LANGUAGE: THE LAW'S ESSENTIAL TOOL

The Hon Justice Margaret J Beazley AO*

Introduction

1 The law is a wonderful and exciting profession of which Sir Ninian Stephen was the exemplar. A profession, by definition, carries with it the concept of service to others. There are, of course, many professions, some of them not so honourable. Indeed, there are those who suggest that law is one such profession. The old joke 'how many lawyer jokes are there?' elicits the response 'only three – the rest are true stories' whilst the question 'how many lawyers does it take to change a lightbulb?' is met with 'three – one to climb the ladder, one to shake it and one to sue the ladder company'.

2 In keeping with this thrice times theme, I will first examine the role and impact that language has on law and legal concepts. Secondly, I will explore the way that concepts in the law have both remained constant whilst at the same time legal concepts and principles have developed through the use of language. Finally I wish to say something about the venerable jurist Sir Ninian Stephen, who passed away late last year, and the legacy he leaves us.

3 Before doing so, it is always salutary to remind ourselves that as lawyers, we play a central role in the administration of justice. Stated in slightly different terms, we are the custodians of the rule of law, an organising principle of our democratic society. Despite its ancient foothold in the laws of England, many of which themselves derive from the laws of Ancient Rome, the law continues to evolve, with sensitivity to today's issues and in a manner that provides us with intellectual challenges and new horizons throughout our legal careers. At the outset, however, it is necessary to make the following disclaimer. This paper is not an excursus on legal history or culture per

* President of the New South Wales Court of Appeal and Adjunct Professor, University of Notre Dame, School of Law, Sydney. I wish to express my thanks to my Researcher, Brigid McManus, for her research and assistance in the preparation of this paper.

se, nor an examination of the principles of law but rather of the relationship between language and the law.

4 It is self-evident that law comes into being and is given form by language. Sir Ninian is praised for judgments that were clear and concise. One would hope that all legal writing was thus. But like lawyers and the law itself, the language of the law often has harsh critics. In *Bleak House*, Charles Dickens likened legal language to 'street mud which is made of nobody knows what … and when there is too much of it, we find it necessary to shovel it away'.[1]

5 One would have hoped that since those sharp words were written in the 1850s lawyers might have cleaned up their act. However, in a letter written on 27 January 1972, one solicitor wrote in the following terms to another solicitor in respect of a conveyancing transaction:

> Preparatory to the occurrence of completion herein, I furnish herewith for your approval:
>
> 1. the instant Memorandum of Mortgage in duplicate signed by the Mortagors and apposite witness consonant with your pertinent requisition.
>
> ...
>
> 3. The Mortgagor's authority respecting disposal of the advance noting that at completion we shall by endorsement thereon confirm our oral request when appointing completion herein.[2]

6 Language such as this is fodder to the sceptics who suggest that legal language is a tool fashioned for obscuring the true meaning of statements, documents and legal principle.[3] The sceptics are correct in referring to language as a tool. But rather than shrink from the barb, as lawyers, we should embrace it. Language is the tool by which we negotiate and create contracts. It defines principle and enables us to persuade others of our case. At a higher level of abstraction, language provides insight into the

[1] Charles Dickens, *Bleak House* (Bradbury and Evans, 1853) 153.
[2] Copy on file with author.
[3] Timothy A O Endicott, 'Law and Language' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 935, 939. There are also those who suggest that sentences in legal writing tend to be longer than in other disciplines and that their structure is particularly complex: see Risto Hiltunen, 'The Grammar and Structure of Legal Texts' in Peter M Tiersma and Lawrence M Solan (eds), *Language and Law* (Oxford University Press, 2012) 39, 41, 44.

jurisprudential basis of the law and how the law works in practice. In these various ways, language, used appropriately, aids and strengthens the rule of law.

The Language of the Law

7 Any discussion of the language of the law calls for some preliminary observations about the rich history of legal language, some of which has its historical roots in Latin. Terms such as *ratio decidendi*[4] and *obiter dicta*[5] are undoubtedly familiar, as would be the *nemo dat*[6] rule and the *ex turpi causa*[7] principle. Recently the High Court reintroduced the archaic legal term *felo de se* into the legal lexicon.[8] These terms, perhaps with the exception of the last, are well-known and the underlying principles which they expound are well-understood.

8 Although such Latin expressions are the source, in part at least, of the complaint that the law is inaccessible, we need not be overly apologetic about their use. We don't require doctors to give up terms such as tibia and fibula. Fibula, incidentally, comes from the Latin word *figo* which means fasten and in the 17th century a *fibula* was a buckle, brooch or clasp. Similarly botanists have yet to abandon the Latin names of plants. Take *monstera deliciosa* as an example, described in that scholarly online research facility Wikipedia as an *arum*, a genus of flowering plants within the *Araceae* family, which describes an epiphyte with aerial roots.[9] I trust I have made my point!

