Introduction

Jack Richardson left the Australian National University Law School to become the first Commonwealth Ombudsman the year I started there as a student. We met only late in his life and then all too briefly. But like all who attended that great Law School during those first few decades of its existence, I am a direct beneficiary of his determination to establish it as a first class national law institution and of his skill in achieving that goal. It is an honour to give this oration in his memory.

My topic lies at the intersection of legal practice and legal thinking: it is concerned with the impact of information technology on the judicial development of the law within a common law system. I should start by explaining what I mean when I refer to a common law system, and what I mean when I refer to the judicial development of the law within a common law system.
A common law system

A common law system is a system of law which derives historically from the system:

- which began to develop in England around the twelfth century; and

- which had come to exist in its early modern form in the United Kingdom by the last quarter of the eighteenth century: the beginning of the industrial revolution, the time of the American and French political revolutions, and the beginning of European settlement in Australia and New Zealand.

It is a system:

- which is founded on the existence of some degree of structural separation between the legislative function of laying down general rules and the judicial function of deciding individual cases; and
in which the exercise of the judicial function of deciding an individual case is characteristically accompanied by the judicial elaboration of reasons for the decision made in that case.

A common law system posits the existence of two principal kinds of authoritative legal texts: those produced by the legislature in the form of statutes; and those produced by the courts in the form of reasons for judgment in decided cases. Those two principal kinds of authoritative legal texts can loosely be described as "statute law" and "case law".

The main difference between the two principal kinds of authoritative legal texts lies in the nature of the authority which they carry. The coercive authority of the state makes a statute binding on all of those to whom the statute is addressed and makes the actual judgment or order made by a court in a decided case binding on the parties.
The authority accorded to the reasons for judgment in a decided case is of a different nature. It derives from the method of reasoning which courts in a common law system employ to decide individual cases. That method of reasoning permits, and often requires, reasons for judgment in an earlier decided case to be taken into consideration by a court deciding a later case. Just why that should be so can be justified in a number of ways:

- as promoting fairness or equality before the law (ensuring so far as possible that like cases are decided alike);

- as contributing to efficiency (avoiding having to recreate the wheel in every case);

- as contributing to coherence, stability and predictability.

Whatever the justification, the practice of courts deciding later cases according some measure of authoritative status to the reasons for judgment in earlier cases is one of the defining features of a common law system. It distinguishes the functioning of a common law system from the functioning of a civil law system.
Courts in a common law system routinely refer to reasons for judgment in earlier decided cases as "authorities". They also routinely distinguish between authorities that are "binding" and authorities that are "persuasive". A binding authority refers to reasons for judgment which a court must apply – or "follow" – in deciding the case at hand unless those reasons can be "distinguished". A persuasive authority refers to reasons for judgment which the court may choose to follow if, but only if, persuaded by those reasons.

A common law system typically provides for a judicial hierarchy consisting of three tiers: one or more trial courts, one or more intermediate appellate courts and an ultimate appellate court. The status of an authority within a particular judicial hierarchy depends on the application of fairly standard rules of precedent. An authority which emanated from a higher court is always binding. An authority which emanated from a court of coordinate status is ordinarily presumptively binding, in the sense that it is to be followed unless there are strong reasons for departing from it. An authority which emanated from a lower court, or from a court outside the judicial hierarchy, is at best persuasive.
The judicial development of the law within a common law system

The judicial development of the law within a common law system occurs through the dynamic iteration and reiteration of the content of the law in reasons for decision in decided cases. The content of the law to be applied by a court deciding a case is found in, or is at least informed by, the court's consideration of reasons for judgment given in similar cases in the past:

- by looking back to those reasons for judgment and extracting, through a process of reasoning that is in broad terms one of induction, the content of the law; and

- then by applying the content of the law, through a process of reasoning that is in broad terms one of deduction, to decide the case at hand.

The extent to which formal inductive and deductive reasoning constrains the judgment to be made by a court in the case at hand is the stuff of controversy between legal philosophers, and occasionally surfaces in complaints in the popular press about courts being either "activist" (when they allow other considerations to bear on the decision-making process) or "out of touch" (when they don't).
Whatever the latitude for other considerations to bear on the decision-making process of a particular court in a particular case, the case at hand will always be concluded by judgment and reasons for that judgment will always be given. Those reasons for judgment will become themselves an authority. That new authority will then be added to the authorities permitted or required to be taken into account by a court deciding a subsequent case. So the fabric of the law in a common law system is consistently woven, picked at, patched and re-woven.

