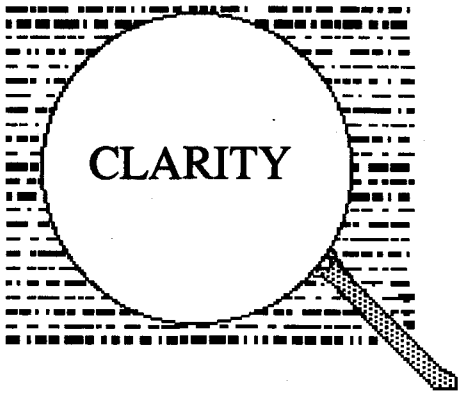

A movement to simplify legal English

Patron: Lord Justice Staughton

No 26: December 1992

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SUBSCRIPTIONS

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A subscription paid on joining at any time during 1992 is good until 31st August 1993.

This issue reproduces Gyles Brandreth's plain language bill just presented to the British parliament, and reports New Jersey's experience 12 years after passing a similar Act.

In March we will look at the wording and effectiveness of other plain language laws, and report on the progress of the British one.

The March issue will also see the introduction of page headings for the longer articles.

Press date for the next issue:

8th March 1993

Change of
document exchange number

DX box 80056 East Molesey

has now closed, and has been replaced by

DX 57722 Surbiton.

Documents sent to the old box number before November 1993 will be forwarded.

News

Britain

Plain Language Bill

Gyles Brandreth MP has presented a private member's bill, the Plain Language Bill. It had its first reading in the House of Commons on 8th December, and the second reading will be on 22nd January. Private members' bills are rarely passed, but Mr Brandreth says that the Department of Trade and Industry (whose library subscribes to CLARITY) has shown an interest.

Paul Flynn, the member for Newport, objected on behalf of the Picts and Celts to Mr Brandreth's remark in his introductory speech that "we in this country are born with the privilege of having a unique language as our parent tongue - English". However, the bill itself is culture-neutral.

The full text of the bill appears on p.10.

Clarity's 2nd research project

The first stage has been completed. This involved asking solicitors and barristers who were not CLARITY members for their views on four versions of a document and on plain language generally. Some 250 questionnaires were sent out, and 55 have been returned.

However, there has been a delay with the second stage, in which we hope to compare the views of judges with those of, and attributed to them by, those in practice. As a matter of courtesy, and in the hope that their co-operation would help persuade the judges to answer, we asked the Lord Chancellor's Department for permission. They have refused without giving a reason. However, individual judges have expressed an interest and the project has not been abandoned.

We are also seeking the views of lay people to compare with those of the lawyers.

Change in the rules of judicial construction

On 26th October a special judicial committee of the House of Lords - comprising six law lords and the Lord Chancellor - decided by a majority of six to one to relax a long-established common law rule of construction. The Lord Chancellor was the dissenting voice.

When interpreting ambiguous legislation, judges may now read the Hansard reports of the parliamentary debates preceding the passage of the Act to help them decide what "the intention of parliament" had been.

Hansard Report

The Hansard Society for Parliamentary Government expects to publish in February the report of its Commission on the Legislative Process. The submissions made to it, including that of CLARITY, will be published at the same time.

Meanwhile, we are serialising CLARITY's submission, the second instalment of which appears on pages 4 to 8 of this issue.

Canada

Alberta reforms government correspondence

All letters written after December 31st 1992 by the Government of Alberta to the public must be in plain language. The cabinet has approved as deadlines for clarifying forms, educational and promotional materials, and regulations the end of 1993, 1994, and 1995 respectively.

Ottawa Law Review

Susan Krongold's article *Writing Laws: Making Them Easier to Understand* is to appear in the Ottawa Law Review, probably at the end of January or the beginning of February.

After extensive discussions, the editors have agreed to allow publication with plain English footnotes instead of the traditional Latin abbreviations, with a note explaining this strange concession .

Europe

Council directs plain consumer contracts

Robin Edmunds writes:

An EC directive approved by the commission on 22nd September provides:

> In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

"Consumer" is defined as:

> ... any natural person who ... is acting for purposes which are outside his trade, business or profession.

The directive applies to all contracts concluded after 31st December 1994. Article 10 directs member states to bring into force legislation to comply with this requirement by that date.

Clearer Timeshare Act 1993

Martin Cutts looks at ways to improve parliamentary drafting

The language and layout of Acts of Parliament often make them difficult to understand, as Clarity's submission to the Hansard Commission on Parliamentary procedure has shown. Is this inevitable, or could an infusion of plain-language and information-design principles help to clarify Acts for the benefit of judges, other lawyers, government officials, and citizens?

In 1987 I met the then first parliamentary counsel (the government lawyer responsible in the UK for writing Bills) to discuss this question. He considered that his office was producing the most understandable language it could, given the pressures of deadlines, MPs' last-minute amendments, and the way the courts interpreted statutes. He did, however, suggest that if I didn't think his Acts were clear enough, I should have a go at revising one myself and he would examine it — a fairly common parliamentary counsel riposte, I gather.

Rather belatedly I've been responding to the challenge by undertaking a research project about the clarity of Acts. I've received much help on general questions of law from two lawyers, Tony Thurnham and Tim Cox, as well as encouragement and advice from lawyers and non-lawyers in Canada, Australia, and the UK.

Benefits of clearer laws

It's obvious that a society based on the rule of law needs statutes which are clear and understandable as well as just. Indeed, you could argue that to be just, they should be clear and understandable. Clear law is in everyone's interest. It is in the interest of the Commons and the Lords, as they need to know exactly what law they are making. It is in the legal profession's interest, so that time and money are not wasted trying to root out the hidden meaning of an Act. It is in the interests of civil servants, local authority staff and business people, many of whom must work closely with Acts. And it is in the interest of citizens, for several reasons: we pay the MPs' and parliamentary counsel's salaries; we pay for the administration of justice in the courts, which relies heavily on Acts; we pay for every minute that a lawyer wastes trying to understand a complicated Act or locate a relevant point in an Act; and we sometimes need to read the exact words of an Act ourselves — rather than a leaflet interpreting it — to find out precisely what the law says. That is especially important, of course, to some litigants-in-person.

Baffling legislation reduces respect for the law, just as the gobbledygook sometimes written and spoken by lawyers diminishes respect for their profession. Citizens are deemed to know the laws which govern them; they cannot, for example, plead ignorance of a law in order to escape the consequences of wrongdoing. The fiction of perfect knowledge is harder to sustain when even highly literate citizens find laws incomprehensible. As Francis Bennion has put it:

> It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend. The democratic origins are impeccable, the result far from satisfactory....

What seems to be missing from the drafting process is the voice of the citizen. Surely those Bills which most directly affect the public should be tested for comprehensibility with citizens and other users, preferably before they become law. The results could then be fed back into the parliamentary process or at least used to inform future drafting decisions on other Acts. Reasonably literate citizens should be regarded as the primary audience for most legislation — not judges, other lawyers and professionals — and the writing and typography should be arranged accordingly. Although there is little point pretending that all Acts could be written and structured in a way that everyone would understand, this should be the ultimate goal.

Savings from better Acts could be considerable. Assume that statutes are consulted, say, four million times a year by judges, other lawyers, and the public. Assume also that improvements in language and layout could save those readers six minutes every consultation. Finally assume that readers' time is worth £90 an hour (less than most solicitors charge). The saving would be £36 million a year. Pie in the statistical sky, of course, but in the 1980s government departments regularly costed inefficiencies in their forms by similar methods and boasted of the savings made by improving them. Government could do a similar exercise now on legislation.

Clearer Acts would help to create a climate in which other clear legal documents would flourish. Lawyers with the example of clear Acts in front of them would have less excuse for writing gobbledygook. Further, all the leaflets, notices and forms which spring from Acts might be simpler if the Acts themselves were clear. Remarks by a local authority's chief executive, replying to criticisms of a notice it had issued, illustrate this well:

> I agree that the notice is in rather legalistic language, but then so is the statute on which the notice is based. It seems to me what you are attacking, or should be attacking, is the tendency for Acts of Parliament and legal documents generally to be written in legalistic, instead of plain, English. In that I wish you well, but you have a long row to hoe.

Lawyers are among those who have appealed for change. In a talk to the Statute Law Society in 1985, Richard Thomas, then legal officer of the National Consumer Council, said:

> Having said that we cannot expect all statutes to read like an Office of Fair Trading leaflet, let me stress my conviction that there remains an overwhelming need to achieve much greater clarity and simplicity and overwhelming scope to do just that. The need is manifest: complexity and obscurity cause massive waste — unnecessary expense for commerce, for professionals, for government and for the public; complex detail brings its own uncertainty before the courts...; ... complexity means uncertainty and ignorance in the daily disputes which will never be litigated, where bureaucracies and the economically dominant will usually prevail; complexity brings contempt for the law, for Parliament and for democracy itself.

Giving evidence to the Renton Committee on the preparation of legislation, Sir Robert Micklethwait QC, the Chief National Insurance Commissioner, said:

> A statute should not only be clear and unambiguous, but readable. It ought not to call out for the exercise of a cross-word /a crostic mentality which is able to ferret out the meaning from a number of sections, schedules and regulations.

In 1979 Lord Renton himself wrote:

> In Britain the drafting of legislation remains an arcane subject. Those responsible do not admit that any problem of obscurity exists. They resolutely reject any dialogue with statute law users. There is resistance to change, and to the adoption (or even investigation) of new methods. The economic cost of statute law is enormous, yet official interest has been lacking.

The Timeshare Act

The first part of my research, which has just been published as a discussion paper*, provides a total revision of the wording, structure, and typography of the Timeshare Act 1992, whose main purpose is to provide a cooling-off period for people who sign timeshare agreements. The Timeshare Act has been chosen because it is recent, brief, relevant to ordinary consumers, and is already being spoken of as a model for EC-wide legislation on the subject. The paper seeks to stimulate debate among statute users, writers and typographers. The second part of the project will test the revised Act with users, solicit comments from anyone who is interested — including the present first parliamentary counsel — and publish a final report. I'd particularly welcome the views of CLARITY lawyers and I'd like to receive any particularly good or bad examples of modern parliamentary drafting that they've come across. All contributions will be acknowledged in the final report.

* *Unspeakable Acts?* is available from Words at Work, 69 Bings Road, Whaley Bridge, Stockport SK12 7ND, price £6 including UK postage.

Analysis of the original Timeshare Act

One chunk of the Act must, according to statutory instrument, be reproduced in its entirety on right-to-cancel notices issued to customers by timeshare companies. This belies the notion that ordinary people never need to read Acts of Parliament. Unfortunately, the extract includes a sentence of 102 words in subsection (3):

> 7.—(1) This section applies following—
>
> (a) the giving of notice of cancellation of a time-share agreement in accordance with section 5 of this Act in a case where subsection (9) of that section applies, or
>
> (b) the giving of notice of cancellation of a time-share credit agreement in accordance with section 6 of this Act.
>
> (2) If the offeree repays the whole or a portion of the credit—
>
> (a) before the expiry of one month following the giving of the notice, or
>
> (b) in the case of a credit repayable by instalments, before the date on which the first instalment is due,
>
> no interest shall be payable on the amount repaid.
>
> (3) If the whole of a credit repayable by instalments is not repaid on or before the date specified in subsection (2)(b) above, the offeree shall not be liable to repay any of the credit except on receipt of a request in writing in such form as may be prescribed, signed by or on behalf of the offeror or (as the

> case may be) creditor, stating the amounts of the remaining instalments (recalculated by the offeror or creditor as nearly as may be in accordance with the agreement and without extending the repayment period), but excluding any sum other than principal and interest.