9 The continued use of terms such as *ratio* and *obiter* reflects not only the deep historical roots of our law but the continuity of the legal concepts and principles they represent and thus their ongoing relevance. This is unsurprising in our common law

[4] Meaning 'the reason for deciding'.
[5] Meaning 'by the way'.
[6] Meaning 'nobody gives'. The full expression of the rule is *nemo dat quod non habet*, meaning 'nobody gives what he does not have'.
[7] Meaning 'from a dishonourable cause'. The full expression of the principle is 'from a dishonourable cause an action does not arise'.
[8] *IL v The Queen* (2017) 91 ALJR 764, 769-72. *Felo de se* is described as a 'peculiar species of felony, a felony committed on oneself': William Blackstone, *Commentaries on the Laws of England* (1769) Book 4, 190.
[9] Wikipedia, *Monstera Deliciosa* (11 November 2017) <https://en.wikipedia.org/wiki/Monstera_deliciosa>.

tradition based on precedent,[10] but in any event a sound case should be made before such well entrenched terms are abandoned.

10 The old and embedded traditions of the law can also be found in the continuing influence of the language used by the earliest common law lawyers. Take, for example, the Elizabethan jurist Sir Edward Coke, who is quoted as saying that 'justice must have three qualities', it must be free, full and speedy.[11] This notion finds similar expression in s 56 of the *Civil Procedure Act 2005* (NSW), which provides that the overriding purpose of the Act is to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'.

11 Notwithstanding the simplicity of this language, the statutory injunction in s 56 is not an idle or catchy aphorism. It is central to basic but important procedural issues such as whether a party will be granted an adjournment or how many times a party will be permitted to amend a statement of claim or other legal process. The requirements of the section play a key role in ensuring a successful commercial environment, as the High Court explained in *Aon Risk Services Australia Ltd v Australian National University*.[12] In that case, Justice Heydon, after observing that 'commercial life depends on the timely and just payment of money', stated that 'the efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce'.[13]

12 The failure to deliver outcomes in accordance with the statutory injunction embedded in s 56 also affects how people feel and react when they are exposed to the legal system. This is an important consideration in maintaining respect for justice as administered by the courts.[14] Allsop J (as his Honour then was) was alert to this in *White v Overland* when he observed: '[l]itigation is not a game. It is a costly and stressful, though necessary evil'. Section 56 and the observations made in *Aon Risk Services* and *White v Overland* are directed as much to the profession as they are to the administration of justice by the courts. As lawyers we not only have extraordinary

[10] Peter R Macleod, 'Latin in Legal Writing: An Inquiry into the Use of Latin in the Modern Legal World' (1997) 39(1) *Boston College Law Review* 235, 248–51.
[11] *Klopfer* 386 US 213 (1967), 224-225 quoting Sir Edward Coke, *The Second Part of the Institutes of the Laws of England* (Brooke, 5th ed, 1797) 55.
[12] (2009) 239 CLR 175.
[13] Ibid [137] (Heydon J).
[14] [2001] FCA 1333, [4]. See also *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 [100]-[103]; *Richards v Cornford (No 3)* [2010] NSWCA 134, [42] (Allsop P).

privileges, we also have enormous responsibilities in ensuring that, in its everyday application, justice bears the hallmarks identified by Sir Edward Coke.

Linguistic Theory and Legal Language

13 Academics and judges alike have analysed and commented upon the use of language in the law, although it is fair to say that academics tend, appropriately, to focus on linguistic theory whilst judges are more concerned with language in a practical sense. However, the one is integral to the other.

14 The work of the British legal philosopher Professor HLA Hart suggests that there are four concepts that provide insight into the nature of language and how language can elucidate the nature of law: context; diversity; vagueness; and the performative use of language. It is the first three of these that I wish to discuss in this paper.

15 'Context' is a simple, indeed, obvious, concept. It applies where the meaning of a word depends on the circumstances in which it is used.[15] Consider the difference in the meaning of the word 'prune' depending on its use. Used as a noun, the word refers to a dried fruit. Used as a verb, it means 'to trim'. We can only make sense of which meaning is intended by considering the word in its context. This does not only mean the words surrounding it in a sentence, which serve to characterise its grammatical meaning. It may be the geographical location in which the word is uttered or the identity of the speaker which provides the context.[16] The point is that context provides insight into the intended meaning of the word used.

16 Understanding context is crucial for good lawyering and good judging. Perhaps one of the clearest examples of why context is important is when a word is used incorrectly. In the English case *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*,[17] Lord Hoffman observed that '[i]t is a matter of constant experience that people can

[15] Endicott, above n 3, 947.
[16] Unless of course it was a botanist speaking who could be using the word in either sense!
[17] [1997] AC 749.

convey their meaning unambiguously although they have used the wrong words'.[18] His Lordship explained that:

> We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying. No one, for example, has any difficulty in understanding Mrs Malaprop. When she says 'She is as obstinate as an allegory on the banks of the Nile,' we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like 'allegory'.[19]

17 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* concerned a tenant who had given notice to terminate two leases on 12 January 1995, pursuant to a clause which provided that the lease could be terminated 'on the third anniversary of the term commencement date'. The leases had commenced on 13 January 1992 and the trial judge held that, on their true construction, the date on which they could be terminated was 13 January 1995.

18 The Court of Appeal held that a notice to terminate stated to take effect on 12 January could not operate to take effect on 13 January. A majority of the House of Lords rejected this approach and held that the notices, objectively construed and bearing in mind their context, left no doubt that the tenant wished to terminate the leases on 13 January. As a result, although the date of termination was wrongly described as 12 January, the notices were effective to terminate the leases. Hence, context was used to give meaning to the language of the lease.

