

# Researching American Authorities - An Introduction

The Winter 1992 *Bar News* told readers how to evaluate (and cite) American authorities. Inspired by the response and further requests, the author, Robert Angyal, enlisted the assistance of Jane Williams BA (Hons) LLB, research assistant to DMJ Bennett QC, to provide a guide to researching American authorities.

**1. Introduction.** The last issue of *Bar News* (Winter 1992) explained how to understand and use references to American authorities (they call them "precedents"). That article provoked quite a number of requests for a guide to researching American case law. Here it is.

Warning: Everyone has his or her own way of finding case law. In this article we describe the standard approaches, based on the resources that are available in Sydney. There is, of course, no one foolproof method.

A number of law libraries in Sydney have a wide range of American case law resources, including online access to Lexis. The Supreme Court and both University of Sydney Law School and University of NSW libraries have large holdings and computer-aided research facilities. The Supreme Court collection may be accessed only by way of a bar-coded card which may be applied for at a cost of \$20 per day for the casual user or more for a yearly pass. Lexis facilities are able to be accessed only by judicial users of the Supreme Court Library. Charges are levied by all public libraries for Lexis use.

**2.** Textbooks are often a good start to finding case law. Here are some of the better-known American texts on areas likely to be of interest to Australian lawyers. The major texts are easily identified by the name of the original author "on" a particular topic. Those most relevant for Australian use are generally civil law texts which are found at 346.73 in the Dewey classification system. Some constitutional and criminal law texts may also be of interest and these may be found only in the larger collections. Their Dewey references are 342.73 and 345.73 respectively. Holdings in collections in the Sydney CBD are noted.

*Collier on Bankruptcy* 15th edition; looseleaf; 9 volumes plus 4 appendices **Holdings:** Supreme Court  
*Corbin on Contracts* 8 volumes (1963) incl index plus supplements **Holdings:** Supreme Court, Bar Association  
*Couch on Insurance 2d* 26 volumes **Holdings:** Supreme Court  
*Milgrim on Trade Secrets* 4 volumes; looseleaf **Holdings:** Supreme Court  
*Modern Intellectual Property* Epstein; 2nd edition; looseleaf **Holdings:** Supreme Court  
*Nimmer on Copyright* 5 extended volumes; looseleaf **Holdings:** Supreme Court, Sydney University Law School  
*Powell on Real Property* 7 extended volumes plus index and table of cases; looseleaf **Holdings:** Supreme Court  
*Prosser: The Law of Torts* 5th edition; 1984 **Holdings:** Supreme Court, Bar Association  
*Scott on Trusts* 4th edition; 6 extended volumes plus supplements **Holdings:** Supreme Court, Bar Association, Sydney University Law School  
*Trusts and Trustees* Bogert; 2nd edition revised; 24 volumes **Holdings:** Supreme Court  
*Wigmore on Evidence* 10 volumes plus supplements **Holdings:** Supreme Court, Bar Association, Sydney University Law School

*Williston on Contracts* 3rd edition 1957-1978, 18 volumes plus index; 4th edition 1990; looseleaf **Holdings:** Supreme Court, Bar Association, Sydney University Law School  
*Williston on Sale* Revised edition; 4 volumes **Holdings:** Supreme Court, Bar Association.

**3.** *The Restatements of the Law* are also an invaluable tool to researching a particular subject area. The Restatements are promulgated by The American Law Institute and include coverage of the law on agency, contracts, conflict of laws, property, restitution and torts. Each of the major libraries, including the Bar Association, has comprehensive holdings of the various Restatements.

The Restatements attempt to state the consensus of American courts on particular areas of law. They do so succinctly and, because of this, they are particularly useful to Australian lawyers, since conventional research methods, such as digests, can often produce a blizzard of authorities which are difficult to evaluate (see further on this problem later in this article). The Restatements are regarded by American courts as persuasive, perhaps more so than any other secondary material, and are themselves often cited by American courts. But because they attempt to state the consensus view, they are by nature backward-looking: they are not the place to find authorities on novel points.

**4. Looseleaf Services.** There is a vast array of specialised US looseleaf services. Most are unlikely to be available here except by direct subscription. A number of the larger texts are also published in looseleaf format as noted above. Here are some others that are available.

