

Article in Justice of the Peace

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Is Law Still A Learned Profession?

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Introductory

Government departments seem to have adopted a policy of “simplifying” legal language whenever they get the chance. Is this a good thing? Will it mean that the law ceases in time to be a learned profession? Has in fact the law already ceased to be that? If so, does it matter? This article discusses these questions, using as a sample what the Ministry of Justice is currently doing to the language used in family courts.

A press release by the Ministry of Justice on February 22 announced plans to simplify family court procedures and modernise legal language as part of an ongoing programme “to improve people’s experience in court”. It said:

“In the new proposals, archaic terms will be replaced with easier to understand language, a decree nisi will be known as a conditional order and a divorce petition will become an application for a divorce order.”

In the press release Justice Minister Bridget Prentice MP said these proposals will make it easier for people to follow what is being said in court, adding that outdated language will be replaced by everyday terms that reflect the way people think in the 21st century. To this Richard Harrison sagely rejoined:

“There are some assumptions in here, of course: whether the language being replaced is really outdated; whether the replacements do indeed reflect the way people think; and whether their introduction will make it easier to follow what is happening in court. *And, possibly, whether that is a desirable thing.*”¹

The doubt raised in the italicised words is echoed in a response to the consultation paper² by National Family Mediation which poses as an objection to the proposed new terminology that it assumes “that people have some understanding of the process with which they are engaged.”

These are deep waters, Watson (though the shallow may think otherwise). We are concerned here with the vice of law-churning, about which I have written recently in these columns³ and will not say more now. There are problems for practitioners, teachers and students whenever the *Termes de la Ley*⁴ are altered for no compelling reason. There is the vexed question of whether it is wise to encourage non-lawyers to read legal texts, or witness legal proceedings, believing they can grasp their legal meaning. There are other points of difficulty.

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¹ Richard Harrison, “Linguistics and litigation Part 3” 158 NLJ (April 25, 2008) 584, emphasis added.

² See below.

³ See p. 228 above and www.francisbennion.com/2008/010.htm.

⁴ The title of a book published in 1624 which was founded on an earlier work published in 1563 as *An Exposition of Certain Difficult and Obscure Wordes and Termes of the Law*.

I will return to these matters. First though I must explore the meaning of the term “learned profession”, which presents problems in itself.

What Is A Learned Profession?

In discussing the meaning of the term “learned profession” the logical first step is to tackle the meaning of the term “profession”. I propose to sidestep this now, having tackled it at length in a book published nearly forty years ago⁵. The original meaning of the term “learned profession”, dating from the Middle Ages, was restricted to the church, the law, and medicine. Their practitioners were learned in the classical languages of Greek and Latin, but throughout Europe it was Latin that was the *lingua franca* of the learned.

In his 1976 Nuffield Lecture⁶ Sir George Pickering, Regius Professor of Medicine at Oxford University 1956-68, recalled that above the portico of the old Royal College of Physicians in London there stood the statue of its founder Thomas Linacre, physician to King Henry VIII. He went on:

“In Linacre’s time, learning meant a profound knowledge of Latin and Greek, in which languages Linacre excelled. He was one of the chief instruments in making available to his and succeeding generations the knowledge and ideas of the ancient world concerning science and medicine. Indeed it was knowledge of Latin which distinguished the learned professions from other vocations. Armed with this they were able to participate in university education which in the Middle Ages was entirely conducted in Latin.”

After the Norman Conquest law French joined Latin as a learned language employed by English lawyers, as indicated by the title of the book *Termes de la Ley* referred to above.⁷

It is ironic that the very thing that distinguished law as a learned profession, its use of Latin, should recently have been marked down for abolition by the leaders of the profession. Prominent among these was Lord Woolf, who showed chagrin at his lack of total success. He jestingly told the Fifth Worldwide Common Law Judiciary Conference held in Sydney, Australia on 10 April 2003 that when the Civil Procedure Rules 1998⁸ were being drafted:

“I urged, as part of our reforms, the abolition of Latin and the adoption of simple English and, indeed, in our courts; a recommendation which was singularly ill-received. How, it was complained, were you to make an *ex parte* interlocutory application *in terrorem* for an interim order of *certiorari* when the court needs to be assisted by an *amicus curiae* if there is no guardian *ad*

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litem or any *pro bono* representative?”