19 It is not uncommon for counsel appearing in matters before the court to offer a word and suggest it be given a meaning that overlooks the context in which it appears. This may be a word found within legislation or a term within a legal instrument, such as a contract or even a word uttered by a party to proceedings. A particularly striking example of a word being given a meaning removed from the context in which it was spoken is found in a recent case heard before the Louisiana Supreme Court.

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[18] Ibid 774.
[19] Ibid 774.

20 The case concerned a suspect in an interrogation, who told detectives to 'just give me a lawyer dog'. The Louisiana Supreme Court ruled that the suspect was asking for a 'lawyer dog' and as the state of Louisiana had no canine attorneys, the police were not required to stop questioning the suspect. This ruling overlooked not only the colloquial meaning of the term 'dog' but also the meaning given to the term by the suspect's full request. The suspect had said to the detectives: '[t]his is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog 'cause this is not what's up.'[20]

21 As this makes clear, failing to consider words within their context risks misconstruing them. If this occurs in the interpretation of a statutory provision or clause in a legal instrument, it risks giving the statute or instrument an effect it simply does not carry, and was not intended to carry. For example, terms in contracts must be construed in light of their commercial context.[21] Similarly, if we misconstrue case law in this way, the precedential strength of the common law may be compromised. And if we remove words said by parties, whether in civil or criminal proceedings, from their context, we risk undermining the administration of justice. Had the suspect in the Louisiana case been reprimanded for calling the police officer a 'dog', but provided with a lawyer, the administration of justice would have been rightfully served.

22 The second concept, diversity, is linked to the context principle. It recognises that variations in context can extend the application of a word in diverse ways. A word may have a single, clear application while its meaning varies in different contexts. For example, we are all familiar with adopted children referring to their adoptive parents as 'Mum' and 'Dad', although if one heard those terms being used without knowing the context, it is likely to be assumed that those being referred to were the child's biological parents.

23 The meaning that a word may have in the legal context may vary from the meaning commonly understood by the lay person, or may vary between different areas of law

[20] Tom Jackman, 'The Suspect Told Police "Give Me a Lawyer Dog." The Court Says He Wasn't Asking for a Lawyer.', *The Washington Post* (online), 2 November 2017 <https://www.washingtonpost.com/news/true-crime/wp/2017/11/02/the-suspect-told-police-give-me-a-lawyer-dog-the-court-says-he-wasnt-asking-for-a-lawyer/?utm_term=.7bc3abea3850>.

[21] See *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633.

and application. Returning to the example of the adopted child, the word 'parent' usually refers to a child's biological parents but in some areas of law may refer to anyone charged with the care of a child.[22] One can even go so far as to say that the Court in the exercise of its *parens patriae* jurisdiction performs a parental role.

24 Indeed, the word 'Judge' might fall into Professor Hart's diversity category. I was once engaged in the following correspondence with a would-be author of a miscellany at law who was looking for legal anecdotes. It was addressed to 'Justice' and commenced 'Dear Sir'. I responded as follows:

> Dear Mr X,
>
> Thank you for your letter … beginning 'Dear Sir'. Perhaps your first anecdote could come from you. My first name is Margaret.

Not defeated, the would-be author responded. His letter commenced 'OOPS' and continued that he was embarrassed and would consider including the gaffe in the foreword of his book. He beseeched me again to provide him with anecdotes saying 'perhaps something arises related to Her Honour's femininity'. So far as I am aware, the miscellany never came into existence.

25 Thirdly, although we search for certainty in the law,[23] Professor Hart points to aspects of the law where certainty gives way to what he describes as 'vagueness' in the sense that a word or circumstance may not be prescriptive or may not reflect a single given meaning or lead to a specific outcome.

26 Professor Hart uses the discretionary exercise of a power to explain 'vagueness'. For example, whilst the exercise of a judicial discretion permits a range of outcomes, so that its normative expression is 'non-prescriptive', its freewheeling exercise is not permitted. It must be exercised judicially.[24] As Professor Hart explains:

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[22] Endicott, above n 3, 950-951.

[23] For example, a fundamental principle in the formation of a contract is that of certainty. In cases were the language of a contract is uncertain such that a court is unable to give the parties' language a sufficiently clear and precise meaning in order to identify the rights and obligations agreed upon, there will be no concluded agreement. See, eg, *G Scammell & Nephew Ltd v Ouston* [1941] AC 251.

[24] See, eg, *Oshlack v Richmond River Council* (1998) 193 CLR 72 in which Gaudron and Gummow JJ held, at 81, that the conferral of a discretion as to costs was to be 'exercised judicially, that is to say not arbitrarily,

> In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate ….[25]

27 An example is found in the use of the word 'may'. When used in statutes and regulations 'may' will not always have the permissive meaning it otherwise bears.[26] For example, in *Finance Facilities Pty Limited v Commissioner of Taxation* the High Court considered s 46(3) of the *Income Tax Assessment Act 1936* (Cth) (since repealed) which provided that the 'the Commissioner may allow' a taxpayer a further rebate if satisfied of the matters specified in the section.[27]

28 A majority of the Court held that despite the permissive nature of the words 'may allow', if the Commissioner was satisfied of the matters set out in the section, the Commissioner was obliged to allow a further rebate. Windeyer J explained that as the scope of the permission or power given was circumscribed, this was one of those cases in which 'the "may" becomes a "must"'.[28]

29 The use of the word 'shall' provides another example. As Earl Cairns LC explained in *Julius v Bishop of Oxford*:

> The words 'it shall be lawful' are not equivocal … They confer a faculty or power, and they do not of themselves do more … But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty …[29]

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capriciously or so as to frustrate the legislative intent'. McHugh J, at 96, and Kirby J, at 120-1, reached similar conclusions.