**The topic refined**

I have so far described nothing most of us did not learn in introductory legal method in our first year at Law School. Where am I going? My starting point is that common law legal method evolved in a pre-digital age. My question is: what is digitisation doing to it? To what extent is the publication of case law on the internet affecting the way courts reason from authority? To what extent is word processing affecting the way courts express their reasons for judgment which themselves become authorities? How, if at all, are those technological developments changing the process of legal reasoning? How, if at all, is that change in the process of legal reasoning, changing the content of the law itself?
Lessons from history

The explanation I have given of a common law system and of the judicial development of the law within a common law system is broadly descriptive of the systems of law which had come to exist by the last quarter of the twentieth century in the United Kingdom, the United States, Canada, Australia, New Zealand and most of the other countries which then formed part of the Commonwealth of Nations. It is broadly descriptive of the systems of law as they had existed in those countries for roughly a century before.

It had not always been so. The whole notion of the authority of case law is technologically dependent. It is first and foremost dependent on reasons for judgment in a decided case being physically available to be taken into account by a court deciding a subsequent case. That physical availability depends on those reasons for judgment having been recorded at the time they are given and then having been published in a form accessible to the court deciding the subsequent case.
Only a century earlier, when Sir William Blackstone was writing his influential treatise on the laws of England and when Lord Mansfield presided over the Court of Kings Bench in England, the position was quite different. Then, as for centuries before, reasons for judgment in decided cases were delivered orally and were rarely recorded. Where they were recorded and published, it was generally by individual lawyers who operated privately and for profit and the reliability of whose reports varied enormously. Lord Mansfield’s immediate successor, Lord Kenyon, is reported to have said of one of the lower quality reports of cases current in his day (ambitiously called the "Modern Reports") that "they will make us appear to posterity for a parcel of blockheads".

Reasons for judgment in decided cases, to the extent they were available to courts deciding subsequent cases, were then generally regarded not as authoritative legal texts in their own right but as evidence (of variable veracity) as to the way in which the content of the law existing in custom and reason had been elaborated and applied in other cases. Professor Gerald Postema has explained that the view of precedent which prevailed in common law courts at that time had three salient features:

1. *Slater v May* (1790) 2 Ld Raym 1071.
"First, past judicial decisions claim[ed] judicial respect and attention not in virtue of merely having been decided – laid down or posited – but in virtue of having been taken up by subsequent courts and thereby having found a place within that body of common experience. ... Secondly, while individual cases [were] not regarded as establishing authoritative rules, they [were] taken to illustrate the operation of proper legal reasoning, to exemplify the process of reasoning within the body of experience. Thirdly, past cases [did] not preclude deliberation and reasoning in subsequent cases but rather they invited and focused that reasoning.

According to Blackstone, the common law was "unwritten law", the decisions of courts were evidence of that unwritten law, and "the law and the opinion of the Judge, [were] not convertible terms, or one and the same thing; since it may happen that the Judge may mistake the law"\(^\text{3}\). According to Lord Mansfield, "[t]he law does not consist of particular cases, but of general principle, which are illustrated and explained by these cases"\(^\text{4}\), "precedent, though it be evidence of the law, is not the law itself, much less the whole law"\(^\text{5}\), rather "[t]he reason and the spirit of cases make law; not the letter of particular precedents"\(^\text{6}\).

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\(^\text{4}\) *R v Bembridge* (1783) 99 ER 679 at 681.

\(^\text{5}\) *Gaming Jones v Randall* [1774] Lofft 383 at 385.

Legal historians have noted that the notion of reasons for judgment in decided cases becoming authoritative legal texts because of what they decided came to prominence in the course of the nineteenth century in tandem with a significant growth in the availability of law reports produced by professional reporters from the end of the eighteenth century. The notion became more marked as the standard of law reporting improved, not merely because reporting became professionalised but also because the development of the Pitman shorthand system in the 1830s made it possible for reporters to reproduce, in a more or less verbatim form, the reasons for judgment which were still then generally orally delivered\(^7\).

Legal historians have also noted how the common law system as it came to exist by the last quarter of the twentieth century in the United Kingdom owed almost as much to the establishment in 1865 of an Incorporated Council of Law Reporting as it did to the establishment in 1875 of a clear cut three tier structure in the courts at Westminster providing for appeals from the various divisions of the newly created High Court of Justice to a newly established Court of Appeal with the possibility of further appeals to a newly established Judicial Committee of the House of Lords. Similar institutions came to exist within the next couple of decades in most recognisable common law systems.