Note that technical terms like 'offeror', 'offeree', and 'prescribed' are unexplained. There are references to sections and subsections which readers cannot explore unless they happen to have a copy of the Act. This wording is appearing on documents which non-lawyers are being encouraged to read before deciding whether to cancel — 'Please read carefully', say both the right-to-cancel notices which have been prescribed. The notices use several other phrases, taken straight from the Act, which might be difficult for readers to understand: 'provisions for credit', 'under or in contemplation of the agreement', and 'specified period of not less than fourteen days'.

The Act has other 70-word and 100-word sentences, helping to create an average sentence length of 36 words — even when each item in a tabulated sentence has been counted as a whole sentence. An average of 15-25 words is usually achievable even in most legal documents and readability research suggests it is desirable. The high average sentence length in Acts is almost inevitable given the apparent convention of parliamentary counsel that full stops may not be used within subsections. In 1975, the Renton Committee said there should be no such convention.

The structure of the Act, in particular the way readers are plunged straight into complex definitions in the first section, militates against clarity. The first definition would stretch most readers' understanding:

> "timeshare accommodation" means any living accommodation, in the United Kingdom or elsewhere, used or intended to be used, wholly or partly, for leisure purposes by a class of persons (referred to below in this section as "timeshare users") all of whom have rights to use, or participate in arrangements under which they may use, that accommodation, or accommodation within a pool of accommodation to which that accommodation belongs, for intermittent periods of short duration.

This 75-word sentence is central to the meaning of the Act and seems almost designed to create confusion and litigation. Apart from anything else, it requires the careful reader to refer to three other definitions, two of which — 'timeshare users' and 'period of short duration' — are difficult to locate as definitions, being submerged elsewhere without the inverted commas which reveal other terms in the Act as defined. Also it is unclear whether 'that accommodation' refers to 'timeshare accommodation' or 'living accommodation in the United Kingdom or elsewhere... [etc]'. I assume it must mean the latter, but when 'accommodation' is used four times in twelve words, the mind begins to go numb. Any readers who manage to shin up the greasy pole of this definition — the very first subsection of the Act — will find it curious that timeshare accommodation is never referred to again. Its only other appearance is in the long title.

The Act begins with the standard enacting words which make it law:

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

The main problem with this is that 'the same' could refer to the Queen, the Lords, the Commons, the present Parliament assembled, or some or all of those people at the same time. Constitutional experts probably know exactly what is meant, but it is far from clear to other people. Perhaps the meaning is irrelevant and the sentence merely has a ritual significance. Whatever the explanation, surely this most basic of messages in the law should be in understandable language instead of mumbo-jumbo?

Headings to most of the sections are much vaguer than they need be: 'Obligation to give notice of right to cancel timeshare agreement' (whose obligation?); 'Obligation to give notice of right to cancel timeshare credit agreement' (whose obligation?); 'Provisions supplementary to sections 2 and 3'; and 'Right to cancel timeshare agreement' (whose right?). To people who already understand the Act, the answers to these questions are obvious: to the first-time reader, such details would provide vital clues.

Occasionally 'must' and the present tense are used together to signify obligation. This is good and is widely supported by plain-language advocates instead of 'shall' and the future tense. Since Acts are regarded as 'always speaking', the use of the future is unnecessary and potentially ambiguous, as it is in section 5(5), which, for extra linguistic complexity, begins with that curious beast, the gerund:

> The offeree's giving notice of cancellation of the agreement to the offeror before the agreement has been entered into shall have the effect of withdrawing any offer to enter into the agreement.

In this Act, 'shall' is used alongside 'must', without any apparent difference in meaning. It would be better to standardise on 'must' and use the present tense. To most people, 'shall' does not signify obligation; the moment has come when the reflex use of 'shall' should

be abandoned in favour of 'must'. This has happened already in legislation in the state of Victoria, Australia, where the Attorney-General has directed that 'must' should replace 'shall'.

'Where' is used to begin most of the conditional sentences in the Act. The simpler and shorter 'if' is used for the same purpose in only four subsections and throughout the Schedule. It would be better if 'if' were used as the first choice wherever possible, since this is the accepted usage outside legal settings.

The typography of the original Act, which is similar to that of other Acts, makes the information less accessible than it could be; this wastes readers' time. For example, the running heads (small-print lines of type at the top of pages) fail to say what section the reader will find on the page. Section headings are smaller than the size of the main text and, as they share a side column with cross-references to other Acts, they fail to stand out well. The result is that, on some pages, the reader is cast adrift on a sea of grey print without any of the usual navigational aids.

Features of the revised Act

The revised Act, called the Clearer Timeshare Act, tries to rectify the problems of the original while retaining its meaning, as far as that can be ascertained without access to the draftsman's sources (which are denied to the outsider). It makes sentences shorter (average 24 words), and puts full stops within subsections where necessary. This follows Lord Denning's advice in evidence to the Renton Committee:

> If you were seeking to see what different principles should be applied, the first would be to recommend simpler language and shorter sentences. The sentence which goes into ten lines is unnecessary. It could be split up into shorter ones anyway, and couched in simpler language. Simplicity and clarity of language are essential.

The rewriting and restructuring has created an Act which is some 980 words — almost 25 per cent — shorter than the original.

Where possible, the revision uses everyday language, for example 'if' instead of 'where' to begin conditional sentences, and 'must' instead of 'shall' to express obligation. It replaces 'offeror' and 'offeree' with 'seller' and 'customer' respectively. The enacting words now say:

> This is law by the authority of the House of Commons and the House of Lords, and by the assent of Her Majesty the Queen acting with their advice and consent.

Given the amount of restructuring, and the rewriting of all the definitions, it is impossible to provide 'before' and 'after' examples which are exactly in parallel and which make complete sense out of context. Here, however, are some of the comparisons.

1 *Before*

The offeree's giving, within the time allowed under this section, notice of cancellation of the agreement to the offeror at a time when the agreement has been entered into shall have the effect of cancelling the agreement.

After

An agreement is cancelled if the customer gives the seller notice of cancellation within the time this section allows.

2 *Before*

An agreement is not invalidated by reason of a contravention of section 2 or 3.

After

Contravening this section does not make an agreement void.

3 *Before*

(2) Subject to subsection (3) below, where a person who enters into a timeshare credit agreement to which this Act applies as offeree has not received the notice required under section 3 of this Act before entering into the agreement, he may give notice of cancellation of the agreement to the creditor at any time.

(3) If in a case falling within subsection (2) above the offeree affirms the agreement at any time after the expiry of the period of fourteen days beginning with the day on which the agreement is entered into, he may not at any subsequent time give notice of cancellation of the agreement to the creditor.

After

If a customer does not receive the notice required by section 8 before entering into the agreement, he or she may give the lender notice of cancellation of the agreement at any time. But if the customer affirms the agreement at any time on or from the fifteenth day after entering into it, he or she may not give the lender notice of cancellation.

4 *Before*

This Act shall have effect in relation to any timeshare agreement or timeshare credit agreement notwithstanding any agreement or notice.

After

The parties may not prevent

this Act applying to an agreement.

5 Before

This Act shall come into force on such a day as may be prescribed.

After

This Act comes into force on a day to be prescribed.

6 Before

A person must not in the course of a business enter into a timeshare agreement to which this Act applies as offeror unless the offeree has received, together with a document setting out the terms of the agreement or the substance of those terms, notice of his right to cancel the agreement.

After

A seller may enter into a timeshare agreement only if the customer has received a right-to-cancel notice together with a document setting out the terms of the agreement or the substance of its terms.

In the revised Act, definitions are in alphabetical order and, I hope, in simpler language. They now have a section of their own, whereas the original mixed them up with other material and split them between sections 1 and 12.

Typography

The typography tries to be as reader-centred as possible, with clear headings and running heads. A new numbering system means that readers can easily tell what section and subsection they are in.

I spent some time deciding whether to identify defined words typographically wherever they appear in the text; I've done this in insurance policies and it can be successful. There are several methods: using an asterisk next to defined words and referring readers via a footnote to a set of definitions; picking out defined words in bold or italics whenever they are used, after warning readers what this signal means; and picking them out in bold or italics only on the first occasion they are used in a section. At least two problems exist with all these approaches: they are visually intrusive; and the use of defined words in an undefined sense becomes a little risky; if a defined word is not printed in italics, say, does that mean it is being used in an undefined sense or has the compositor just forgotten to italicize it? The second problem could perhaps be overcome with the aid of a computerised concordance which would highlight all uses of defined words. Writers could then change any word which had been used in an undefined sense. But this solution seems likely to lead to the second-best word being chosen, just for the sake of variation, and would certainly take the parliamentary counsel some time to accomplish. And common words like 'order' and 'notice', if defined as nouns, might not then be usable as verbs.

In an early draft of the Act, I used italics (the least obtrusive type weight apart from the roman or 'book' weight), for defined words wherever they appeared. About 160 words — including, for example, 'notice' 45 times — were italicized. The effect was visually acceptable, but there were anomalies when defined words were used in undefined senses and when two defined words ran together so that they looked like a new defined term. I therefore abandoned the experiment and put a complete, alphabetical list of defined terms in section 2, straight after the introduction.

This and other problems need further attention. Getting this far has shown me what a tough job the parliamentary counsel have, but it has convinced me they could make statutes much simpler.

A page from the original Act appears overleaf, reduced in size by 10 per cent.

Facing that is a page from the Clearer Timeshare Act, also reduced in size by 10 per cent. Some of its main features are:

- Running heads (top of the page) are specific, so readers flicking through the Act can quickly locate the section they want.
- Section headings are in the same size of type as the main text, but picked out in bold to make them more obvious.
- The cross-references are positioned as true footnotes.
- The numbering system means that readers always know what section and subsection they are in. Numbers stand out as they occupy a column of their own.
- Definitions are in alphabetical order and in italics.

See also the notes about Mr Cutts' discussion paper on the Act on p.21 and his presentation in Vancouver on p.30.

(c) by virtue of his taking part in a collective investment scheme (as defined in section 75 of the Financial Services Act 1986), 1986 c. 60.

or to such rights as may be prescribed.

(4) In this Act "timeshare agreement" means, subject to subsection (6) below, an agreement under which timeshare rights are conferred or purport to be conferred on any person and in this Act, in relation to a timeshare agreement—

(a) references to the offeree are to the person on whom timeshare rights are conferred, or purport to be conferred, and

(b) references to the offeror are to the other party to the agreement,

and, in relation to any time before the agreement is entered into, references in this Act to the offeree or the offeror are to the persons who become the offeree and offeror when it is entered into.

