The Norris Ward McKinnon Lecture

Aiming for Simplicity

By the Hon Justice Robert Fisher*

I. Introduction

This lecture has been given annually by current or former Governors-General, Prime Ministers, Ministers of Justice, Chief Justices and distinguished professors and judges. Tonight, you hear from a country lad raised nearby in Te Awamutu. But my roots at least equip me to talk about the topic for this evening. The topic is simplicity.

Simplicity is an important topic for lawyers because:

- evolution has left the human brain with marked limitations in its capacity to process information;
- the only way we can work within those limitations is to keep things simple;
- simplicity is achieved by identifying the intended audience, discarding the unnecessary, organising what is left, and communicating it efficiently;
- lawyers are notorious for their failure on those fronts;
- the only way lawyers can think clearly is to simplify; and
- simplifying allows others to understand what lawyers are saying.

This paper examines those propositions. The conclusion is clear: the defining characteristic of great lawyers is their ability to simplify.

A. Limitations of the Human Brain

1. Origins of the human brain

The brains of our ancestors were shaped by the natural world around them. They needed to interpret external phenomena if they were to achieve a relatively limited range of outcomes. Assessing terrain and vegetation would lead them to game and edible plants. Clouds, wind and temperature were a guide to expected weather. Interpreting the behaviour and expressions of others would promote the formation of extended families, the cooperative hunting of animals and the joint defence of territories.

That was the environment in which our brains evolved. In evolutionary terms it was yesterday. Insufficient time has passed for our brains to evolve significantly since then. The point can be illustrated by the following facts:

---

* Hon Robert Fisher QC, LLD, FAMINZ, arbitrator and mediator, Auckland, author, appellate judge Samoa and Cook Is, former NZ High Court Judge, Fulbright Scholar. My thanks are due to Auckland law graduate, Isabelle Boyd, for her research assistance.

- The current sapiens brain size (about 1200 ml) was reached about 300,000 years ago.[1]
- The current sapiens brain shape and organisation was reached about 35,000 – 100,000 years ago.[2]
- The Stone Age ended about 10,000 years ago.[3]

2. The modern world

That is still the brain with which we wake up each morning to take on the 21st century. Your smart phone will tell you when to rise (the alarm app), how warmly to dress (the weather app), how smartly to dress (the calendar app), whether the neighbour's child needs a lift to school (texting), what happened to your extended family overnight (Facebook), Trump's latest altruism (a media app) and what must be done urgently before your meeting at 9.00 am (email).

What your smart phone will not tell you is how to deal with glitches in its own operating system, your cellular network, your home Wi-Fi, the underfloor heating timer, the electronic dishwasher controls, the oven clock, your multiple TV remotes, or your telecommunications provider. You are not up to helping with trigonometry homework. Over breakfast you and your spouse come to the pleasing, if uncharacteristic, agreement that neither understands your teenager's language. On the way to work you cannot listen to your favourite music because you do not yet know how to programme your car's audio system. On arrival at the office your IT technician points out, with asperity, that all your computer needed was rebooting. You wish it had not been rebooted when it enables you to read an email requiring you to peruse a colleague's impenetrable debenture trust deed by lunchtime. Taking refuge in a daily newspaper, you wonder whether the draft was so bad when you read the following:[4]

> As science struggles to overcome the challenges around making lithium-ion batteries more efficient while still keeping up with global demand, the questions around how will we power all of these new electric vehicles, what can we do to reduce our dependence on rare earth metals and how we should recycle lithium-ion batteries once they run out still need to be answered.

Such is modern life; such are the demands placed on our Stone Age brains.

3. Why humans need simplicity

Our Stone Age brains have finite processing capacity. When we receive too much information at once our brains stall. The elaborate mathematical equation dances beyond reach. The over-long sentence evades comprehension. Psychologists call this condition "cognitive overload".

Life in the 21st century teems with cognitive overload. Negotiating a way through requires some understanding of the point at which it is likely to occur. The threshold is surprisingly low. The first to point this out was an American psychologist, George A Miller, in his 1956 paper "The Magical Number Seven, Plus or Minus Two – Some Limits on Our Capacity for Processing Information".[5]

---

1 Simon Neubauer, Jean-Jacques Hublin and Philipp Gunz "The evolution of modern human brain shape" (24 January 2018) Science Advances <www.advances.sciencemag.org>.

2 "Modern human brain organization emerged only recently" (24 January 2018) Max-Planck-Gesellschaft <www.mpg.de>.

3 "Stone Age" Wikipedia <https://en.wikipedia.org> at [3.1].

4 Michelle Dickinson "Nanogirl Dr Michelle Dickinson: Race against battery burnout" *The New Zealand Herald* (Auckland, 4 August 2018) at A12.

5 George A Miller "The Magical Number Seven, Plus or Minus Two: Some Limits on our Capacity for Processing Information" (1956) 63(2) Psychological Review 81.

Miller pointed to three capacity limits encountered when humans try to absorb and process information. The first arises when attempting to exercise what Miller referred to as "absolute judgment". "Absolute judgment" can be measured by asking a subject to place an incoming stimulus into one of a number of previously learned categories. In a typical experiment the subject learns line categories A, B and C:

A _____

B _____

C _____

The three categories of line length are removed from sight. The subject is then shown a single line thus:

_____

The subject is asked to allocate the single line to one of the known categories.

The task is easy where the known categories are confined to the three shown previously. It becomes increasingly difficult as the number of known categories is increased, for example:

A ____

B _____

C _____

D _____

E _____

F _____

G _____

H _____

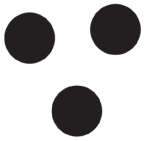
I _____

J _____

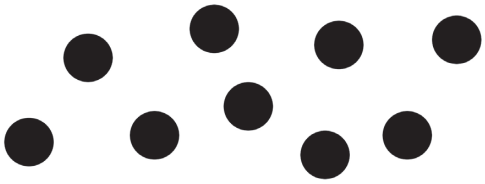
The same process can be followed for other stimuli such as auditory signals of different pitches. Miller found that whatever the nature of the stimulus, the maximum number of known categories humans can cope with is normally about seven. If they try to go beyond that number they suffer cognitive overload.

A second mental limitation is encountered during a form of information processing known as "subitising". Subitising is the ability to instantaneously recognise the number of objects in a small group without counting them. Recognising the number of dots on the upper surface of dice is an example.

For experimental purposes the subject may be asked to assess at a glance, without counting, the number of beans that have been dropped in a heap on the floor. Again the task is easy with few items:



and more difficult with many:



As with absolute judgment, Miller found that most people cannot subitise more than about seven items at a time.[6]

A third limitation is encountered when trying to hold items in working memory.[7] "Working memory" is the temporarily heightened availability of information about a small number of recent events or thoughts.[8] It has something in common with the buffer used by a computer while live-streaming a video. In a computer the buffer holds the information in active memory (RAM) during the period between receiving and playing.

For humans, working memory holds a number of items of information for a short period so that they can be processed by the conscious mind in a single mental exercise. For example when readers encounter a subordinate clause like this one at the beginning of a sentence, they must hold that clause in working memory until they reach the end of the sentence.[9] Only when they reach the end of the sentence is it possible to understand how the subordinate clause was intended to affect the sentence as a whole.

A simple test of working memory is to show the subject a series of letters on a screen. The subject is asked to memorise the letters. After the image has been removed the subject is asked to repeat the letters in reverse order. Tasks of this kind can be performed only if the original letters are held in working memory until the task is complete.

