Powerful and persuasive reasoning: using foreign precedent to best effect

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"The indictment was for a battery upon Doctor R The evidence was, that the defendant spit [*sic*] in his face. Holt, Chief Justice. It is a battery."

In eighteenth-century England it seems judging could be a terse business.

Nevertheless, when looking for precedent on something like this for which there is clearly no specific statute, such a past verdict could bring a courtroom spat to within spitting distance of a swift and decisive conclusion.

The case was *R v Cotesworth* [1794] 6 Mod 172 – view the free sample page from the English Reports at <www.justis.com/rcsample> and according to Vanessa Blackmore, it was cited in the Supreme Court of New South Wales as recently as 1997.[1] Writing as Vanessa O'Meara in this journal last year, Blackmore drew attention to it to illustrate to budding law librarians the necessity for access to foreign precedent: without relevant legislation and when there's little or no domestic precedent, it can be essential.

Blackmore's co-author Melanie Elron (formerly Adams) of law firm Blake Dawson Waldron (now Blake Dawson) suggested in the same piece that if health or science records were lost, they would eventually be built up again because the human body and nature would be the same, whereas "the legal system is purely intellectual and man-made, and if we were to start from scratch today, [it] would probably be entirely different".[2]

For a readership in a country with a relatively short history and a low population, these thoughts provide a convenient springboard from which to launch an investigation into the value and use of foreign precedent across different jurisdictions.

In the previous issue of the *Australian Law Librarian* (see www.justis.com/news/news-all-story.pdf), we introduced readers to London-based Justis Publishing and their antipodean agents, TimeBase; in this follow-up we ask those behind, and users of, the Justis full-text legal library and the provider-neutral JustCite citator exactly why foreign precedent is needed; how authoritative it is; how it's used; how it's accessed; which countries' courts provide the most useful cases; and for which areas of law it is most useful.

My first port of call is Sarah Worthington, professor of law at the prestigious London School of Economics and president of the Society of Legal Scholars. Though she's been based in the UK since 1994, she undertook academic and professional training in her native Australia. Worthington asserts that "most Australian lawyers know more about English law than the other way round," thankfully thereby validating my approach of looking into the whys and hows of foreign precedent use in Australia – the focus of this piece – rather than showing whether it is actually used in the first place; it is!

Kicking things off, Worthington explains that "Australia still looks to the UK, New Zealand and Canada more than say Hong Kong or India, which reflects the feelings of cultural similarities, particularly regarding commercial law." She adds that "arguments referencing those three [jurisdictions] are very common, although broader research increasingly informs appeal decisions."

1 O'Meara, Vanessa & Adam, Melanie, 'So you want to be a law librarian' (2007) 15(3) *Australian Law Librarian* at 45.

2 Ibid at 49-50

But are they binding? The short answer is of course no, at least not technically; the long answer is that this slightly misses the point.

Even before the 1986 *Australia Act* that abolished their ultimate authority, the only Privy Council cases that were binding in Australian courts were those that, despite taking place on British soil, were an extension of the Australian courts. So technically very little over the last century has altered regarding the status of foreign precedent. True, an important change of emphasis came about in Australia's highest courts of appeal that year: British law lords made way for Australian judges, who naturally came with an Australian take on the law. But this did little to alter the persuasiveness of English and other foreign precedent.

And this could be key for relatively young countries with comparatively low populations, particularly if their legal systems are based on the Westminster model.

Based in Sydney, Leonie Muldoon is the CEO of TimeBase. A developer of research tools for Australian professionals, her company has partnered Justis Publishing in Australia for the past two years. She agrees with Worthington's assessment of the leading foreign jurisdictions and highlights the particular significance of Britain. "Many of the common law areas originated in the UK," says Muldoon, "and I'd be surprised to see anyone rank anything else above the UK for Australia." In her offshore market, UK case law is also popular, she adds.

Muldoon is a keen advocate of the JustCite citator, which provides a common entry point to an expanding body of common law, European law and international law. Including links to 25,000 cases from the Australian Law Reports and Commonwealth Law Reports, it marries up cases, legislation and journal articles and shows how they relate to each other; soon it will also index journals from RMIT Publishing. "JustCite is important for [our customers] to contextualise cases, showing whether they've been applied, overturned, distinguished or whatever," Muldoon says.

A useful example of this can be demonstrated through a subject search of "insolvent trading" on JustCite. The results screen can be seen at <www.justcite.com/itsample> and, for this area, shows a mixture of relevant Australian, English and Irish cases. Clicking on the first citation, *Smith v Barron* [2004] FCA 1596 and viewing the free sample page at <www.justcite.com/sbsample> shows how an English case from 1952 was cited.

