

NMLR Annual Lecture Series – 7th June 2012

Judicial Precedent – Taming the Common Law

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“Law reporters are the unsung heroes of our legal system”¹

1. I am delighted and honoured to be invited to give this lecture, to mark the first anniversary of the relaunch of the Nigerian Monthly Law Reports. The series dates back to 1964, when reports under this name were first published, under the guidance of a highly distinguished editorial team, led by Justice Olu Ayoola. But publication ceased in 1976, apparently because the founding editors moved to other judicial or executive appointments. The law firm, Babalakin and Co, are to be congratulated on their initiative in reviving the series, through their publishing arm Optimum Law Publishers Ltd.
2. The most striking features of the new reports, to an English lawyer, are the care given to identifying and highlighting the critical passages in the judgments, and the editorial notes designed to put the decisions in their full legal context. I was struck by one highlighted passage in a recent judgment of the Supreme Court, which is directly relevant to the subject of this talk². The issue was whether the Court of Appeal, faced with two conflicting judgments of the Supreme Court, was free to revisit the matter “in the interest of justice”. The judgment of Ogbuagu JSC was unequivocal:

“I wish to stress the fact in the hierarchy of the courts, where there are conflicting judgments, the Court of Appeal, is bound by the latter or last decision of this court. It has no choice however brilliant and knowledgeable the justice of that court may think or hold that they are more than this court.”

3. The language reminded me of the terms in which the House of Lords used to put down Lord Denning’s attempts to move the law further than precedent would allow. For example, in *Cassell v Broome* in the Court of Appeal he had described the House of Lords decision in *Rookes v Barnard* (on the award of exemplary damages) as “per incuriam” and “unworkable”, and had directed the judges of the lower courts to ignore it. Lord Hailsham was equally forthright in condemning this approach (albeit with what he described as “studied moderation”):

“... it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way... The fact is, and I hope it will never be necessary to say so again, that, the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers...”³

4. The truth of the matter is that the doctrine of judicial precedent, or *stare decisis*, is central to the strength of the common law, as practised in both our countries. Without it, in the words of Lord Neuberger MR, “the notion of a *corpus* of law built up in a

¹ Lord Neuberger, *Law Reporting and the Doctrine of Precedent: The Past the Present and the Future* Halsbury’s Laws of England Centenary Essays 2007 p 71

² *Osakue v Federal College of Education* (2010) 3 NMLR (Pt II) 319 para 15,

³ *Cassell v Broome* [1972] AC 1027, 1053-4, noted in *Tobi, Sources of Nigerian Law* p 89

reasonably coherent and consistent way by the judiciary is a dead letter”.⁴

5. In this paper, I propose to say something about the crucial role of the law reporter, before looking at some of the practical problems posed by the doctrine of precedent, and in particular of identifying the *ratio*, or legal principle, underlying a judicial decision which alone is binding on lower courts. I shall conclude with a particular hobby-horse of mine, reflected in the title, which is the need in the modern age to control the sheer volume of case-law with which the courts are increasingly burdened.
6. I approach these subjects in Nigeria with due humility, conscious that they have been covered very fully, and with reference to Nigerian authorities, in a number of the excellent textbooks. I have been particularly assisted by the chapter on “Case Law and Precedent”, in Justice Tobi’s *Sources of Nigerian Law* (1996). I am conscious also that the hierarchical system of courts in Nigeria is inevitably more complex than in the UK, in view of the interaction of Federal and State Courts. On the other hand, I understand that the status of the Supreme Court and Court of Appeal, as regards rules of precedent, is very similar to that of our own equivalents.

The role of the law reporter

7. Law reporting had a troubled early history in England. Blackstone complained of reporters who, whether through haste, or want of skill, have published “very crude and imperfect (perhaps contradictory)

⁴ Lord Neuberger, *op cit* p70

accounts of one and the same determination.”⁵ Reporting from the 17th C onwards was generally left to the unregulated market. The judgments contain many critical comments of the quality of the reports. In *Miscellany at Law* Sir Robert Megarry quotes some choice examples, for example Holt CJ’s remark that “these scrambling reports... will make us appear to posterity for a parcel of blockheads”.⁶ Or *Bird v Brown* (1849) whose reporting shook Lord Macnaghten’s “confidence in the infallibility of reports”, because as he said:

“[The case] was heard by four judges. Only one judgment was given. The Exchequer reports attribute the judgment to Rolfe B. The *Law Journal* ascribes it to Parke B. The *Jurist* puts it in the mouth of Pollock CB. No one gives it to the fourth judge; but then there were only three sets of reports current at the time.”⁷

8. The concerns came to a head in the mid 19th C, and led in due course to the founding in 1865 of the Incorporated Council of Law Reporting, and the launch of the official law reports. In 1863, William Daniel QC, who led the movement which resulted in the founding of the official Law Reports, had set out in a letter to the Solicitor General, the problems of expense, prolixity, delay and imperfection in the then system of law reporting that then existed. He continued:

“To these I would add a further evil.... That of reporting cases indiscriminately without reference to their fitness or usefulness as

⁵ *Ibid* p 72

⁶ *Slater v May* (1704) 1 Ld Raym 1071, 1072

⁷ *Keighley v Durant* [1901] AC 240, 248

precedents, merely because, having been reported by rivals, the omission of them might prejudice circulation and consequently diminish profit.”

9. Nathaniel Lindley (later Master of the Rolls) in a supporting paper expressing the view of the Chancery Bar suggested that the cases to be reported were:

1. All cases which introduce, or appear, to introduce a new principle or a new rule.

2 All cases which materially modify an existing principle or rule.

3 All cases which settle or materially tend to settle a question upon which the law is doubtful.

4 All cases which for any reason are peculiarly instructive”.

10. Important features of the new reports were clear headnotes, identifying the legal points decided, with summaries of the facts and procedural history, and verbatim reports of the judgments. Where the judgment was delivered *ex tempore* the practice developed (and continues today) of sending a transcript to the judge for amendment and approval.
11. Problems of inaccurate reporting have largely disappeared, as have those of accessibility. An important development in recent years has been the Bailii website⁸ (a charitable, non-government project using the same software as the Austlii model from Australia). This provides free on-line access to nearly all judgments from the High Court and above, including European Court decisions, and many

⁸ <http://www.bailii.org/>

from the newly reformed tribunal system. It also provides access to cases and statutes from many other common law jurisdictions.

12. The free availability of so much material does not diminish the role of the reporter. If anything, it demands a more sophisticated approach. The main issue today is not accuracy, but selection. The Lindley principles still hold good today, but the task of selection is much more challenging. I shall return to this issue.

Judicial precedent in practice

13. Fundamental to the operation of judicial precedent is the identification of the *ratio decidendi*, or essential reasoning, on which a case was decided, and which alone is binding on lower courts. Arthur Goodhart, in his classic 1930 article “Determining the *ratio decidendi* of a case”, said of the term:

“With the possible exception of the legal term ‘malice’ it is the most misleading expression in English law, for the reason which a judge gives for his decision is never the binding part of the precedent.”

14. This apparently paradoxical observation reflects the fact that the stated reasoning is only part of the story. The *ratio* can only be determined by analysis of the legal reasoning in its factual context. As Lord Halsbury LC said, more than 100 years ago:

“... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole

law, but governed and qualified by the particular facts of the case in which such expressions are to be found. “⁹

He added:

“...a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.”

15. I am not sure that I would wholly subscribe to the second half of that proposition. We should start from the assumption that the law is logical, coherent and just, and try to keep it that way. However, he was undoubtedly right to underline the need first to relate the legal reasoning to its factual context, but secondly for care in extending the logic of a decision beyond that context.
16. There are dangers perhaps in getting over-analytical. In one case, Lord Simon spoke of the exercise as “a sort of complex syllogism” with the “major premise” consisting of an established principle of law, and the “minor premise” the material facts of the particular case.¹⁰ Usually it is not too complicated. A simpler approach is noted by Justice Tobi referring to a statement in a Nigerian case. In *Chief Egbo v Chief Laguna*¹¹ Kolawole JCA suggested that one could take the proposition of law put forward by the judge, reverse it, and then see if its reversal would make any difference to the result.

⁹ *Quinn v Leathem* [1901] AC 495, 506

¹⁰ *Lupton v F.A & A.B. Ltd* [1972] AC 634, 658.

¹¹ (1998 3 NWLR (Pt 80) 109; cited in Tobi *op cit* p 84

“In other words,” he said, “the *ratio* is the general rule without which the case would have been decided otherwise.”