This is easy if the number of items is few:

C C S H

The difficulty grows as the number of items is increased:

U I I C L I I B L I I N P A Z L I I S T L A A I

Miller concluded that the maximum items that could be held in working memory was again roughly seven.

---

6 If one accepts the theme of the film *Rain Man* (1988), starring Dustin Hoffman, autistic savants have no such limitation.

7 Also known as "short term" or "immediate" memory.

8 Nelson Cowan "George Miller's magical number of immediate memory in retrospect: Observations on the faltering progression of science" (2015) 122(3) Psychological Review 536.

9 Pushing the limits of working memory is the following masterpiece from an actual tenancy agreement: "The tenant hereby agrees … to immediately any litter or disorder shall have been made by him or for his purpose on the staircase or landings or any other part of the said building or garden remove the same" – Ernest Gowers "Splitting that Infinitive" [1984] NZLJ 279.

Psychologists have since questioned the precise number that people can cope with in tests of this kind. Some argue for as few as four.[10] Much apparently turns on the nature of the information and its context.[11] But for present purposes the exact number is immaterial. Everyone agrees that the number is no more than a handful.

The contrast with computers is humbling. A computer's equivalent of working memory is its RAM (random access memory). A computer holds current use data in RAM so that it can be rapidly accessed and used by the processor. A single exercise in processing information by a computer might be regarded as the equivalent of a single mental exercise by a human. A computer's most basic unit of data is a bit ("binary digit"). A byte, which might be regarded as the broad equivalent of an item of information from a human viewpoint, is eight bits. A megabyte is a million bytes and a gigabyte a thousand megabytes. A typical desktop computer can hold about 16 gigabytes in RAM. This means that for the purpose of carrying out a single exercise in processing information, the number of items of information an ordinary computer can hold in working memory is about 16 billion. We can hold about seven.

B. How to Work within Our Limitations

Fortunately what Miller also found was that the capacity of working memory could be greatly increased by combining individual bits of information into one or more meaningful combinations. Psychologists refer to these combinations as "chunks".

Take the string of letters referred to earlier:

U I I C L I I B L I I N P A Z L I I S T L A A I

The 24 items of information (letters) are beyond the working memory of ordinary people. But suppose the same letters are reorganised into four chunks:

NZLII AUSTLII PACLII BAILII

Most people carrying out online legal research today are familiar with the online Legal Information Institutes. Those readers will have little difficulty holding all of the 24 letters in working memory. All they have to remember is that there is a Legal Information Institute for New Zealand, for Australia, for the Pacific and for Britain and Ireland combined.

What is more, a series of chunks can be usefully combined into an overarching chunk. That overarching chunk can in turn be combined with others to form a still higher overarching chunk. In the present example the result of building a hierarchy of that kind is as follows:

SELECTED NZ LEGAL SOURCES

LII DATABASES NZ LAW JOURNALS

NZLII AUSTLII PACLII BAILII NZLJ NZFLJ NZRLR

UIICLIIBLIINPAZLIISTLAAI JNLLFJZNRZLZRN

10 Nelson Cowan "The magical number 4 in short-term memory: A reconsideration of mental storage capacity" (2001) 24 Behavioural and Brain Sciences 87 at 91.

11 Cowan, above n 8, at 539.

So long as the hierarchy remains meaningful to users, they can find their way back from one high level chunk to all the individual bits of information (in this case letters). One of the principal ways of overcoming the capacity limits of working memory is therefore to organise low level items of information into higher level chunks. This will work so long as the chunks remain meaningful to the user. So the chunking example given would be useful to someone familiar with the name and existence of the Legal Information Institutes but not otherwise.

To summarise, limitations in the structure of our brains restrict the number of items of information we can process at any one time. This limitation affects absolute judgment, enumerating without counting, and reliance on working memory. Items must be retained in working memory until completion of the mental exercise in question. In general the fewer the items or chunks that have to be simultaneously held in working memory, the better. Chunking is one important means by which multiple items can be remembered and retrieved.[12]

C. Ways of Achieving Simplicity

Those are the psychological principles which explain why humans need simplicity. They are also the clues to its achievement. At a practical level, four steps are required ("the IDOC approach"):

(a) Identify the intended audience.
(b) Discard clutter.
(c) Organise what is left in a way that will be meaningful to that audience.
(d) Communicate the result in a way that will be understood by that audience.

Each requires explanation.

(a) Identify the intended audience

Identifying the recipients makes it possible to estimate their levels of comprehension and the concepts with which they will be familiar.

We do not speak to a class of six-year-olds in the way we would address a panel of scientists. Nor would we try to impart the same quantity and complexity of information. The nature of the audience dictates all that follows.

(b) Discard clutter

The fewer the items that have to be held in working memory, the more chance there is that the brain can process those that remain. It follows that information that is not essential to a mental exercise should be discarded. If the sole object is to compute the product of 3 and 4, gratuitous advice that 3 is green and 4 is red is an unwelcome distraction. The same applies to information that would be beyond the needs or understanding of the intended audience. There is normally no point in analysing case authorities in an opinion. Information that does not add to a message detracts from it.

This was anticipated long before modern psychology. In the 13th century St Thomas Aquinas considered that "[i]f a thing can be done adequately by means of one, it is superfluous to do it by means of several; for we observe that nature does not employ two instruments where one suffices."[13] The Chinese author Lin Yutang considered that "[b]esides the noble art of getting things

12 Other ways of organising information include recoding, association and compressing. In the interests of simplicity these have been omitted but see further Jacob Feldman "The simplicity principle in perception and cognition" (29 July 2016) National Center for Biotechnology Information <www.ncbi.nlm.nih.gov>.

done, there is a nobler art of leaving things undone … the wisdom of life consists in the elimination of non-essentials."[14] Discarding clutter underlay 20th century minimalism in art, architecture and design. It has recently re-emerged as an enthusiasm for removing unnecessary items from one's house and personal effects.[15]

Discarding the things that do not matter is essential for efficient reasoning. The 19th-century philosopher Henry David Thoreau put it this way:[16]

> When the mathematician would solve a difficult problem, he first frees the equation of all encumbrances, and reduces it to its simplest terms. So simplify the problem of life, distinguish the necessary and the real.

A modern psychologist would have said that Thoreau was advocating cognitive fluency by eliminating those items that would otherwise overload the working memory. If ordinary consumers are to understand an insurance policy, the first step is to excise all terms that the insurer can live without.[17]

(c) Organise what is left in a way that will be meaningful to the intended audience

Unless the subject is a particularly simple one, the information will need to be organised into chunks that are meaningful to the intended audience. The chunks themselves can then be layered in a hierarchical structure. Family trees and corporate wiring diagrams are examples.

A textbook is an extreme example of hierarchical chunking. If all the letters in a book were laid end to end in a row, the reader would have no prospect of understanding them. The reverse is true if the letters are combined into words, the words into sentences, the sentences into paragraphs, the paragraphs into sections, the sections into chapters, and the chapters into a book. Although George Miller was content to rely on an inner stream of consciousness, he never tried to write a legal textbook, draft a debenture trust deed, or persuade a judge.

(d) Communicate the result to the intended audience

The final step in the process is to communicate the result. Effective communication begins by identifying the intended audience. The object is to deliver the information in a way that will avoid cognitive overload for that audience. The steps by which this is achieved are as follows:

---

13 Anton Pegis (ed) *Basic Writings of St. Thomas Aquinas: (Volume 2) Man and the Conduct of Life* (Hackett Publishing, Indianapolis, 1997) at 129.

