

JUDICIAL DECISIONS: A RIPOSTE

by Francis Bennion

In our zeal for clarity we must not distort the realities of legal practice. At the Law Society's last annual conference the Vice-Chancellor, Sir Donald Nicholls, won easy applause for his condemnation of the White Book (Clarity 29, p. 4), but he ought to know that it is just not possible to rewrite this "in a form that anyone can understand". Lord Renton asked the Prime Minister to insist that all legislation should be "clear, simple, concise and unambiguous" (Clarity 29, p. 5), which he ought to know is another impossible task. Dr Robert D. Eagleson's article "Judicial decisions: acts of communication" (Clarity 29, p. 11) presents a travesty of the judicial function and is open to a number of objections. Here are some of them.

The article is written as if all judicial decisions are of the same type. In fact they are of widely differing types. Advice on how to present them must differ accordingly.

Dr Eagleson says "the purpose of a [judicial] decision ... is to communicate the law". It is not. The purpose is to resolve a dispute by applying the law to it. The dispute may be about the facts, or the law, or both. Presentation of the decision will reflect this.

The article assumes the parties to the litigation form the only audience. However their advocates also form an audience, as does the profession at large and indeed the public at large. The way a judicial decision is formulated must take account of all the audiences.

The author confuses understanding a judicial ruling with accepting it as reasonable. He equates a case where antagonism is aroused because "organisations ... have fallen back on convoluted provisions in small print to snatch a victory over you" with a case where one side cannot make sense of what the decision maker is saying and so feels disgruntled. The two are obviously different.

Then there is the usual blanket assertion that "we should use the active rather than the passive". But sometimes the passive is better, as in the very example Dr Eagleson gives. He says, as if the two variants meant the same, that an order stating "You must return the goods by 30 November" is preferable to one saying "The goods must be returned by 30 November".

They don't mean the same. The first suggests, without being quite clear on the point, that the goods must be returned by the "you" in question and no one else. The second allows for the possibility that that person might die or become incapacitated before 30 November, or the goods might pass into the possession of someone else. There is a possible difference in the persons bound by the order.

Technical terms, says Dr Eagleson, should always be explained. Do we really want judgments to be lengthened, and the time taken to prepare them extended, so that judges can pepper them with little homilies on the relevant law? Isn't that a job better done by the parties' legal advisers? (In the rare case where a party appears in person I accept that judicial explanations may be needed.)

Dr Eagleson says it is those judges who make themselves clear who impress "because the hearers go away satisfied". He adds: "They have understood the law - and that is what they came to court for". In my experience of litigation, extending over more than forty years, parties come to court to win their case. They go away satisfied when they have won the case, and not otherwise. Understanding the law is little comfort when your case has gone down, whether you think it went down justly or unjustly.

Of course these criticisms do not mean I am unsympathetic to attempts to improve the form and quality of judgments. I agree when Dr Eagleson says that judges must determine rigorously what is the real issue in the case and how the law applies to it. I note what is reported in Clarity 29 (p. 5) about Dr Eagleson's understandable dissatisfaction that in the important Mabo case there are five separate judgments totalling some 200 pages. But in his article Dr Eagleson misses the one point that really could make a significant difference to the quality and usefulness of many judgments, namely the inclusion of a statement in legislative form of the rule(s) of law applied by the judge. This is particularly important when the applicable law is in dispute between the parties.

In this connection I refer the reader to the passage on interstitial articulation on page 20 of my article "Statute Law Reform - is anybody listening?", also published in Clarity 29. I suspect Dr Eagleson would condemn the phrase interstitial articulation as "inflated" or infected by what he considers the vice of "breadth of language". So I will conclude by explaining what I mean by it in contracted or narrow language.

The adjective interstitial refers to the interstices within a legislative formulation. Dr Eagleson might prefer to call them gaps, but there is a difference. A chain-link fence has interstices between the links. It does not have gaps unless it is broken.

The interstices in a passage of legislation mark the places where the drafter has not felt able to be more detailed. Yet the court may find more detail necessary in order to decide the point at issue. If a previous reported decision does not settle the point, the court must do so itself. What I am suggesting is that the court should do it by articulating the missing words. It should do this in legislative form, that is by devising a form of words which the drafter might have used if he or she had gone into more detail.

This process of articulation is occasionally carried out by judges today, but it is rare. Yet it has great advantages. If either party wishes to consider an appeal on a point of law, the articulation makes it crystal clear just what the point of law is. It is that the judge's articulation is an incorrect formulation of the missing statutory rule.

In future cases, if the judgment is reported or otherwise available for reference, the articulation makes it clear just what the case decided. The future court may follow it or (if it has the power) overrule it.

If the law in question is later reduced to code form (as I believe it should be whenever this is helpful), the codifier can use the articulation as part of the code. Wide availability of such articulations would simply the process of codification and make it more likely to be carried out.

Finally the articulation would tell the litigant precisely what rule of law the judge had used to decide the case. I'm sure Dr Eagleson would approve of that.

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