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This study is an important contribution to access to justice scholarship and research. The subject is the English Court of Appeal as the authors found it in 2000–2001 responding to the deep and comprehensive agenda of change resulting from the “new public management” initiatives of the Tory and Labour governments in power during the 1980’s and 90’s. Although the study is concerned primarily with the present day operation and recent history of the Court of Appeal, significant events in the life of the court from its beginnings in the court restructuring legislation of the 1870’s are recounted and analyzed at appropriate junctures in the text. An important body of data was collected by the authors during 2000-2001 from which they describe and analyze the subjects, types and origins of cases, the throughput of applications and appeals and their outcomes, and in particular, the new requirement for permission to appeal.

The book however is more than a descriptive account of the operation of the Court of Appeal. Comparative, theoretical and philosophical issues are engaged throughout the text to provide contextual support for the synthesis and analysis of the data. There is an informative and pivotal account of the nature of the appellate process, delving en route into the nuances of the word “appeal” and the various functions which, as “a piece of linguistic shorthand” it is used to describe. The authors discuss the rationale of English civil appeals, contrasting the approaches of trial and appeal judge in light of the forensic and psychological distinctions between the thought processes involved in the tasking of each. The authors do not shy away from questioning conventional wisdom as where they engage and debunk the notion that the trial judge is better placed to deal with factual matters because of the opportunity to observe the demeanor of the witness - a notion which the authors pragmatically and intellectually demonstrate as “misplaced” and “nothing more than a distraction from the quality of the written or spoken word.” 3 Species of appeal and the distinction between the review and supervision appellate functions are discussed as just part of the comprehensive backdrop which the authors provide to their central theme: the operational impact of the transforming substantive changes resulting from the Woolf and Bowman inquiries, and the equally transforming new managerial culture of the public services spreading into the justice system.

The authors set out to capture the mood and operation of the Court of Appeal, its personnel and clientele, at the critical time of transition of their traditional processes following the implementation by the 1999 Access to Justice Act and the 1998 Civil Procedure Rules, of the Woolf and Bowman reports. In 2000-

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1 Page 13.
2 Page 26.
3 Page 25.
01 longstanding structures, procedures and accompanying attitudes were being replaced by initiatives driven by the efficiency, effectiveness, and cost-conscious goals of the public sector managerial revolution of the 1980’s and 90’s. Surprisingly there was precious little existing scholarship or research for the authors to build on concerning the Court of Appeal either at or before this critical time. Since 1934 in fact, when the first major reforms to the Court of Appeal occurred, the authors found there had been no research at all into the court and its work. The history they recount is of an institution operating under the radar of the academic community for over 100 years. During this time traditions of orality evolved into operational principles, the rights of appeal and appearance in person matured and became entrenched, the caseload grew, generated substantial backlogs, delays and cost increases, and underwent significant content changes. Clerks without legal qualifications handled scheduling and most organizational matters concerned with the processing of appeals.

Approaching the end of the century when, first, facing concerns of value for money in the delivery of public service, and then the need to respond organizationally to growing problems of delay, time use and management, the appellate system was propelled, with the civil judicial system in general, towards implementing the root and branch changes which resulted from the two most significant enquiries, the Woolf and the Bowman inquiries, ever to have impacted the Court of Appeal. To pause at this point for a moment to envision the court navigating in Sunday afternoon sailing style the ebb and flow of events of the last century or so under the influence of its erudite, eccentric and patrician leadership, what seems striking apart from the absence of interest in or curiosity about the court, is the telling contrast between the multiple initiatives taken in the last decade to update the court and the very modest support given to the court at and around its birth in 1875 and thereafter. While a price no doubt will be paid for the amount of new wine forced into the old bottle by the modern vintners one can only wonder how differently things might have turned out for the court had it been given from the start the resources and support which seem to surround the present day court. The court which for so long was left to its own devices is now awash with budgetary, managerial, and logistical support. Studies of the effect of rules and rule changes are carried out within, and under contracts with, the Department and Constitutional Affairs. The overall impression, with which the authors seem to concur, is that the infrastructure necessary to make the post-Woolf/Bowman court an effective and efficient de facto final court of appeal is now in place.