14 Lin Yutang, as quoted in Jerome Agel and Walter D Glanze *Pearls of Wisdom: A Harvest of Quotations From All Ages* (William Morrow Paperbacks, New York, 1987) at 46.

15 Marie Kondo *The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing* (10 Speed Press, Berkeley, 2014).

16 Robert N Hudspeth (ed) *The Correspondence of Henry D. Thoreau: volume 1: 1834-1848* (Princeton University Press, New Jersey, 2013) at 360.

17 Aaron Gilbert, Associate Professor and head of the finance department at Auckland University of Technology, recently studied the life insurance policies of New Zealand's major life insurers. The average length of the policies was 6000 words. He considered them to be virtually unreadable due to long sentences and multiple syllables. About one in every five words had at least three syllables. See further Tamsyn Parker "Life insurance docs 'unreadable' for average Kiwi, says academic" The New Zealand Herald (online ed, Auckland, 31 January 2019).

1. *Summarise.* The summary sits at the apex of the information pyramid. It draws together the logic of the message as a whole (something which will often be as much a revelation to the author as it is to the reader). Whether the summary is described as an "executive summary", "summary of submissions", "introduction", "road map" or simply "table of contents" is immaterial.
2. *Communicate through layers of information.* The multi-layered chunks referred to earlier inform the way in which the material is communicated to others. By reference to a table of contents or its equivalent, the reader will have a road map by which to beat a path through the material. Layering of chunks also makes it easier to cater for multiple audiences. Where there are layers to choose from, business leaders can confine themselves to the executive summary while their staff and professional advisers go on to study the detail.
3. *Use multiple short exercises instead of one long one.* Wherever possible a single large mental exercise should be broken down into multiple short ones. Smaller exercises reduce the number of items that need to be held in working memory at any given time. That is why the information in a long and complex sentence is more readily grasped if divided into several short sentences. The same is true of computations.
4. *Discard expressions that do not advance the message.* In the course of preparing their material writers often fall in love with their own eloquence ("an orchestrated litany of lies"). If these advance the message, well and good. But if not, the temptation to include them must be resisted. Anything that fails to promote the message distracts from it. Film directors refer to the process of excising their own superfluous creations as "killing their babies".[18]
5. *Simple language.* As far as possible communications should be expressed in short sentences with simple everyday words. The extent to which that has been achieved is objectively measurable. The most well-known measure is the Flesch Readability Scale.[19] Writers should avoid ambiguous pronouns and double negatives. They should keep subordinate clauses and the passive voice to a minimum. These are underlying aims of the Plain English movement. The movement supports language that is easy to understand, emphasises clarity and brevity, avoids technical jargon and complex vocabulary, and is appropriate to the audience's development, education and familiarity with the topic.[20]
6. *Clear visual layout.* For most people information is more readily understood if displayed in clear visual terms. The human eye seeks out visual stimuli that are easy to recognise and distinguishable from the rest. The visual dimension may amount to no more than careful formatting (font sizes, page positions, bullet points etc) used to distinguish between headings, subordinate headings, main text and lists. Ideally it extends to graphics such as flow charts, family trees and corporate wiring diagrams. An Auckland Queen's Counsel uses highly effective

18 Alan Siegel and Irene Etzkorn *Simple: Conquering the Crisis of Complexity* (Twelve, New York, 2013) at 82.

19 Rudolf Flesch *Say What You Mean* (Harper & Row, New York, 1972). But for criticism of the Scale see "Christmas Reading" [2006] NZLJ 401. Microsoft Word has recently made it possible to apply the Scale to documents created in Word and further Alan Siegel "Let's Simplify Legal Jargon!" Ted Talk (February 2010) <www.ted.com>. See also the "Gunning fog index" used by Gilbert, above, n 17.

20 "Plain English" Wikipedia <https://en.wikipedia.org>. The Plain Language Bill, published on 12 December 2017, would have promoted the use of plain English in New Zealand official documents and websites, and require the Government to make plain English the standard for all official public and private communication in New Zealand.

flow charts to outline his argument. Data visualisation ("data viz") promotes understanding of data through graphics and other visual tools.[21]

7. *Check reader's perception.* Familiarity breeds myopia.[22] The more time authors devote to creating a document, the more difficult it becomes for them to see it through the eyes of a stranger. Ideally a final draft is put to one side in order to re-read it later with fresh eyes. If time and cost permit, it should be tested on a stranger with the background of the intended audience.

To summarise, simplification is achieved by identifying the intended audience, discarding the unnecessary, organising what is left, and communicating it in clear and simple terms. The next question is how lawyers measure up in reality.

D. How Do Lawyers Rate?

1. Triumphs of obscurity

Lawyers are not noted for simplicity. Three examples will suffice.

First, a jury direction to a New Zealand jury on the so-called co-conspirator rule:[23]

> The normal rule is that a conversation to which an accused is not a party does not represent evidence against that accused. The co-conspirator rule is an exception. The rule says that in some circumstances in a conspiracy case the Crown can, as against a particular accused such as [Mr Smith], rely on a conversation in which [Mr Smith] did not participate. But before you could rely on that rule you would have to be satisfied of three things. First, you would have to have accepted on the balance of probabilities, and without reliance on conversations between other alleged co-conspirators, that [Mr Smith] was party to a conspiracy. If so, the conversations between other alleged co-conspirators may be relied on by the Crown as evidence capable of elevating its case from proof on the balance of probabilities to proof beyond reasonable doubt. Secondly, the rule is confined to conversations in which one or more of the accused's co-conspirators took part (although the co-conspirators need not be co-accused in the current trial). Thirdly, remarks may be relied on only where they were made for the purpose of furthering the common design of the conspiracy. It is not enough if the conversation was a mere narrative of past events. So to summarise, before you could use against [Mr Smith] a conversation to which he was not a party you would need to be satisfied of three things – (i) for other reasons you already think he was probably a party to a conspiracy, (ii) the conversation included one of his co-conspirators and (iii) the purpose of the conversation was to further the conspiracy.

Needless to say, much of what judges tell juries passes them by.[24]

---

21 "Data Visualisation" Wikipedia <https://en.wikipedia.org>.

22 Siegel and Etzkorn, above n 18, at 168.

23 An actual direction in a jury trial given by the writer.

24 James Hartley "Legal Ease and 'Legalese'" (2000) 6 Psychology, Crime and Law at 14; and in New Zealand see S Blackwell and F Seymour "Jurors' knowledge and understanding of child sexual abuse issues" (paper presented at Joint Conference of the Australian Psychological Society and New Zealand Psychological Society, Auckland, 1 September 2006).

