another donation this morning. And if the iwi leader in Levin wants an official report on-line, it will cost them $30 per case.[22]

37. I really do not think this is at all satisfactory. If the point of the official reports is to collect, and (via headnotes) explain, cases truly representative of our common law, they need to be more accessible to those directly involved in legal processes. It is their law, and they should be able to see it. People engaged in the law should not be made to swim in a tsunami, let alone wearing swimming goggles resembling blinkers. The contrast with on-line access to legislation is striking. In contrast, one of the two free common law access systems, NZLII, operates on a hand-to-mouth basis.[23]

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20 For example, Westlaw's KeyCite system, and LexisNexis's Shepard's Citation service.

21 In fairness, I should note that the Wellington Public Library does have them—in its Heritage collection, happily up to date, but unhappily in storage while the building is strengthened.

22 New Zealand Council of Law Reporting <www.lawreports.nz>.

23 The Ministry of Justice publishes unreported judgments on Judicial Decisions Online. Neither NZLII nor JDO is selective, and neither of course offers headnotes.

38. A very big conversation needs to be had, but my fourth prediction is that there will be a change to the delivery of the NZLRs, making them much more accessible to a far wider circulation than at present.

Conclusion

39. So there you have it. That is my punditry for tonight. I hope my predictions prove reasonably accurate. Ask me back in twenty years. I am an optimist by nature.

40. Thank you for inviting me to speak tonight, and thank you all for your kind attention. Good evening, and good luck.

Kia ora rawa atu. Tēnā koutou, tēnā tatou katoa.