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Lawyers and Latin

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Aimwell: Then he has been in England before?
Boniface: Never, sir, but he's a master of languages, as the saying is - he talks Latin; it does me good to hear him talk Latin.
Aimwell: Then you understand Latin, Mr Boniface?
Boniface: Not I, sir, as the saying is, but he talks it so very fast that I'm sure it must be good.

George Farquhar,
The Beaux' Stratagem (1707) act iii, sc. 2

Mr Unsworth wrote in to this journal - tongue in cheek, I expect - to draw attention to the use of Latin in the *Justice of the Peace Law Reports* (Correspondence, p.715 *ante}.* He observed, correctly no doubt, that the expression *inter alia* regularly graces those reports. Perhaps, as editor-in-chief - and, more especially, as one with an interest in some of the broader issues affecting law and language - I may be permitted a few remarks. My intention is not to defend the particular use of Latin to which Mr Unsworth alludes. There is no need to do so. *First,* to the extent that there exists a veto on legal Latin, Lord Woolf's edict only really applies in the civil context ... for the time being (it is of course known that English criminal procedure is to be re-worked, presumably much after the manner of its civil counterpart): the contents of the *Justice of the Peace Reports,* however, are predominantly criminal. *Secondly,* it hardly needs stating that *inter alia* is far from being a specifically legal tag. Doubtless, its extirpation would afford fleeting pleasure to the myriad admirers of the sanitized, surrogate terminology now deployed in the Civil Procedure Rules. Nevertheless, it does seem pretty pointless to outlaw, solely in the legal context, an expression in comparatively wide general usage - and, in particular, one which, like *ceteris paribus, mutatis mutandis* and many others (*aliter, inter alia*), successfully contracts a less gainly English expression into a trim, and wholly memorable, Latin jingle. *Thirdly,* it may not be entirely inapposite to point out that even Lord Woolf himself has had resort to the expression *inter alia* in his speeches (see, eg, *Ashworth Security Hospital v. MGN Security Ltd* [2002] UKHL 29 at [48]; [2002] 1 WLR 2033).

All the same, some interesting issues surround. Mr Unsworth's letter, particularly were we to take as our point of reference those Latin words and phrases which *are* specifically or uniquely employed by lawyers in their calling.

The Problem with Latin

The common objections to the use of Latin scarcely need to be rehearsed. Latin is considered by some to be an elitist language, which is familiar to an ever smaller portion of the population, which fosters general incomprehension - and which is even a bit pretentious, to boot. As I endeavoured to show in an article, published in this journal a few years ago (*Does Latin Impede Legal Understanding?* (2000) 164 JPN 995), upon investigation these charges look to be either unfounded or largely trivial. It seems incontestable that the Latin terms and tags to which exception has sometimes been taken are simply one part of a complex but effective technical shorthand of a learned profession. Most trades and callings, whether manual or intellectual, develop such languages. They can of course appear arcane and inaccessible to the outsider. In the case of the law, the fact that we are dealing with Latin, a 'dead' language - associated in some minds with private education, Empire, high culture and privilege - helps make the charge of elitism stick.

As far as the dead and arcane aspects of Latin are concerned, in my experience as a teacher of Law over many years, students simply do not find the occasional Latin maxim or latinized term a major obstacle. When it comes to absorbing English legal principles, it appears to make no

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difference whether or not students happen to have a classical background. (For that matter, since my University happens also to be just about the last in which Roman law remains a compulsory subject for all first-year Law undergraduates, I might add that an absence of classical learning does not seem to impede students' ability to comprehend and retain

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the principles of Roman law either.) Despite the fact that all too few students nowadays would have spoken Latin at home, the truth is that they encounter no more difficulty in acquiring skill in handling Latin maxims - *in pari delicto ..., ex turpi causa...,* or in utilizing latinate terms - *certiorari, mandamus, actus reus, mens rea* ..., than in manipulating the more obviously home-grown aspects of law - Mareva injunctions, the trust, legal capacity ... Even in the combative 1960s and early 1970s, when little received learning could be taken for granted, I cannot recall protests at legal latinity.