[25] HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 136.

[26] But see, eg, *Acts Interpretation Act 1901* (Cth), s 33(2A); *Interpretation Act 1987* (NSW), s 9. Similar provisions have been enacted in other Australian jurisdictions.

[27] Section 46(3) provided that:

> Subject to the succeeding provisions of this section, the Commissioner may allow a shareholder, being a company that is a private company in relation to the year of income and is a resident, a further rebate … if the Commissioner is satisfied that
>
> (a) the shareholder has not paid, and will not pay a dividend during the period commencing at the beginning of the year of income of the shareholder and ending at the expiration of ten months after that year of income to another private company …

[28] (1971) 127 CLR 106, 134.

[29] (1880) 5 App Cas 214, 222-3.

Interpreting Legal Language

30 An understanding of Professor Hart's linguistic concepts offers two primary insights into the practice and development of the law. The first, and perhaps the area in which the study of language and linguistics has had greatest impact, concerns legal interpretation.[30] In the area of constitutional law one only need consider the debate between originalists and those who propound a 'living tree' approach to constitutional interpretation to appreciate how vague, uncertain and context-dependent constitutional language can be.[31]

31 In the area of statutory interpretation, consider, for example, the *Acts Interpretation Act 1901* (Cth) which provides in s 15AA that when interpreting legislation, the interpretation which would 'best achieve the purpose or object of the Act' is to be preferred. Similarly, the *Interpretation Act 1987* (NSW) provides in s 33 that the 'construction that would promote the purpose or object underlying the Act or statutory rule' is to be preferred. Both Acts provide that a Court may have regard to extrinsic material in interpreting a provision where that provision is 'ambiguous or obscure'.[32]

32 This broadly reflects the common law approach to interpretation known as the 'purposive approach'. The purposive approach looks beyond the literal meaning of the words where the literal meaning of the text is ambiguous, so as to interpret them in light of the underlying purpose of the Act or the 'mischief' the provision seeks to address.[33] The *Interpretation Act* provisions can also be understood as part of what Chief Justice Spigelman of the Supreme Court of New South Wales described in 2007 as a shift from 'text to context' and from 'textualism to contextualism' in constitutional, statutory and contractual interpretation.[34]

33 The *Interpretation Act* provisions, and the principles of statutory interpretation recently articulated by the High Court, emphasise the balance in interpretative method

[30] Michael Freeman and Fiona Smith, 'Law and Language: An Introduction' in Michael Freeman and Fiona Smith (eds), *Law and Language* (Oxford University Press, 2013) 1, 5.
[31] See eg, the conflicting approaches taken by the US Supreme Court in *District of Columbia v Heller* 554 US 570 (2008) with respect to the Second Amendment right to bear arms.
[32] *Acts Interpretation Act 1901* (Cth) s 15AB(1)(b)(i); *Interpretation Act 1987* (NSW) s 34(1)(b)(i).
[33] See *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).
[34] Chief Justice James Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (Paper presented at the Risky Business Conference, Sydney, 21 March 2007) 1.

between text and context.[35] This is evident in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*, where Hayne, Heydon, Crennan and Kiefel JJ explained the principles of statutory construction in terms with which we are well familiar:

> the task of statutory construction must begin with a consideration of the text itself. The meaning of the text may require **consideration of the context**, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[36] (emphasis added)

34 Similarly, French CJ explained that statutory interpretation involves looking to 'the ordinary and grammatical sense of the statutory words to be interpreted having regard to their **context** and the legislative purpose' (emphasis added).[37]

35 The place of context in statutory construction was again examined in *Certain Lloyd's Underwriters v Cross*, where Kiefel J (as her Honour then was) explained that:

> The starting point for [the] process of [statutory] construction is the words of the provision in question **read in the context** of the statute.[38] (citations omitted, emphasis added)

36 This integrated approach to text in context was reiterated more recently in *SZTAL v Minister of Immigration and Border* Protection, where Kiefel CJ, Nettle and Gordon JJ stated that that:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. **Context should be regarded at this first stage** and not at some later stage and it should be regarded in its widest sense.[39] (emphasis added)

37 This recognition of the significance of context and purpose may be seen as involving a recognition of Hart's context and diversity principles, although not expressed in precisely those terms.

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[35] See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 94.
[36] (2009) 239 CLR 27, [47].
[37] Ibid [4].
[38] (2012) 248 CLR 378, 412. Her Honour continued: '[c]ontext is also spoken of in a broader sense as including the general purpose and policy of the legislation, in particular the mischief to which the statute is directed and which the legislature intended to remedy.'
[39] (2017) 91 ALJR 936, [14].

