What, Not Swahili Again, Your Honour!

There are many things that are taken for granted in a court of law: eccentric judges, sleepy court officers, brusque associates, long delays - the list goes on. One of the most basic, most commonsense assumptions of laymen, lawyers, and judges alike is that English is the language that must be used in a New South Wales court. Why? It just seems obvious, doesn't it?

The question of which language or languages may be used in court proceedings is not a question that can be quickly answered. Reference to the Supreme Court Practice will yield, at 38/1/9, the categorical statement that "The proceedings of the Court must be in English". The authorities supporting this brazen assertion are two English cases: the first is Re Trepca Mines [1960] 1 WLR 24, and the second, In the Estate of Fuld, Deceased [1965] 1 WLR 1336, which decision is an application of the first case. In Re Trepca Mines Roxburgh, J. states "There is, of course, no question but that the proceedings before me must be conducted in English and in no other language" (p. 27). The learned judge supports this contention by reference to the Pleadings in English Act, 1362 (36 Ed. 3, c. 15), despite the fact, which he concedes, that it was repealed in England in 1863. He also cites the Welsh Courts Act, 1942, but as this Act only applies to Wales, it is hard to see how it is relevant. No other support is offered, so the judge's ruling becomes nothing more than an assertion. As a result, the Supreme Court Practice can make no useful contribution.

There do not appear to be any New South Wales or Commonwealth statutes that relate directly to the question. Australian case law does not go much further. The only cases even slightly related concern the rights of parties with regard to court interpreters (Dairy Farmers Co-operative Milk Co. Ltd. v. Acquilina (1963) 80 WN (NSW) 501). Both take the proposition that English must be used for court proceedings as a given. Both were correct, but that was before the Imperial Acts Application Act, 1969 (NSW)....

36 Ed. 3, c. 15 was the first Imperial enactment to attack the by then well-established practice of using French in courts of law. Despite this statute, and a valiant, but ultimately thwarted, attempt by Oliver Cromwell to force all court proceedings to be in English, this did not occur until 1731, when 4 Geo. 2, c.26 finally abolished the highly corrupted Law-French, and enshrined the English language as the language of all English courts (apart from the Court of Admiralty, which was allowed to proceed in Latin). Or so Parliament must have thought.....

4 Geo. 2, c.26 was repealed in New South Wales by the Imperial Acts Application Act, 1969 (NSW), ninety years after its repeal in England in 1979. Upon its repeal, all statutory basis for the proposition that English is the prescribed court language in New South Wales vanished.

What, then, is the law as it now stands? Do we, perhaps, revert to Law-French, the common law reviving upon the repeal of a statute? Although s. 9 (1)(a) of the Imperial Acts Application Act purports to prevent a revival of old law upon the repeal of Imperial Acts, in the case of the repeal of an Act without its replacement by a new one, there would have to be a common law revival in order that there be any law at all on the topic. The alternative is that a no-law area springs into being. If this were the case, then any language would have equal legal status in court, the language or languages to be used in any particular hearing to be agreed upon, presumably, between judge and counsel.

So if during your next court appearance the judge asks you whether you consent to the case being tried in English, do not be thrown, but, rather, consent magnanimously. Or perhaps you might prefer Latin, Greek, Slovenian, or Sanskrit. Remember, however, that cases tried in Ancient Sumerian may require court reporters to brush up on their cuneiform. And always, yes always, carry your Law-French phrasebook. ❑ Marcus Young, Tipstaff of the Supreme Court.

The Cruellest Cut

Wheelahan DCJ (as he then was)
"X" v. "Y" District Hospital

R.E. Quickenden for Plaintiff
A. Renshaw for Defendant

R.E. Quickenden: "In this case, Your Honour, the Plaintiff alleges he lost a testicle due to the negligence of the "Y" District Hospital.

His Honour: ....(flicking through court papers) "Has a Memorandum of Consent been filed?"

A. Renshaw: "Your Honour, the Plaintiff is not a thoroughbred racehorse." ❑