(5) In this Act "timeshare credit agreement" means, subject to subsection (6) below, an agreement, not being a timeshare agreement—

(a) under which a person (referred to in this Act as the "creditor") provides or agrees to provide credit for or in respect of a person who is the offeree under a timeshare agreement, and

(b) when the credit agreement is entered into, the creditor knows or has reasonable cause to believe that the whole or part of the credit is to be used for the purpose of financing the offeree's entering into a timeshare agreement.

(6) An agreement is not a timeshare agreement or a timeshare credit agreement if, when entered into, it may be cancelled by virtue of section 67 of the Consumer Credit Act 1974. 1974 c. 39.

(7) This Act applies to any timeshare agreement or timeshare credit agreement if—

(a) the agreement is to any extent governed by the law of the United Kingdom or of a part of the United Kingdom, or

(b) when the agreement is entered into, one or both of the parties are in the United Kingdom.

(8) In the application of this section to Northern Ireland—

(a) for the reference in subsection (2)(a) above to section 29(1) of the Caravan Sites and Control of Development Act 1960 there is substituted a reference to section 25(1) of the Caravans Act (Northern Ireland) 1963, and 1960 c. 62. 1963. c. 17. (N.I.)

(b) for the reference in subsection (3)(b) above to section 153 of the Employment Protection (Consolidation) Act 1978 there is substituted a reference to article 2(2) of the Industrial Relations (Northern Ireland) Order 1976. 1978 c. 44. S.I. 1976/1043 (N.I. 16)

Obligation to give notice of right to cancel timeshare agreement.

2.—(1) A person must not in the course of a business enter into a timeshare agreement to which this Act applies as offeror unless the offeree has received, together with a document setting out the terms of the agreement or the substance of those terms, notice of his right to cancel the agreement.

■ INTRODUCTION

1 What this Act does; when and where it applies

1.1 This Act gives a customer the right to cancel a timeshare agreement or timeshare credit agreement. Later sections explain how and when this may be done.

1.2 This Act applies to an agreement if:

(a) the customer is acting as a private individual when entering into the agreement;

(b) the seller or lender is acting in the course of a business when entering into the agreement; and

(c) at least one of the parties is in the United Kingdom when entering into the agreement, or the agreement is to some extent governed by the law of the United Kingdom or of a part of the United Kingdom.

1.3 The parties may not prevent this Act applying to an agreement.

1.4 This Act comes into force on a day to be prescribed.

1.5 This Act extends to Northern Ireland.

2 Meaning of words

2.1 The meanings of certain common words in Acts, such as 'person', 'summary' and 'writing', are given in the Interpretation Act 1978[1]. In addition, in this Act, whenever the following terms are used they have the meanings given here unless the context indicates otherwise.

Affirm means that the customer takes a significant action which shows that he or she considers the agreement to be in force.

Caravan means the same as in section 29(1) of the Caravan Sites and Control of Development Act 1960[2] when applying this Act to Great Britain, and the same as in section 25(1) of the Caravans Act (Northern Ireland) 1963[3] when applying this Act to Northern Ireland.

Credit includes a cash loan and any other form of financial support.

Customer means someone who, as a private individual, agrees to pay for a timeshare property through a timeshare agreement. As to a time before the agreement is entered into, this meaning includes someone who becomes the customer.

Lender means a person who, in the course of a business, provides or agrees to provide credit to or for a customer through a timeshare credit agreement.

Notice means notice in writing.

[1]1978 c30
[2]1960 c62
[3]1963 c17(NI)

Britain's Plain Language Bill

presented by Gyles Brandreth
[see news item on page 2]

A BILL TO

Secure improvements to the language and layout of certain contracts.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Requirement of clarity

1. (1) A contract to which this Act applies shall -

(a) be written in clear and readily understandable language using words with common and everyday meanings;

(b) be arranged in a logical order;

(c) be suitably divided into paragraphs with headings;

(d) be clearly laid out; and

(e) use lettering that is easily legible and of a colour which is readily distinguishable from the colour of the paper.

(2) This Act shall not prevent the use in a contract of -

(a) words or phrases or forms of contract which are required by statutory authority; or

(b) words or phrases of a technical nature which are required for precise specification.

Consumer contracts

2. This Act applies to any consumer contract entered into after the commencement of this Act which is made on written standard terms of business and which is -

(a) a contract to the supply to a consumer of goods of a type ordinarily supplied for private use or consumption; or

(b) a contract for the supply of a service to a consumer.

Consumer credit contracts

3. This Act applies to a regulated agreement within the meaning of the Consumer Credit Act 1974 which is entered into after the commencement of this Act and which is made on written standard terms of business.

Housing Contracts

4. This Act applies to any contract entered into after the commencement of this Act which is made on written standard terms and which is -

(a) a secure tenancy;

(b) a protected tenancy;

(c) a restricted contract; or

(d) a contract to which Part VII of the Rent (Scotland) Act 1971 applies.

Remedies

5. (1) If a contract does not comply with section 1 of this Act the party who made the contract in the course of a business shall be liable to an action for damages brought by the other party.

(2) The measure of damages to which a person shall be entitled in an action under this section shall be the estimated loss suffered by that person as a result of the non-compliance.

(3) If, in an action under this section, a person -

(a) is found liable to pay damages; and

(b) fails to show that he has attempted in good faith to ensure compliance with section 1 of this Act,

he shall pay additional damages of £500.

(4) In England and Wales and in Northern Ireland, the county court shall have jurisdiction to hear and determine any action under this section.

(5) In Scotland, the sheriff court shall have jurisdiction to hear and determine any action under this section.

Enforcement by Director General of Fair Trading

6. The following subsection shall be inserted after section 34(3) of the Fair Trading Act 1973 -

"(3A) A course of conduct on the part of a person carrying on a business shall also be regarded as unfair to consumers for those purposes if it consists of failures to ensure that contracts made by him comply with section 1 of the Plain Language Act."

Application

7. This Act applies notwithstanding any provision to the contrary in any contract.

Interpretation

8. (1) In this Act -

"business" includes a professional practice, any other undertaking carried on for gain or reward, and the activities of any government or local or public authority;

"consumer" has the meaning given to that expression in the definition in this section of "consumer contract";

"consumer contract" means a contract in which one party to the contract deals, and the other party to the contract ("the consumer") does not deal or hold himself out as dealing, in the course of a business;

"goods" has the same meaning as in the Sale of Goods Act 1979;

"protected tenancy" has the same meaning, in England and Wales, as in the Rent Act 1977 and, in Scotland, as in the Rent (Scotland) Act 1971;

"restricted contract" has the same meaning as in the Rent Act 1977;

"secure tenancy" has the same meaning, in England and Wales, as the Housing Act 1980 and, in Scotland, as in the Tenants' Rights (Scotland) Act 1980.

(2) In this Act a "contract for the supply of a service" -

(a) means, subject to paragraph (c) below, a contract under which a person agrees to carry out a service, whether or not goods are also -

(i) transferred or to be transferred, or

(ii) bailed or to be bailed by way of hire,

under the contract, and whatever the nature of the consideration for which the service is to be carried out;

(b) includes a contract of insurance; but

(c) does not include a contract of service or apprenticeship.

Short title, commencement and extent

9. (1) This Act may be cited as the Plain Language Act;

(2) This Act shall come into force on 1st January ....;

(3) This Act extends to the whole of the United Kingdom.

(4) This Act shall bind the Crown.

Editor's note

I propose writing to Mr Brandreth before the second reading to support the bill and suggest a few improvements of detail. I had hoped that this issue would reach members in time for them to write with comments, either to me for inclusion in a general CLARITY submission, or to Mr Brandreth direct at the House of Commons, but I am afraid that I have not managed to complete this quickly enough. However, it is less likely that this bill will become law than that the proposal will be adopted by the Department of Trade & Industry and resurface as a government bill later. I will try to keep abreast of developments, and would welcome suggestions to collate into a CLARITY submission. Meanwhile, my rather hasty interim comments are are:

The Act should require the Office of Fair Trading to operate a self-financing review scheme, like that run by the Attorney General of New Jersey (see pp 12-13), providing (as there) a useful drafting serviuce and a defence to proceedings under the Act.

Shall should be replaced by the present indicative throughout (and in particular in clause 5(2)), as it has been in most of clause 5(3).

Clause 1(1)(2) should refer to *the background* rather than to *the colour of the paper*.

The heading to clause 3 should refer also to consumer hire agreements.

Clause 3 should apply the Act to *any* [not *a*] regulated agreement, to match clauses 2 and 4. The *a* was probably a typing mistake.

Clauses 2 to 4 should be run together and headed *Contracts to which this Act applies*. This would improve the logical structure of the bill and save double repetition of the introductory paragraph.

I am not sure that the remedy (plural in the heading?) is sufficient, though I understand the experience overseas has been that the legislation has worked without recourse to similar remedies. There will very rarely be a loss, apart from legal fees of translating the document, and the economics of litigation will deter most consumers from claiming. The bill should make clear whether the legal expenses of interpreting the contract and of pursuing the claim would be allowed.

Subclauses 5(4) and (5) could be merged. And *hear and determine* is unduly wordy.

It may be worth setting out in full the definition of *goods* in clause 8, rather than referring the consumer to another Act.

The word *in* has been omitted, presumably in error, before the reference to the Housing Act in the definition of *secure tenancy* .

No tenancy definitions apply to Northern Ireland, though this may be because none are necessary.

Clause 8(2)(a) needs an *and* at the end.

The short title clause is unnecessary if the heading is clearly printed at the top.

New Jersey's

Plain Language Act 1980

A note from Jeanne F. Pasmantier

Regulatory Officer, Division of Consumer Affairs,
Dept of Law and Public Safety, State of New Jersey

The New Jersey Plain Language Law has proved to be extremely effective, and the review system is working well. After some initial unease, all segments of the legal profession, the legal publishing industry, other large suppliers of contracts, and individual businesses cooperated fully.

Contracts to which the law applies

The law applies to all consumer contracts, defined as:

> **a written agreement in which an individual:**
>
> **(a) leases or licenses real or personal property;**
>
> **(b) obtains credit;**
>
> **(c) obtains insurance coverage ... ;**
>
> **(d) borrows money;**
>
> **(e) purchases real or personal property;**
>
> **(f) contracts for services *[no comma!]* including professional services;**
>
> **for cash or on credit, and the money, property or services are obtained for personal, family or household purposes. "Consumer contract" includes writings required to complete the consumer transaction.**

Certain dealings in securities are excluded, as are contracts involving more than $50,000 (although the dollar limitation does not apply to contracts for real estate or insurance).

The law is not restricted to those dealing with the consumer in the course of a business.

Obligation

A consumer contract must be written "in a simple, clear, understandable and easily readable way".

Remedies

A consumer is entitled to:

- compensation for actual damage caused by non-compliance "if the violation caused the consumer to be substantially confused about the rights, obligations or remedies of the contract";
- up to $50 as punitive damages; and
- reasonable attorney's fees and costs, to a limit of $2,500.

There are provisions for class actions and for injunctions, which may also be sought by the Attorney General.

History

Publishers of legal forms were among the first to "translate" their consumer contracts into plain language in order to be ready for the effective date of the law (originally October 15 1981, later extended by amendment to April 15 1982. The difference between the old and new style language in these forms is dramatic, as can be seen from the example below.