38 The problems which can arise when context and purpose, or context and diversity, in Hart's terminology, are overlooked and a strictly literal interpretive approach is adopted are starkly apparent in the decision of the Full Court of the Supreme Court of Western Australia in *Higgon v O'Dea*.[40] In that case, the Court considered the effect of s 84 of the *Police Act 1892* (WA), which provided that:

> Every person who shall have or keep any house, shop, or room, or any place of public resort, and who shall wilfully and knowingly permit drunkenness or other disorderly conduct … or knowingly suffer any unlawful games or any gaming whatsoever therein, or knowingly permit or suffer persons apparently under the age of sixteen years to enter and remain therein … shall … be liable to a penalty of not more than five pounds.

39 The defendant owned an amusement arcade and was charged under the Act with permitting persons under the age of 16 to enter. The arcade did not permit gaming or disorderly conduct. The Court held that despite this, and the fact that the provision operated 'absurdly, unjustly and unreasonably'[41] – for example, under a literal reading no children would be permitted in shops – its words were clear and the defendant had committed an offence.

40 Even the language used in the provisions of the *Acts Interpretation Act 2001* (Cth) and the *Interpretation Act 1987* (NSW) relating to the use of extrinsic materials is worthy of note. These provisions allow for consideration of extrinsic materials where the language of a statute is 'ambiguous or obscure'. In *R v Sharma*,[42] Spigelman CJ noted that the use of the both of these two words seemed curious but considered that it may be explained by the distinction drawn between them by a member of the House of Lords in the English case *Ellerman Lines Ltd v Murray*.[43]

41 In *Ellerman Lines Ltd v Murray*, their Lordships were unanimous that a statute which provided for the payment of wages for a period of two months to sailors whose employment was terminated as a result of their ship being wrecked or lost and where they remained unemployed, was unambiguous. However, two law lords held that payment must be made irrespective of whether the sailor would have been employed but for the wreck or loss of the boat. A further two law lords considered that payment

[40] [1962] WAR 140.
[41] Ibid 142.
[42] (2002) 54 NSWLR 300, [54].
[43] [1931] AC 126.

must be made unless the owner of the ship could show that the sailor would not have been employed. One law lord, Lord Blanesburgh, held that payment need only be made for the sailor's contracted period of employment.

42 Lord Blanesburgh considered the distinction between ambiguous and obscure language in a passage which is worth repeating. He began by noting that the section did not bear its meaning 'upon its sleeve' and continued by observing that:

> It yields up its secret only to the patient inquirer; its truth lies at the bottom of the well. It is obscure, it remains oblique, but it is not in the result ambiguous. The truth from the well is found, at the end of the search for it, to have been leaking out of the section itself all the time just as the truth … may leak out sometimes even from an affidavit.[44]

43 Recognition of the importance of context can also be found in the jurisprudence concerning the construction of contracts. In *Mainteck Services Pty Ltd v Stein Heurtey SA*, the New South Wales Court of Appeal emphasised that:

> to say a legal text is 'clear' reflects the outcome of [the] process of interpretation. It means that there is nothing in the context which detracts from the ordinary literal meaning. It cannot mean that context can be put to one side …[45]

44 Similarly in the United Kingdom, in a case concerning patents, Lord Hoffman has noted that:

> No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.[46]

45 An understanding of the role played by context in shaping meaning has resulted in less reliance on dictionary definitions, although this is far from a modern phenomenon. In *Mainteck Services Pty Ltd v Stein Heurtey SA*, Leeming JA quoted from Lord Herschell, who in 1898, said that the words in a clause of a contract must not be given a meaning that encompasses 'everything that might be said to come

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[44] Ibid 144.
[45] (2014) 89 NSWLR 633, [77] (Leeming JA).
[46] *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667 [64].

within a possible dictionary definition use of them'.[47] Rather, the words 'must be interpreted in a way in which business men would interpret them'.[48]

46 A century later, Mahoney JA expressed a reluctance to rely on dictionary definitions on the basis that '[d]ictionaries are not a substitute for the judicial determination of the interpretation and then construction of statutes and other documents'.[49] This is because

> [t]he meaning of the words used in a statute or document is not merely the sum of the individual meanings of the words used, ascertained from dictionaries … a word is the skin of a living thought and it is the thought which the court must ascertain and apply.[50]

The Development and Designation of Legal Terms

47 The second way in which the study of language and linguistics offers insight into the law concerns the development and designation of legal terms. Indeed, Socrates is said to have counselled that wisdom begins with the definition of terms.[51] Legal terms can be understood as the names or labels given to an underlying legal concept or principle. Reference has already been made to Latin terms such as *ratio decidendi* and the *nemo dat* rule. As words, they tell us little. As words which relate to, describe, or define a legal concept or principle they convey a deep and precise meaning. It could be said that such terms are the external expression of the underlying legal concept or principle.

48 In this respect, a distinction needs to be drawn with purely descriptive terms. We are all familiar with the Shakespearean aphorism that a 'rose by any other name would smell as sweet'.[52] However, this is not true in law. Legal terms, properly used, are inextricably tied to the underlying legal concept. It would not do, for example, to call the legal concept embodied in the term *ratio decidendi* the *nemo dat* rule.

