



## **15th BILETA Conference: “ELECTRONIC DATASETS AND ACCESS TO LEGAL INFORMATION”.**

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University of Warwick, Coventry, England.

### **Address by Lord Justice Brooke to the Annual BILETA conference**

1. I am honoured to have been asked to address a BILETA conference again, so soon after my last visit. I am also honoured to be speaking to you in Scarman House. Lord Scarman will be ninety next year. He is very well known for the vision he showed in relation to such matters as human rights, race relations, and the need to make English law simpler and more accessible. What is less well known is that his vision also extended to the use of applied technology in the law. In 1973 he was appointed the first President of the Society of Computers and Law: there have only ever been three holders of that post.

2. Two years ago in Dublin you invited me to talk to you in general terms about the way the English court system was facing up to the IT revolution. Today I have been asked to confine myself to legal information services.

3. Those who heard me speak in 1998 will remember that I described then the under-investment in IT in this country's court system compared with those of other comparable countries. I want to start from this point today, because past legacies will colour a lot of what I want to say. I am joined in this session by a speaker from the United States and speakers from Australia. For different reasons, those two countries are miles ahead of us in all this. I remember that when I first started to become interested in issues concerned with IT and the law in 1985 I was impressed by the way that Australia was forging ahead even in those far off days. So far as the United States were concerned, we might as well have been on another planet.

4. Why were we so far behind? I can think of five reasons immediately. The first is that we were very firmly in the grip of a traditional book-bound legal culture which didn't much like the idea of change. The second is that the Lord Chancellor's Department, which services the courts, was in those days a small, rather inward-looking department which didn't really have a wider vision, much less the funds to support such a vision. The third is that in this country, unlike the States, there was no tradition of judges and court administrators and businessmen and academics - let alone politicians - meeting together to make common cause to drive our court system forward into the future. The fourth is that our public sector capital spending arrangements didn't permit for outside investment, much as big business would have liked to invest in the Commercial Court, for instance, and a Government Department could only be sure of what money it had for one year at a time. The fifth is that law publishers wanted to conserve their markets for hardbook sales, and were mostly very slow to capitalise on the possibilities of electronic publishing. In their defence I would say that even ten years ago there was little demand for it from a very traditional market.

5. Most of this has changed now, but we still have a lot of skeletons from the past about, obstructing progress.

6. Why have I always been so enthusiastic about the need for free provision for primary sources of legal information? My answer is that I have always been keen to establish a level playing-field in access to the law. Our great long-established universities have always had wonderful law libraries. So have the Inns of Court and the leading law firms and barristers' chambers (and their equivalents in Scotland, Ulster and Ireland). But what about the universities which started developing law faculties from 1960 onwards? What about the smaller law firms and barristers' chambers, particularly those away from big urban centres? What about the courts themselves, particularly the smaller courts, and the judges and magistrates who sit there? What about law centres and pro bono units and citizens' advice bureaux? What about the poorer countries of the Commonwealth, particularly in Africa and the Caribbean, which are desperate to obtain access to English law texts?

7. The world I watched developing in the 1990s was a world in which the gap between the haves and the have-nots was widening. As the courts provided more and more of their judgments in written form, the lawyers involved in the cases had the precious transcripts photocopied or scanned onto their firm's or their chambers' electronic databases, available only to a comparatively charmed circle. Electronic publishers got hold of these unpublished court transcripts and created subscription services for those customers who could afford to pay for them. Unless there was a brief summary in a newspaper law report, the rest of the market was left to wait for the report eventually to be published in one of the series of law reports to which they had access. Often they had to wait a long time.

8. More and more specialist law report series were also being created, and there was a limit to the number of law reports most people practising or studying or teaching the law could afford. As a judge I watched the way in which the leading firms and sets of chambers had access to recent case-law which was not readily available to the rest of the market. No doubt the fees they charged their clients reflected, in part, the benefits they could give them from this privileged position.

9. Five years ago, as chairman of the Law Commission, I introduced one of our law reform bills to a House of Lords committee. It was designed to modernise and codify that part of our private international law which was concerned with the law of tort and delict. I remember referring the committee to a paper it had received from Professor Anson, one of the great scholars on this topic north of the border. He said that one of the great merits of the bill was that it would make the law accessible to those who didn't have access to very specialist law libraries in the charmed triangle of Oxford, Cambridge and London. I picked up this theme when I told the committee that the two Law Commissions wanted to put legal advisers (and their clients) in Wigan and Inverness on an equal footing with those who served their clients from within that privileged triangle, and that this bill would help to achieve that aim. Parliament approved what we were proposing, and the bill is now law.