*Biotechnology and the Law* Boardman **Holdings:** Supreme Court  
*Copyright Law Reporter* CCH **Holdings:** Supreme Court  
*Environment Reporter* BNA **Holdings:** Sydney University Law School  
*Federal Securities Law Reporter* CCH **Holdings:** Supreme Court  
*Federal Standard Tax Reporter* CCH **Holdings:** Supreme Court, Sydney University Law School  
*Human Rights - The Inter-American System* 5 volumes **Holdings:** Sydney University Law School  
*Law of Liability Insurance* 4 extended volumes; Long **Holdings:** Supreme Court  
*Personal Injury* Schwartz; 6 volumes **Holdings:** Supreme Court  
*Products Liability* Fumer and Friedman; 5 extended volumes **Holdings:** Supreme Court  
*Prosecution and Defence of Forfeiture Cases* Smith; 2 volumes **Holdings:** Sydney University Law School  
*Securities Fraud and Commodities Fraud* Brumberg; 6 volumes **Holdings:** Supreme Court  
*Securities Regulation* Gadsby; 11 extended volumes **Holdings:** Supreme Court

5. **Encyclopaedias.** There are two frequently used American encyclopaedias which, like *Halsbury's*, attempt to state the law on a very broad range of topics. The first is *Corpus Juris Secundum*, published by West Publishing Company in 159 volumes with annual supplements. The second is *American Jurisprudence 2d*, published by The Lawyers Co-operative Publishing Company in 82 volumes plus supplements and indexes.

Availability is as follows:

*Corpus Juris Secundum*  
Supreme Court  
University of Sydney Law School  
University of NSW  
Macquarie University

\* Note: The Bar Association library has *Corpus Juris* only.

*American Jurisprudence 2d*  
Supreme Court  
University of Sydney Law School  
University of NSW  
NSW Bar Association

6. **The Wests Digests.** To go beyond the resources described so far, you need to understand the West Key Number system, around which a huge series of research tools is structured. Wests assigns Key Number to each sub-topic in much the same way as in the *Australian Digest*. Once you find a relevant authority, you note its Key Number - for example, "Offer and Acceptance" is key 16 under Contracts. You can then go to the *Wests Digests* or *Corpus Juris Secundum* for other cases on point. Or you may be able to go direct to a digest and find relevant case references there. *Corpus Juris Secundum*, which also uses the Key Number system, is another way of getting into the system, although Key Numbers and topics between the two systems are not directly equivalent but are extensively cross-referenced. There is a considerable range of digests published by Wests.

Most of these may be found in the Supreme Court or University of Sydney Law School or University of NSW libraries. Macquarie University library has about half of the available reporters and digests.

The *West's Digests*. This system is the most comprehensive of the *West's* reporters. The system covers all reported decisions of all courts. It consists of the Century Edition covering the period 1658-1896 and ten Decennial Editions, each covering a decade. It is continued by *West's General Digest* 7th and currently 8th series. There are also more specialised *West's* digests such as:

*Federal Digest*  
*Federal Reporter Digest*  
*North-Eastern Digest*  
*US Supreme Court Digest*

The *West's Digests'* strength - their comprehensiveness - is also their weakness. To ensure you have all the law on point, you need to look at all the digests covering every ten-year period. On any significant point they will throw up a large and rapidly increasing number of authorities. The Eighth Decennial Digest (1966-1976) has 50 volumes. Its successor, the Ninth Decennial Digest (1976-1986), has 86 volumes. The Tenth

(1986-1996), plus the general digests which update it, already has 129 volumes.

Wests also produces a wide range of reports which are key-noted in the same way as the digests. These include the *US Supreme Court Reporter*, *US Supreme Court Reporter Lawyers' Edition* (annotated), and the twelve separate series of reports known as the *National Reporter System* including the *Federal Reporter*, *Federal Reporter 2d* and *Federal Supplement* and the various regional reporters (described in the previous article).

Of the specialised subject reporters produced by Wests, only *Wests Bankruptcy Reporter* is available in Sydney in a formidable 140 volumes currently and is held by the Supreme Court library.

7. **Shepard's Citators.** There are citators produced for each of the series in the *National Reporter System* by Shepard's. Each contains lists of citations, arranged in tabular form by volume number and page showing where reported cases have been cited in later cases. Shepard's citators are available on Lexis and have not been stocked by the Supreme Court library since 1988 for this reason, but Sydney University Law School has up-to-date sets.

8. **Computerised Legal Research.** There are two primary computerised legal research systems available which cover American law, Lexis and Westlaw. As its name suggests, Westlaw is offered by the West Publishing Company, but is not available in specialised law libraries in Sydney. Lexis is available through libraries or by direct subscription. Both are full text services. This is not the place for an introduction to using full text retrieval systems for case research, but readers not familiar with the techniques for using such systems should note that they are quite different from the concept-based research methods we have traditionally used. Rather than searching for cases organised by reference to a concept (such as Offer and Acceptance), you search for words likely to occur in the cases you want to find.