The banking and insurance industries also took action long before the effective date, setting up committees to deal with the new law. Most consumer banking documents were entirely rewritten in plain

BEFORE	AFTER
In the event that the said edifice, of which the demised premises form a part, be so damaged by fire that the Landlord shall decide to rebuild or tear down, this lease shall be null and void and of no effect, and all agreements shall cease, terminate, and be at an end despite and notwithstanding the circumstance that the herein-demised premises may not have been affected by reason of aforesaid conflagration.	**If the building in which this apartment is located is so damaged by fire that the Landlord decides to rebuild or tear it down, this lease shall terminate even if the apartment has not been affected.**

language. Health and life insurance policies had already been subject to language simplification because of an earlier statute; under the new law, however, consumer insurance policies of all kinds had to be simple, clear, and easily readable. (Insurance contracts, incidentally, are the one major category of consumer contracts not reviewed by the Division of Consumer Affairs; the Department of Insurance has review jurisdiction over everything in that area.)

Contrary to fears, businesses were not disrupted by the new law, and no major problem arose in any industry. As one newspaper headline put it, no "horror stories" have been generated by the New Jersey Plain Language Law.

To date, we have reviewed some 4,000 documents, and there have been only three lawsuits, and one action by the Attorney General. The first suit claimed that incomprehensible provisions confused a homeowner seeking a second mortgage; the second, settled before trial, concerned an apartment lease. In the third case, the buyers of a residence won actual and punitive damages and attorney's fees because the real estate broker's sale contract did not comply with the Plain Language Law. In the fourth, the Attorney General successfully sought an injunction against the continued use of a fine print service contract.

Between October 1 1981 and September 15 1983, 1,040 documents were submitted for review. Of these, 628 complied with the requirements of the law, 312 did not, and the other 100 or so should not have been submitted to us.

How is the law administered?

The Attorney General has to give an opinion as to the compliance of documents voluntarily submitted for review. The law gives nine guidelines which a court or a reviewer may consider*[not* must! *See comment below- ed]*.

Review and approval are not required. However, submission for review is an attractive option, in that approval by the A-G constitutes a complete defense against a lawsuit based on the Plain Language Law.

The review operation is not complicated. First, receipt of a submitted contract, and the fee, is acknowledged to the sender (or we request the fee), and the material is logged in. I then review the documents according to the nine guidelines. I do it as an English teacher would, with red-pencilled comments and specific suggestions for simpler wording or sentence shortening. If a contract meets the guidelines, certification of compliance is sent to the submitting party. If not, the submitting party gets back the marked-up copy of the document and a checksheet listing its plain language defects. Everything, of course, is photocopied for our files. Revisions are reviewed without charge.

What problems have been faced in administering the law?

The only major problem with the first version of the law was that of review jurisdiction. This was too widely scattered amongst a number of agencies, and was centralised by an early amendment.

We did have a temporary operational problem in that, just before the effective date of the law, we had a great rush of submissions At one point, we had over 100 submissions awaiting review. This backlog slowly diminished to the point where we can now send out an opinion about three weeks after submission.

How has the law affected businesses, corporations, and small companies?

The law is working very well, with no major problems that we are aware of either for industry or for the state. That is not to say that no effort was required at the beginning: obviously, all companies doing business with consumers had to take a good look at the contracts they were using and, if they fell short of the guidelines, either rewrite them or buy approved publishers' forms.

We did hear some grumbling about having to discard old forms (as well as old writing habits). But we are not aware of any serious adverse consequences to industry. On the contrary, the New Jersey law is so constructed as to give businesses several important benefits. First, there is the certification defense mentioned earlier. Second, the review machinery provides guidelines and assistance in the writing of plain English. Finally, because there is less chance of the consumer misunderstanding contract provisions, litigation may well be reduced in the long run, rather than increased as originally feared.

Editorial comment

The act has clearly been a considerable success, and should encourage the British DTI to support Mr Brandreth's bill. But it is a pity that New Jersey's law is badly drafted. For instance:

- Section 2 provides that in determining whether a document complies, the court of the A-G "*shall* take into consideration the guidelines set forth in section 10 of the act".
- Section 10 sets out, ungrammatically and with unnecessary and clumsy repetition, two "examples of guidelines that [a court or the A-G] *may* consider in determining [whether a document complies]".

Using plain English in statutes

by David Elliott

CLARITY's submission to the Hansard Society for Parliamentary Government

This is the second part of the serialisation, which began in Clarity 25 and will continue in coming issues. The Hansard Society is to publish the full text, with other submissions and their report, in February.

The editor apologises for omitting the footnotes from the last instalment.

PART 2
SOLVING INFORMATION ANXIETY

Information anxiety

People read legislation looking for answers to questions. More often than not they find what Richard Saul Wurman calls "information anxiety"[7]; the black hole between data and knowledge. It happens when "information" doesn't tell us what we want or need to know.

The starting point to fill that black hole is to accept that what we write is not for ourselves but for others.

The moment we accept that fact our minds start to reorient themselves. We start to think not only of getting what we write technically correct but of getting the message across to those for whom we write. It means we become interested in clarity as well as precision. That leads us to ask

- what helps people understand texts (and then to use those things in our writing); and
- what impedes understanding (and so avoid those things in our writing).

Writing for others means we are constantly on the look-out for ideas. Ideas that help communication. Ideas we can then use for particular drafting jobs. What we should be about is to reverse the extraordinarily strange situation that free societies have arrived at where their members enter binding obligations they do not understand and are governed from cradle to grave by legislative texts they cannot comprehend. [8,9]

Each advance of knowledge about how readers read and understand texts should be complemented by a shift in style, organization, word order, thinking, or document design by drafters.

Social and economic reasons for improving the language of the law

If laws cannot be readily understood by those most affected by them the social cost is an increasing ignorance of the law and growing disrespect for the law and those who administer it. Ignorance of and disrespect for the law damage the fabric of society.[10]

Unnecessarily complex language, redundant words, and language which fails to communicate, impose an enormous financial burden on all levels of society. Even minor improvements to the language of the law can bring substantial savings of time; time which can then be put to more productive use.

Communicating to an audience

Improved drafting techniques and

[7] Richard Saul Wurman: *Information Anxiety*, Doubleday.

[8] A modification of Francis Bennion's comment:

> It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend. The democratic origins are impeccable, the result far from satisfactory...

F Bennion: *Bennion on Statute Law*, Longman (3rd ed) p.10.

[9] The admirable comment of a witness in the Wandsworth County Court comes to mind:

> I know that ignorance is no excuse for the law.

Recorded in a footnote to A Russell: *Legislative Drafting and Forms*, Butterworths 4th ed.

[10] See Sir John Donaldson's comment in *Merkur Island Shipping Co. v Laughton* (1983 1 All ER p.334).

ideas stem from accepting that legislation is intended to be read.

Understanding by whom particular legal language will be read and how readers will use a document gives writers ideas for writing documents so that they can be more easily understood.

(1) Stating a purpose

Research shows that readers are better able to understand and interpret texts when they have a context for reading them. Purpose sections can create a context.

What are purpose sections?

Purpose sections are sections in an Act stating the basis of the legislation and which are themselves law making or intended to have legal effect.

Sir William Dale has described the reason for including purpose sections in legislation this way[11]:

> *An enunciation of principle gives to a statute a firm and intelligible structure. It helps to clear the mind of the legislator, provides guidance to the Executive, explains the legislation to the public, and assists the courts when in doubt about the application of some specific provision.*

Why purpose sections are becoming more popular

Every Act is passed for a reason. Those reasons may be, in the mind of the reader, of lesser or greater importance, valid or not. But there is, in the collective "mind" of Parliament, a reason for every Act it passes.

On that basis, if there is a reason, a purpose, for passing an Act, it is only common sense to say what that purpose is. In the absence of a statement of purpose, the reader is left to search for his or her understanding of the purpose.

If the reader has to come to a conclusion about the purpose of an Act, even if that conclusion is a mental exercise, why not help the reader by stating the purpose explicitly?

So the reason for a 'purpose section' is to help understand the text of the Act and to help interpret it when questions arise. A purpose section is an aid to every reader - from the recipient of some benefit or obligation under the Act to the interpreter, whether that interpreter acts to administer the Act or to judge legal issues arising from it.

The problem with purpose sections

The major objection (raised by writers not readers) about including purpose sections in legislation is that they will be used! But used to obscure what the writer thinks would otherwise be clear.

Another typical objection to purpose sections is that they restate in different words what is said more specifically in later provisions of the Act.

A third objection is that purpose sections tend to lose their purpose and become merely statements descriptive of what follows (eg "this Act regulates the sale of liquor"), or much worse, a political manifesto.[12] This can be a real problem for legislative counsel.

Aiding interpretation

The bottom line is surely that the proprietary interest a drafter has in the legislation he or she writes is fleeting. After the writing is complete the document gains a life of its own. New issues, different situations, new technology, human ingenuity all create situations the original writer may not have contemplated or may have dealt with imperfectly. These issues most often arise years after the document leaves the writer. It is then that purpose sections can be particularly helpful in aiding interpretation.

Writing purpose sections is not easy, nor are they always helpful or desirable, but most readers do find them helpful. Drafters should think about including them in legislation more often than they do.[13] We urge the Hansard Society to recommend their use.

[11] Statute Law Review, Spring 1988, p15.

[12] Francis Bennion probably sums up the drafter's objections best:

> Draftsmen dislike the purpose clause. They take the view that often the aims of legislation cannot usefully or safely be summarised or condensed by such means. A political purpose clause is no more than a political manifesto, which may obscure what otherwise may be precise and exact.... The draftsman's view is that his Act should be allowed to speak for itself.
>
> F. Bennion: *Statutory Interpretation*, Butterworths, London 1984 p.580.

[13] Using purpose sections is not an argument for a civil law drafting style instead of a common law style. It is intended as a plea to keep an open mind and to use whatever tools are appropriate to do the job. The Renton Committee supported their use.

(2) Document organization

Documents should be organised to help the most likely readers. Legislation is not read for pleasure but to get information. So, from the readers' point of view, good writing is writing that structures information in a way that enables readers to get the information they seek as easily as possible.

How will the document be used

Organizing a document well means that we must know who the most likely readers of it will be. The writer is often not the best person to make decisions about the organization of a document. Clients can help here because they should know who the likely readers are and the questions they commonly ask and mistakes most often made by the readers they serve.

Research into how people read and react to documents can be a guide to internal organization. If we can foresee how readers are likely to use a particular document we can organize it so that it is as efficient as possible for their use. For legislation we have barely entertained the notion that testing, or reader considerations, should affect our writing.

Organizing for readers

The usual drafting practice is to impose the writer's thinking process and organization on readers. A process and organization that is entirely logical to the writer but not necessarily helpful for the readers.

We can look at organization of statutes on several levels:

(a) overall organization [14]

(b) organization within Parts and divisions

(c) sentence word order.

For example:

A typical legislative section will start a clause "Subject to ..."

For the writer this is entirely logical. He or she knows that what is about to be written is qualified by something coming later. The writer wants readers to be warned, so the automatic "subject to" pops into mind.