Lord Woolf said that he had held a competition for the best substitute for *pro bono* and awarded the prize to the dismal phrase “law for free”. This use of an ugly pleonasm as a supposed improvement in language indicates the poverty of current thinking in the area. That is skilfully exposed by Roderick Munday in a lengthy and comprehensive article.⁹ Munday remarks that, as he showed in an earlier article¹⁰, the Latin terms and tags to which exception is taken by some “are simply one part of a complex but effective technical shorthand of a learned profession”.

⁵ See F A R Bennion, *Professional Ethics: The Consultant Professions And Their Code* (Charles Knight, 1969), Pt. I, www.francisbennion.com/1969/001.htm.

⁶ 70 *Proc. Roy. Soc. Med.*, January 1977, pp. 16-20.

⁷ The title is in law French, “ley” being a variant of “loi” meaning law.

⁸ SI 1998/3132.

⁹ Roderick Munday, “Lawyers and Latin”, 168 *JPN* (2004) 775.

¹⁰ Roderick Munday “Does Latin Impede Legal Understanding?”, 164 *JPN* (2000) 995.

In his later article Munday refers to “the sanitized, surrogate terminology” of the new Civil Procedure Rules, which substituted for the ancient and well-understood term “writ” the inelegant “claim form”. Richard Harrison says of this change:

“. . . I really would want to poke fun at the notion that the term ‘claim form’ is an improvement on ‘writ’ or that ‘claimant’ is any more accessible to the masses than ‘plaintiff’. A claim form is what you send to an insurance company. It does not convey the required idea that to use the court system is to invoke the coercive powers of the state. The “writ of summons” made clear the element of compulsion *and majesty*.”¹¹

Ah, that word *majesty*! It sits ill with the strange modern perception that positively nothing and nobody is to be accorded any respect whatsoever. That must include the self, and there lies mischief.

Legal maxims have value as the repository of distilled legal wisdom. Part of their meaning lies in the Latin in which they are usually couched. Law students need to learn how to master this. The term maxim with its meaning of an *axiom* is derived elliptically from the Latin *maxima propositio* (important proposition). Early English lawyers venerated maxims. Coke said that a maxim is so called *quia maxima est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur* (because its merits are very great, its authority is most reliable and it is very highly esteemed by all)¹². Francis Bacon said:

“Not only will the use of maxims be in deciding doubt and helping soundness of judgment, but, further, in gracing argument, in correcting unprofitable subtlety, and reducing the same to a more sound and substantial sense of law, in reclaiming vulgar errors, and, generally, in the amendment in some measure of the very nature and complexion of the whole law¹³.”

In 1730 the use of Latin in court proceedings was forbidden by statute¹⁴. The statute was however mistakenly repealed as spent by the Civil Procedure Acts Repeal Act 1879. Judges still use Latin maxims despite the judicial disapproval periodically expressed. For example Ward LJ said of facts required to be considered under the Sex Discrimination Act 1975 s 5(3): “Thus, in those circumstances, there is no need for a comparator simply because *res ipsa loquitur*”¹⁵. This was a reference to the maxim meaning “the thing speaks for itself”¹⁶ which is often applied in actions for negligence. Lord Shaw of Dunfermline said satirically (and it is submitted incorrectly) that if it had not been in Latin, nobody would have called this a principle¹⁷.

Law is said still to be a learned profession not because of the guilty use of naughty Latin but because a great deal of learning is required for a person to be a good and effective lawyer. Indeed there is now in existence a much greater quantity of material that needs to be known of and understood by the practising lawyer than there was in Coke’s day. But that material is being adulterated and contaminated by misguided meddling on the part of the powers that be. Useful verbal landmarks are mindlessly demolished.

A recent example concerned the *Mareva* injunction, named after the case that gave it birth.¹⁸ John Fordham says in a recent article:

“Most recently, and regrettably, there has been an attempt to abolish the *Mareva* name in favour of the allegedly more plain English ‘freezing injunction’. But, *Mareva* has stuck . . .”¹⁹

¹¹ Richard Harrison, “Linguistics and litigation” 149 NLJ (October 8, 1999) 1491, emphasis added.

¹² Co Litt 11a.

