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Introductory Note by Francis Bennion

This article follows an earlier letter (Doc no. 1983.003) to the *Law Society's Gazette* (29 Jun 1983, pp 1635-1636) on the same subject which can be viewed at www.francisbennion.com/1983/003.htm.

Litigation

Citation of Unreported Cases: a Challenge

Francis Bennion alerts the Bar to a need for resistance

The Bar faces many challenges, some serious and some less so. The point raised in this article is perhaps one of the less serious. Yet it is symptomatic of failings not least of the Bar itself. If we don't stand up for our rights, even against the judiciary, we shall lose those rights. That will be a loss not only to the Bar itself, but to the nation. To stand up for one's rights it is first necessary to know what they are.

A Practice Statement was issued on April 22, 1998 by Lord Bingham of Cornhill CJ with the agreement of the Master of the Rolls, the Vice-Chancellor and the President of the Family Division. It applies to proceedings in the Court of Appeal and the High Court, and is reported at [1998] 1 WLR 825 and [1998] 2 All ER 667. It outlines various procedural changes which are stated to be made on an experimental basis and to have as their purpose 'to improve the quality of service rendered by the judges to those who use the courts'. This article is concerned with the citation of unreported cases, a point which is covered by the Practice Statement although no change is proposed.

I respectfully submit that the existing directions restricting the citation of unreported cases are mistaken, and that the chance should be taken to put the matter right. The Practice Statement invites suggestions for improvement of its wording, with a view to the revised version being formalised as a Practice Direction. The passage in the Practice Statement I complain of is the following, in paragraph 8C

> 'Leave to cite unreported cases will not usually be granted unless counsel are able to assure the court that the transcript in question contains a relevant statement of legal principle not found in reported authority and that the authority is not cited because of the phraseology used or as an illustration of the application of an established principle.'

This is objectionable in the following respects. It is an unjustified restriction on the right of counsel, who are presumed to be responsible, to present their cases as they think fit. It is based on the misconception that the authority which a decided case has as a precedent is somehow less weighty if the case has not been (or not yet been) selected by any law reporters for inclusion in their reports. It requires counsel to refrain from citing a helpful statement of a legal rule merely because it has been previously articulated in a case reported perhaps many years earlier in circumstances giving it less authority, and in that connection places an unreasonable research burden on counsel. Finally, it rules out the citing of a helpful example even though the facts may be very similar to those of the instant case. Examples are an important aid to statutory interpretation.[1]

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1 This is shown by the fact that in the 1997 edition of my textbook *Statutory Interpretation* there are no fewer than 1,463 numbered examples, as well as many more that are not numbered.

The passage cited goes beyond judicial interference with the rights of the Bar. These rights are accorded only because they reinforce rights of the citizen. The right of a person to litigious control, that is to bring, defend, conduct and compromise legal proceedings without unwarranted obstruction, is a basic right of citizenship.[2] A litigant's right to conduct proceedings as he or she thinks fit, whether in person or through an advocate, is highly regarded, and may even outweigh the right to personal liberty.[3] In the case of a defendant, the right to conduct legal proceedings covers 'the right to defend himself in the litigation as he and his advisers think fit'.[4] The rights of a plaintiff can be no less.

While the court, because it is a court, has command, subject to legal rules, over its own procedure, this cannot authorise any ruling which abridges this basic right of the citizen to litigious control. The right covers the putting of legal argument in such manner as the party or advocate thinks fit, having regard to the court's power to rule against tedious, repetitious, irrelevant or otherwise improper argument or conduct. The course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law including the freedom of a person accused of crime to elect . . . the mode of trial which he prefers and to conduct his defence in the way which seems best to him and his advisers.[5] Parties in civil proceedings have like rights.

All this means that, subject to the court's general disciplinary powers over counsel and solicitors and the power to make wasted costs orders, such legal authorities as the party or advocate thinks fit to cite may be laid before the court without restriction. Here unreported cases should be accorded no less a status than reported cases, since the authority of a judicial decision derives from the court not the report. On obvious principle, a law reporter's choice of case ought not to be granted juridical effect.

So the ruling in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] AC 192 placing restrictions on the citation of unreported cases, which underpins the 1998 Practice Statement (though not referred to in it), is contrary to principle and must be taken as incorrect.[6]

The attempt to restrain citation of unreported cases is not merely unconstitutional, it is in modern conditions pointless and unnecessary. More and more cases are being looked up by electronic means rather than in books. If a computer search is carried out it makes little practical difference whether a judgment thrown up on the screen is unreported or is also included in some bound volume. No doubt many judges would rather handle a bound volume than a computer printout; and the convenience of judges must obviously be served so far as practicable. The costs of litigation must also be kept under control. However there are adequate powers to secure these ends without reliance on a Practice Note which, as I hope to have shown, is constitutionally improper and represents a judicial encroachment on Bar privileges.

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2 See *In re the Vexatious Actions Act 1896 - in re Bernard Boaler* [1915] 1 KB 21 at 34-35.
3 *Prescott v Bulldog Tools Ltd* [1981] 3 All ER 869 at 876.
4 *Starr v National Coal Board* [1997] 1 WLR 63, per Scarman LJ at 71
5 *A-G v Times Newspapers Ltd*, February 11, 1983, unreported: cited *Attorney General v MGN Ltd* [1997] 1 All ER 456 at 459n.
6 For further argument as to the illegitimacy of this ruling see The Law Society's Gazette (1983) 1635; (1984) 257.