Now think of this from the readers' point of view. Before they read anything they are told to refer to somewhere else in the document. They look there, not knowing how the qualification relates to what they are about to read. They go back to the clause and read the rest of it. Inevitably they must then go back to the qualifying clause.

The readers are bounced about the document trying to understand the writer's logic.

A different approach will often help readers. If readers first understood the basic content of the section they would then be much better able to fit qualifications into it. This could be done in a number of ways:

- putting the "subject to" at the end of the section
- briefly describing what the "subject to" is about, followed by the section reference
- structuring the whole document so that the basic thrust of sections comes in subsection (1) and exemptions or limitations in later subsections
- using a footnote to indicate there is a qualification to the statement [15]
- using typographical aids to highlight exceptions and qualifications to a statement.

What works best? Whatever works best for the readers for whom drafters are writing. Don't know? Do some testing...,[16] ask some questions, take advice from others.

A specific example

Here is an example of what happens when surplus words are removed from a section and it is reorganized. It is taken from New Zealand legislation but the points apply to legislation in all jurisdictions.

[14] It is entirely correct for a writer to start a drafting project making sure the foundations are properly established. Creating an administ-rative agency and providing for its operation, for example - and then building on that structure. But when the writer is satisfied that all the pieces are correct he or she should think of organization from the reader's point of view. Is it helpful for the administrative agency to come first? Would it be more helpful if the important substance of the legislation came first - with the administrative agency coming much later?

[15] Footnotes and typographical aids are not used in legislation but there is no reason that this should be so.

[16] The Law Reform Commission of Victoria, Australia, commented on the practice of stating conditions before a rule in these words:

> Linguists have discovered that that style of writing is only suitable for those who read or write in Japanese or Turkish. It runs directly contrary to the way in which ideas are presented in other languages, including English.

Access to the Law: The structure and format of legislation (1990).

Section 4 of the *Disputes Tribunals Act 1988* reads:

4. Establishment of Tribunals - (1) The Minister may from time to time, by notice in the Gazette, establish such number of tribunals as the Minister thinks fit to exercise the jurisdiction created by this Act.

(2) The tribunals established under subsection (1) of this section shall be known as Disputes Tribunals.

(3) Each Disputes Tribunal shall be a division of a District Court.

(4) A notice under subsection (1) of this section establishing a Disputes Tribunal shall specify the District Court of which the Tribunal is to be a division.

(5) The Minister may at any time, by notice in the Gazette,

(a) Disestablish a Disputes Tribunal; and

(b) Direct how the records of that Tribunal shall be dealt with.

Not including the heading, but counting the cross-references to "subsection (1)" as 2 words, the section contains 109 words. The number of words in the section can be reduced by more than 30% by:

1) deleting unnecessary words (reduces the text by 19%)

2) reorganizing the text (reduces the text by a further 12%), and

3) using the present tense.

(1) deleting unnecessary words

The underlined words can all be deleted without affecting the meaning of the section or its legal certainty:

4. Establishment of Tribunals - (1) The Minister may from time to time, by notice in the Gazette, establish such number of tribunals as the Minister thinks fit to exercise the jurisdiction created by this Act.

(2) The tribunals established under subsection (1) of this section shall be known as Disputes Tribunals.

(3) Each Disputes Tribunal shall be a division of a District Court.

(4) A notice under subsection (1) of this section establishing a Disputes Tribunal shall specify the District Court of which the Tribunal is to be a division.

(5) The Minister may at any time, by notice in the Gazette,

(a) Disestablish a Disputes Tribunal; and

(b) Direct how the records of that Tribunal shall be dealt with.

21 words were deleted; a 19% reduction in the number of words used in the section.

The words deleted in subsection (1) "from time to time", "such number of" and "as the Minister thinks fit" are superfluous. The words "from time to time" are not necessary because power given to make an appointment or to do an act or thing is capable of being exercised from time to time, as occasion may require (s.25(g) Acts Interpretation Act 1924 New Zealand). The other words are unnecessary because the Minister has power to establish tribunals to exercise the jurisdiction created by the Act. It is implicit that in doing so the Minister will decide on the number to be established.

The words deleted in subsection (2) "of this section" are unnecessary. There is no other section to which subsection (1) could refer.

The reasons for deleting the words underlined in subsections (4) and(5) will be apparent from the preceding explanation.

(2) re-organizing the text

More words can be saved by a better organization of the section.

At present section 4 breaks up the various elements of the section in the following way:

- establishment issues appear in subsections (1), (2) and (4)
- creating tribunals as divisions of the District Court is dealt with in subsections (3) and (4)
- the notice establishing a tribunal is dealt with in subsections (1) and (4)
- disestablishment is dealt with in subsection (5).

One way to reorganize the section is

- to deal with the establishment of a tribunal as a division of the District Court by notice in subsection (1)
- to establish the name and jurisdiction in subsection (2)
- to deal with disestablishment in subsection (3).

For example, a minimum of rewriting results is this:

Establishment of tribunals

(1) The Minister may establish tribunals as divisions of a District Court by

(a) publishing a notice in the Gazette; and

(b) specifying in the notice the District Court of which-

each tribunal is to be a division.

(2) Each tribunal shall be known as a Disputes Tribunal and may exercise the jurisdiction created by this Act.

(3) The Minister may by publishing a notice in the Gazette

(a) disestablish a Disputes Tribunal, and

(b) direct how its records are to be dealt with.

This reorganization results in a further reduction of 9 words, or 8% of the total number of words in the section.

The elimination of words is largely achieved by omitting words which connect one subsection to another; words like "established under subsection (1)" and "under subsection (1)". Well organized sections rarely need to connect one subsection to another by specific reference. A section must be read as a whole and meaning should flow from one subsection to the next, leading the reader logically through the section.

The object of the rewrite is to treat each subsection as one complete unit of thought within the section as a whole.

(3) using the present tense

Another word can be saved if the present tense is used in subsection (3).

Instead of:

(3) Each Disputes Tribunal shall be a division of a District Court.

subsection (3) should read:

(3 Each Disputes Tribunal is a division of a District Court.

In this section, use of the present tense saves only one word. Clarity is imperceptibly improved.

The principle to be drawn from the research on organizing documents is this:

writers should structure information around people performing actions or asking questions in particular situations

This principle has been called the scenario principle. [17]

(3) The scenario principle

Here are some examples of the scenario principle:

(i) using questions

Most readers come to legislation with questions: can I do this? what happens if I do that? how can I get this or that?

How helpful it would be if readers coming to a document with a question not only found the same question in the document - but the answer. It is a simple matter for documents to be given appropriate headings stated as questions; and suddenly the document becomes alive, meaningful, useful - it becomes functional.

For example, instead of a heading "Eligibility" why not try "Who is eligible?"; instead of "Coverage" try "What happens if there is a fire?" Some commercial documents have started to use this technique but rarely is it found in legislation. It could and should be, either as a side note or as a section heading, particularly for legislation designed for consumers.

[17] PV Anderson, RJ Brockmann, CR Miller: *New essays in Technical and Scientific Communication: Research Theory and Practice* (1983), essay by Linda Flower, John Hayes and Heidi Swarts called *Revising Functional Documents: The Scenario Principle* p41.

(ii) using diagrams

Some provisions are tough to write [18]. Despite efforts they may not be easy to understand. How can the reader be helped in these circumstances?

If there is a series of complex provisions in which it is easy to get lost an explanatory line diagram can help paint the big picture so that readers can find a map out of the confusion. A line diagram was included in Alberta's 1973 Labour Relations Bill (although not enacted as part of the legislation) to explain how parties in collective bargaining could move to a strike or lock out position through a complex process. Australian drafters have gone further and included line diagrams as part of the Act.

(iii) using examples

Examples have been used occasionally in legislation.[19] They have been welcomed by a wide variety of readers and more use

[18] In a great response to a question about why the Canadian Income Tax Act could not be drafted using a ten commandments style, Don Thorson, former deputy Minister of Justice and principal drafter of the Act said

> the fact is that Moses is not available for employment by the Department of Justice, and even if he were available it would be interesting to see what Moses could hope to do with concepts such as "tax paid undistributed surplus on hand" "control period earnings" and "foreign accrual property income..."

ML Friedland: *Access to the Law*, Carswell-Methuen (1975) p.65.

[19] Section 14AD of the Australian Interpretation Act says how examples are to be treated if they are used in legislation.

should be made of them. United Kingdom Parliamentary Counsel have been leaders in this field.

Examples illustrate ideas. The texts we write have ideas behind them - our ideas. If those ideas are not, or are inadequately, conveyed to the readers of the text there is a lack of communication. One way of making sure the ideas we have get across to readers is to help readers with examples. Examples then can be seen as some of the thoughts that the writer has for interpreting the text.

The use of examples, or ideas, embedded in a text can take many forms but the fundamental reason for them is to help readers better understand the information presented in the text.

Examples can be designed in various ways:

a simple illustration like this

(x) "writing" includes printing, typewriting, or any other intentional reduction of language into legible form, or to a form which can be converted into legible form by a machine or a device, such as language

(i) on microfilm,

(ii) in electronic, mechanical or magnetic storage, or

(iii) in electronic data transmission signals;

Extract from a Model Land Recording and Registration Act prepared by a Joint Land Titles Committee representing all Canadian Provinces and Territories, except Quebec, July, 1990.

This simple kind of illustration is similar to the typical formulation of regulation making sections in Acts which start with a general statement followed by a list (of examples) of specific regulation making powers.

an illustration of how a complicated section works

This technique has been used to good effect. An outstanding example is the Consumer Credit Act 1974.

a way of helping to change long held attitudes and approaches

The traditional way of drafting local government bylaw making powers is to list in considerable detail what a local government can make bylaws about. If as a matter of policy instructions are to draft bylaw powers as general statements, how can this be done while ensuring administrators know what they can advise their councils to do; councils have some reasonable assurance that they are not losing bylaw making powers; and the courts take a different approach to interpreting bylaw making powers?

One answer is to include in the Act a list of examples illustrating and indicating what bylaws a council can pass - all the questions listed above are then conveniently answered. [20]

(iv) using formulae

Quite often now used in legislation, the use of formulae instead of words is a very helpful drafting technique. United Kingdom Parliamentary Counsel are to be congratulated for their frequent use of formulae in legislation.

(v) other techniques

Pictures, maps, graphs, algorithms, and logic trees are other techniques that could be used to good effect in some of our laws.

4) Drafting in the present tense

Advice from experts

Everyone who writes about legal writing advocates use of the present tense. Yet lawyers persist in complicating their writing by the use (and often misuse) of the word "shall" in various forms.

The advice to use the present tense in drafting legal documents is consistently given but persistently ignored by most lawyers, including Parliamentary Counsel. J.K. Aitken says: [21]

> *The way is therefore open for draftsmen to restrict their use of shall to the expression of the will of the parties as to actions in the future in pursuance of the document. If this is a draftsman's practice, he will find that his language seems to be less cumbersome and is easier to follow. He may also avoid positive errors ....*

J.K. Aitken then goes on to recount errors that can arise by using the future tense in drafting. [22]

Robert Dick, the Canadian author of *Legal Drafting*, concurs with the advice to use the present tense. He also goes on to point to the dangers of not using the present tense. He concludes with a quotation from Pigeon J., formerly of the Supreme Court of Canada, who said (in translation): [23]

> *An error to be avoided is the unnecessary use of a tense other than the present tense ... the use of future tense is therefore to be avoided.*

[20] A separate paper expanding on the argument for using examples and encouraging their use is appended to this submission.