10. Last November some of you attended the meeting I chaired at Chatham House in London at which Professor Graham Greenleaf of Austlii was the main speaker. It was a bit like a revivalist prayer meeting. There were people there from government and the judiciary, from both sides of the legal profession, from the academic world and the world of legal publishing, from the worlds of law librarians, consumer associations and advice centres. They came not only from England and Wales, but from Scotland, Northern Ireland, Ireland and the Channel Isles, too. The mood of the meeting was unanimous. We all wanted to see in these islands the creation of an electronic legal information service like the one Professor Greenleaf had showed us, giving access to our primary sources of law, both statute and case-law, free at the point of delivery. A hundred thousand pounds was raised before Christmas to enable work to start quickly, without things getting tangled up in red tape and committees.

11. Where are we now, and where are we going? There are those who think that this venture is starry-eyed, that it is initiated by dreamers with no knowledge of commercial realities, that it is bound to collapse. We shall have to wait and see.

12. Progress has been made since then on a number of fronts. The most visible has been the creation of the website called [www.baillii.org](http://www.baillii.org). This we owe almost entirely to the efforts of Graham Greenleaf, Andrew Mowbray and Philip Chung, the co-directors of Austlii. Andrew built the databases, Philip developed the interface and Graham generally encouraged and negotiated baillii's development.

13. They have created a pilot site which includes a lot of the primary source materials that are now accessible free of charge and free of copyright restrictions. It is already the single largest free access law site for the United Kingdom and Ireland. It obtained 14,000 hits on its first day. Site watchers in early April will have seen the volume of English caselaw multiply more than a hundredfold overnight. This occurred when Smith Bernal, the official shorthandwriters since April 1996, generously made available free of charge to baillii more than two years' worth of their archive of transcripts from the two divisions of the Court of Appeal and the Crown Office List.

14. This pilot site will grow and grow, as more and more material is added to it. So far as English law is concerned, it has all the House of Lords cases since November 1996, and it will soon have a great many Privy Council opinions. There are problems with the availability of cases from what we call our Supreme Court - the High Court and the Court of Appeal - which I will describe to you. There are no similar problems with recent Scottish caselaw. And the volume of material from Northern Ireland and the Republic of Ireland is growing steadily. I hope that a lot of statutory material will follow soon.

15. We are also developing our organisation. For the last four months the project has been steered by a small group of us, all very busy people but not too busy to meet at 8.30 in the morning from time to time to take this project forward. The group has comprised two senior judges, a senior civil servant, the Controller of HMSO, Professor Richard Susskind and Laurie West-Knights. Recently, at my suggestion, we were joined by the Chairman of the Law Commission, Mr Justice Carnwath.

16. I want to break off from the main story for a moment to explain the pivotal position of the Law Commission in any project designed to make the law more accessible. I have already mentioned Lord Scarman, the first and most charismatic chairman the Commission has ever had. When he chaired the Commission, he was absolutely determined to make our laws simpler and easier for us all to access.

17. This was the reason why the Commission was formed in 1965. One of its early projects was the creation of a hard-back series called "Statutes in Force". With its annual updates this series enabled people to see immediately the effect of any repeals, amendments or substitutions in statute law since the time an Act of Parliament was first passed. When I was chairman of the Law Commission I acquiesced reluctantly in the suspension of this series for a short time while resources were transferred to the creation of a new electronic statute law database. Sadly, it is still suspended, and it will probably never be revived. This is one of the reasons why it is so important to involve the Chairman of the Law Commission in this new project.

18. There was, of course, never any idea that a project on this scale could be managed long term by a small group of very busy people meeting early in the morning on an ad hoc basis, but we had to start somewhere. Four weeks ago there was a successful meeting in London, which I had to miss through illness, when members of the steering group met people from a number of universities who were interested in what we were doing. It is now broadly agreed that the academic community within the five jurisdictions in these islands should create a fledgling management body. This would draw this year on our present sponsorship funding to employ two people who would be trained by Austlii and then planted into a university under the tutelage of a sympathetic Dean to take over the data management from Austlii, using Austlii's software and knowhow. At the same time we would discuss with Austlii what additional resources they will need to maintain and continue the growth of the baillii pilot service for the next 6-12 months.