However as noted above a price will be paid for the “New World”5 of civil appellate justice: public service agreements with the Treasury, and the bureaucracy of the Department for Constitutional Affairs, will provide unfamiliar constraints on the “judicial individualism”6, which in the authors’ view, characterized the court until recent times. Also, the Civil Procedure Rules are already generating some considerable complexity in the application and interpretation of central rules concerning appeals as the authors note in their discussion of the rules and

5 Page 47.
6 Page 123.
the growing case law on the question of whether a review or a rehearing may take place after permission to appeal has been granted. Reference has been made by some judges, and indeed by one of the authors, to the risk of judges becoming too managerially involved with cases in their preliminary stages of appeal through the much heralded case management process. Also as even a superficial survey of the literature reveals and the comments of some judges disclose, independence of the judiciary in the “new world” of new public management is and will be a matter of ongoing concern despite the 2005 concordat by which the government acknowledged its duty to uphold the independence of judiciary.

The authors address several thorny issues arising from the traditions of the Court of Appeal identified as contributing to the backlogs and delays in the throughput of appeals. At the core of the book is the authors’ treatment of the right to appeal, the right to present one’s own case and the right to an oral hearing. Discussion of these issues is against the backdrop of the traditions of the court, and in light of the data collected on the operation of the court in 2000 – 2001. The authors also discuss the judges and the judgment making process of the court, and the relationship between the court and the House of Lords.

As far as the right to appeal is concerned the authors note that by the time of the Woolf inquiry “an unfettered right of appeal had outlived its utility… the only right a litigant has is to ask a higher court to look at the lower decision and see if it ought to be considered afresh.”7 The new procedure introduced by the 1999 Access to Justice Act imposes the requirement of an application for permission to appeal either from the lower court or from the Court of Appeal. The general principle is that there can only be one appeal. The rejection of an absolute right of appeal and the introduction of a near universal requirement of permission to appeal in its place is explained as a response to the number of “unmeritorious appeals” and as the authors note, “Costs are saved… [and] If permission is granted the court has an early opportunity to make case management directions.”8

The data collected by the authors and detailed in chapter 6, reveal a number of problems with the permission to appeal process which has been tightened further by reforms in 2006 providing the court with the power to order that a written application for permission which has been rejected may not be renewed at an oral hearing. While the authors express reservations about the research project on which the reform is based,9 they do not oppose the availability of this preventive power.

The permission to appeal process and data are probably the central concern of the book. The authors were not able to collect specific data on the time taken by the Court of Appeal judges to consider paper applications for permission to appeal. However they were concerned about inroads taken on the judges’ time by applications, particularly in light of Civil Appeals Office data indicating that the making of applications to the court below was not as widely used by parties as had been hoped. Another problem was the significant number of applications filed by litigants in person (LIPs), amounting to 36% of the authors’ sample of

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7 Page 67.
8 Page 70.
9 Pages 75-76.
applications. The inability of a majority of the LIPs to handle the formal paperwork for the application raised resource allocation questions which provoked the relatively severe response from the authors mentioned below.

The Department for Constitutional Affairs perceived another problem—the number of “hopeless applications”\[^{10}\] for permission to appeal diverting the valuable resources of the court from the perceived meritorious appeals. In contrast to the attention given to addressing the concerns for independence of the judiciary, the access to justice community will note the somewhat less strenuous efforts expended to find solutions to the problem of the “hopeless” application other than the outright removal of the right to appeal. To some extent this is compounded by responses to the issue of the unrepresented litigant. As may be seen in the information excerpted in chapter 9 from the official annual reviews of the court’s operations, and in the comments there of influential Australian judges, the unrepresented applicant is now identified with “the unarguable appeal” and the “obsessive litigant”. The exasperation caused to the judges by, and the potential for wasteful expenditure of time, money and all other resources of the court on, obsessive litigants and hopeless cases cannot be denied. However the authors found no data on the needs and motivation of such litigants. Anger at the judges, confusion about the court process, and an awareness of the right to be heard in their own cause are all offered by way of explanation and description of the LIP by the authors from their own research. The Bowman solution, building upon an earlier proposal from the Judges Council Working Party in 1995, was to recognize the inadequacies of some of the processes of appeal as they impact on the legally untrained litigant, and to work to mitigate the deficiencies by a greater availability of pro bono and legal aid assistance, and the provision to the LIP of much more information about the process. This access oriented approach is eschewed by the authors who conclude that “It is time to grasp this nettle of reform and leave the appellate system to be conducted forensically by legal representatives.”\[^{11}\] R.I.P. –LIP!