Lexis generally charges by a combination of a search fee and an hourly online cost. For private access to Lexis the search fee is currently around \$50 plus small hourly charges, although the search fee can be avoided by the use of a citation directly. There are differing levels of access and pricing and these should be checked when using the system. The University of Sydney Law School library, for example, charges online costs for Lexis use plus a \$5 surcharge for staff and students or a \$50 surcharge for non-members of the university. Small online searches of under 5 minutes generally do not incur a charge.

9. **Dictionaries.** There are a number of legal dictionaries and smaller encyclopaedias of American law available in Sydney for both specialised and general reference. These include the following:

*Black's Law Dictionary* Published by Wests; 6th edition 1990  
**Holdings:** Supreme Court  
(earlier editions available in other libraries)  
*Ballantine's Law Dictionary* 3rd edition  
**Holdings:** Supreme Court

*Dictionary of Medicine and Traumatic Surgery for the Attorney*  
10 volumes plus encyclopaedia

**Holdings:** Supreme Court, Law School, Bar Association  
*West's The Guide to American Law* 12 volumes; 1985

**Holdings:** Law School

*West's Words and Phrases - Permanent Edition* 46 volumes  
**Holdings:** Supreme Court

10. **The American Law Reports** approach reporting from a perspective unfamiliar to Australian lawyers. They only report the most important cases. Each volume contains a comprehensive discussion ("annotation") of the law on a number of areas, each prompted by an important recently-decided case (which is also reported in full). For example, at 3 ALR 5th 784 (volume 3 of the fifth series of the ALR at page 784), you will find a 66-page account of the law on the admissibility of tape recordings of telephone calls to the 911 emergency number (equivalent to our "000" number). The annotation was prompted by a decision of the Court of Appeals of Virginia, *Bowling v Commonwealth* 403 SE2d 375 (Va App 1991), admitting a tape recording of a murder victim's telephone call to 911 under an exception to the hearsay rule. The annotation not only discusses the law, it also lists relevant texts, practice aids, statutes and even suggests the appropriate Lexis search request ("tape! or record! or transcript w/8 911 w/15 admitt! or admit! or inadmitt!").

Once you find the right ALR much of your research will already be done for you. The trick, of course, is finding the right annotation among the 13,000 or so published to date. To this end, there are comprehensively indexed. If you have the name of a relevant case, Lexis' "Autocite" feature will give you all ALR annotations that referred to that case. And the ALRs will also give you the relevant West's Key Number so that you can also look in all the West's publications for authorities. There is also an ALR Federal series (now about 107 volumes) containing annotations on federal law questions, held by Sydney University Law School Library.

11. **General Pointers.** The greatest difficulties Australian lawyers have with American authorities are finding them; not being overwhelmed by them; and evaluating their persuasiveness. This article and its predecessor should help solve the first two problems. The third is the hardest. To some extent, it is made more complex by the fact that American lawyers tend to regard the newest precedent as the best, while Australian lawyers tend to think that the best authority is an old one that has stood the test of time.

Apart from this, the problem really lies in assessing the relative persuasiveness of decisions from the 52 jurisdictions making up the United States (and bearing in mind that the Federal Courts comprise the US Supreme Court, the 13 US Courts of Appeals, the 94 US District Courts and sundry specialised Federal courts). Ultimately you must be guided by commonsense: a decision of the highest court of New York is likely to be more persuasive (even giving all due respect to President-elect Clinton) than that of the highest court of Arkansas. □

## Dogged

Miles CJ & Jury

"Just stopping you there. Will you tell us then, where did you hear the noise from?" — "Well, I couldn't tell you where I heard the first noises from, but there was mainly - it was outside, the garage - it sounded like someone was throwing rocks either on the garage or towards the side of the shed, or something, and we heard the side gate opening, and on another occasion there was a really big, loud bang, like somebody had dived through a wall, or something, in the spa area, in that room there."

"That is the spa that you have to gain access from outside?" — "From outside, yes. And there was just - like, the dog was really scared and the dog wasn't usually frightened much at all."

"Whose dog are we speaking of?" — "Jason's dog."

His Honour: "Well, you can't really say what is in the mind of another person, so, I can't see how you can say what is in the mind of a dog, but —?" — "Because the dog was crawling on its hands and knees practically with its tail between its leg and it wouldn't go outside the house."

"All right. Well, the jury may assume from that that the dog was scared. I don't know - it is a matter for the jury." □

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