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## Letter to The Law Society's Gazette

# Citation of unreported cases

*Introductory Note by Francis Bennion*

Apart from the article by Roderick Munday referred to at the beginning of the following letter, there were two interesting letters on the topic published alongside mine. They were by lawyers connected with commercial computer retrieval systems, and naturally each puffed his own wares. One of them, Colin Tapper, made the following valuable points additional to those in my own letter:

> '[A] basic principle of common law systems [is] that the decisions of the superior courts *are* law . . . it is often difficult, and sometimes impossible, to determine the ultimate significance of a decision at the time it is given. Yet such a decision is still a constituent part of the law . . . A second fundamental feature of our legal system is its adversarial character in which each party is free to advance his case as best he can, supported by whatever legal rules he can adduce.'

See also my later article on this subject (Doc. No. 1988.013) at www.francisbennion.com/1998/013.htm.

Writing now, a quarter of a century later, I am thankful that with non-commercial comprehensive systems like Bailli we have quick and full access to important judgments as they are handed down by the courts, without having to depend on choices and editing by individual reporters. This almost sets at rest the controversy discussed in the following letter, but we still need to be vigilant. [5 February 2008.]

Dear Editor,

The following points arise on the interesting and valuable article by Roderick Munday about the citation of cases ([1983] *Gazette*, 25 May 1983, p 1337).

Although the argument concerns legal principle, the Law Lords' restriction of citation laid down in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 1 All ER 564 is, with respect, contrary to principle. No extra authority is conferred on any judicial decision by the fact that a law reporter has chosen to include it in his reports. Unreported cases have equal authority with reported cases, and therefore should be equally accepted in citation.

Moreover the ruling is too simplistic in saying that an unreported Court of Appeal decision can be cited only if it contains 'some new and relevant principle of law'. The function of case law, both in relation to common law and statute, is more complex than this suggests.

A legal proposition (whether of common law or statute) can be expressed in varying degrees of *detail*. The prohibition of theft can be stated as 'thou shall not steal'; or we can have the convoluted sections of the Theft Acts at the other extreme. Even the Theft Acts require further spelling-out by the courts. (This is the legal function I call 'dynamic processing' in my book *Statute Law*.) Academics such as Dr Munday and the author of *The Bramble Bush* [Karl Llewellyn], delight in those broad statements of principle that give plenty of room for learned and ingenious dispute. On the other hand the practitioner advising a client wants a detailed rule. He wants it spelt out in terms that fit his own case.

Apart from this, there is value in *examples*. A case that does not advance the judicial processing of a legal principle may still be of use as an illustration of its application.

True the court should not be overwhelmed by unnecessary citations. The right of counsel to cite any authority he thinks fit is a vital one, however, and needs to be insisted on by the Bar.

*Francis Bennion*