The research design and data gathering by the authors did not include the impact of the tradition of orality of procedure before the court and the process of judgment making. Certainly changes have been made for the better with the introduction of the judge driven case management process, the disappearance of the reading to the court of the judgment given below, the recognition by the judges that pre-reading does not mean prejudging, and the adoption of the skeleton argument and time limits for submissions. Future research will have to weigh the changes against the objectives of the Woolf/Bowman reports. In chapter 8 the authors describe and offer a restrained critique of the judgment making process of the court. Clearly the trend towards the composite judgment is a welcome development away from the traditional multiple judgments and their “profusion of precedent.” The authors flag with concern the appearance of the specialist judge in the appeal process who, they report, “in some cases positively parades his expertise…”\[^{12}\] The author’s conclusion that “It is difficult to gauge

\[^{10}\] Ibid.
\[^{11}\] Page 142.
\[^{12}\] Page 129.
litigant satisfaction in the contemporary Court of Appeal…” just sets the scene for further research in this area.

In looking at the relationship between the Court of Appeal and the House of Lords in chapters 10 and 11 the authors do their best to debunk the A.P. Herbert aphorism that “people may be taught to believe in one court of appeal; but where there are two they cannot be blamed if they believe in neither.” The authors’ finding that a significant proportion of appeals set down for hearing during the time periods when their data was collected were Administrative Law matters signals a changing role for the House of Lords. And this when the House of Lords is about to be replaced by the new Supreme Court, which in 2009 will assume the jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council relating to the powers of the Scottish, Welsh and Northern Ireland assemblies. While this new court is intended to be physically and operationally independent of Parliament it is not intended to challenge the constitutional principle of sovereignty of parliament with powers of disallowance exercised by the United States Supreme Court. However with administrative and constitutional law cases constituting almost 40% of the caseload of the House of Lords as it passes the torch, decision-making by the Supreme Court will lead to the appearance of a coherent body of public law jurisprudence through which questioning of some of the Westminster constitutional principles will be inevitable.

In the modern context of the European Community, devolution to Wales Scotland and Northern Ireland and the preoccupation of the Court of Appeal with civil matters, a final court of appeal with heightened sensitivity on public law issues will be necessary. The four cases included in chapter 11 by the authors as their contribution to the discussion on this issue of course support the supervisory role for such a court. This reasoning however simply invites those with the opposite view to come forward with their four best examples to demonstrate why there should not be a second appeal court and the principle of one appeal maintained intact. The development of a body of public law could provide an objective rationale and purpose supporting, as the authors do, the continued existence of a House of Lords/Supreme Court appeal. Clearly as the transforming changes are implemented in the appeals processes, further ongoing research will be needed to monitor the legal, constitutional and operational efficiency and effectiveness of the division of labour between the Court of Appeal and the House of Lords and its Supreme Court successor.

The authors have provided a valuable analysis of the Court of Appeal at a critical juncture in its existence. The impetus for their work lies in the transforming proposals of the Woolf and Bowman inquiries and the analysis provided in this book is broadly supportive of the conclusions and reforms suggested in the reports of these inquiries and now largely implemented. The data collected and analyzed by the authors provide a snapshot of the Court of Appeal at a particular time. Subsequent research projects will confirm or qualify the conclusions

13 Ibid.
14 Quoted at page 143.
15 Table 2, page 85.
offered and the trends predicted. One prediction which can be safely made is that this foundational work will stimulate and provide a comprehensive basis for the next generation of researchers to design their research into the Court of Appeal. Whether the discourse from here on will continue to reflect the nuances of Woolf and Bowman and New Public Management ideals or whether new voices will participate in the dialogue is an open question. In contrast to the attention given to addressing the concerns for independence of the judiciary, the access to justice community will note the somewhat less strenuous efforts expended to find solutions to the problem of the “hopeless” application other than the outright removal of the right to appeal. Clearly this book has succeeded in identifying, if not provoking, issues and directions for future research, like the problems with the application for permission to appeal, the question of how resources can be allocated to accommodate LIPs, and the question of satisfaction of the clients as well as of the practitioners with the appellate process, and for now we could not ask for more.