So began the age of authorised law reporting, epitomised in the United Kingdom by what are colloquially known as the "rainbow reports" faithfully produced by the Incorporated Council of Law Reporting in colour-coded bound annual volumes each year since 1875, and epitomised in Australia by the publication in numbered volumes of the Commonwealth Law Reports recording decisions of the High Court since its establishment in 1903.

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As explained by Justice Geoff Lindsay of the Supreme Court of New South Wales⁹:

"The concept of an 'authorised' law report is a construct of the age of print. It is associated with the idea that law can be found in volumes of printed text; published with the approval, if not under the authority of judges; dedicated to the dissemination of edited reports of reasons for judgment; selected by an editor in whose judgment the legal community reposes trust."

Authorised law reporting contributed to the authority accorded to case law and to the working out of modern common law methodology in three principal respects. First, it served as a de facto system of quality and volume control. It separated the wheat from the chaff by distinguishing reportable reasons for judgment (considered by the reporters to add in some meaningful way to the content of the law) from unreportable reasons for judgment. Some reasons for judgment of trial courts were considered reportable, more reasons for judgment of intermediate appellate courts were considered reportable and many (but by no means all) reasons for judgment of ultimate appellate courts were considered reportable.

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⁹ Justice Geoff Lindsay, 'The Future of Authorised Law Reporting in Australia' (Paper presented to the Australian Law Librarians Association, 11 June 2013) [7].
Of the 125 reasons for judgment delivered by the High Court of Australia in the calendar year 1960, for example, 96 were reported in the Commonwealth Law Reports and 29 were not. Of those 29 unreported reasons for judgment, two were reported in the unauthorised Australian Law Journal Reports. The rest were simply archived, published at the time of judgment to the parties in dispute and perhaps mentioned in newspaper articles but not circulated in full more widely. Together with hundreds of other unreported decisions of the High Court over the course of the twentieth century, they were archived and are only now in the process of becoming publicly accessible by being uploaded onto a database soon to be accessible on the internet.

The significance of the filtration or narrowing function served by authorised law reporting was highlighted by the English Law Lord Patrick Devlin when he wrote in 1981:

"In England case law is not something which is made by judges alone. Judges spin and others weave. Each time a judge gives a reasoned judgment he spins a thread. It is for the law reporters to decide in the first instance whether the thread can be woven into the law."

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10 "Unreported Appeals and Applications" (1960) 104 CLR 665.
Secondly, authorised law reporting contributed to the crystallisation of authority in that the reporting of each judgment considered to be reportable was invariably accompanied by the meticulous preparation and publication of a carefully crafted headnote which summarised with conspicuous clarity (often but not always with the approval of the court concerned) the proposition or propositions of law on which the judgment in the case turned. The proposition or propositions of law for which reasons for judgment in a reported case stood as authority was thereby immediately apparent on the face of the report.

Thirdly authorised law reporting contributed to the taxonomy of authority in that each reported set of reasons for judgment was indexed according to a standard system of classification and numbers of those indexes were compiled more generally into digests of case law arranged conceptually. Reasons for judgment in a particular reported case were thereby at least provisionally assigned to a particular location within what was conceived and presented as a structured system.
Those features of authorised law reporting – selectivity, and the clarification and taxonomy of authority – combined to contribute significantly to the apparent coherence of case law for more than a century. The authorised law reports within a judicial hierarchy served as repositories of its case law. They were readily accessible in printed volumes, not to the public, but to courts and legal practitioners within that judicial hierarchy. The authorised law reports were supplemented by various commercially produced unauthorised reports of cases, similarly summarised and indexed, and also similarly accessible. The multifarious less important or lower quality unreported judgments within that judicial hierarchy, in contrast, were for practical purposes non-existent. Authorities of appellate courts which were unreported remained theoretically binding on lower courts but they could not be binding in practice if they could not be found. Potentially persuasive authorities published in the law reports of courts outside the judicial hierarchy were for most practical purposes unavailable.
The internet: a plethora of authorities

That was before the internet which we sometimes forget has only been with us since the 1990s. Many courts in many common law systems started to upload many of their reasons for judgment in a form freely accessible to users of the internet around the turn of this century\textsuperscript{12}. Increasingly since then there has been an uploading not only of currently generated reasons for judgment but also of previously unreported or poorly reported reasons for judgment stretching back for centuries.