17. Unfortunately, judges do not always distinguish clearly between the statement of a legal proposition and its factual context. Goodhart cites a 19th C case from the law of the vicarious liability, *Barwick v English Joint Stock Bank*¹². The defendant’s bank manager fraudulently induced the plaintiff to accept a valueless guarantee. Willes J said:

“The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of his service *and for the master’s benefit*, though no express command or privity of the master be proved.” (emphasis added)

This appeared to imply that a factual finding that the action was “for the master’s benefit” was a necessary part of the legal test. That was how the case was treated for more than 40 years, until it was put right by the House of Lords in *Lloyd v Grace, Smith & Co*. They held that such a requirement was not supported by the earlier authorities. The words “for the master’s benefit” should be taken as merely descriptive of the facts in the *Barwick* case, rather than as a necessary part of the legal principle involved.¹³ This, said Lord Loreburn, should have been clear if “the whole judgment of Willes J be looked at instead of one sentence alone”.

18. Often the fault is the other way. Instead of extending the *ratio*, the lower court, perhaps unhappy with the full implications of the higher

¹² (1867) LR2Ex 259, 265

¹³ [1912] AC 716

court's decision, attempts to narrow its scope. Lord Denning (fairly described by Tobi as "one of the greatest protagonists of judicial law-making...") sometimes resorted to this technique. For example, in *Paal Wilson & Co A/S v Paartenrederei Hannah Blumenthal*,¹⁴ a case on time-limits in arbitration, he sought to avoid the unwelcome consequences of a House of Lords' decision¹⁵ by treating a central passage in the majority speech of Lord Diplock as *obiter dictum*, because it was directed only to the facts of the case rather than of more general effect. His judgment is of particular interest, because of the care he took (conscious of the rebuke he had received in *Cassell v Broome*) to justify his action by an almost textbook exposition of the principles of judicial precedent, and a sentence by sentence analysis of Lord Diplock's words to distinguish between what he considered the material and the immaterial facts. It remains a characteristically perceptive discussion of the authorities. Unfortunately this did not avail him in the House of Lords, Lord Brandon thought it "crystal clear" from Lord Diplock's words that the relevant passage was all part of the essential reasoning. Not surprisingly, Lord Diplock agreed.¹⁶ Perhaps Lord Denning can claim the moral victory, since his view of what the law should be was eventually adopted by the legislature.¹⁷

19. In any event, considered statements of the highest court must be treated with respect, even if technically *obiter*. This has been recognised in the Nigerian courts:

¹⁴ [1982] 3 All ER 394

¹⁵ *Bremer Vulkan v South India Shipping Corpn* [1981] AC 909

¹⁶ [1983] 1 All ER 34.

¹⁷ Note that the *Bremer Vulkan* and *Paal Wilson* decisions were ultimately modified by the Arbitration Act 1950, s. 13A, added with effect from 1 January 1992 by the Courts and Legal Services Act 1990.

“This does not mean that an *obiter* has no strength or teeth, indeed no lower court may treat an *obiter* of the Supreme Court with careless abandon or disrespect but the Supreme Court could ignore it if it does not firm up or strengthen the real issue in controversy.”¹⁸

20. A famous example from the UK courts is *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, in which the House of Lords held unanimously that there could be a legal duty of care for negligent misstatements where there was a special relationship between the parties, and liability had not been excluded. Technically that might have been regarded as *obiter*, since on the facts it was held that there had been an effective disclaimer of responsibility. However, these *dicta* in the reserved opinions of five Law Lords delivered after eight days of argument have rightly been treated as authoritative on that issue in countless subsequent cases.
21. A less clear-cut example can be found in the cases on barristers’ immunity. In *Rondel v Worsley* (1969)¹⁹ the House of Lords held unanimously that a barrister is not liable in tort for the negligent presentation of a case in court and associated work, but three of their Lordships said, *obiter* (and without full argument) that a barrister would not be immune from an action in negligence in relation to matters unconnected with cases in court.²⁰ A decade later, in *Saif Ali v Sydney Mitchell & Co*²¹, these *obiter dicta* were followed by a majority of the House of Lords. Lord Wilberforce said:

¹⁸ *Buhari & Ors. v. Obasanjo & Ors.* (2003) 11 SC pg 1 at 124, per Pats-Acholonu JSC

¹⁹ [1969] 1 AC 191

²⁰ *Per* Lords Reid, Morris, and Upjohn, at pp. 231-2, 244, and 286, respectively.