As I argued in my earlier paper, legal Latin cannot really be demonstrated to have impeded legal understanding to a significant degree. Even on those rare occasions when the courts are claimed to have been led astray by the Latin label of a doctrine or concept - *res ipsa loquitur, res gestae, non debet bis vexari...,* and *volenti non fit injuria* are the most frequently cited offenders - all turn out to be explicable on quite other grounds. Latin is not especially prone to induce error. Nor ought it to be made the scapegoat for ignorance and sloppy thinking.

Might there have been any particular virtue in retaining the latinate terms in our civil procedure, or for continuing to do so in other contexts? On what is probably the most recent occasion on which a member of our Court of Appeal, in *Fryer v. Pearson* (2000) March 15, fulminated against a Latin brocard - *in specie, res ipsa loquitur* - May, LJ declared that this concept could be just as effectively expressed in English. That it can be translated cannot be contested. I do wonder, however, whether the English rendering produces quite the same effect. The virtue of many of our Latin tags - and, who knows, one reason why they found an enduring place in the English legal lexicon is that they both tend to have pleasing resonances and operate as intelligible signals in legal discourse, conveying instantly and arrestingly, in just a few words, complex legal concepts. I am not at all sure that counsel saying, 'M'lud, I submit that the thing speaks for itself,' has anything like the impact of 'M'lud, I submit that the doctrine of *res ipsa loquitur* applies here'.

And when Judges do affect to be uncertain as to the meaning of perfectly well-known Latin tags, their protestations ring a trifle hollow. Was Ferris J entirely serious when, in *Interlink Express Parcels Ltd v. Night Truckers Ltd and Parker* (2001) 165 JP 166 at [18], he said:

> 'The House of Lords recognized that an employee engaged by someone whom it described as the general employer might be transferred to another person, referred to as the temporary employer, in such a way as to make the temporary employee of the temporary employer *'pro hac vice*\ which I understand to mean for a limited purpose ...'?

I am inclined to doubt it.

The principal argument for outlawing Latin obviously has to do with legal 'PR'. If the terms lawyers employ sound remote, the public will assume that the law is remote. The law, then, needs to get up close and personal. For myself, I am unpersuaded by the force of this argument. Laymen's law is a recurrent pipe dream of social reformers. As long ago as the Workmen's Compensation Act 1897 Parliament attempted to draft legislation in language that would make law easy to apply and intelligible to all. As Lord MacMillan was to note, 40 years on, it did nothing to ease the application of the law; indeed, quite the contrary (see, *Law and Other Things* (1937: Cambridge, Cambridge University Press) pp. 159ff). The French Civil Code, it was sometimes said, was drafted in language of pellucid clarity so that the copy, which it was hoped would stand on every peasant's mantle-shelf, would tabulate a civil law immediately accessible to all. To quote the great Molesworth, 'as any fule kno' French civil law is not remotely intelligible through the sole medium of the Civil Code (Willans & Searle, *Down with Skool,* 1953: London, Max Parrish.)

Is it actually true that the public at large finds legal terms hard to understand and the law therefore remote simply because of its occasional lapses into what Ronald Firbank termed 'the harmonious Latin tongue' *(Concerning the Eccentricities of Cardinal Pirelli* (1926: London, Grant Richards) ch.8)? To a degree, this must be true. It is to be expected. Some legal concepts are hard to understand, in no matter what language they are drafted. But the run-of-the-mill Latin that one encountered on a regular basis would have held few terrors, even for the intelligent layman. One notes that, in his letter, Mr Unsworth acknowledged that personally he has no difficulty in understanding expressions like *inter alia.* His concern is rather for 'those poor souls whose Latin may be a bit shaky.' Is this solicitude really necessary, I wonder? I was much struck recently by

the fact that in its issue of February 21, 2004 that canniest and most populist of newspapers, *The Sun,* did not shrink from using legal Latin. For in Jeremy Clarkson's column we find the following:

> 'For 2,000 years the world ran on a Roman principal (*sic*) of law. *Volenti non fit injuria.* No injury is done to one who consents.'