The result has been that, relatively suddenly, there has become and is still becoming available to courts, legal practitioners and the public within each particular judicial hierarchy, in an unfiltered, undigested, unclassified but fully word-searchable form, all of the binding authority and potentially persuasive authority ever produced by courts within that judicial hierarchy, as well as a vast amount of potentially persuasive authority emanating from courts outside that judicial hierarchy.

The immediate result for lower courts within any given judicial hierarchy has been an increase in complexity. They have found themselves faced daily with more potentially binding authorities emanating from appellate courts within their own judicial hierarchy generally downloaded, printed in full on A-4 sized paper, photocopied and handed about in the course of argument. Unsummarised, as well as unfiltered and unclassified, they are authorities which lower courts are forced themselves to digest and to classify, then to apply or distinguish in deciding the cases before them.

The immediate result for higher courts within a judicial hierarchy has been an increase in complexity of a different order. Their place in the judicial hierarchy means that those potentially binding authorities are relatively fewer than the potentially binding authorities facing lower courts. They have, on the other hand, found themselves faced with a plethora of potentially persuasive authorities emanating from lower courts and from courts outside that judicial hierarchy. No longer arranged and retrieved through the application of commonly accepted legal taxonomy, authorities are available to support increasingly divergent strands of reasoning.\(^{13}\)

One tendency of appellate courts which has been digitally enhanced has been increasing reference to the case law of other countries. That is sometimes, but rarely, in the form of a comprehensive comparative survey of case law in an attempt to discern patterns or common trends or themes. More frequently, it is in the form of selective citation or quotation of particular foreign cases which are seen to contain reasoning in support of the reasoning adopted by the appellate court in deciding the case at hand; a practice colourfully, if somewhat pejoratively, described by Justice Antonin Scalia of the Supreme Court of the United States as equivalent to looking over a crowded room to pick out your friends.
Another observable trend within appellate courts which has been digitally enhanced has been the embracing of a new form of historicism. In the late nineteenth century and throughout the twentieth century the judicial development of the law could be seen by and large, as an incremental development from reported case to reported case. Except in circumstances of overt overruling or departure from it, the last reported decision of an appellate court in a developing field of law tended to be treated not only as the last word on the law in that field but also as the starting point for any consideration of the law in the case at hand. To attempt to trace the legal rule applied in that decision to its historical roots was an extremely labour-intensive manual exercise which was generally seen to be of limited utility. Where the law was consciously and deliberately developed, it was ordinarily developed by reconsideration of the legal rule in the contemporary circumstances of the case at hand. It is now possible for a clever and industrious appellate court, with relative ease, to trace a proposition of law back through the decided cases to a point of obscurity, to examine and explain its origins, and then to reinterpret the decided cases within a broad historical narrative which would be unlikely to have been apparent to the courts deciding them.
Yet another observable tendency within all courts at all levels of most judicial hierarchies has been the picking up from earlier reasons for judgment words and phrases that have been used to embody ideas or concepts. Television created "sound bite" journalism. The suggestion has been made that computerized legal research is creating "law-byte" reasoning\textsuperscript{14}. Typically, the electronic researcher goes about their research task by typing a key word or phrase into a search box. The database will then respond by mapping the relevant word or phrase to the documents stored, and subsequently display chunks of texts, in which the word of phrase appears. The method emphasises words, rather than principles; language rather than ideas.

Whereas in the past the proposition for which an authority stood might have been expected to have been assimilated by a court and restated in its own words in its own reasons for judgment, propositions of law are coming increasingly to be transmitted from case to case in the form of "word concepts" which are constantly restated but the meaning of which is rarely unpacked. The more often they are repeated, the more they can take on a crystalline, almost mystical and even cabalistic, quality.

\textsuperscript{14} Allison Orr Larsen, 'Factual Precedents' (2013) 162 University of Pennsylvania Law Review 59 at 76.
Word processing: reasons reserved and revised

The very modern phenomenon of digitally enhanced access to reasons for judgment in decided cases has overlapped with the only slightly less modern phenomenon of digitally enhanced production of reasons for judgment in deciding cases. That phenomenon itself is the culmination of a much longer term trend. Over the last 200 years reasons for judgment delivered by appellate courts have changed: from normally being delivered orally immediately after the conclusion of a hearing (when they were very short); to normally being reserved and delivered orally some time later (generally having been written out long-hand); to normally being reserved and delivered in written form. For much of the twentieth century, reasons for judgment when delivered in written form had generally been type-written and minimally revised. For the last thirty years or so, reasons for judgment delivered in written form have almost invariably been composed with the benefit of a word processor and subjected in that process to multiple revisions.