19. At the same time a study will be conducted, possibly under the auspices but not under the control of the Government's civil justice initiative, to consider the long-term needs and ramifications of the undertaking on which we have embarked.

20. Under Richard Susskind's guidance, six distinct elements of the project have been identified: funding, capture, archiving, delivery, infrastructure and supplementing.

21. Funding speaks for itself. For the first year, whenever it starts, we have the funds already pledged. Year 2 funding has not yet been sought, but I am told that it is anticipated that there will be no difficulty in raising at least £250,000 once the databases have grown and the service begins to attract large-scale traffic. After that, the scale of the permanent funding which will have to be sought, and the sources of that funding, will depend partly on the outcome of the 9-month study. This in turn will inform the decisions which will have to be taken in due course on how best to provide the databases in the future.

22. Capture refers to the process of acquiring data, assuming that permission has been granted by the judges and (where relevant) by government. This, sadly, is at present quite a complex matter, about which I will have a little more to say in due course..

23. Archiving was quite a controversial topic at first. We do not want this pro bono project to stagnate because it is a monopoly. All the materials supplied direct to the project will therefore also be stored elsewhere, probably by the Society for Computers and Law in the first instance. It is not intended in the pilot phase to spend money on making this a separately intelligible, searchable or Internet-accessible archive. It is merely a duplicate store. During the pilot phase materials will be sent to bailii and to the archive store simultaneously. In the final, permanent, outcome it may well be that publishers will wish to fund this archive so that it is intelligible and accessible in a format suitable to their needs. It will still, however, remain in place as a guaranteed free source of data to anyone who wishes to emulate what we are doing on a bona fide basis.

24. Delivery is the visible part of it all. The pilot will use the Austlii tools and knowhow for automatic additions, hyperlinking and searching. Long term provision may or may not involve those tools. It also may or may not be in an academic environment, although our friends in Austlii would certainly have things to say about the use of their software if we decided to change to a non-academic environment. It would be easy for us to assume now that the concepts behind the bailii pilot project cannot be bettered, but we are all conscious that many things may change, and we may learn a lot during the next two years or so, which may lead to a change of direction.

25. Infrastructure comes next. I have already said a bit about it. In order to set up a formal body, we will need to agree the structure that will be needed to run the project effectively across our five jurisdictions fairly soon. Members of the Steering Group are conscious that we cannot go on meeting like this for much longer. The strategic management of the project and its day to day direction will have to be put onto a proper, and properly accountable, footing.

26. Finally, supplementing. The provision of raw data, admirable though it is, has a lot of limitations, although these can be alleviated to some extent by the use of sophisticated tools and search engines. What is going to be of real value is the provision of material which summarises and digests and comments on the raw material. We do not envisage that the pilot phase will offer much scope for the supplementing of the databases with metadata on any basis, free or paid for. On the other hand, this is likely to be a significant feature of any permanent service, and may well be a source of self-generating finance.

27. I see my own main task this year as speeding up the delivery of approved judgments from the High Court and the Court of Appeal. For example, I want to see all approved written judgments on the Human Rights Act available to everyone on the Internet within an hour from the time they are

delivered in court. The other day, when Lord Woolf handed down the major judgment of a five-judge Court of Appeal on the future level of personal injury damages, he announced in court that the judgment was being posted on the Court Service website as he spoke. I also want to see the processes of transcribing *ex tempore* Human Rights Act judgments and then approving and publishing them, speeded up, because everyone will be keen to have access to them, particularly in the early years of the Act, as quickly as possible.

28. But the full text of the court's judgments will be of limited use to most of the market. We need to think about those in central and local government, about busy judges and magistrates and lawyers and those who work in tribunals, and about everyone who provides advice through the new Community Legal Service, those concerned with families (Article 8) or the media (Article 10) or the police (Articles 5 and 6) or the prison service (Articles 3 and 6). The list is endless, and what all these people will need is a rapid summarised digest of the courts' decisions, not the actual transcripts themselves.

29. I want to talk now of some of the practical problems the judges face in helping to make this dream come true.

30. One of the strengths of our common law traditions of justice has always been seen to be the way in which our judges almost always gave judgment orally as soon as the hearing was ended. Litigants got their result immediately, and did not have to wait. Before the days of the photocopier, trials were quite short, there were quite few documents in most cases, as they all had to be typed out specially for the trial, and the judge had the oral evidence well in mind at the end of the hearing. He or she - and it was always he - could put almost complete trust on a fairly small number of competent advocates to tell him the law that had to be applied. This saved him having to do his own research.