Even without access to the full text, JustCite gives enough information to track down the case for oneself. However, deep links are given to the full text of a number of publishers, including Justis, which contains over 300,000 full-text cases from England and Wales, Scotland, Ireland, the EU and the international courts.

This brings us to Muldoon's other major argument: the value of access to UK case content. "Quite apart from our historical reliance, there's a great deal of respect for the UK court system and the judges there," says Muldoon. Because of the UK's far greater population and court infrastructure than Australia, she says "the chances of finding something with similar circumstances are much higher as there are so many more cases". She adds that Justis's printable PDFs and intuitive index address "the pressures of inner-city rental"

and the fact that "hard copies are difficult to use from a research perspective".

This explains her enthusiasm. Unsurprisingly, Masoud Gerami, Managing Director of Justis Publishing, agrees. This all "reflects the level of interest we've seen in various jurisdictions," he says, adding that in turn, Caribbean lawyers are now very interested in Australian cases. Practitioners "need to be aware of many arguments and ways of thinking," he says, and Justis and JustCite aid this.

But do users at large agree, both with these assessments of the situation and the valuation of Justis and JustCite?

Blackmore, who subscribes to Justis and JustCite, is Manager of Client Services for the NSW Attorney General's Department Library Services, which caters for all New South Wales courts (Local, District and Supreme) and the Sydney registry of the Federal Court of Australia. "Some judges put a global weight of opinion on English judges, such as Lord Hoffmann," she says. "They will start off with key UK texts, cite leading cases, then look to see whether it's still good law – and that's where we'd use JustCite."

So-called 'novel areas' are of real importance, Blackmore explains. "In a couple of states we have ongoing terrorism cases". Judges have started looking to the UK. With an unfortunate history of paramilitary terrorism, Britain is an ideal starting point in the search of sentencing guidelines, given that its "criminal practices are comparable."

On the flip side, there are many areas of Australian law that have no precedent in the old world. Native Title is one such example, according to Blackmore. The issue of indigenous land rights has never arisen in the UK. But it has in the United States, New Zealand and Canada, where there are parallels. JustCite's recent arrangement with Canada Law Book should therefore come as welcome news. (See <www.justcite.com/news/news-canada-law-book.html> and keep an eye on <www.justcite.com/news/news.html> for updates on an expected delivery date – it should be early next year.)

Following a spell at Mallesons, Cathy Bushrod has been a librarian for Baker & McKenzie's Melbourne office for 16 years. Also a subscriber to both services, her thoughts echo earlier sentiments. She explains that although the admissibility of cases can depend on judges' whims, "it's well and truly accepted that you can follow precedent [from elsewhere] if there's no Australian precedent". She adds: "It depends on the practice area. If it's suitable and relevant, then there's no problem – UK construction law, for example, is used a lot". Good news for Justis: it holds the BLISS construction industry database.

For this reason and more, "all our lawyers have access to Justis and JustCite" she says. "Justis is most useful" for its coverage and because "it saves a huge amount of copying". JustCite "was the next step and filled the gap in our resources". Links to Canada Law Book's Dominion Law Reports "would certainly be useful," she adds.

Naish Peterson, Library Services Manager for Melbourne law firm Arnold Bloch Leibler, is last up to offer his thoughts, along with his practitioner colleague Lucy Kirwan. Peterson concurs that "if you can't find the answer you were looking for in Australian case law, then it's straight to

other jurisdictions, usually the UK first," though he adds that he's also often asked to find US, Canadian and New Zealand decisions. "Hardly a day goes by when we're not asked for some [foreign case law], so from our perspective it is still used quite substantially"

Kirwan, who specializes in commercial litigation and white-collar crime defence, comes back to Blackmore's point: "Foreign case law is very important when the courts are determining novel or difficult issues which may not have been the subject of previous court decisions. As foreign courts have sometimes considered issues before Australian courts have grappled with them, the reasoning of those courts may have an impact on a decision here".

Powerful and persuasive reasoning, rather than explicit authority, is clearly an important and uniting theme. This point strikes a chord with Gerami, who appears as keen to promote the discursive journal articles that JustCite indexes, as he is its growing list of cases. "An article is much more than a description," he says, and shouldn't be overlooked when formulating arguments for court.

Perhaps lawyers on the other side of the planet should take note of what's out there. Worthington agrees that English lawyers should "come out of their comfort zone"; with a system that relies on precedent and an increasingly less conservative judiciary, practitioners in England could benefit immensely by following Australia's example.