²¹ [1980] AC 198

“not all obiter dicta have the same weight, or lack of weight, in later cases. Of those then made in the House [in *Rondel v Worsley*], two things may be said. First, they were considered and deliberate observations after discussion of the same matters had taken place in the Court of Appeal and in the light of judgments in the Court of Appeal. It may be true that the counsel in the case did not present detailed arguments as to the position outside the court room – they had no interest in doing so – but I cannot agree that this invalidates or weakens judicial pronouncements... Secondly, it would have been impossible for their Lordships to have dealt with the extent of barristers’ immunity for acts in court without relating this to their immunity for other acts... These factors, in my opinion, tell in favour of giving considerably more weight to their Lordships’ expressions of opinion than *obiter dicta* normally receive. We may clarify them, but we should hesitate before disregarding them.”²²

22. Interestingly, a further twenty years on, the House of Lords in *Arthur J. S. Hall & Co v Simons*²³ held that *Rondel v Worsley* itself should no longer be followed. Thus within the space of 35 years the barrister immunity rule was abolished by the same court that had earlier confirmed it and continued its existence.
23. This last case illustrates another important principle, that the law of precedent should not become a straightjacket; and that, at least in the highest court, the rule may yield exceptionally to changing social conditions and public expectations. In 1966 the House of Lords issued a Practice Statement, modifying its previously rigid practice of treating itself as bound by its own decisions.²⁴ While affirming the importance of the principle (“an indispensable foundation upon which to decide what is the law and its application to individual

²² pp. 212-13

²³ [2000] 3 All ER 673

²⁴ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

cases”), it recognised that “too rigid adherence to precedent may lead to injustice in a particular case and also restrict the proper development of the law.” In future the House, while treating former decisions as “normally binding”, would depart from a previous decision “when it appears right to do so”. However, they would bear in mind “the dangers of disrupting retrospectively the basis on which contracts, settlements of property and fiscal arrangements had been entered into”, and also “the special need for certainty as to the criminal law.”

24. In practice this power has not often been used. Commenting much more recently on this change of practice Lord Bingham said:

“While adherence to precedent has been derided by some, at any rate since the time of Bentham, as a recipe for the perpetuation of error, it has been a cornerstone of our legal system.... The House made plain that this modification was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance it attaches to the principle.”²⁵

25. The Court of Appeal applies a stricter test to its own decisions. It may decline to follow a previous decision in three cases (in summary): (i) if there are two conflicting decisions; (ii) if a previous decision of the court, though not overruled, cannot stand with House of Lords authority; or (iii) if the decision was *per incuriam*, that is

²⁵ *Kay v Lambeth LBC* [2006] 2 AC 465, [2006] UKHL 10 para 42

where material cases or statutory provisions were not brought to its attention.²⁶

26. It is not for me to comment on what should be the correct approach in Nigeria. However, I note with interest Justice Tobi's criticism that the courts take an unduly rigid stance. He says that the present trend in Nigeria is to "follow the doctrine of precedent slavishly, with the result that the law is conservative and to a large extent static." He suggests that, particularly in cases involving the interpretation of the constitution (not an issue in the UK), such a rigid approach is inappropriate. "Law as a living discipline must change with the times in order to answer to the social and cultural needs of a society".²⁷

Multiple judgments

27. A different problem for lower courts comes when they are faced with a multiplicity of judgments from the highest court, perhaps sitting with five or even more judges. It is possible for all the judges in an appeal to find for the same party but for different reasons. In this event, the *ratio* is whatever is agreed by the majority. If there is no majority in favour of any one view, its precedential value is limited. A notorious example was the House of Lords' decision in *Bell v Lever Bros Ltd* [1932] AC 161 (mistake of fact in contract), in which, after wide divergences of opinion in the High Court and the Court of Appeal, the appellant ultimately secured judgment by a majority of three to two in the House of Lords. But only two (Lord Atkin and Thankerton) of the majority of three decided on the same *ratio*, namely, that there was, on the facts, no fundamental mistake to

²⁶ *Young v Bristol Aeroplane Co Ltd* [1944] KB 718

²⁷ *Op cit* p 99-101.

avoid the contract. The opinion of the third member of the majority, Lord Blanesburgh, was based on a different, procedural, ground.