¹³ Francis Bacon (1561-1626), *Collection of Maxims*, preface.

¹⁴ 4 Geo 2 c 26.

¹⁵ *Smith v Gardner Merchant Ltd* [1998] 3 All ER 852 at 865.

¹⁶ *Croke’s Reports* (1603–1625) 508.

¹⁷ *Ballard v North British Rly Co* (1923) SC (HL) 43 at 56.

¹⁸ *Mareva Compania Naviera SA v. International Bulk Carriers SA The Mareva* [1980] 1 All ER 213.

Word-mongering in the Family Division

The Courts Act 2003 s 49 provided a new version of the Magistrates' Courts Act 1980 s 67. The new version says that magistrates' courts sitting for the purpose of hearing family proceedings are to be known as family proceedings courts. It provides power to make rules of court for family proceedings, after consultation with the Family Procedure Rule Committee. The Family Procedure (Adoption) Rules were made in October 2005. The next stage is to complete the process for all family proceedings. For this purpose a consultation process has been under way. The Ministry of Justice has published a response to the consultation²⁰, upon which I now propose to draw.

The consultation paper had set out "modernisation of language" as one of the objectives of the new rules. To this CAFCASS in Wales wisely said: "Agree in principle, but the language and terminology of separation and divorce is now embedded in our culture and people have come to understand certain terms..."

It was proposed that in divorce proceedings the term "petitioner" should be replaced by "applicant". The Legal Services Commission said this might cause confusion: "the applicant (petitioner) may not be the applicant to an application in respect of children or financial issues". The Commission added that there would need to be a uniformly recognised way of distinguishing between the applicant (petitioner) and the applicant in relation to any particular application.

Another question was: Do you agree that the new rules should adopt a single term "respondent" in place of "respondent", "co-respondent" and "party cited"? 51% of respondents agreed that the new rules should adopt a single term. 37% said "no". Several respondents believed that such a change would lead to "unnecessary confusion". Nicholas Mostyn QC said "Certainly not. They describe entirely different things." The Law Society agreed with him. The Family Justice Council said:

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"...respondent is still confusing when the respondent to the petition is also the applicant in a financial application. A return to the use of "Husband" and "Wife" would be less confusing though provision would also have to be made for civil partners."

It was proposed that in divorce proceedings the historic terms "decree nisi" and "decree absolute" should be replaced by "conditional order" and "final order". The Family Justice Council objected:

"[These] are both terms that are used extensively in other areas of law and [the change] could cause more confusion. If a client is asked whether they have their decree absolute it is generally well understood that this refers to a particular part of the divorce process. If a client is asked whether they have their "final order" it will not be clear whether divorce proceedings, the financial aspects or even children matters are being referred to."

The Legal Services Commission said: "The term "final order" has the disadvantage that it could be understood to mean any final, as opposed to interim, order".

Respondents to the consultation were asked whether they agreed that the term "ancillary relief" should be replaced by "financial order". 24 agreed, many commenting that this is more likely to be understood by court users. The Legal Services Commission said:

"...the use of the term "financial order" may be insufficiently precise/detailed – this could obviously be understood to mean any financial order, as opposed to an order ancillary to divorce, judicial separation or nullity..."

¹⁹ John Fordham, "Disarming litigation terrorists" 158 NLJ (May 9, 2008), pp. 649-650 at 649.

²⁰ CP(R) 19/06, 22 February 2008.

Three respondents considered that the term ‘ancillary relief’ should not be replaced. Richard Todd (barrister) said: “...I have never heard of any difficulty with the established expressions - there will be some confusion when there are two acknowledged expressions to describe the same thing”.

A further question was: do you agree that all financial proceedings, including ancillary relief proceedings, should come under the term “financial remedy”? 31 respondents commented on this. 28 agreed with the use of this term. Just three respondents disagreed. Dyfed Powys Family Panel Chairpersons said: “No - should be termed ‘financial arrangements’. The word ‘remedy’ is too adversarial”.