[21] JK Aitken: *Piesse, The Elements of Drafting*, The Law Book Company (6th ed) p.81.

[22] See also *Attorney-General v. Craig* [1958] VR 34, in which the Victorian Full Court commented on the practice of present tense drafting.

[23] *Redaction et Interpretation des Lois;* Quebec: University of Laval, 1965. p.9.

Legislative drafting practice

In Australia, the United Kingdom, and New Zealand some legislation is in the present tense but there seems to be no uniform drafting practice. (Although in the 1991 U.K. statute book the improper use (in our view) of "shall" was consistent.) In Canada, legislation has long been written in the simple present tense.

The reason Acts were originally written in the future tense was best summed up by former Parliamentary Counsel Sir Harold Kent in his book, *In on the Act.*

In describing his first few days in the Office of Parliamentary Counsel he said he read Lord Thring's book, *Practical Legislation*:

> *The heart of the little book is Thring's analysis of legislative language, the form of an enactment. He says that in its simplest form it is a declaration of the legislature directing or empowering the doing or abstention from doing of a particular act or thing. He goes on to say that "if the law is imperative, the proper auxiliary verb is "shall" or "shall not", if permissive, "may".' Later on in the Office I heard people speak of the "imperative shall" as a key feature of the legislative form. Indeed, even when an enactment is permissive, such phrases as "shall have power" or "it shall be lawful" are often used instead of "may". The truth is that a statute creates a new legal situation, and it is appropriate for a sovereign Parliament to command that it shall be so. (p 25)*

Later in his book Sir Harold notes:

> *from time to time I note that even the old imperative "shall" is yielding to the present indicative. (p 106)*

On this analysis the use of "shall" is the command of Parliament rather than a direction to exercise a power or duty at some future time. Whatever the historical reasons for its use its time has surely passed. [24]

The practice of drafting in the present tense has long been followed by legislative counsel in Canada, in part bolstered by Interpretation Acts which require legislation to be regarded as 'always speaking'.

All these views are little more than a restatement of the view expressed by George Coode, an English barrister, when he wrote in 1842:

> *The attempt to express every action referred to in a statute in a future tense renders the language complicated, anomalous, and difficult to understand...*
>
> *If the law be regarded while it remains in force as constantly speaking, we get a clear and simple rule of expression, which will, whenever a case occurs for its application, accurately correspond with the then state of facts. The law will express in the present tense facts and conditions required to be concurrent with the operation of the legal action...*

But still the imperative "shall" continues in U.K. legislation. Contrast this with the best in private drafting which has abandoned "shall" - for example:

(a) forms in Trevor Aldridge's *Practical Lease Precedents* (Longman)

(b) the Standard Conditions of Sale (first and second editions)

(c) the Rosscastle Letting Conditions in Murray Ross *Drafting and Negotiating Commercial Leases* 3rd edition (Butterworths)

(d) the Law Society's business leases.

We do not necessarily suggest that U.K. Acts use "must" for "shall" where "shall" is imposing an obligation as does New South Wales and several Canadian jurisdictions, but we do say:

(a) where Parliamentary Counsel feels the urge to use "shall", Counsel should consider whether or not it could be left out, or some other word or expression used; and

(b) the drafting must make clear what follows from a failure to do what an Act says "shall" (or "must", "will", "is to", or "has to") be done.

The objection to "shall" is not only that its use is now often used in an archaic way (though that would be enough to condemn it) but that the word is used for so many purposes that its effect is often unclear. A glance at the "shall" section in Stroud's Judicial Dictionary will confirm this.

[24] Even Lord Thring went on to say in *Practical Legislation* (p.63):

> *An Act of Parliament should be deemed to be always speaking, and therefore the present or past tense should be adopted and "shall" should be used as an imperative only...*

The last two parts - 3 (Structure and format of legislation) and 4 (Other remarks) - will appear in the March issue. The appendix will be divided between the June and September issues.

Book reviews

Drafting Legal Documents

Principles and Practices

by Barbara Child
(2nd ed)
West Publishing Co, 1992
Paperback: 432 + xviii pp

American members of CLARITY have decried the progress of their bar towards the use of plain language, but this book suggests they are well ahead of their English colleagues. The very existence of Barbara Child's job - as director of legal drafting at the University of Florida - shows a concern missing from this side of the Atlantic.

Drafting Legal Documents is a long and solid but easily readable book. It is a textbook, not on any particular field of law, but on drafting as an essential legal skill. It has clearly been developed from Ms Child's own classroom materials, and her skill and experience as a teacher show through.

Part 1 offers an introduction to the documents which will be met in an American litigation practice: complaints, motions, affidavits, and answers.

Part 2 is headed *Drafting in the Practice of Preventive Law: Introduction to the Documents.* This covers contracts, wills, and both public and private legislation. As the heading indicates, the emphasis is on drafting to avoid problems of interpretation.

Part 3 covers general principles of drafting. I particularly liked the treatment of ambiguity, which compares favourably with that of my other plain language books. I also found helpful - and new (though others may not share my earlier ignorance) - her distinction between between *list* and *tabulated* sentence structure.

All parts of the book are rich in examples, and contain challenging exercises for the student. In fact, the student must do most of the work, because Child gives generalised advice, and examples of bad writing, but she gives away little of her own drafting style: she does not offer her own *afters* to show how she would have rewritten the *befores.*

I have one criticism, but that is probably directed at her publishers rather than the author. The typography is a bit of a jungle. For example, the heading of examples uses more prominent type than the headings of the sections of which they are part. I had to use the contents page to see what was a sub-section of what.

Incidentally, on page 24 of *Clarity* 25 I referred in passing to Ms Child's description of a certain construction as "normal". It has been suggested that that implied her approval of the construction. It was not meant to; she disapproves of it.

MA

Unspeakable Acts?

Clarifying the language and typography of an Act of Parliament
(discussion paper)
by Martin Cutts
Words at Work, 1993
Paperback: 44 A4 pp

This professionally produced booklet is the full text from which Martin Cutts' article on pages 3 to 9 was culled, and it is recommended to anyone whose appetite is whetted by the trimmed-down version printed here.

He prints alongside each other the sections of the Clearer Timeshare Act and the sections of the original Act on which they are based. The reader can compare not only the language, but the structure of the documents and their typography. His introduction, and his vast improvement on the original, constitute a serious indictment of parliamentary counsel.

Cutts sent an earlier draft of the CTA to Peter Graham, who has taken over as first parliamentary counsel since his predecessor mooted the project. Mr Graham's unimpressive reply is reproduced in *Unspeakable Acts,* which he would do very well to read.

Martin Cutts *has pointed out that I overlooked the note "Not for publication" at the top of his faxed comments on my review of his Making Sense of English in the Law, as he has a policy of not replying in print to reviews; his letter was for my information only. I apologise for the misunderstanding. - MA.*

Drafting Trusts and Will Trusts

by James Kessler
Sweet & Maxwell, 1992
Hardback:305 + xxxv pp
£55

In the preface to his new book, James Kessler states that "the principal aim of this modest work is to aid the draftsman by discussing both general and technical problems which arise in the drafting of settlements and will trusts". The book is, in fact, far from modest in either its scope or its achievements: it not only includes precedents for standard-form trusts, both lifetime and testamentary, and for a wide range of administrative provisions, but also discusses the advantages and

disadvantages of specific clauses, including those of a purely administrative nature, and it includes a useful glossary and bibliography. The author suggests that "there are three ways to deal with the problem of sex" (in the context of coping with the his/her difficulty), and asserts that the question of the senile trustee is easily dealt with by a clause providing for compulsory retirement at 65 (judges please note).

The style is clear, crisp, and easily understood - remarkably so given that, by his own admission, Mr Kessler twice read through the 1925 property legislation "like a novel" as a preparation. The forms and clauses have been based whenever possible on statutory precedent, from 1925 onwards, and their style will instantly commend itself to members of CLARITY: "say what you mean and mean what you say". There is an understandable reliance on snappy definitions, consistent use of punctuation, clause headings, and layout, to most of which we have become accustomed in lifetime settlements but which cause more traditional will drafters to raise their eyebrows. There is no logical reason, however, why wills should not have the same benefits of indentation of sub-clauses and the use of clause headings simply because, historically, they have not been drafted in this way.

There is much in the text to jolt the average complacent lawyer into thinking twice about words and phrases which, hallowed by long usage, tend to trip off the tongue, pen, or even word processor, almost without thinking. The word "issue" can, in context, be restricted to "children" and often gives rise to uncertainty, acrimony, and even litigation. Why not, therefore, as Mr Kessler suggests, use "descendants" instead? This was judicially described over a century ago as a perfectly unambiguous word which no layman or lawyer would use to designate children only (James LJ in *Ralph v. Carrick,* 1879).

Alert as all reviewers are to justify their existence by pointing to at least one fault, I question the express incorporation in the will trusts of Form 8 of the Statutory Will Forms. Earlier the author had asserted that, as a general rule, it is better to set out text in full than incorporate it by reference, as in the common-form extensions of the statutory power of appropriation, since "not everyone is familiar with the terms of section 41 of the Administration of Estates Act 1925". Most lawyers, if not their clients, can recall well enough the terms of section 41, but how many lawyers or clients know the wording or effect of Form 8?

That criticism apart, the book is to be commended to all CLARITY supporters. Indeed, the chapter on "Style" could largely be used as a manifesto for the aims of CLARITY. There is little, or nothing, in the 302 pages of text and precedents which could be castigated as pure verbiage, and yet Mr Kessler has avoided the trap of equating clarity with brevity. He has indeed given us a modern approach, but it is one which will also appeal to many who claim to depend on well-known words and phrases: the baby has not been thrown out with the bath-water.

The book will attract many and shock few, although it will make its readers think.

Robin Towns

Note

The Society of Trust and Estate Practitioners has published a set of standard terms based on James Kessler's work. Simon Jennings, the chairman of STEP's technical committee, writes in his introduction:

> One of the first proposals which the technical committee considered was for the publication of standard administrative clauses which could be incorporated in settlements or wills by reference, so as to enable such documents to be shortened and simplified. Our aim has been not only to provide the necessary standard powers, but to do so in language which is lucid, contemporary and easily understood by the layman.
>
> I am very glad that this project has been brought to fruition within a remarkably short space of time. The committee is deeply grateful to James Kessler who shouldered the burden of preparing the drafts....
>
> The Society and practitioners generally also owe a debt of gratitude to Sweet & Maxwell for generously sponsoring the publication of these Standard Provisions.

Wills

In November I was asked to advise on a pair of wills. The parties had married quite late in life, and intended that the matrimonial home, which was in the husband's name, would go to the wife for her life, and then to the adult children of his previous marriage.

Several pages of gibberish whittled away the wife's prospects of litigation-free security during her widowhood.