28. In *Paal Wilson*, Lord Denning MR spoke of the formidable problems in such cases of distinguishing between *ratio decidendi* and *obiter dicta*. He concluded that where there are four or five speeches and they each give different reasons, the lower court was free to “choose which it likes”.²⁸ On the other hand, he saw dangers in the recent move towards single judgments in the House, where the lower courts might be tempted to treat its words “almost as if they were the words of a statute”. Lord Reid had the same concern that the words of a single speech might be treated as a definition:

“The true ratio of a decision generally appears more clearly from a comparison of two or more statements in different words which are intended to supplement each other.”²⁹

29. My own experience in the Court of Appeal and now the Supreme Court leads me to the clear view that the greater risk is from too many judgments, rather than too few. I spoke of this in a Court of Appeal judgment in 2006.³⁰ We were considering the availability of a human rights defence (protection for family life) in local authority possession cases, often against gipsies, on sites where they had no legal right to remain, but sought to invoke the protection of the Convention. It was an issue which was arising in county courts every day of the week, and on which clear guidance seemed essential. Instead, the most recent authority from the House of Lords (*Kay v*

²⁸ *Supra* p 400

²⁹ *Saunders v Anglia Building Society* [1971] AC 1004, 1015,

³⁰ *Doherty v Birmingham City Council* [2006] EWCA Civ 1739 (with Tuckey and Neuberger LJ)

*Leeds CC*³¹) took the form of six substantive speeches (four majority, and two, including Lord Bingham, dissenting). The majority had in fact attempted to impose a degree of unanimity by each adopting as part of their judgment a particular passage from the judgment of Lord Hope. Unfortunately, this was of limited help, because of the need to relate the same passage to the different observations made in each case.

30. In my own judgment, having struggled to extract some coherent principles from the six judgments, I made a heart-felt plea (with the agreement of my two colleagues, including Neuberger LJ as he then was):

“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?”

31. Referring to Lord Reid’s 1971 comments, I said:

“It may be that the balance of priorities has changed since 1971, when Lord Reid was speaking. To take the most obvious point, in those days the domestic statutes for a single year fitted comfortably into a single volume, and there was no European legislation or case-law to muddy the waters. We live in a very different legal world today. The overriding problems are the sheer volume of new legal material, legislation and case-law (domestic and European), and the pace of change. In my view, the main challenge for the UK Supreme Court is not so much to develop

³¹ *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465

the law, but to consolidate, clarify and make accessible what is already there.”

32. The sequel again is of interest. Four years later, the Supreme Court found itself having to review the same issues, in the light of further judgments from the European Court of Human Rights. David Neuberger (who had in the meantime been elevated to the House of Lords, but had returned to the Court of Appeal as Master of the Rolls) was recalled as part of a nine-justice Supreme Court to bring finality to the debate. He was able to practice what we had preached. He gave the unanimous judgment of the Supreme Court, which finally resolved the main issue, as it happens in accordance with the dissenting judgment of Lord Bingham in the earlier case. The judgment as a whole is a model of lucid reasoning, combined with practical and authoritative guidance for the lower courts. To my mind it sets a model for which the Supreme Court should aim in all cases.

“Taming the common law”

33. Finally I come back to the second part of my title, that is the need in the modern age to keep the doctrine of precedent within reasonable bounds, in a world which differs so much from the conditions in which it was developed.
34. The problem of course is not new. Thirty years ago, Lord Diplock spoke of the evils of what he called “superfluity of citation”:

“The citation of a plethora of illustrative authorities, apart from being time and cost-consuming, presents the danger of so blinding the court

with case law that it has difficulty in seeing the wood of legal principle for the trees of paraphrase”.³²

35. That of course was long before the internet revolution led to exponential growth in the availability of potential cases. In 2000, Lord Bingham, speaking extra-judicially, said:

“Large numbers of decisions, good and bad, reserved and unreserved, can be accessed... it seems to me that the common law system, which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material...”³³

36. More recently, in a television programme on the working of the new UK Supreme Court, the President, Lord Phillips, spoke of a recent case in which the list of authorities ran to 400 cases. It was not entirely clear whether he spoke with pride, horror, or mere resignation.

37. The view of the lower courts has been vividly expressed by Laddie J (one of my liveliest former colleagues in the Chancery Division, sadly now prematurely deceased). Referring to the impact of the volume of unreported decisions, derived from the growing number of computerised databases, he said:

“... there is no pre-selection. Large numbers of decisions, good and bad, reserved and unreserved, can be accessed. Lawyers frequently feel that they have an obligation to search this material. Anything which supports their clients' case must be drawn to the attention of the court...