Other terms were proposed for replacement. One practitioner suggested difficulties with the terms “prayer”, “suit”, “dissolved”, “periodical payments” and “maintenance”. Others suggested that the following terms should be replaced by the term shown in brackets:

- “*ex parte*” (“without notice”)
- “leave” (“permission”)
- “interim” (“temporary”)
- “acknowledgement of service” (“response”)
- “answer” (“defence” or “reply”)
- “cross petition” (“application for a divorce order”)
- “periodical payments” (“maintenance”)
- “issue” (“start”)

The Ministry of Justice say they intend to proceed with the amendments listed with the exception of changing “maintenance pending suit” to “maintenance pending outcome of proceedings”, which needs more work. They say many consultees have commented that the terms “conditional order” and “final order” may be confusing as they are used in other areas of law. “However on balance we consider that these terms are simply expressed and, in the context of the rules, are clear to understand.”

A narrow majority supported the one term respondent rather than the terms “co-respondent” and “party cited”. It is proposed to follow this majority. It is felt that greater certainty would be achieved with the term “2nd respondent” for parties previously known as “party cited” and “co-respondent”.

Another proposal was that the term “affidavit” should in some cases be replaced by “statement of truth”. 31 respondents commented on this. 22 agreed that it should be so replaced. One added that time and cost would be saved, given that a statement of truth “is more practicable and convenient”. Many commented that parties would not have to pay additional solicitors’ fees or take a trip to the court in order to get an affidavit attested. Four respondents added that in certain circumstances the courts should be able to require an affidavit. Five respondents said that affidavits should not be replaced. Judge John Platt argued that “the CPR require affidavits in some cases and affidavits are appropriate where a change of status follows and divorce orders are being made without parties coming to court”. However, the Ministry of Justice agree with the majority response and intend to replace affidavits by statements of truth. “We believe it would simplify procedure and reduce the likelihood of delay without affecting the importance the court places on verifying the truth of evidence given”.

Conclusion

I will not attempt to comment extensively on the above findings. I have set them out at length so that readers can judge for themselves. My own submission is that they show in pitiless detail the folly of this sort of unnecessary tinkering with the language of the law. There will not in fact be increased simplicity from this exercise; only increased confusion. The objective is misguided, because there is no way that lay persons can be enabled to understand the

minutiae of legal process. They are safer if that is left to the experts; and the experts can only be hindered by interference of this sort. The public interest will suffer.

The truth is that there is a battle going on between misguided outsiders who would ignorantly dumb down the law and knowledgeable insiders who are aware that the law needs for the public good to be preserved as a learned profession. This is all part of the fight some have been waging for years against thoughtless iconoclasm by politicians and civil servants. It is not limited to our own country: see for example my 1994 article relating to New

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Zealand titled “If It’s Not Broke Don’t Fix It”.²¹ A popular tabloid recently said in a leader that voters “are sick of the way politicians ignore public opinion, ‘fix’ things that ain’t broken and make a complete horlicks of everything they touch”.²²

I referred above to outsiders and insiders. This had in mind the way in recent years lawyers (like other professionals) have lost control of their own profession in favour of state organisms. I warned of the danger of this in my book referred to above written nearly forty years ago. There is much that could be said about this area, but I only have space to mention a letter in the Times some years ago in which I said:

“In a book published in 1969, and in various articles since, I have advocated the setting up of a Council of Consultant Professions. The council would promote professionalism, provide common services to the professions and act as their spokesman on questions of general concern.”²³

This suggestion was never acted on, which is symptomatic of the failure of the law and other consultant professions to act vigorously in their own defence (and ultimately to the benefit of the public, who need free professions). The situation is different in some other countries, for example Canada²⁴.

In 2003 I asked a leading lawyer, Lord Phillips of Worth Matravers MR, whether he thought the law is still a learned profession. He replied, after some pressure, in the affirmative. Whether it will continue to be that for much longer is doubtful.

²¹ 15 Stat LR (1994), pp. 164-169, www.francisbennion.com/1994/004.htm. This was a review of the New Zealand Law Commission’s proposals for changes in the format of New Zealand legislation.

²² *Daily Mail*, May 5, 2008, p. 12.

²³ *The Times Business News*, January 9, 1978.

²⁴ See Beverley G. Smith, Professor Emeritus, Faculty of Law, University of New Brunswick, *Professional Conduct For Lawyers And Judges*, Fredericton: Maritime Law Book, 3rd edn 2007, chap. 1 (for text see www.francisbennion.com/2002/nfb/002.htm).