Second, a clause taken from a lease guarantee:[25]

> NOW THIS AGREEMENT WITNESSES that in consideration of the Lessor at the request of the Guarantors (which request is evidenced by their execution of this Agreement) continuing at its discretion and during its pleasure the provision of a forbearing to sue for the repayment of leasing accommodation already granted to the Debtor or presently or at any time or from time to time hereafter at its discretion and during its pleasure granting further leasing accommodation advances a financial accommodation to the Debtor the Guarantors jointly and severally HEREBY GUARANTEE to the Lessor the due and punctual payment to the Lessor of all moneys now or hereafter to become owing or payable to the Lessor by the Debtor (including but not limited to interest or any sum or sums so owing and payable calculated at any specified increased rate due to the default of the Debtor) either alone or jointly with any other person on any account whatsoever including all moneys which the Lessor pays or becomes actually or contingently liable to pay to for or on behalf of or for the accommodation of the Debtor either alone or jointly with any other person whether or not such payment is made or liability arises by way of loans, advances or other accommodation of whatever nature by reason of the Lessor having already or hereafter become a party to any negotiable or other instrument or entered into any bond, indemnity or guarantee or, without restriction, under or by reason of any transaction or event whatsoever whereby the Lessor is or becomes or may become a creditor of the Debtor (all of which moneys and liabilities as aforesaid are intended to be secured by this Guarantee and are hereinafter referred to as 'the Moneys Hereby Secured').

The clause uses 180 words to say that in return for the Lessor probably not suing the lessee, the Guarantor guarantees performance of the lessee's monetary obligations under the lease.

Third, a distinguished law professor's description of his own article on entrapment:[26]

> However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what might constitute appropriate police conduct.

The best that can be said of this passage is that it achieved economy of language. Meaning something to the reader was evidently a step too far.

Those examples of lawyer obscurity are scarcely atypical. Unsurprisingly, American simplification experts advise companies that if they want to simplify their documents they should exclude their lawyers:[27]

> … simplification is almost impossible to achieve if lawyers are calling the shots. For companies to simplify, they must empower the right people, not those who contributed to the complexity in the first place. In fact, it may be necessary to wrest control from those who are inclined to foster complexity. And when we talk about people prone to complicating things, we refer to Exhibit A: company lawyers. Obviously, companies need lawyers— just not as much as they think they do. Because so many business leaders are risk averse and perceive their biggest risk to be lawsuits, they elevate lawyers to a position of unchallenged authority, meaning the legal department has the last word. And lawyers, for the most part, have an aversion to simplicity.
>
> For example, lawyers often contend that simplified language is not sufficiently precise; many argue that legislation and court decisions have given precise meanings to the most arcane terms used in consumer contracts so that they will stand up in court. As a practical matter, the legal profession's case for exacting language that will "stand up in court" rests on increasingly shaky ground. Judges in many

25 Example given by Law Commission of Victoria in *Plain English and the Law* (Report No 9. 1987) at 10.

26 Quoted by Irving Younger "In Praise of Simplicity" [1984] NZLJ 277 at 278.

27 Siegel and Etzkorn, above n 18, at 170–171.

states are applying the doctrine of *reasonable expectations,* meaning that if you screw your customers, all the boilerplate language in the world may not protect you anyway.

2. What caused legal obscurity?

Obscurity in legal expression had a number of causes:[28]

(a) *The legacy of earlier languages.* Latin, and a form of Anglo-French, were used in statutes, writs, court records, and courts until the Middle Ages. As English became the official language it borrowed terms and phrases from earlier sources. In addition it was thought that there would be less room for ambiguity if documents catered for speakers of both English and the foreign equivalents. That gave rise to the tautologous double or triple expressions loved by lawyers ("null and void", "fit and proper", "will and testament", "give, devise and bequeath" and "goods and chattels").

(b) *Fear of omission.* It was thought that as a legal document should leave nothing to chance, every conceivable possibility should be catered for.

(c) *Payment by the page.* Legal fees used to be calculated on the number of sheets or folios produced by lawyers.

(d) *Fear of departing from precedent.* Over time judicial interpretation gave particular meanings to standardised expressions ("quiet enjoyment", "current market value", "brought into hotchpot", "give, devise and bequeath") and commonly used standard forms (agreements for sale and purchase, leases and wills). This gave lawyers a rationale for continuing to use expressions long after they had passed from general usage.

(e) *Maintaining the status of lawyers.* It has been suggested that lawyers have a vested interest in fostering technical jargon, complex sentence structures, and their own mystique, in order to preserve their monopoly over legal activities.

3. Analogical reasoning

To those sources of legal obscurity one must add the common law's traditional use of analogical reasoning.

Reasoning by analogy required a comparison between the current fact situation, on the one hand, and a previously decided case, on the other. Provided there were sufficient similarity between the two, the outcome reached in the earlier case was applied to the current one.[29]

The problem with that kind of reasoning was that it combined an infinite potential for differing fact situations with infinite opportunity for debate over comparability with the current one. Although one of the strengths of the common law was undoubtedly its foundation in actual experience,[30] the experience needed to feed into principles, not a multitude of factual outcomes from which one selected an analogy.

Lawyers and judges who cannot rise above analogical reasoning continue to contribute greatly to the law's complexity.[31] Faced with a case in which a driver carelessly drove his truck into a

28 Most of the reasons were collected in Law Commission of Victoria, above n 25, at 12–19.

29 Dan Hunter "No Wilderness of Single Instances: Inductive Inference in Law" (1998) 48 J Legal Educ 365 at 367.

30 "The life of the law has not been logic; it has been experience" Oliver Wendell Holmes Jr *The Common Law* (The Lawbook Exchange, New Jersey, 2005) at 1.

31 Hence the need for 224 pages to explain the judge-made hearsay rule in John Huxley Buzzard, Richard May and MN Howard *Phipson on Evidence* (13th ed, Sweet & Maxwell, London, 1982) ("Phipson") compared with three pages for the legislative substitute in the Evidence Act 2006.

farmer's letterbox, some lawyers persist in scouring databases for cases answering to the search terms "truck", "farm", "letterbox" and "damage". Having collected all the decisions that result, they regurgitate the facts and dicta of each, untroubled by any unifying general proposition. Deductive reasoning or, in psychological terms, chunking, passes them by. In the result they never arrive at the simple proposition that those who negligently cause loss by damaging the property of another must compensate the owner.

The United States was fortunate to escape that trap early. The sheer multiplicity and diversity of state and federal decisions forced them to turn to unifying themes and principles. These were collected in secondary sources such as the *Restatements,* treatises, and law reviews.[32] As Justice Cardozo said of the American scene:[33]

> An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more.

In 18th-century England Tennyson described the problem in the following terms:[34]

> Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances,
> Through which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame."

Our job is to ensure that the law rises above a wilderness of single instances. As my predecessor, Justice Gault, said when giving this annual lecture 26 years ago:[35]

> The outcome of a particular case should be determined by the application of principle rather than because there does, or does not, happen to have been a case some time over the past 400 years in which the facts may be said to have been materially the same.

In a few areas (for example sentencing, family protection, and defamation damages) past decisions can contribute to quantitative standards. It is precedent that shows the sentencing starting point for rape to be eight years' imprisonment. But with the exception of quantitative standards of that kind, past decisions are of no interest unless they give rise to a principle of general application. The law is a collection of principles, not a collection of factual precedents. It is through deductive reasoning alone that we can usefully apply a principle to the next case.

4. Our report card overall

To summarise, lawyers typically fail to take the opportunity to simplify. Unnecessary complexity abounds in our documents, judgments, academic articles, advice to clients and communications with the public. The causes are traceable to the foreign languages in which the law was originally expressed, fear of overlooking something important, payment by the page, fear of departing from hallowed precedents and perhaps a subconscious wish to exclude others from an exclusive preserve.

---

32 For full discussion see Robert Fisher "New Zealand Legal Method: Influences and Consequences" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 25 at 34–35.