The copy editor did not see fit to delete this reprehensible literary lapse. No reader, one would hope, wrote in protesting at the inclusion of some Latin in that typically thoughtful piece of journalism. In fact, the peculiar thing is that this passage in Mr Clarkson's article closely echoes passages to be found in contemporary High Court and Court of Appeal judgments (see *infra).* In the main, even technical legal Latin probably does not interfere with public understanding. After all, some Latin expressions, such as *habeas corpus,* have fully penetrated the public consciousness. Although few dare say so, the purge on Latin looks largely to have been cosmetic, an exercise in window dressing.

What do our Judges Think?

One aspect of the question which has not received attention hitherto is the attitude of the profession to Lord Woolf's initiative. Since publishing my earlier essay, I have been struck by the number of lawyers and Judges, at all levels, who, off the record, confess to regretting the recent abandonment, not to say outlawing, of what was relatively innocuous legal Latin. These are not simply the rebarbative, arch-conservative ravings of individuals anxious to preserve

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their exclusive professional arcana. More often they are evidence of bewilderment at the wilful and, to a great degree, pointless impoverishment of the vocabulary of English law. No one, of course, will go to the barricades over this. But if one cared to look, in the law journals and judgments of the courts some lawyers have made little secret of their true feelings.

Take Lord Cooke of Thornden's recent paper in the *Law Quarterly Review* where, in the course of a lecture, he included the sentence: 'I should resist the temptation to add *simpliciter,* for fear of the wrath of Lord Woolf.' Just to make sure that everyone got the point, he later tossed in a second *boutade,* 'But, *pace* Lord Woolf, *solvitur ambulando' (The Law Lords: An Endangered Heritage* (2003) 119 LQR 49 at pp.54 and 66). It will be obvious to all what really lies behind this amiable joshing.

And this is repeated at every level of the law. In *R. v. Hemmings (Proceedings)* (2002) November 6 at [65], for example, we find counsel making teasing reference to Lord Woolf's ban on Latin:

> *'Mr Kovatz:* The European Convention on Human Rights was designed to enable individuals to seek redress for wrongs which they alleged that they had suffered. It was not designed to allow a sort of *actio popularis,* if I may be excused the Latin, in order for a well-intentioned citizen to try and benefit the public by introducing some new system.'

Lower court Judges, too, have tried to make light of the ban. Thus, *via* Hale LJ's judgment in *Sparks v. HSBC pic* [2002] EWCA Civ 1942 at [16] we find the following:

> 'The Judge reminded himself of the evidence ... on this point. He concluded: T find that really, although I remind myself of course I am dealing with liability and not *quantum,* if it is to be taken into account at all, it really does, I am sorry to say for the claimant, come within the definition of *de minimis,* if one is entitled to use the Latin expression still'.'

Better still, we learn from Rimer J's judgment in *Baling Family Housing Association Ltd v. McKenzie* [2003] EWCA Civ 1602 at [10]; [2004] HER 21 that the Judge against whom appeal was taken had said of a notice to quit, that it was

> *'prima facie* a document that means what it purports to say, and yields an intention that is patent on its face. In the good old days the doctrine used to be, as expressed in Latin, *omnia praesumuntur rite esse acta* - that things are presumed to have been done correctly unless the contrary is proved.'

Some first instance Judges, too, gently rebel. Burton, J, for instance, has more than once made a point of referring to the original Latin as well as the modern rendering of *de bene esse:*

> '... So while sceptical at this stage as to whether I would be likely to grant permission to

amend the judicial review claim form in that regard, I adjourned such application to the end of the hearing on the basis that all matters would be heard under reserve, which I think is the proper translation of the Latin which we are not allowed to use, *de bene esse' (R (on the application of Murray) v. Hampshire* CC *(No.l)* [2002] EWHC Admin 1401; [2003] JP L 224).