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[47] *Southland Frozen Meat and Produce Export Company Ltd v Nelson Brothers Ltd* [1898] AC 442, 444.
[48] Ibid 444.
[49] *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541, 560.
[50] Ibid 560.
[51] See Ruth CA Higgins, '"The Empty Eloquence of Fools": Rhetoric in Classical Greece' in Justin T Gleeson and Ruth CA Higgins (eds), *Rediscovering Rhetoric* (Federation Press, 2008) 3, 3.
[52] William Shakespeare, *Romeo and Juliet*, act II, scene II.

Accordingly, legal scholars recognise that the creation and development of useful terminological tools is 'one of the central challenges of the discipline'.[53]

Linguistic Choices and their Consequences

49 Recognition of the significance of legal terms leads to an appreciation of the consequences of our linguistic choices and the manner in which words convey subtle but significant messages. An example can be found in the standard of the 'reasonable man' and the surrounding critique of the concept. The standard of the 'reasonable man' – the man on the Clapham omnibus or the Bondi tram – is used as an objective standard, a stand-in measure for what a reasonable person might think or do in the circumstances.

50 Traditionally the language of the standard was explicitly gendered. In the 1980s, feminist critiques of the test led to a shift in this language – the 'reasonable man' became the 'reasonable person'. This change was not only appropriately inclusive, but recognised that, implicitly, the notion of the 'reasonable man' gave a degree of precedence to male experience.[54] In this respect, the change was part of a broader shift toward gender-neutral legal language, which also saw general references to 'he' or 'his' replaced with 'he or she' and 'his or her' and, more recently, the grammatically incorrect 'them' and 'their' when referring to the singular. Does such language make a difference? Anecdotally and from personal experience it most certainly does.

51 I recall one memorable incident that occurred in my early days sitting as a judge in the Court of Appeal in which a barrister, using the word 'draftsperson' to refer to the drafter of a badly worded contract, was continually corrected by the presiding judge to use 'draftsman'. The barrister would look to me with sheer fear on his face, back at the presiding judge with even greater trepidation and mumble something which sounded like a cross between the two. Eventually, I put an end to the exchange by simply telling the barrister that it was alright to use the word 'draftsman' as a 'drafts**woman** would never have drafted such a bad contract'.

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[53] Endicott, above n 3, 938.

[54] See, eg, Joanne Conaghan, 'Tort Law and the Feminist Critique of Reason' in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Routledge, 1996) 47, 51–8.

52 While this is a humorous story, it does have a more serious undertone, in that it demonstrates a degree of resistance to changing the language of the law in response to changing social values and norms. Not even the rich history of legal language can justify such resistance. To resist, in such cases, reflects stultification rather than the vibrancy which a living law requires. In other words, it has nothing to do with language or law and much to do with obstinacy – a last stand as it were, the resisters clinging to the comforts of the 'old world'.

53 Returning to the notion of the 'reasonable person', concerns have been raised that the simple substitution of the word 'person' for 'man' is not enough to ensure that the underlying concept is appropriately applied to all members of the community. On this view, a simple change to gender-neutral phraseology is not always sufficient to ensure gender-neutral application.[55] A change in language can be an apt starting point but it must be accompanied by changes in the way the law is applied to recognise a broader range of experiences.

54 Recently, the language used to discuss domestic violence has been the subject of attention, both academically and more broadly in the media.[56] Here, the concern is that 'words can convey assumptions or obscure stereotypes using a veneer of objectivity'.[57] In this respect, certain language can 'perpetuate violence, and silence can be used to render issues and persons invisible and their experiences "unutterable"'.[58]

55 For instance, it is not unusual to hear it said that an offender 'lost' his or her 'temper' or 'snapped' or was motivated by 'jealousy' or 'anger'. Such terms may not immediately sound problematic but they can be used to suggest some blameworthy or inflammatory conduct on the part of the victim which, in turn, prompted a loss of control on the part of the offender. It has been suggested that :

[55] Ibid 59–61.
[56] Emma Buxton-Namisnyk and Anna Butler, 'What's Language Got to Do with It? Learning from Discourse, Language and Stereotyping in Domestic Violence and Homicide Cases' (2017) 29 *Judicial Officers' Bulletin* 49, 49.
[57] Ibid 50.
[58] Ibid 50.

> These discursive strategies when used by the perpetrator or defence appear designed to ameliorate the perpetrator's responsibility for the crime, and are reinforced by the court's acceptance and replication of an offender's explanations.[59]

56 The focus on a loss of control can therefore obscure the reality of the dynamics of domestic violence. Rather than framing an offender's behaviour in terms of a loss of control, an offender's actions may, in a given situation, be more correctly framed as an attempt by the offender to maintain control over the victim.[60] The use of appropriate language to accurately characterise what occurred will more aptly capture the degree of wrongdoing and thus be more likely to lead to appropriate remedies or punishment.

57 Similar affects can be observed in the description of a relationship as 'turbulent', 'rocky', 'volatile' or 'stormy'. Once again, this language is problematic in that it removes agency from both the offender and the victim and subtly attributes it to the 'relationship'.[61]

58 Just as gender-based scholarship offers insight into the significance of the terms used to describe legal concepts and the assumptions underlying them, so too does critical race theory. This is evident in discussions regarding the regulation of language, particularly in the context of racial vilification – an area where the balancing of prohibitions with free speech has proved both problematic and divisive.