The husband began, illogically

mixing the Pompous Imperative with a statement of his wishes:

> I DESIRE that my body shall be cremated

He continued:

> I APPOINT JOHN KENNETH BLACKTENANT of 23 Vicars Parade East Horsley Surrey Solicitor to be the sole Executor and Trustee of this my Will and they or other the Trustee or Trustees for the time being hereof are hereinafter called "my Trustees"

This had more faults than there should be in so short a passage:

- The lack of punctuation left the address ambiguous.
- An individual is referred to as *they.*
- ... *or other the Trustee* is pointlessly artificial. And it should be *and,* not *or.*
- The original executor-trustee and any unnamed trustees, but not unnamed executors, are covered by the definition of "my Trustees". So, for example, if Mr Blacktenant died, and his own executor (probably another partner in the firm) took over the administration, the new executor would not have the benefit of the charging clause.
- *for the time being hereof ... hereinafter* is clumsy and unnecessary.

Shortly afterwards we come to the gritty nitty:

> I DEVISE AND BEQUEATH my Residuary Estate ... to my Trustees upon the Administration Trusts declared in Form 8 of the Statutory Wills Forms 1925 (as hereinafter varied) and thereafter to hold the same upon the following trusts :

I am at a disadvantage without a copy of form 8 (which I could find in none of my probate books), but it looks as though the trustees are to hold the property under form 8 for an unspecified period (though perhaps the form makes that clear), and "thereafter" to switch to the following trusts:

> (a) to pay therefrom twenty thousand pounds
>
> (b) SUBJECT thereto UPON TRUST as to both capital and income for the said MAVIS GREEN *[his wife]* if she shall survive me by thirty days
>
> (c) SUBJECT thereto UPON TRUST as to both capital and income including the value of any property which I shall own and in which I and my wife Mavis Green shall be residing at the date of my death for such of my said daughters....

I read the *subject to* proviso in (c) as meaning that the wife's gift in (b) takes priority over the gift to the daughters. And I understand the gift of capital and income (with no restriction to a life interest) to create a bare trust in favour of the wife. So the wife takes the residue outright, and the daughters get nothing.

Definition of quantities, etc

During a lecture given earlier this year for the Surrey Law Societies Judge Michael Cook quoted a demonstration conducted at a judges' training course. This showed that words like "probable" and "many" were construed so inconsistently as to be meaningless. I have been unable to track down the details, but I have repeated the experiment with the same result.

I asked one seminar group to write down what numbers they understood by "some". Replies included:

more than 1	more than 2
more than 3	more than 5
3 - 6	3 - 11
4 - 10.	

Other groups have been asked to evaluate "likely" in a particular statutory instrument. The purpose of the regulations was to give patients a right of access to their medical records. The paragraph in question excepted those documents whose disclosure was "likely" to reveal certain confidential information. On a scale from 0 (impossible) to 100 (inevitable) answers have varied tremendously. "More than 50" and "more than 75" are common. One group's assessment of "likely" ranged from 30 to 85, and of "very likely" from 60 to 99. My own view, no more valid than the others and based on my expectation of what the legislators intended, is that "likely" here means about 20. How are doctors and administrators to interpret their duty?

Definition in residential leases

In December a buyer withdrew from the purchase of a flat and garage, in part because the leases was so badly drafted as to invite litigation. (Although the flat and garage went together on an estate, they were held under separate leases).

The flat lease defined "the Building" as

> the four blocks of flats known as Albert House Barry House Charles House and David House ...

It was not clear whether the grounds between the blocks were included. Certain clues elsewhere in the lease suggested they were, but who in their right mind would define "the Building" to include the garden, especially without making it clear that they were doing so? The definition continued:

> ... which expression shall also where the context so permits also refer to each of the four blocks individually.

The landlord's covenants required it to maintain "the Building" at the tenant's expense. This left it open to the tenant to argue that as the context permits the interpretation that "the Building" meant only that tenant's block, the landlord could not include in the service charge the cost of repairs to the other blocks. The landlord could reply that the word "also" means that "the Building" means both the individual block and all the blocks together (with or without the garden), but a word cannot have two different meanings at the same time. (Ambiguity arises when there are two *possible* meanings and the reader does not know which the writer intended. That is not the same as intending two different meanings.) Whilst the solicitors conducted this interesting debate in the philosophy of language the landlord could not collect the service charges. (Incidentally, it is worth noting that the phrases *where the context permits* and *where the context requires* have different consequences.)

The garage lease defined "The Building" differently, though still intending to refer to the blocks of flats.

Why do landlords' solicitors make life so pointlessly difficult for their clients and everyone around them? They could have referred to Albert Building when they wanted to specify that block; they could have defined "the Blocks" as the four blocks without the grounds between them, and "the Estate" as the blocks, garages and grounds together.

Both leases were riddled with such flaws but they, and the sister leases for the other 23 flats and their garages, had been changing hands for several decades. Do solicitors read the leases they are paid for considering? Do they at least pass an absent-minded eye over them? I was told only yesterday of a colleague who had offered to act on the purchase of a leasehold maisonette for £200. Is he a charity, a superman, or a disgrace?

And/or

In *The Language of Pleadings* (*Clarity* 25 p.5) I criticised the expression *further and/or in the alternative.* I argued that *further and. in the alternative* meant *and and or* and *further or in the alternative* meant *and or or.* Neither is terribly enlightening, but the imprecision is as nothing compared to that of *and and/or or.*

I did not deal in greater detail then with *and/or* because I was not sure whether the phrase was always inexcusable, or could sometimes be justified.

Some uses are clearly awful, and that is why the expression has so often led its users into court. For instance, *Cuthbert v. Cumming* (156 Eng Rep 668 and 889) involved the construction of a contract to

> load a full and complete cargo of sugar, molasses and/or other lawful produce.

Cairns C held that this allowed

> a full (etc) cargo of sugar **and** molasses **and** other produce

or

> a full cargo of sugar **and** molasses, **or** of other produce.

(But why should the *or* not apply between the sugar and molasses? On the other hand, how is *a cargo of sugar or other produce* different from *a cargo of produce*?)

Professor Mellinkoff says[1]:

> It has belligerent enthusiasts within the profession, although the very first time it was called into question, in 1854, *and/or* was given not one but three meanings, and ever since it has been the repeated and direct cause of uncertainty, litigation, and courtroom failure....
>
> What does it mean?
>
> (1) One understanding is that it includes every possibility imaginable with *and* alone plus every possibility imaginable with *or* alone.
>
> (2) Others say it may include all those possibilities, and is to be construed "... as will best accord with the equity of the situation...".
>
> (3) Some judges have said (not held) that *and/or* means that some, but not all, of the possibilities are included, and disagree on what to include.
>
> (4) Another group insists that *and/or* means either *and* or *or* but cannot mean both.
>
> (5) Other judges have turned away in disgust, and said that *and/or* is "meaningless".

There seems to be no ambiguity in the sentence *I will be with John and/or Bill*. I think everyone would agree that that means I will be with John or Bill or both of them. Mellinkoff agrees, though he still dismisses the phrase, with considerable contempt, as clumsy and lazy. And the slightest complication causes a problem:

> I give Blackacre to A and/or B.
>
> The prisoner will be paroled and/or discharged.

Mellinkoff concludes:

> *And/or* is sometimes shorter, but never more precise, than ordinary English. It is usually uncertain. It is completely unnecessary.

[1] David Mellinkoff, *The Language of the Law,* Little, Brown & Co, Boston & Toronto, 1963 (reprinted 1990). Pages 306-310. Readers are referred to the original for the extensive references.

Letters

Building schemes

Richard Oerton

First, the last *Clarity* (which I very much enjoyed) contains an item on building schemes.

Illogical as it may seem, my understanding is that these *can* contain provisions for variation. I enclose *[opposite]* an extract from the Law Commission's *Report on the law of positive and restrictive covenants* (of which I was the rather hapless author) which purports to set out the position. *Preston and Newsom** could no do doubt tell you more if you have it. I don't think we do....

* *Restrictive Covenants Affecting Freehold Land*, 7th ed (1982), p.62.

Law Society precedent

Richard Oerton

... The other thing is the enclosed extract from The Law Society's Gazette which contains a quite abominable "recommended form of receipt and discharge" to be signed by the beneficiaries of estates:

In the estate of deceased

I, authorise you to pay the sum of £xxx being the final amount shown due to me in the estate accounts by a crossed cheque drawn in favour of myself/ and to be sent by first class post to me/ I approve the said accounts and I agree that your compliance with this request shall be in full satisfaction of all my claims against the personal representatives of the said deceased.

LSG 14.10.92, p.16

The CLARITY message is not penetrating to all the Society's corners. How about this as an alternative?

The late ....

The estate accounts show the final sum due to me as £..... I approve the accounts and will accept that sum in full satisfaction of all my claims against the estate. Please pay it by a crossed cheque in my favour sent by first class post.

Alison Plouview passed this letter to the appropriate department, which promised to do better next time.

The Law Commission on building schemes

The classic statement of [the] conditions [for a building scheme] is that by Parker J. in *Elliston v. Reacher* (1908 2 Ch 374, at p. 384):

(1) that both the plaintiffs and the defendants (i.e., both the unit owner seeking to enforce the covenant and the unit owner against whom enforcement is sought) derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and the defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchasers were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

Over the years, however, and particularly in comparatively recent times, decided cases have shown that several of these conditions are not in fact necessary. As matters stand at present it seems that only two requirements are essential - namely, that the area of the scheme be defined; and those who purchase from the creator of the scheme do so on the footing that all purchasers shall be mutually bound by, and mutually entitled to enforce, defined set of restrictions (which may nonetheless vary to some extent as between lots).

Dictionary of Modern Legal Usage

Nick Lear

I have been dipping into Bryan Garner's *Dictionary* (reviewed *Clarity* 20 [April 1991] p.13). Every time I do, I enjoy it; but I wonder how long it will be before everybody

will own up that American and British English are languages.

I have just been enjoying the entry under *and/or.* I do not entirely agree with its attackers, but I resolve in the future to remember to say *X or Y or both.*

I refuse to give up *anent,* which I use about once every five years.

My handy little concise Oxford says *effective* means *having an effect* and *efficient* means *productive of effect.*

Is not efficient *"having an effect for comparatively little effort or price" - or in jargon which seems excusable here "having a low input/output ratio"? - Ed.*

Efficiency

Nick Lear's letter continued

Did you notice the drop out from a practice development training company in last week's *Law Society's Gazette?* An efficient (or should that be effective) solicitor would have dropped it straight in the bin.

On its front page it asked imaginary candidates for an MBA in legal practice to "suggest a definitive way in which solicitors can improve business performance" and offered this model answer:

> Clients judge the effectiveness of solicitors' services by how efficiently they apply their expertise to their clients' needs. An increasing number of solicitors now recognise that personal development means more than just increasing their own specific legal knowledge. Successful practitioners commit themselves, and their organisation, to growing those skills that impact the productivity, service quality and the relationship areas of their business.

If that's a model answer, I'm Twiggy. I suggest:

> Solicitors are judged by their efficiency. Successful solicitors now see that it is not enough to increase legal knowledge. They learn to be productive; to give excellent service; and to get along with their clients [and staff].