'Acting on Mr Berry's behalf has been a former barrister called Dr Adoko. He has today made submissions before me which I have heard under reserve, as I have described the old Latin phrase, *de bene esse, ...*' (*In the case of AFP Berry* [2002] EWHC Admin 1718 at [3])

Neuberger J, too, affected what I assume to be mock contrition in *Maden v. Clifford Coppock and Carter* [2004] EWCA Civ 1037 at [36]:

'...The essential features, at the risk of being criticised for using Latin twice in one sentence, are that, as between Mr Maden and Cliffords, the Goodwin action was *res inter alias acta,* and, from the standpoint of the litigation and settlement in the Goodwin action, Cliffords' negligence in 1996 was *novus actus interveniens.'*

Nor, it would seem, are appellate Judges averse to having a little dig. In *R. v. Wacker (Judgment No.2)* [2002] EWCA Grim 2129 at [5]-[7], for example, this exchange took place between Judge and counsel:

'Kay LJ: Let me tell you what our provisional view is. We are minded to certify there is a point of general public importance but we think the question ought to be phrased a little better ... *Mr Russell-Flint:* I am sure.
Kay LJ: than the two questions. I drafted one but it had Latin in it. Since we are not meant to use Latin, I am going with the version Ouseley J had put forward ...'

Tuckey LJ, in *R. v. Pluck* [2002] EWCA Grim 3166 at [28], similarly let slip, 'It could have been elaborated and might, if Latin is still permitted in the criminal courts, have included the words *prima facie* ...' And is there just a trace of the wistful in Clarke LJ's observation in *Williams v. Camarthenshire* CC [2002] EWCA Civ 1127 at [17],

'We can see no error of law. There is a well-known Latin phrase, which translates into English as: 'it is in the interests of justice that there should be an end to litigation'?'

The foregoing passage from Clarke LJ's judgment, indeed, neatly illustrates the point made earlier, that the Latin rendering of legal maxims is often more arresting than the lifeless English translations to which one is now supposed to have recourse. Even the Master of the Rolls, Lord Phillips of Worth Matravers, made jocular reference to Lord Woolf in *Vowles v. Evans* [2003] EWCA Civ 318 at [30]; [2003] 1 WLR 1607:

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'In *Assicurazioni Generali Spa v. Arab Insurance Group* [2002] EWCA Civ 1642 this court reviewed the considerable jurisprudence that warns appellate courts against interfering, unless there is very good reason, with the findings of primary fact based by a trial Judge on oral evidence. Mr Murphy referred us to this authority with such enthusiasm and at such length that, but for Lord Woolf's prohibition on resort to Latin, we might have been minded to conclude that he saw this as a *'tabula in naufragio'*. The lesson is, nonetheless, a valid one.'

The above, I should emphasize, are just random samples. They, by no means, represent the complete picture. They do, however, confirm one's impression that not all lawyers are comfortable with the recent purge on Latin expressions.

In fact, one can go further. We would be deceiving ourselves to imagine that English Judges have foresworn Latin in their judgments. Quite the contrary. In Collins J's judgment in *Prophet v. York City Council* [2003] EWHC Admin 1448 at [10], we find the following defiant sentence:

'So far as the highway is concerned, the expression *de minimis,* even though Latin, is one which seems to me to cover the point.'

On numerous occasions, the courts just cheerfully continue using Latin words and phrases regardless. Within the judgment of Laws, LJ in *Hewden Tower Cranes Ltd v. Yarm Road Ltd* [2003] EWCA Civ 1127 at [40]; (2003) Con. LR 1, for instance, we find this passage

'...Thirdly, such a result is supported by principle, since whereas the cl.ll indemnity is perfectly general, cl.13 is dealing with the distribution of contractual responsibility on the specific context of the hiring of plant; and the rule, crisply expressed in the Latin maxim *Generalia non specialibus derogant,* is that the general is taken to give way to the specific.'