33 CG Weeramantry *Law in Crisis: Bridges of Understanding* (Littlehampton Book Services, Worthing,1975) at 82.

34 Lord Alfred Tennyson "Aylmer's Field" (1793).

35 TM Gault "Development of a New Zealand Jurisprudence" (Harkness Henry Inaugural Lecture, University of Waikato School of Law, Waikato, 26 March 1992).

To those causes one must add the love affair some lawyers continue to have with analogical reasoning.

The next question is whether we should do something about it.

E. Should We Change?

Unlike medicine and science, which must respond to the complexities of the natural world, the law is a social construct. It is a set of rules invented by people. There are three reasons for keeping it as simple as possible:

- efficient reasoning;
- efficient communication; and
- the rule of law.

1. Efficient reasoning

Advocates for simplicity include one of the greatest scientists of all time, Isaac Newton. He considered that "truth is ever to be found in the simplicity, and not in the multiplicity and confusion of things."[36] In 1960 the U.S. Navy adopted the "KISS principle". "KISS" is an acronym for "Keep It Simple, Stupid". The principle holds that as most systems work best if they are simple rather than complicated, simplicity should be a key goal in design. The principle is now taught in American schools and universities.[37]

The more complicated a legal topic becomes, the more difficult it is to maintain its coherence. We have already seen this with analogical reasoning. Without an overarching principle, the law diverges into anomalous differences. We finish up with one approach to truck drivers who damage letterboxes and another for bus drivers who damage gate posts. The only way of keeping the law coherent is to keep returning to the overview. The overview must be simple if it is to be held in working memory.

Simplification of that kind is achievable. In some cases it may have to come from Parliament. Hearsay is an example. Central to the law of evidence is the general rule that hearsay is inadmissible. To this there used to be major statutory and common law exceptions. Each of these had its own subset of exceptions to the exception. Explaining the result required about a fifth of a typical textbook on the law of evidence.[38] In New Zealand, the Evidence Act 2006 swept away this accumulation of common law principles. It required less than three pages to replace the whole of the common law of hearsay.[39] It is widely accepted that the Act as a whole brought clarity and simplicity to a judge-made labyrinth.[40]

---

36 Cited in *Rules for methodizing the Apocalypse*, Rule 9, from a manuscript published in Frank E Manuel *The Religion of Isaac Newton* (Clarendon Press, Oxford, 1974) at 120, as quoted in Martin Mulsow and Jan Rohls *Socinianism And Arminianism: Antitrinitarians, Calvinists, And Cultural Exchange in Seventeenth-Century Europe* (Brill, Leiden, 2005) at 273.

37 "Kiss Principle" Wikipedia <https://en.wikipedia.org>.

38 In Phipson, above n 31, 224 of the 1064 pages (excluding appendices) were devoted to the hearsay rule and its qualifications.

39 Evidence Act 2006, ss 16–22A.

40 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

Equally, simplification can come from judges. New Zealand courts contributed greatly to the simplification of administrative law. The movement began in 1986 with Lord Cooke's article "The Struggle for Simplicity in Administrative Law".[41] Lord Cooke rejected the "superfluous complications of principle" and use of "phrases of somewhat arcane concepts, in the nature of catchwords or half truths" such as "quasijudicial", "nullity", "jurisdiction", "jurisdictional fact" and "the face of the record".[42] He reduced fundamental administrative law principles to the need for decision-makers to " act in accordance with the law, fairly and reasonably."[43] A New Zealand emphasis on administrative law simplicity has continued since.[44]

2. Efficient communication

Simplifying the content of the law is a worthy end in itself. But it must also be communicated to others. Here lawyers could learn from politicians. Politicians are nothing if they cannot make themselves understood by their public. This was well understood by Mahatma Gandhi, Winston Churchill, Nelson Mandela, Robert Muldoon, and Jimmy Carter. One may or may not agree with what they said, but their message got through.

The same has been true of great judges. Oliver Wendell Holmes, Benjamin Cardozo and Lord Denning were well-known for it. What marked out these leaders was their ability to take seemingly complex subjects and reduce them to simple terms that people could understand.

Simplicity is also a strong selling point. Whatever you might think of Donald Trump's message, you cannot deny that it is understood by his supporters. One reason is the child-like simplicity of his ideas ("lock her up", "make America great again", "build a wall and make them pay for it", "fake news"). The other is the sheer poverty of his vocabulary ("horrible, horrible", "very, very, large brain", "very good man", "very bad deal"). Trumpian simplicity clearly strikes a chord with many Americans.

The Australian Law Reform Commission described the widespread failure of lawyers to communicate efficiently in the following terms:[45]

> Many legal documents are unnecessarily lengthy, over written, self-conscious and repetitious… They suffer from elaborate and often unnecessary cross-referencing. They continue to use tautologies… They retain archaic phrases…They use supposedly technical terms and foreign (Latin) words and phrases…even when English equivalents are readily available … Language which suffers from some or all of these defects is called 'legalese'. Linguists regard it as an identifiably different dialect or class of Language."

Legalese has been described as a "fog" and a "barrier to trust".[46] Complicated legal language distances lawyers from their clients. We live in a high-information, highly connected society, where clients often want to read and understand their own legal documents.

---

41 Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 1.

42 At 5.

43 At 17.

44 The relevant authorities and commentaries have been collected by Dean Knight in "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 11.

45 *Plain English and the Law*, above n 25, at 9.

46 Lynda Harris "From legalese to reader ease" (8 November 2016) Law Society <www.lawsociety.org.nz>; Tania McAnearney "Why you should kick the legalese habit" Law Society <www.lawsociety.org.nz>.

Forty years ago a lawyer, James Redish, reduced these problems to seven propositions:[47]

1. Many legal documents cannot be read and understood by laypersons.
2. People without legal training have to read and understand legal documents.
3. Much legal writing is unintelligible even to lawyers.
4. Tradition, not necessity – and a lack of understanding of the audience – are the major reasons that legal language is so obscure.
5. Legal language can be made clear without losing its precision.
6. It is not the technical vocabulary but the complex sentence structure that makes legal writing so difficult to understand.
7. Clarity is not the same as simplicity, brevity or 'Plain English'.

In 2000 a psychologist, James Hartley, reviewed the current evidence and broadly agreed.[48] The indictment is scarcely a source of satisfaction for lawyers.

3. The rule of law

The final reason for simplifying is to reinforce the rule of law.

People are deterred from using their own legal institutions if they are regarded as "too slow, expensive and hard to understand".[49] It is estimated that although half of all Australians will experience a legal problem throughout a given year, most will not get legal assistance or come into contact with their courts and other legal institutions.[50]

Some laws must be simple enough for the public to understand and remember. Drivers do not have time to consult a lawyer before deciding whether to give way at a left-turning corner. Nor do parents on the point of smacking their children. Laws of this kind must be simple if they are to be understood, remembered and acted upon.

At another level there are laws which need to be accessible to the lay person in case of need. Examples are family law, social welfare, neighbour relations, resource management requirements and building codes. A growing proportion of non-lawyers seek direct access to the law. They see no need for lawyers as intermediaries. To a degree this has been facilitated by online access to legislation. But disappointment often lies in store for those who take the trouble to go directly to the source. Understanding legislation can be difficult.