The evolution has undoubtedly resulted in appellate reasons for judgment becoming longer, more elaborate and less immediately responsive to the issues raised in the case at hand. See also Molly Warner Lien, “Technocentrism and the Soul of the Common Law Lawyer” (1998) 48 American University Law Review 85 at 104.
observations, it might fairly be added that appellate reasons for judgment are becoming less the exposure of the reasoning actually followed by a court to reach a conclusion than they are the marshalling of the best arguments in favour of the conclusion that the court has reached. That is to say, they have tended to become more statements explaining and justifying the position to which the appellate court is persuaded than travelogues of the intellectual journey by which the appellate court has come to be persuaded to that position.

Two particular by-products of word-processing deserve special mention. One is the proliferation of footnotes. The other is the proliferation of quotations and citations.
The first footnote appeared in reasons for judgment of the High Court in 1990. When the first footnote appeared in the reasons for judgment of an appellate court in the United Kingdom in 2006 in an otherwise unremarkable decision of the English Court of Appeal the occasion provoked the publication that year of an article likening an English judgment with footnotes to a fish with feathers\textsuperscript{16}. Beyond the eccentricity, the article made a serious point: the introduction of the footnote, the writer suggested, was symptomatic of a methodological shift in judgment writing away from the elaboration of reasoning to a conclusion and towards the display of the fruits of the judgment writer's own research, towards the defence of the judgment writer's concluded position and towards the attacking of alternative points of view. My own attitude towards the footnote is captured in the words of Abner Mikva, a judge of the United States Court of Appeals for the District of Columbia\textsuperscript{17}:

"If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on [a] horizontal plane."

\textsuperscript{16} Roderick Munday, 'Fish with Feathers: English Judgments with Footnotes' (2006) 170 \textit{Justice of the Peace} 444.

\textsuperscript{17} Albert Mikva, "Goodbye to Footnotes" (1985) 56 \textit{University of Colorado Law Review} 647 at 648
Quotations, like that quotation from Judge Mikva, are expressions of ideas in the words of others. They can be powerful rhetorical tools if used sparingly. Used less discriminately, and particularly when cut and pasted with mouse in hand, the danger that lies in quotations is that they can be a substitute for independent thought: indicating not digestion but indigestion, data without processing, adding to bulk and detracting from focus.

As to citations, there are just too many of them. There is increasing tendency to string citations of decisions in which a proposition has been mentioned and applied without necessarily subjecting the reasoning in each cited decision to independent critical analysis. The difficulty then is that citation itself can be seen to add to the authority of a cited authority even when the cited authority has not been the subject of analysis by the citing court.
Where is it all going?

Where is the technological revolution taking the judicial development of the law in a common law system? There is some risk, albeit slight, that an overload of information might cause the system to collapse under its own weight.

It may be that some other forms of filtration and classification systems will emerge to take the place of authorised law reporting. One possibility is that courts deciding cases might themselves find some way of distinguishing between those reasons for judgment that are and are not worthy of consideration by courts deciding subsequent cases. The experiment in some Australian States of producing "guideline judgments" in some sentencing matters might perhaps be extended to other areas of law.

Another possibility is that courts deciding subsequent cases might attempt to find some way of limiting the number or provenance of authorities that they might need to consider. There have already been attempts by some Australian courts to issue practice directions limiting "lists of authorities" to be used in argument.
There is some likelihood that the technological revolution will lead to reasons for judgment in decided cases being approached somewhat differently: to a change in the nature of the authority of an authority. It may perhaps even involve some partial return to the view of reasons for judgment in decided cases which prevailed at the time of Blackstone and Mansfield, by which some or all of them might come again to be seen not as repositories of law but as illustrations of legal principle. Justice Lindsay, to whom I have already referred, has suggested, that it is possible that we may see principles of law being publicly disseminated in some form of "authorised" publication representing a cross between a legislative code and reasons for judgment. He points to the various "Restatements" of the law on various topics published from time to time by the American Law Institute as a model which might be emulated elsewhere – adding structure to the law whilst at the same time accommodating the widespread availability of reasons for judgment\(^{18}\).

For now it may not be possible to take the topic further than to adopt the words attributed to Zhou Enlai when asked about the consequences of the French Revolution. "It is too early to tell".

\(^{18}\) Justice Geoff Lindsay, 'The Future of Authorised Law Reporting in Australia' (Paper presented to the Australian Law Librarians Association, 11 June 2013) [87].