31. It was only quite rarely that judgments had to be reserved. If they were, they were delivered orally in open court. Until the day he retired in 1993, Lord Justice Tasker Watkins, the former Deputy Chief Justice, always insisted that reserved judgments in the higher courts he controlled, the Criminal Division of the Court of Appeal, and the Crown Office List, should be read out orally by the judges, so that everyone could hear them. This was his idea of what public justice was all about. On the civil side, handed down written judgments had become more common in Lord Donaldson's day as Master of the Rolls, although they still formed a minority of all judgments.

32. This tradition meant that someone had to transcribe the court's judgments when the judge or, more often, his clerk, did not prepare them themselves in written form. The transcribing service was expensive and it had to be paid for. The higher courts always ordered and paid for copies of the judgments it needed, but the Court Service did not pay the shorthandwriters' and the transcribers' salaries. Instead it paid the shorthandwriters' firms an attendance fee, and then allowed them to keep the copyright in the judgments they prepared from their notes or which they transcribed from tape. They were allowed to exploit those rights commercially by selling the approved transcripts on the market. In the electronic age, this has turned into a website service on a subscription basis, although free access is provided to this service to those who are not practising the law for reward. In the High Court, a number of transcribing firms have similar contractual rights when they are invited to transcribe judgments from recording tapes.

33. This accident of history means that we are at a very great disadvantage when it comes to making our judgments free to everyone who wants to read them, because the transcribers and the shorthandwriters possess these valuable rights. Until a solution is found to this problem, there is little chance of most of the recent judgments of the High Court and the Court of Appeal featuring on the bailii site.

34. There is one exception to all this, which came into effect last autumn. If an approved judgment is handed down in written form, the official shorthandwriters have no part to play except as

distribution agents for the Court Service. If an approved judgment is handed down in written form, the official shorthandwriters have no part to play except as distribution agents for the Court Service. These judgments no longer feature among the copyright privileges they own. Before we can make effective use of this new relaxation I am still waiting for the final testing and approval of a new judgments template which has been prepared for us in a new format. This will enable us to sending our judgments immediately to a website without the delays that occur at present. 45% of the judgments of the Civil Division of the Court of Appeal - and most of the important ones - are now reserved and handed down in written form, so this is quite a major breakthrough, but we still have quite a long way to go. Courts like the House of Lords or the Judicial Committee of the Privy Council which deliver all their judgments in writing do not face these problems.

35. The Judges' Council has also agreed that our judgments in the High Court and the Court of Appeal should be given paragraph numbering. I hope that we may also be able to put into effect quite soon their further decision, made last week, that we should introduce a system of neutral citation for all courts with an official shorthandwriter. This means the two divisions of the Court of Appeal and the Crown Office List, which includes the Queen's Bench Divisional Court. There are still some practical problems to be sorted out before this decision can be put into effect, but I hope we can introduce neutral citation quite soon.

36. The remaining problems I am struggling with must await the outcome of the nine-month study. To some extent they are mixed up with a policy which this Government has inherited from its predecessor. This is that civil justice must pay for itself, so far as the Court Service Agency is concerned. In fact, a lot of our judgments, particularly when the Human Rights Act comes into force, will be judgments in criminal cases which are not affected by this policy, but they are caught up with it.

37. The trouble with the application of this policy in this way is that the ideas I have been canvassing today have very little to do with the normal service of the Court Service to litigants who pay court fees in order to take forward their litigation. They are all about making the law of England and Wales, or Scotland, or Northern Ireland, or Ireland available to the citizens of these islands free of charge, preferably so that they can resolve any disputes they have without the need of paying court fees in litigation. When digital television is introduced, my dream is that they will be able to access the law, if they want to do so, through their television set at home.

38. The extent to which taxpayers' money should be available for this service of enabling people, rich or poor, to have free access to all the law on a website like this is a matter for Government as a whole and not really for the Court Service Agency. It may be that we will need to go forward with a mix of public and private money. Until the nine-month study trumpets loud and clear the need to free all our law from artificial constraints, I am left to trying to do what I can within the constraints that presently exist.

39. I have not spoken today about information overload. At present we are suffering from information underload, so far as free access to the law is concerned. I believe we are well on the way towards improving things.