There is a growing view that the current level of difficulty presented by legislation is unacceptable. Richard Heaton, First Parliamentary Counsel and Permanent Secretary of the Cabinet Office, UK, considers that legislative complexity "hinders economic activity, creating burdens for individuals, businesses and communities … It obstructs good government … It undermines the rule of law".[51] John-Paul Boyd, Executive Director of the Canadian Research Institute for Law and the Family, has a similar view, arguing that no-one should have to hire a lawyer to find out which

47 J Redish "How to draft more understandable legal documents" in DA MacDonald (ed) *Drafting Documents in Plain Language* (Practising Law Institute, New York, 1979).

48 Hartley "Legal Ease and 'Legalese'", above n 24.

49 *Access to Justice Arrangements: Inquiry Report* (Australian Government Productivity Commission, draft report, April 2014) discussed in James Farrell "'Slow, expensive, complicated' legal system must be improved" (10 April 2014) The Conversation <http://theconversation.com>.

50 Productivity Commission Report, above n 49.

51 Richard Heaton (First Parliamentary Counsel and Permanent Secretary of the Cabinet Office, UK) "When laws become too complex" (16 April 2013) Gov UK <www.gov.uk>.

laws apply to them. In his view, in a democratic society laws should be written for the people most affected by them, not for lawyers and judges. He concludes that "If we had laws that were clear and comprehensible, as citizens we would have a better understanding of our individual functions in society, how we relate to other people in society, and how government relates to us."[52]

Boyd goes too far. It would be naive to think that we could make all laws understandable to the average person in the street. That must be the aim for laws impacting on their day to day conduct (road code, crimes, consumer law, basic family law). But even where laws impact at a more rarefied level (commercial law, intellectual property, revenue laws) there is a major opportunity to simplify, a point to which I will return shortly.

4. Why simplify?

In summary, lawyers have strong reasons for simplifying. The law is not exempt from the wider intellectual principle that progress in thinking is progress towards simplicity.[53] So lawyers cannot avoid simplification if they want to be effective thinkers. Parliament and the Courts can assist in that regard, an opportunity not always taken. But lawyers must also simplify if they want to be understood by others. Consumers and clients demand transparency. Transparency is meaningless if the information disclosed cannot be understood. Simplicity is also essential to the rule of law. Individuals cannot obey a law that they do not understand.

The next question is what techniques lawyers might use in order to simplify.

F. How Could We Change?

1. Use of recognised psychological techniques

We saw earlier that simplification could be achieved through an understanding of psychological principles. The principles suggested four steps (the "IDOC" approach):

1. Identify the intended audience.
2. Discard clutter.
3. Organise what is left into a coherent structure.
4. Communicate the result in a way that will be understood by that audience.

These steps can be applied to various fields of legal activity. But before turning to them a note of reservation: things cannot be simplified beyond a certain point.

2. The limits of simplicity

No matter how hard one tried, it would not be practicable to explain the conflict of laws renvoi doctrine to a six-year-old. For lawyers, simplifying can go only so far. There are three limits.

First, the law has little choice but to grapple with external complexities. Participants in modern companies, finance, banking, arbitrage, stock exchanges, insurance, and freight-forwarding, inhabit an inherently complex world. The same is true of inventors, filmmakers and trade mark owners. Commercial and intellectual property laws are a response to external demands. Revenue laws need to tax the real world, however complex or anomalous it may be. That is not to say that simplification ceases to be an important goal. But in drafting laws or documents it is reasonable to

52 John-Paul Boyd, Executive Director of the Canadian Research Institute for Law and the Family, quoted in "Is the law too complicated? A call to write laws in plain English" (9 January 2016) CBC Canada <www.cbc.ca>.

53 Siegmund George Warburg cited in Joseph Wechsberg *The Merchant Bankers* (Dover Publications, New York, 2014) at 164.

assume that business professionals will seek legal advice or be experts in their own field. The law must be responsive to the real world, however complex.

The second limitation is that some legal concepts will forever remain beyond the comprehension of some people.[54] As the Australian Law Reform Commission on Plain English conceded, "[t]he Plain English Movement does not require that laws always be drafted in such a way as to make them intelligible to the average citizen. However, it does require that every effort be made to make them intelligible to the widest possible audience."[55]

Thirdly there are some situations in which simplicity might need to cede priority to certainty. For lawyers drafting documents, a central aim is to foresee and cater for situations and disputes that might arise in the future. This cannot always be achieved with brevity. The complexity of New Zealand's Copyright Act 1994 stems from its nine protected subject matters, nine exclusive rights, and more than 80 exceptions to infringement.[56] Discussing reform, a commentator recognised that simplification would need to be balanced against the loss of certainty that could result if too many detailed exceptions were eliminated.[57]

With those limitations in mind, we can turn to the particular legal activities of drafting documents, drafting legislation, expressing legal views and teaching law.

3. Drafting documents

Drafting documents requires application of the IDOC principles discussed earlier. The first step is to identify the audience to whom the document is addressed. A document drafted for consumers will look very different from one intended for legally assisted parties.

The intended audience governs the quantity and complexity of the document. It is increasingly recognised that if an insurer is to attract business from consumers it must sacrifice some of the more detailed terms it would otherwise prefer. The same applies to tenancies. No attempt is made to include all possible terms in a residential tenancy agreement. Consumer documents require particular emphasis on simple language, a clear visual layout and the highlighting of key provisions. Comprehensibility should be tested on typical readers.

Documents of that kind may be contrasted with the detailed provisions normally required in a commercial lease. For a lengthy legal document, a bare minimum is a table of contents and the grouping of like concepts by way of "chunking". For example all clauses associated with termination of the agreement should be brought together so that their interrelationship is understood. For similar reasons there should be layering through the use of main headings, subordinate headings, and sub-subordinate headings.

Plain English is required regardless of the type of document. The following illustrates what can be achieved in the redrafting of a bank loan agreement:[58]

---

54 Masson and Waldron concluded that replacing words and simplifying the text was not enough to increase readers' comprehension. They felt that some legal concepts were too complex to convey to some people – even with simple language. Hartley "Legal Ease and 'Legalese'", above n 24, at 8.

55 *Plain English and the Law*, above n 25 at 45; Hartley "Legal Ease and 'Legalese'", above n 24, at 17.

56 Andrew Christie "Making it simple: how copyright legislation can be simplified" (2011) 6 NZIPJ 783 at 786.

57 At 785.

58 Original taken from David Crystal *The Cambridge Encyclopaedia of the English Language* (2nd ed, Cambridge University Press, Cambridge, 1997) at 17.

4. Original Text (Barclays Bank)

> 16. No assurance security or payment which may be avoided under any enactment relating to bankruptcy or under section 127, 238 to 245 (inclusive) of the Insolvency Act 1986 or any of such sections and no release settlement discharge or arrangement which may have been given or made on the faith of any such assurance security or payment shall prejudice or affect your right to recover from the undersigned to the full extent of this Guarantee as if such assurance security payment release settlement discharge or arrangement (as the case may be) had never been granted given or made. And any such release settlement discharge or arrangement shall as between you and the undersigned be deemed to have been given or made upon the express condition that it shall become and be wholly void and of no effect if the assurance security or payment on the faith of which it was made or given shall be void (as the case may be) shall at any time thereafter be avoided under any of the before-mentioned statutory provisions to the intent and so that you shall become and be entitled at any time after any such avoidance to exercise all or any of the rights in the Guarantee expressly conferred upon you and/or all or any other rights which by virtue and as a consequence of this Guarantee you would have been entitled to exercise but for such release settlement discharge or arrangement.

5. Revised version[59]

> 16. IF you or someone on your behalf gives us anything for our benefit
>
> AND insolvency law later requires us to give back the benefit
>
> THEN you will be liable as if we had never received the benefit.