59 Scholars of critical race theory note that racially vilifying language is often framed in terms of 'causing offense' and argue that when such language is described as merely 'offensive', it undermines the nature of the harm inflicted. They note that 'offensive' is used 'as if we were speaking of a difference in taste', overlooking the fact that so-called offensive language can cause tangible injury:

> There is a great difference between the offensiveness of words that you would rather not hear because they are labeled dirty, impolite, or personally demeaning and the injury inflicted by words that remind the world that you are fair game for physical

[59] Ibid 51.
[60] Ibid 51.
[61] Ibid 52.

> attack, that evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed …[62]

60 The harm that can be experienced as a result of such language has been reported as having both short- and long-term effects and includes physiological symptoms and emotional distress ranging from an increased pulse rate and difficulty breathing, to nightmares, post-traumatic stress disorder, hypertension and, in the most severe cases, self-harm.[63] Racially vilifying language may also have an effect on one's sense of self-esteem and personal security and can result in feelings of being silenced, both individually and as a group, and being excluded from the broader community.[64] Understanding that language considered offensive can cause harm of this nature, as opposed to simply causing offence, has very real consequences for the manner in which we balance prohibitions on racially vilifying language with free speech.

61 What I trust these few examples demonstrate is that language shapes thought and the precise use of language and careful choice of the words we use is important. The extent to which language shapes thought, which in turn shapes law, is, I suggest, becoming evident in Victorian jurisprudence following the introduction of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Charter is only the second of its kind in Australia, where rights have traditionally been protected by the common law. One of the driving forces behind its introduction was a desire to make rights protections clearer and more transparent and to promote a rights-based dialogue within parliament, the courts and the public more broadly.[65]

62 By fostering an explicit language of rights, the Charter can be observed to have encouraged a shift in the manner in which judges approach other areas of law and the issues that arise within them. This is apparent, for example, in the case of *Boulton v*

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[62] Charles Lawrence, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' in Mari Matsuda et al (eds), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 74.
[63] Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' in Mari Matsuda et al (eds), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 24-25.
[64] Ibid 24-25; Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 505.
[65] George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 892-894, 901–3.

R,[66] a Victorian Court of Appeal guideline judgment which considered the sentencing option of Community Correction Orders ('CCOs'). CCOs are flexible, non-custodial orders to which coercive and rehabilitative conditions can be attached.

63 The Court (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) listed a number of ways in which a CCO is punitive as opposed to merely rehabilitative. In assessing the punitive effect of a CCO, the Court stated that:

> The (relative) severity of a penal sanction can be assessed by reference to its impact on the offender's rights and interests. The more important the rights and interests intruded upon, and the more significant the intrusion, the severer is the sanction. Attention should therefore be directed to the degree to which the sanction will affect fundamental rights and interests such as the offender's freedom of movement, choice regarding his/her activities, choice of associates, and privacy.[67] (citations omitted)

The language of fundamental rights and interests seen here, whilst not unknown in the common law,[68] is redolent of human rights discourse.

Rule of Law and Legal Language

64 Experience has demonstrated that the interplay between language and the law can facilitate and strengthen the rule of law. There are many formulations of the rule of law. One of the earliest descriptions is that of Sir Edward Coke, who declared that 'the King should not be under man, but under God and the law'.[69] This is, in effect, a pronouncement of government under law, the idea that the monarch and his council should act through and under the law, and not through the exercise of prerogative powers. It reflected the concerns of the time, a period in which there was growing tension regarding the powers of the monarch and the scope of those powers.[70]

65 One of the most influential enunciations of the rule of law is that of the English jurist A V Dicey, who is credited with popularising the term.[71] Dicey's conception involved 'at least three distinct though kindred conceptions'.[72] First, that 'no man is punishable

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[66] (2014) 46 VR 308.
[67] Ibid [90].
[68] See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562.
[69] *Prohibitions del Roy* (1607) 12 Co Rep 63, 65.
[70] See, eg, Goldwin A Smith, *A Constitutional and Legal History of England* (Dorset Press, 1990) 304–311.
[71] Thomas Bingham, *The Rule of Law* (Penguin, 2010) 3.
[72] A V Dicey, *Introduction to the Study and the Law of the Constitution* (Palgrave McMillian, 10th ed, 1959) 188.

or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.'[73] Secondly, that 'no man is above the law, but … every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.[74] And thirdly, that 'the general principles of the constitution … are … the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'.[75]

66 This formulation has been criticised for placing too great a focus on the form the law takes and failing to consider its substance. This focus has very real practical consequences. One only need look at the experience of Germany during the Third Reich or South Africa during Apartheid to see this. Both these regimes could be said to have complied with a Diceyean formulation of the rule of law but could hardly be said to be fair and just societies.

67 A more recent formulation is the Rule of Law Index, which was developed by the World Justice Project and is used to measure the state of the rule of law in 97 different countries.[76] The index looks to features including accountability under the law generally applicable to governments, public officials, individuals, and public and private entities; clear, publicised, stable and just laws evenly applied which protect fundamental rights including the security of persons and property; accessible, fair and efficient processes for the enactment, administration and enforcement of laws; and timely delivery of justice by a sufficient number of competent, ethical, independent, adequately resourced representatives and neutrals who reflect the makeup of the communities they serve.

