

The common law phrasebook

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Sometimes while in a foreign country you can be overwhelmed with an urge to speak a few useless phrases to the locals in their own language – hence the proliferation of foreign language phrasebooks. Whether it is true or not, the thought behind the use of a phrasebook

is to attempt to gain some better insight into the local culture.

I think the same might apply in the law. Picture an equity lawyer straying into a common law court (an image of a mousy English tourist with a box camera, shorts and long socks stumbling into a hill-tribe of *Cromagnons* comes to mind). Can the equity lawyer be made to understand what is going on?

For this reason, I have produced a phrasebook which translates common law speak into English for the use of equity adventure travellers. I hope it is of some use.

Between counsel during settlement negotiations

Settlement negotiations at common law are conducted with admirable frankness, despite the fact nobody says what they truly mean. This frankness is achieved by employing key phrases, the meaning of which is well-understood amongst the initiated.

Common law speak	English
'I am instructed to put an offer of [sum of \$]'	'The clients will not listen to my advice'
'I'll kick off negotiations with an offer of [a sum of \$]'	'I haven't spoken to my client yet'
'That's ridiculous'	'We should continue negotiations'
'How can you justify that?'	'That sounds reasonable'
'You've got to be joking'	'OK. I will seek instructions to put a counter-offer'
'Our offer is [sum of \$] and that's it'	'Please put a counter offer'
'Our offer is [sum of \$] and I haven't got a penny more'	'I have \$10,000 up my sleeve'
'My people'	'People' means the common lawyer's clients. Strangely, the plural is employed even if there is only one client. A client can also be known as 'the punter' or 'the customer'
'My people would like to settle this matter'	'I need to get away as I have another case'
'That is our absolute bottom line'	This is how plaintiff's counsel indicates that the offer is getting close to, but has not yet reached, the 'bottom line'
The equivalent phrase used by defendant's counsel is	'That is our absolute top dollar'
'If this case does not settle it could run for days'	'I have a restaurant table booked for one o'clock'
'We will need to make a phone call'	This is used by defendant's lawyers to pretend that their instructions are exhausted and it is necessary to call the insurance company to get more money. It is not a direct lie because a phone call will be made to book a table at a restaurant
'I will put the offer to my people, but I want you to know that I will not recommend it'	'The case has settled'

By Counsel to the Court regarding settlement negotiations

Nearly all of the available court time in the common law courts is spent keeping the judge off the Bench by taking a series of short adjournments. For reasons not readily able to be understood, this is justified on the basis that the most efficient use of court time is not to use it at all. The purpose of the short adjournments is, of course, to conduct settlement negotiations, but, oddly, the word 'settlement' is never allowed to be said; instead weird euphemisms are employed.

Common law speak	English
'May the parties have some time for discussions, your Honour?'	This is the classical method of getting the judge off the Bench. Usually the judge will respond by feigning resistance and then say (voice dripping with reluctance) 'Well, all right – provided the parties assure me this might be leading somewhere'
'This case could profit from some discussion between the parties'	The counsel who states this needs to go to the toilet'
'Thank you for the time your Honour. Some progress has been made, but nothing has crystallised yet'	This means, although the court gave an adjournment to permit settlement negotiations, the parties have not yet exchanged offers
'Thank you for the time your Honour, but the parties need a little more time to see if discussions can be advanced'	'By the time I went to the toilet and got some coffee, we had no time to exchange offers in the 20 minutes you gave us'
'Your Honour, my learned friend has put something meaningful which may well shorten the case'	This is, in fact, a method of calculating time. It means it is a quarter past to me twelve on a Friday. This leaves time to draw terms of settlement and to get off to lunch

By Counsel to the Court during submissions

Common law speak	English
'Your Honour, this case raises a difficult legal issue'	The counsel who says this is actually stating in open court that his or her client is willing to settle on any terms available
'Your Honour, my client's case is very simple'	a) If said by the plaintiff's counsel it means that there is no evidence to support the plaintiff's case b) If said by the defendant's counsel it is a concession of defeat
'These proceedings fall into a narrow compass'	Although it is often said, no one knows what this statement means
'The damages claimed are calculable on a Malec v Hutton basis'	'The plaintiff accepts that he/she is unable to prove his/her case on damages'
'Your Honour should allow a buffer'	This is a concession by counsel that there is no intelligible basis to support an award of damages

By the Court ruling on objections to evidence

Common law speak	English
'I reject the question in that form, but you may put it again'	'Sorry, I wasn't listening'
'I will allow the evidence. It is a question of weight and I will ask counsel to address me on it during submissions'	'This evidence is inadmissible, but crucial. If I do not let it in the plaintiff will lose for sure'

By the Court during the course of judgment

Every case is different and must be tried and decided on its own merits. At common law individual justice is achieved by the trial judge drawing upon a bank of standard incantations.

Common law speak	English
'Taking a broad-brush approach ...'	This has two potential meanings: a) If it is said on a Wednesday, it means the judge needs to get away to golf or the races; b) On any other day, it means 'I wish it was Wednesday'
'I would infer ...'	'There is no evidence which would permit me to make a finding on this issue'
'The sum which I allow under this head of damages must, of course, be heavily discounted'	'I should not have awarded this head of damages in the first place'
'On balance ...'	'This means 'buggered if I know' and is a method of reasoning commonly applied by judges, but rarely explicitly acknowledged.
'Exercising my discretion ...'	'I do not know or understand the governing legal principles'
'I watched and listened to [witness name] carefully while he/she gave his/her evidence and I have formed a view, based upon my observations in Court, that his/her evidence was not reliable'	'This case looks like it is on the way to the Court of Appeal so I better stitch it up'
'Doing the best I can ...'	'See 'Taking a broad-brush approach'
'Taking into account the whole of the evidence ...'	'I bet I have forgotten something'
'The damages are not capable of precise, mathematical calculation.'	See 'Taking a broad-brush approach'
'Taking a robust and pragmatic approach ...'	'The evidence in this case is very thin'
'I have taken into account the helpful submissions of Counsel for the Plaintiff/Defendant'	'Thank you for employing the code words which told me that you conceded defeat'
'I listened closely to counsel's careful submissions...'	'I was compelled to sit through submissions which were repetitive and/or boring'
'The plaintiff/defendant was very ably represented by [counsel's name]...'	This means the party represented by the named counsel has lost