Features of the revised version are that without any loss of substantive content, the 241 words used in the original have been reduced to 37, the meaning is clearer, the words used are simpler, and the layout is easier to read.

6. Drafting legislation

Most legislation must cater for a variety of readers. A minimum requirement is that the meaning be clear to lawyers. Ideally this will extend to non-lawyers as well.

To achieve readability the first step is that the proposed legislation must be organised into a logical framework. Among other things this will throw up opportunities for simplification through chunking. When a series of particular items are found to fall within the same general category, they can be replaced with a higher level concept. The point of high level concepts is that the legislative purpose can be applied to an infinite variety of situations without the need to define all the fact situations to which the legislation was intended to apply.

Chunks are easier to assimilate than a list of specifics. The drafters of the Matrimonial Property Act 1976 fell into the trap of trying to divide property according to defined asset-types (matrimonial home, household furniture, household appliances, tools, garden equipment, motor vehicles, caravans, trailers, boats, household pets, life insurance policies, superannuation). Overlooked were other conceptually identical asset-types (building society shares, family bank accounts, family holiday homes, land yachts, private aeroplanes). It was a failed attempt to define

59 The revised version is the writer's.

relationship property at a low level of particularity. The result was a series of obvious anomalies[60] and litigation over arbitrary labels.[61] Missing altogether was conceptual analysis stemming from a stated rationale.

An example of a conceptual approach to relationship property – albeit only one of many – would be to direct that capital created by the efforts of either or both parties during their relationship (for example earnings) be divided equally while capital derived from sources external to the operations of the partnership (for example pre-relationship assets, external gifts and inheritances) be retained by its original recipient. Whatever the philosophy adopted, one hopes that new relationship property legislation will be expressed in the form of concepts stemming from an articulated rationale.[62] Conceptual simplicity is particularly important where legislation governs the day to day relationships between ordinary people.

Two other examples suffice. One concerns the evolution of breath and blood alcohol testing in this country. The Land Transport Act 1962 set out to define with great particularity the steps that a law enforcement officer would have to follow when administering breath and blood alcohol tests. In the earlier years of the legislation, entire legal practices were built on the art of pointing to some pin-pricking omission or error in the steps taken by the hapless officer or the evidence provided on that topic.[63] This banquet for defence lawyers was progressively diminished by statutory amendments in 1970, 1978 and 2001. The 2001 introduction of section 64(2) to the Land Transport Act completed the journey. If the result could be relied on in substance, it did not matter whether the intricacies of the prescribed procedure had been followed.[64] These amendments moved the focus from low level particulars to the conceptual end that the Act had always been designed to achieve.

Another example is the Copyright Act 1994. Speaking of copyright, the Director-General of the World Intellectual Property Organization commented:[65]

> We risk losing our audience and public support if we cannot make understanding of the system more accessible. Future generations are clearly going to regard many of the works, rights and business agents that we talk about as cute artefacts of cultural history.

An Australian commentator, Professor Andrew Christie, identified structural complexity in the Copyright Act as the root problem. Urging simplification, he suggested a radical restructuring of the Act as a whole. This would include identifying the conceptual basis for each exclusive right

60 As originally enacted. But why include life insurance in relationship property and exclude building society shares, an existing interest in a superannuation fund and exclude term deposits, a boat and exclude a land yacht?

61 Can a corner dairy amount to a matrimonial home if the family occasionally lives there? Do tools that are used mainly by a builder amount to family chattels? Can a family-friendly sheep dog qualify as a family pet? How many angels can dance on the head of a pin?

62 Compare Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018).

63 *Hope v Transport Department* [1971] NZLR 449 (SC).

64 *Bennetts v Police* [2003] DCR 609; *Police v McCutcheon* [2000] DCR 589; *Ariki v Police* HC Auckland CRI-2007-404-174, 6 November 2007; *Police v Wi* HC Auckland CRI-2007-404-32, 18 June 2007; *Kavanagh v Police* HC Wellington CRI-2005-409-231, 27 February 2006; *Becroft and Hall's Transport Law* (online ed, LexisNexis) at [LTA64.3(c)].

65 Francis Gurry "The Future of Copyright" (2011) 6 NZIPJ 781.

and conflating into more generalised categories those which share, or ought to share, the same conceptual basis.[66] This is an excellent description of simplification through chunking.

7. Expressing legal views

Much of the job of lawyers, judges, academics and arbitrators is to explain or argue the law to others. Attempts to do so sometimes founder. When they do, the problem is nearly always due to one or more of the following:

- lack of a clear and logical framework (inadequate chunking of the raw material);
- failure to summarise (and thus bring the overall message within the limits of working memory); and/or
- discussion in the language of individual decisions rather than higher level principles (another form of inadequate chunking).

As to the first, all forms of legal expression require a clear and logical framework. In its simplest terms, the raw material must be combined into chunks that will be meaningful to the user. And unless the subject is unusually simple, the chunks themselves need to be layered in a hierarchical structure. Submissions and judgments are essentially theses with a set of conclusions founded on individual chapters, chapter sections, and sub-sections.

The second requirement is a summary. The summary is the most important part of the document. It draws together the logic of the message as a whole. It allows the reader to hold the whole of the message in working memory, albeit at a high level of abstraction. That is why an initial summary of the argument is mandatory in the Court of Appeal.[67] There is no topic or dispute so complicated that it cannot have a concise summary. The summary sits at the apex of the information pyramid. It may take the form of an executive summary, summary of submissions, introduction, table of contents, or road map. But it cannot exceed one page if the whole is to be held simultaneously in working memory. The greatest beneficiary of a summary is the author.

The third requirement is that the law be discussed in the currency of propositions or principles, not individual authorities. Articulating propositions is relatively easy where the source is legislation. A set of rules can be deductively applied to individual fact situations. Even there, it is usually necessary to summarise the material effect of legislation before applying it to the circumstances of a particular case. Less obvious is the way in which to discuss the effect of prior authorities. For the reasons expressed earlier, the law is a collection of principles, not a collection of factual precedents.[68]

The great majority of legal principles are uncontroversial. For the most part legal discussion can be confined to those principles, relegating the authorities from which they are drawn to footnotes.[69] In that situation quotations from, or descriptions of, authorities is clutter. Information that does not add to the message distracts from it. In psychological terms, it places an unnecessary burden on the working memory. It is different if the law is novel or uncertain. There may be conflict between authorities or a challenge to their reasoning. Of course in that situation the authorities themselves become part of the discussion.

---

66 Christie, above n 56, at 784–786.

67 Court of Appeal (Civil) Rules 2005, r 41(1)(a).

68 See above nn 28–33.

69 Recently endorsed in NZ Court of Appeal Practice Note 1 February 2019 at [4(j) and (k)].

Genuine legal debates arise in only a minority of cases. But when they do, one of the responsibilities of courts is to clarify. Appellate courts, in particular, have that duty. Clarity is promoted by single judgments of the court. The rationale usually offered for multiple judgments – that a multiplicity of diverse ideas represents a resource for future development – is unconvincing. It overstates the responsibility of the courts, rather than the legislature, to provide for future development. It undervalues appellate courts' duty of clarifying the law as it stands.[70] Only when the law has been defined in clear and simple terms can citizens safely plot their course.

