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# The Duty to Give Reasons: *English v. Emery Reimbold & Strick Ltd*[1]

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## 1. INTRODUCTION

In *English v. Emery* the Court of Appeal heard together three appeals which all challenged the adequacy of the reasons the trial judges had given for their decisions. The Court re-considered *Flannery v. Halifax Estate Agencies Ltd*[2] and relaxed the requirements for what constitutes sufficient reasons. The problem often occurs if the judge or arbitrator has heard detailed expert evidence from two rival experts and then says in his judgment or award, after reciting the rival contentions, "I prefer the expert evidence that was given by X to that given by Y". No reasons are then given for the preference. The losing party does not understand why one expert has been "preferred". As no reasons are given, the court cannot properly consider any appeal or challenge.

## 2. THE FACTS

*English v. Emery* was a personal injury case where there were two rival expert consultant orthopaedic surgeons. The central issue was whether the claimant's condition was developmental in origin and was therefore present before the accident or whether it was caused by the accident. The judge said " . . . I prefer, on the balance of probabilities, the evidence of Mr Andrew that the spondylolisthesis was developmental in origin and was therefore present before the accident and was not caused by the accident as is the view of Mr McBride."

In *DJ & C Withers (Farms) Ltd v. Ambic Equipment Ltd*, the main issue was whether the defendant's hydraulic milking equipment caused mastitis in the claimant's cows. There was again a dispute on the expert evidence. When the judge delivered his judgment (which had been provided in advance) the claimant indicated that it was minded to apply for permission to appeal on the ground that the judgment did not give adequate reasons for the judge's preference for the defendant's evidence. This led the judge to add a short addendum to his judgment.

In *Verrechia t/a Freightmasters Commercials v. Commissioner of Police for the Metropolis*, the claimant was seeking to recover items from the police which had been seized in connection with legal proceedings. He was successful in respect of a proportion of the items claimed. The judge made no order as to costs after receiving substantial written submissions on the issue. She gave no reasons for this decision apart from commenting that she was unpersuaded that her provisional view was incorrect.

[1] *English v. Emery Reimbold & Strick Ltd, DJ & C Withers (Farms) Ltd v. Ambic Equipment Ltd, Verrechia t/a Freightmaster Commercials v. Commissioner of Police for the Metropolis* [2002] EWCA Civ 605. Now [2002] 3 All ER 385.

[2] [2000] 1 W.L.R. 377.

## 3. THE ISSUES AND THE LAW

The Court of Appeal considered *Flannery v. Halifax Estate Agencies Ltd*[3] and *Eckersley v. Binnie*.[4] In *Flannery*, Henry L.J. said that the duty to give reasons has two principal aspects. Fairness requires that parties (especially the losing party) should be left in no doubt why they won or lost. Secondly, the requirement to give reasons concentrates the mind of the judge and enables the resulting conclusion to be much more likely to be based on the evidence.[5] As to what the judge should actually do in giving reasons, he said[6]:

> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
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> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.

The Court of Appeal in *English* also quoted Bingham L.J. in *Eckersley v. Binnie*[7]:

> In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons. The advantages enjoyed by the trial judge are great indeed, but they do not absolve the Court of Appeal from weighing, considering and comparing the evidence in the light of his findings, a task made longer but easier by possession of a verbatim transcript usually (as here) denied to the trial judge.

The issues on the appeals were whether the trial judges had given adequate reasons for their decisions.

## 4. THE JUDGMENT

The Court of Appeal said[8] that a "coherent reasoned rebuttal" did not:

> mean that the judgment should contain a passage which suggests that the Judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more

[3] *ibid.*
[4] (1988) 18 Con L.R. 1 at 77–78.
[5] [2000] 1 W.L.R. 377 at 381G-H.
[6] *ibid.* at 382A–C.
[7] (1988) 18 Con L.R. 1 at 77–78.
[8] The Court of Appeal considered Article 6 of the European Convention on Human Rights and the Strasbourg jurisprudence but concluded that they did not require more extensive reasoning than that required by the common law.