³² *Lambert v Lewis* [1982] AC 225, at p. 274. See also *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1981] 2 All ER 1030, at p. 1046, *per* Lord Roskill with whom the other Law Lords agreed on the point.

³³ Cited in *R v Erskine* [2009] EWCA Crim 1425, para [73] (as part of a series of quotations on the same theme over more than 100 years).

It seems to me that the common law system, which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material, not just from this country but from other jurisdictions, particularly common law ones.”³⁴

38. He noted the solution adopted in the United States Court of Appeals for the Federal Circuit, under which rules of practice provided:

"Non-precedential Opinion or Order. An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent....."

As to the sanction, he quoted an unnamed American Professor, who had told him that, if counsel tried to cite a non-precedential judgment to the Federal Circuit, “the court arranges for his hanging right on Lafayette Square”. That seems a little drastic. But the problem will not be solved unless the higher courts are willing to impose and enforce strict discipline.

39. Lord Judge LCJ spoke of the need for firm action, when discussing the problem in the Criminal Court of Appeal. The question as he said was whether his judgment would be merely one more plaintive lament against an irreversible process, or whether action should be taken to avert an impending crisis. He favoured firm action:

“The essential starting point is...: 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

³⁴ *Michaels v Taylor Woodrow* [2001] Ch 493

authorities, it is *necessary* to exclude it. That approach will be rigorously enforced.”³⁵

40. My own contribution to the debate has been to emphasise the value of the textbook or academic article as a substitute for multiple authorities.³⁶ In one case in the Court of Appeal the answer turned ultimately on the application to the facts of a proposition of law stated by Cockburn CJ as long ago as 1864, and confirmed by citation in the text-books. Yet we had been taken through some twenty-four authorities dating back more than 100 years. I said (with the support of my colleagues):

“One of the curses of the common law method in the 21st century is unlimited accessibility to authorities, reported and unreported, and apparently unlimited resources for copying them.... On the other hand, one of the blessings is the availability of up-to-date and authoritative textbooks on almost every relevant subject, in which the material cases have been sorted out and digested.... Of course, that is only the starting point. Authorities may be needed to qualify, expand, or merely illustrate the basic principle. However, it is important to be clear for which of those purposes any case is being advanced. Furthermore, where the purpose is to qualify or expand, it is not enough simply to cite an authority, without being able to articulate with reasonable precision the proposition which it is said to support.”

41. The law reporters also have a very important role, in their selection of cases for reporting, and in providing clear sign-posts to guide the reader to what is significant in the cases reported. I am impressed by the way in which the editors of the NMLR have sought to apply

³⁵ *R v Erskine*, at para [75].

³⁶ *Nedlloyd Lines UK Ltd & Anor v Cel Group Ltd* [2003] EWCA Civ 1716 para 23-6

these principles in practice. The index gives clear pointers to the relevant subject-matter of the all cases reported; and in the reports themselves the context is set by the clear headnotes and annotations, and the key passages are highlighted in the text itself. This promises to be a very valuable service for judges, practitioners and academics alike.

Conclusion

42. Greater certainty in the law is perhaps the most important advantage claimed for the doctrine of judicial precedent. From this advantage, other benefits flow. The existence of a precedent may prevent a judge from making a mistake which he might have made if he had been left on his own without any guidance. It may allow persons generally to order their affairs and come to settlements with a certain amount of confidence.
43. But the advantage of certainty is lost where there are too many cases or they are too confusing. This can arise through the process of distinguishing cases and over-refining the principles embodied in them, or simply, as I have sought to explain above, by omission to distinguish correctly the *ratio* of a decision from its *obiter dicta*.
44. The number and volume of cases will not diminish in the coming years. The way forward is for lawyers to be more discerning and selective in their citation of authorities, for judges to be rigorous in their enforcement of this approach. The sheer quantity of judicial decisions now available in the public domain represents a particular challenge. The law reporters have an important role to play in their selection and presentation of cases of real significance. The modern

common law system is one of the great achievements of our age. The doctrine of precedent has been central to that achievement; but so has pragmatism, and an ability to evolve and develop to meet the conditions of a changing world. I am confident that judges and lawyers in both our countries will rise to the challenge.

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