68 Sir Ninian himself offered a formulation of the rule of law as 'not one simple ideal but rather a group of vital principles'.[77] Like the biblical Ten Commandments, he described these principles as negative in nature, 'descriptive of what should not occur'

[73] Ibid 188.
[74] Ibid 193.
[75] Ibid 202.
[76] See World Justice Project, *WJP Rule of Law Index 2016* <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016>.
[77] Sir Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Academy of Social Sciences* 8, 8.

and 'what should not be done'.[78] Sir Ninian then suggested that the rule of law embodied four 'cardinal' principles. First, 'that government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen'. Secondly, 'that those who play their part in administering the law … should be independent of and uninfluenced by Government in their respective roles'. Thirdly, 'that there should be ready access to the courts of law for those who seek legal remedy and relief'. And fourthly, 'that the law of the land should be certain, general and equal in its operation'.

69 The common thread that wends through these various formulations is that of government under law. However, the language through which the rule of law is now expressed encompasses broader notions responsive to modern times. The addition of requirements such as 'access to the courts', 'equal' application, or 'just' laws gives the concept an enriched meaning in that it demonstrates its adaption to changing social contexts.

70 A notable feature of more recent formulations of the rule of law is the requirement that the law be 'clear' and 'certain'. This depends significantly on the language through which it is expressed and the language used by legal professionals and the courts. One approach to ensuring clarity and certainty is to use 'plain language'. While simple and direct expression has long been a focus in some corners of the legal community, the plain language movement first gained strength in the 1970s as a result of various initiatives which centred on the belief that the public at large should be able to understand their rights and obligations.[79] The plain language movement eschews traditional legal phraseology and expression in favour of producing:

> language and design that presents information to its intended readers in a way that allows them, with as little effort as the complexity of the subject permits, to understand the writer's meaning.[80]

[78] Ibid 8.
[79] Mark Adler, 'The Plain Language Movement' in Peter M Tiersma and Lawrence M Solan (eds), *Language and Law* (Oxford University Press, 2012) 67, 69.
[80] Ibid 68.

71 Plain language is one approach to achieving clarity and certainty but it is not the only means by which to ensure that legal language clearly and accurately reflects underlying legal concepts in a manner that strengthens the rule of law. While plain language is desirable, it is sometimes necessary, in order to capture the rich complexity that makes law so effective, to use language directed to more precisely capturing that complexity.

72 This is certainly not to say that we need not consider the language we use. In fact, quite the opposite – language is important and precise language the goal. An understanding of language and how it works assists in construing legal texts such as statutes and contracts, aiding our understanding of law and how it works. An understanding of language also allows us to recognise the significance and consequences of the legal terms we use, as well as our word choice more generally. As these two points illustrate, precise language assists in developing clear and certain law. Precise language, which may be plain language – but is not necessarily – thus plays a key role in building and strengthening the rule of law.

Conclusion

73 If we are looking for the model use of precise language, we cannot go past Sir Ninian Stephen. Sir Ninian is widely praised for 'his enviable communication skills – his lucid writing style, his compelling turn of phrase and his beautiful voice'.[81] It certainly does not stop there. Sir Anthony Mason observed in Sir Ninian's judgments 'an elegance of literary style, a lightness of touch, indeed an elusive quality'.[82] Sir Ninian's judgments were 'easy to read, a world apart from the dense, grinding judicial style which is characteristic of typical High Court judgments'.[83] His influence has been enduring.[84]

[81] Timothy L H McCormack and Cheryl Saunders, 'Preface' in Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) xxv, xxvii.
[82] Sir Anthony Mason, 'Justice of the High Court' in Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 3, 5.
[83] Ibid 5.
[84] For example, the High Court continues to undertake the task of constitutional characterisation in accordance with his approach in *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169.

74 Sir Ninian's career, and his influence, is not limited to his time on the High Court. In fact, he left the Court prematurely to take up an appointment as Governor-General of Australia. In this position, he displayed the same deftness, impartiality and commitment to public service that he demonstrated as a judge, earning him praise as 'the very model of a modern Governor-General'.[85] His time as Governor-General was certainly no quiet retirement – over the course of his appointment he is said to have delivered nearly one thousand speeches.[86] Unsurprisingly then, his words continue to be his most enduring legacy. For example, his description of the governor-general's role as being to 'represent … the Australian nation to the people of Australia' is oft-repeated and said to remain 'one of the best "job descriptions" of the vice-regal office'.[87]

75 Following his term in office, Sir Ninian was appointed Ambassador for the Environment in 1989, one of the first such positions anywhere in the world.[88] Sir Ninian went on to serve as an International Peace Envoy in South Africa, Northern Ireland, Bangladesh and Burma.[89] He also served at the Permanent Court of Arbitration, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia, as well as serving an investigatory function in relation to the Khmer Rouge atrocities in Cambodia.[90]

76 This string of extraordinary appointments demonstrates Sir Ninian's unyielding commitment to public service. They are also a testament to his skills as a diplomat, his political sensitivities and ultimately, his gift for clear, measured and graceful communication.

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[85] Professor Geoffrey Lindell, 'Governor-General' in Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 26, 28.
[86] Ibid 31.
[87] George Winterton, 'The Evolving Role of the Governor-General' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 44, 55.
[88] Doug Laing, 'Ambassador for the Environment' in Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 98, 98.
[89] Timothy L H McCormack, 'International Peace Envoy' in Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 119, 120.
[90] Ibid 119.