Latin, then, continues to slip naturally into the English judgment - phrases like *in pari delicto* (*Feasey v. Sun Life Assurance Company of Canada et al* [2003] EWCA Civ 885 at [86]; [2003] 2 All ER (Comm.) 587 *per* Waller LJ; *Standard Chartered Bank v. Pakistan National Shipping Corp*. [2001] QB 167 at [126] *per* Sir Anthony Evans), *solvitur ambulando* (*Inter Lotto (UK) Ltd v. Camelot pic* [2003] EWCA Civ 1132 at [41]; [2003] 4 All ER 575 *per* Carnwath LJ), *omnia praesumuntur contra spoliatorem* (*IS Innovative Software Ltd. v. Howes* [2004] EWCA Civ 275 at [92]; (2004) (13) LSG 35 *per* Neuberger J), *falsa demonstratio* (*Internaut Shipping GmbH v. Fercometal Sari* [2003] EWCA Civ 812 at [73]; [2003] 2 Lloyd's Rep. 430 *per* Rix LJ), *ex facto oriturjus* (*Hayes v. DPP* [2004] EWCA Grim 277 at [16] *per* Buxton LJ; *Brown v. Stott* [2001] 2 WLR 817, at 836C *per* Lord Bingham of Cornhill), *falsa demonstratio non nocet (Beale v. Harvey* [2003] EWCA Civ 1883 at [26] *per* Peter Gibson LJ), *ex turpi causa non oritur actio* (*Hewison v. Meridian Shipping Sevices Pte Ltd* [2002] EWCA Civ 1821 at [23]; [2003] PIQR P17 *per* Clarke LJ), and many more.

More pointed classical references, too, make occasional appearances. So, in *Knauf UK GmbH v. British Gypsum Ltd (No.l)* [2001] EWCA Civ 1570 at [71]; [2002] 1 WLR 907, Rix LJ avoided the hackneyed *tabula in naufragio* with the following gem of learning:

'In truth, the clause was not a wooden plank grasped in desperation by a drowning litigant nor was Peters shipwrecked (cf. *'si tabulam de naufragio stultus arripuerit'*, Cicero, *Off.* 3, 23). The ultimate merits of the litigation are wholly unknown...'

Once in a while, a Judge may even go so far as to suggest that the Latin rendering of a legal maxim is preferable to its English counterpart. Laws LJ in *Smith v. Bridgend CBC* (2000) BCC 1155 at [35] stated:

'... It is not to the effect that the more general provision has to be confined to the scope of the more particular: it is, rather, that the scope of the particular is not to be cut down by the terms of the general provision. The Latin makes it clear: *generalia non specialibus derogant...*'

Just once in a while the court may overreach itself. I am not sure that in *R. v. Deering* [2003] EWCA Crim 1203 at [32] Kay LJ was necessarily correct to refer to 'the Latin maxim of *res gestae.*' But finally, just for interest, the reader may care to count up the number of times Auld LJ incorporates the term '*simpliciter*' into his judgment in *Independent Assessor v. O'Brien et al* [2004] EWCA Civ 1035. .

Ave! Imperator, morituri te salutant

For all its intended modernity, in several ways this new-found desire to regiment English legal vocabulary looks odd. Needless to say, it was not a consequence of widespread consultation.

On the one hand, the banishment of Latin from English judgments looks to be a hopeless task, at least in the short-term. The problem goes deeper than what may be a few recalcitrant Judges, academics and practitioners who have yet to be fully won over to the new barbarism. Given that courts in the past freely employed Latin, unaware of the crime they were committing, and that many of their decisions will continue to be referred to as precedents into the foreseeable future, the effect of introducing a new 'English' terminology is to compel the lawyer to be conversant with not one, but two languages. Thus, one finds in Simon Brown LJ's judgment in *R (on the application of Redgrave) v. Metropolitan Police Commissioner* [2003] EWCA Civ 04 at [15], the following passage in which the old and the new ways combine:

'Lord Lane CJ in [*R. v. Statutory Committee of Pharmaceutical Society of GB* [1981] 2 All ER 805] posed the questions at p. 808: '... is the Latin maxim relevant? ... The full version of the maxim ... is as follows; *nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa,* or in its alternative form: *nemo bis punire pro uno delicto* (no one ought to be punished twice for the same offence)'.'