In summary, there is much scope to simplify opinions, submissions, judgments, legal publications and arbitration awards. The key requirements are a clear and logical framework, a summary, and discussion in the language of propositions and principles rather than individual decisions.

8. Teaching law

At least some of the responsibility for legal obscurity can be traced to the way in which law is taught. Here there are two related problems. One is the failure to provide an overview. The other is over-reliance on the case method of study.

We have already seen the importance of summaries or overviews in opinions, submissions, judgments, legal publications and arbitration awards. Recipients need a road map before embarking on the detailed journey. If Court of Appeal judges need such an overview,[71] there is no reason for thinking students would not. An American professor of law, W David Slawson, put it this way:[72]

> A lawyer seeking to learn an unfamiliar area of the law would not begin by reading cases. That would waste the lawyer's time, as much as it would waste the time of a person who wanted to learn the history of a country to begin by researching in the historical archives. The lawyer would begin by reading one or more of the hornbooks, treatises, or practice manuals that exist on the subject, just as the person who wanted to learn the history of a country would begin by reading a history book about that country. The lawyer would begin to read cases only after reading enough in these other sources to know which cases to read, or at least what kinds of cases to read, and how to understand them. Surely this is also the way we should teach the law to students. Students are at least as unfamiliar with the subjects they must learn as a lawyer would be with a new and unfamiliar area of law.

An overview is not only a necessary introduction to a course. It is the legacy graduates take away with them when they leave university. The details will be quickly forgotten; ideally not the big picture.

What law teachers may not realise is that for most law students, law school is their last and only opportunity to acquire a bird's eye view. Piecemeal teaching selects particular sub-topics, treats them in depth, and ignores the rest of the topic. Teaching of that kind is usually followed by either an examination confined to the sub-topics that had been selected or vehement protests from students that not all questions had been taught or foreshadowed.

---

70 Lord Neuberger suggests that appellate judges should "park their egos outside the courtroom" noting that "[t]he desire to write your own judgment, particularly in an interesting and important case, can be quite considerable" but commenting that this can make things more confusing and complex than they need to be: Siobhain Butterworth "Master of the Rolls to Judges: Keep Your Judgments Simple" *The Guardian* (online ed, London, 23 March 2011). To similar effect see the Chief Justice of Australia, Kiefel CJ, quoted in Jeremy Gans "The Great Assenters" (1 May 2018) Inside Story <http://insidestory.org.au>.

71 Court of Appeal (Civil) Rules 2005, r 41(1)(a).

72 W David Slawson "Changing how we teach: a critique of the case method" (2000) 74 SCLR 343 at 344–345.

A fragmented understanding of selected parts of the law does not equip a lawyer to undertake legal practice. Clients do not announce that they have a problem turning on "frustration of contract" or "restitution". All they can say is that they paid a deposit on a painting which was burnt before delivery. It is for the lawyer to recognise the legal topics that might engage. This is possible only if the topics already reside in the lawyer's head. No treatise on earth can perform that initial categorisation for the lawyer.

It is not necessary to carry round a detailed knowledge of the law. That is what textbooks, legal databases and legislation are for. But it is necessary to know where to start looking. One cannot turn to the right textbook (contract, tort or restitution?), let alone the right chapters within the book (offer and acceptance, frustration and/or remoteness of damage?) without an overview of the law as a whole. Lack of that overview explains why plaintiffs frequently fail to plead causes of action drawn from a different branch of the law altogether (restitution needed rather than contract), and defendants fail to plead available defences (estoppel needed rather than variation of contract).

The opportunity to impart an overview at law school is unique and precious. Precisely how it is taught is a matter for individual teachers. However "bar charts" have proved popular among students in the United States. Bar charts are double-sided A4 sheets of laminated cardboard, each setting out in graphical form the whole of a subject such as torts, criminal law, or constitutional law.[73] In the writer's view they are masterpieces of simplification.

The antithesis of a principled overview is the case method of study. Despite its early adherents,[74] the method has come in for much criticism.[75] The problem lies in confusion between teaching case analysis (a skill undoubtedly required for its own sake) and teaching substantive topics (for which there are far more efficient techniques). Case method is a laborious way of learning substantive law. The focus of a course on land law is surely land law, not case analysis. To spend a whole year learning land law by case method[76] wastes time that ought to be spent on land law. Nor am I alone in this. In the view of one American professor:[77]

> [d]espite these seemingly strong points in favor of the case method, my experience has led me to believe that it is ineffective. Indeed, I think it *prevents* most students from learning the law. Probably much of the shock, fear, and confusion that besets most law students for at least the first few weeks of their first year is not a result of something inherent in the law, but a result of this method of teaching it. Of course, lawyers must know how to extract the law from cases and how to identify and exploit an opinion's ambiguities and vaguenesses; therefore, we must teach these skills to law students. But it does not follow that this is how we should teach the law itself.

The ultimate problem with the case method of study is not the time it wastes. It is the fact that it keeps the focus down in the trenches. There is no chunking. What students need is a distillation of principles culminating in an overview of the topic as a whole.

---

73 Published by Barcharts, Inc, cost in 1994 $4.95 each.

74 RO McGechan "The Case Method of Teaching Law" (1953) 1(1) VUCLR 9.

75 Transcript of remarks by Warren E. Burger, Chief Justice of the United States, "The Future of Legal Education" [1970] NZLJ 108 at 109, "To a large extent this failure [the failure of legal education methods to meet societal needs] flows from treating Langdell's case method of study as the ultimate teaching technique".

76 As was the writer's own experience at law school.

77 Slawson, above n 70, at 344–345.

9. What should we now do?

In summary, whenever lawyers are preparing a legal document or presentation they should break the preparation down into four steps:

- identify the intended audience;
- discard clutter;
- organise what is left into a coherent structure; and
- communicate the result in a way that will be understood.

Those four steps will be necessary whether drafting a transactional document, drafting legislation, expressing legal views or teaching law. That is not to pretend that all legal documents or presentations can be confined to a few bullet points. The law has little choice but to respond to external complexity. Sometimes simplicity must be sacrificed in the interests of certainty. But those limitations are rarely the problem. The problem lies in our failure to strive for simplicity in the first place.

II. Conclusion

The simple expressions of great minds may seem effortless. One suspects that even there, appearances are deceiving. But for the rest of us, simplicity is hard work.

The first draft of a document is usually little better than a collation of raw materials. It includes everything that seemed relevant on the first time through. There is a strong temptation to stop at that point. Many do. The draft is served up as the finished product. An undigested mass of statutory references and authorities is presented as an opinion. A summary of each witness's evidence is presented without relating each assertion to the facts in issue. A contract is left as a disorganised ramble through pages of legalese. No attempt is made to simplify.

Faced with undigested raw material, the recipient is left with two choices. One is to take over the job of organising and simplifying that ought to have been undertaken by the original author. This occupies much of the time of judges. The other is to give up and remain in a state of confusion. This is the path often taken by clients and consumers. Neither leaves the recipient warmly disposed towards the author.

What lifts the material to a higher plain altogether is simplification. Simplification requires repetitive revision. Haste engenders prolixity.[78] The object of revision is to weed out the unnecessary and bring simplicity to the rest. Simplifying is essentially a product of the time devoted to the first draft.

Fortunately, the rewards of simplification far outweigh the cost. It earns the everlasting gratitude of clients, students, judges, and the public. It reveals to us what we really think. The defining characteristic of great lawyers is their ability to simplify.

78 Hence the cliché that the writer of a letter lacked the time to write a short one.