For a further example, see eg, *Brotherton v. Aseguradora Colesguros SA* [2003] EWCA Civ 705 at [24]; [2003] 2 All ER (Comm.) 298 *per* Mance LJ, quoting the words of Lord Mansfield in *Carter v. Boehm* (1766) 3 Burr. 1905). The day when all Latin will finally have been expunged from the annals of our law still looks far off.

Another striking point is that, when interpreting words in a statute - probably, the commonest exercise performed in a court of law today - because much of our language has Latin roots, the court will make reference to the Latin origins of the term under scrutiny. In this context, it would seem that Latin actually proves of utility, when Judges resort to it in an endeavour to make sense of English vocabulary. In *Young v. O'Connell* (1985) *The Times*, May 25, for example, Glidewell LJ found it helpful to look at the Latin root of the adjective 'ancillary':

> 'As I pointed out in argument, the root of 'ancillary' is the Latin word *ancilla*, which means a maidservant. The dictionary meaning of ancillary in the *Shorter Oxford Dictionary* is 'subservient or subordinate'. In my judgment, in its meaning in this Act that is the sense in which the word must be understood.'

Similarly, Munby J, in *R (on the application of Churchhouse) v. IRC* [2003] EWHC Admin 681 at [5], in discussing the solicitation of a reward, described the claimant as 'motivated in part at least by considerations which are, in the original sense of the word, mercenary (*OED:* 'serving for wages or hire', from the Latin *merces, ...*') See also Nourse LJ's inquiry into the origins of the word 'curtilage' in *Dyer v. Dorset* CC [1989] 1 QB 346, 358B. Latin will still be drawn into service for certain purposes, just as one would hope that Judges will continue from time to time to enliven their judgments with a well-chosen classical allusion.

The oddest aspect, perhaps, of recent moves to outlaw Latin terminology from English law is the notion of 'legislating' this subject-matter at all. It is utterly alien to English traditions. Our language has always been in a state of free association, so to speak; it has been allowed to absorb whatever foreign matter might happen its way and adhere. In contrast, one could cite the case of France, a country with a very different linguistic tradition. The *Academie Francaise,* ever since it received its letters patent in 1635, has been the guardian and repository of the French language, legislating on correct usage, normally through the medium of its *Dictionnaire.* This background, of course, would serve to explain the scale of apparatus assembled as of 1975 in a bid to expunge *le franglais* from many areas of French social existence (see generally, R. Munday, *Legislating in Defence of the French Language* [1985] *Cambridge Law Journal* 218).

Curiously, in France too there have been attempts to reduce the amount of Latin employed in legal texts, but the surprising thing is Latin's unexpected durability (see *Hortus deliciarum, Au jardin des lettres latines du langage du droit,* in *Leges tulit, jura docuit: Melanges Jean Foyer* (1997) pp. 53ff.). More generally - and this is a personal viewpoint - at root there is something fundamentally illiberal about legislating language. After all, it is often one of the by-products of totalitarian regimes - there are plenty of well-known examples, but I will restrict myself to mentioning Mussolini's henchman, Achille Starace (1889-1945), who sought *inter alia* to expunge words like 'hotel' and 'foyer' from Italian usage. Purges, then, have their dark side. This one also has its mildly comic side. For Lord Woolf chose to proclaim his blitz on Latin during a speech delivered to the American Bar Association, which was making one of its periodic visits to London. One can only surmise at the puzzlement it will have afforded his transatlantic audience to learn that we were abolishing forthwith the use of the term *certiorari* and replacing it with what was claimed to be a more intelligible neologism, 'quashing order', given that *certiorari* - and a great deal of other Latin besides - is in regular and untroubled legal use within the United States. No one can doubt in which direction the wind is currently blowing. Moves to expurgate Latin from the legal tongue will doubtless continue. To that degree, I freely concede that this issue represents something of a tempest in a teapot - or, as we used to say, *de minimis non curat jurisconsultus.* There is a passage in the late George V. Higgins' *The Progress of the Seasons* (1989: New York, Henry Holt & Co.), a fine book on the subject of baseball, in which he drops the remark,

> 'Charlie was buried in Latin. My father ordered him laid out in the front room.'

Somehow, that just about sums up the fate of England's legal Latin.