Help wanted: conveyancing terms

David W. Jones

I am enclosing a copy *[reproduced on the next page]* of a section in a local property newspaper, from which you will see it is the paper's intention to provide a handy guide to the most commonly used conveyancing expressions.

I have indicated that I will assist in providing, if I can, clearer definitions. *Endowment* is one word which might be added.

Any comments on these definitions and suggestions for further words to assist the average domestic house buyer or seller would be appreciated.

David Warren Jones
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MDX 20307 Cotteridge
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And/or

David Elliott

Pottering through a 1930s volume of the American Bar Journal I came across an editorial criticising the use of *and/or.* The editorial quoted from a 1925 Louisiana case:

> When used in a contract the intention is that one word or the other may be taken, according as the one or the other will best effect the purpose of the parties .... (S)uch an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such an interpretation as will best accord with the equity of the situation and for that purpose to use and or or and to be held down by neither.

The editorial concluded that the symbol was a device for laziness.

A subsequent issue of the journal contained a number of letters both supporting and opposing *and/or.* Interestingly, the proponents of the phrase gave differing interpretations of its meaning - so emphasising the error of using it.

A former Justice of the Supreme Court of Canada, the late Mr Justice Pidgeon, said over a decade ago:

> *And/or* seems to be used by writers whose main concern is to appear erudite. In my opinion, quite the opposite impression is created. Use of this conjunction is repugnant to the spirit of the language, English or French.

And/or

Alexander Gunning

Bowes v. Shand (1877 2 AC 455) concerned two contracts for the sale of Madras rice "to be shipped at Madras, or coast, for this port, during the months of March *and/or* April, 1874, about (300) three hundred tons ...." The argument arose from the fact that only 50 of the 4,640 bags shipped were put on board in March;

the remainder had been loaded in February.

The Lord Chancellor, Lord Cairns, was alone in looking at the meaning of *and/or:*

> My Lords, looking at the construction of these words, I put aside in the first place some which to any one unaccustomed to a contract of this kind, might appear peculiar, the words *and/or,* inasmuch as no question has been raised on these words, and it is agreed upon both sides that they are so used simply as a mercantile way of expressing that something is to be done in the months of March and April, or in either of those months. [pp 462-3]

His Lordship went on to consider "the meaning of this contract", which he stated must be "one of two things":

> *Primâ facie,* I should say it meant that the shipment must be made, that the rice must be put on board, during the two specified months, and neither before nor after those months. But if the contract does not mean that, the only other meaning which it appears to me it could have is - and as to that I think evidence would be required to shew that by usage it had obtained that meaning - that the shipment should be made in a manner which could be described as continuous, and that it should come to a consummation or completion in one of these months which are here mentioned, and that the bill of lading should be given for the whole and complete shipment at that time. [p.464]

If the date goods are shipped is the

PROPERTY FILE

Your handy guide to the jargon

ADVANCE

Money lent, usually by a building society or bank, to enable the borrower to purchase.

BRIDGING LOAN

A short term loan to complete the purchase of a property while the buyer is waiting for the sale of his home.

COLLATERAL

Property pledged as a guarantee for the repayment of money.

DEEDS

Legal document entitling you to a property.

EASEMENT

A landowner's legal right to use the facilities of another's land, for example, a right of way.

EQUITY

The net value of mortgaged property after the mortgage has been deducted.

GROUND RENT

Periodical payments required under the terms of a lease.

JOINT TENANCY

Where two people - for example, husband and wife - hold half shares in a property. If one dies, the survivor takes all.

LAND REGISTRY FEES

Fees paid by the buyer to register evidence of ownership with the Land Registry. There is a scale of fees set by the government.

LEASE

Possession of property for the length of time fixed in the lease. This usually includes payment of an annual ground rent.

LEASEHOLD

Land held under a lease for a fixed number of years.

MORTGAGE

The person or organisation to whom the property is mortgaged, eg a building society. *"Mortgage" is presumably typographical error - ed.*

MORTGAGOR

The person mortgaging his or her property as security - the borrower.

PRINCIPAL

The amount of the loan on which interest is calculated.

REDEMPTION

The final payment on a mortgage. Some building societies make a charge (redemption fee) if a mortgage is ended earlier than was first agreed with them.

SUBJECT TO CONTRACT

A stage in the process of purchasing when either party may withdraw without incurring a penalty.

SURVEY

Inspection of the property by an independent surveyor usually on behalf of the intending purchaser.

UNDER OFFER

When the vendor has received an offer for his home, but contracts have not yet been exchanged.

VENDOR

The owner of a property, either an individual or a company, who wishes to sell.

Local newspaper definitions

Members will no doubt be able to suggest many improvements. Please send them direct to Mr Jones at the adress on page 26.

particular day on which loading is completed and the bill of lading becomes due, then it is difficult to see how goods can ever be shipped in March *and* April. There is of course no particular day that falls within both those months. Accordingly, the second "meaning" of the contract provided by Lord Cairns is inconsistent with the meaning he had attributed to *and/or*. His second meaning would only make sense if the goods were to be shipped in March *or* April.

Book review

Duke Maskell

I lost my confidence in your review of Martin Cutts' *English in the Law* as quickly as you lost yours in the book. And for pretty much the same reason. I thought you too casual. Your review was casual and your reply to his--as it seemed to me--reasonable request that you justify your judgements was more casual still. I don't know about him, but *I* would have liked something better than, "I'm right. But you can buy the book and see for yourself." Well, we can spend our own money and make and justify our own judgements. We can't justify *yours*, though.

The worst thing about the review is that it's impossible to tell how deep your criticism goes. Mr Cutts is surely right when he says that what matters is not what you do say--that his book contains mistakes--but what you don't--how many it contains and how important they are. But your own 'mistake' goes deeper than that; it's that: even though you are clearly hostile, you don't make a clear judgement.

You *could* be taken to mean that what's wrong with his book is merely a matter of editing which could be pretty easily corrected--in the second edition you *hope* for. That's the note you end on, permitting us--if we like--to take it as your conclusion. But you also suggest that there's something fundamentally wrong with the book, which has to do with Mr Cutts being a layman. So you begin (in tones of old-port-and-over-ripe-pheasant) by finding it "extremely odd" that Mr Cutts hasn't had his draft checked by a specialist. And you go on to say that he is staggeringly inaccurate, misleading, gets things wrong, garbles them. So you also let us believe that a second edition is the last thing anybody should hope for.

You stir together, as if of equal importance, unclear importance and no importance at all. If Mr Cutt's legal advice is misleading and his legal definitions are wrong or garbled, *that*--in a legal dictionary--(if it's typical) is important. It isn't important--or even a criticism--that some of his definitions are jokes. One of the things the famous founding-father of lexicographers is famous for is his joke definitions. (See *lexicographer*, Dr Johnson's Dictionary, 1755. It may help you to see why a lexicographer might joke.) It's not even as if--the subject being the relation between 'plain' and legal English or the place of legal culture in the larger common culture--the jokes you quote are irrelevant. It's not at all important *in itself*--the proof of all puddings being in the eating--that layman Cutts doesn't cite much in the way of legal authority for his definitions. And if in cross-referencing 'title deeds' with 'land certificate' he commits the staggering inaccuracy of implying that all title deeds are land certificates, what would he commit if he cross referenced 'cows' with 'milk maid'? It *is* a mistake that, despite the cross-reference, there's no entry for 'land certificate', but if it's just an isolated mistake, in 4000 cross-references, how much does it matter? (You misspell "dictionary" at the start of your review--so what?) And then, what's wrong with his punctuation? Is it self-evident?

So when you say that his mistakes "abound" (and, in saying so, apparently answer part of his criticism) how can your readers be confident that they do and that, if they do, they matter?

But as well as a bad review, wasn't this a missed opportunity? To try to say something about the relation between the two sides of plain legal English: good writing and sound law? Ideally, no doubt, anyone offering to write plain legal English will be both writer and lawyer. But in practice there must be collaboration between writers who aren't lawyers and lawyers who aren't writers. There must be an interchange between two kinds of knowledge or ability which aren't the same but aren't wholly distinct either. Couldn't you have found something more *interesting* to say than that the book contains mistakes?

The view I was trying to express was that

in its present form the book just will not do, because it has too many mistakes to be reliable as a work of reference;

but there is no reason why those mistakes cannot be corrected in a second edition.

It was a disappointing book well below Martin Cutts' usual standard. His Clearer Timeshare Act, covered elsewhere in this issue, is on a different plane.

Guardian ad litem

Eirlys Roberts

A visitor to lunch today told me about her mother's work as a Guardian at litem. When I had finally disentangled the syllables, I guessed what it meant - but only just.

You don't think CLARITY could get that translated into *Court guardian* or whatever you think appropriate?

My friend and I both enjoyed the CLARITY supper immensely.

Clarity's typography

J.B. Stutter

I think that I have read every issue of your periodical and I thoroughly approve your aims.

Sadly the presentation layout typography and paper used for the periodical are not of an adequate standard. The lack of a cover is a disadvantage and the paper is too shiny. The American style boxes with rounded corners and shading are not appropriate to the subject matter.

I suggest that if this were the style of any periodical whose clarity of expression was being analysed the items I have mentioned would be heavily criticised.

The type itself is unattractive and the layout distinctly "bitty".

The services of a graphic designer and typographer could achieve a dramatic improvement and serve the cause of CLARITY.

Plain language in Ireland

Cliona Kimber

Thank you for including the piece on the Law Reform Commission in your last edition. I received quite a few replies from various parts of the world, and particularly from David Elliott in Alberta, Canada. He was extremely helpful, taking a lot of time and trouble to give me information on plain language in Alberta and Canada.

At the moment I am writing up the discussion paper on the introduction of a plain language policy in Ireland. It will probably be some time before it is published, however.

I wish CLARITY all the best for the coming year.

The Press

Not weeding the leadership deck: maritime and gardening metaphors don't mix

The leadership must take steps to keep the grass roots on board.

Another metaphor backfires

Smoking gun aimed at Major.

Unbalanced language

Defectively designed with reference to stability.

Plain speaking in-laws

Joe and Joan Kappel together with Julian and Diane Siefert are happy to announce the engagement, at long last, of Claudine to Martin ....

Just Language

The Plain Language Institute's conference on the theory and practice of plain language in law, government, and business

Vancouver, 21st - 24th October 1992

This report is necessarily piecemeal, as there was too much going on for us to cover everything. But the PLI is hoping to publish the proceedings in detail, and more information about this will appear in the March *Clarity*.

Effective, efficient, and productive business writing

Dr Mark Vale

Principal, IME Inc

- Plain language is:
  1. an approach to communication;
  2. attitude toward the reader; and
  3. a process.
- It is a way of communicating that should lead to effective and efficient communication. It is not just a set of rules.
- Plain language:
  1. organizes information so that it makes sense to the reader;
  2. speaks directly to the reader;
  3. matches the vocabulary and style of writing to the reader's needs;
  4. explains technical terms, and uses examples that relate to the reader's experience;
  5. uses concrete words with common meanings;
  6. uses layout and design appropriate to the content of the document and the needs of the reader.
- It is not simple-minded writing, Dick and Jane vocabulary, the misuse of language, nor the inaccurate representation of professional or technical or legal language.
- Testing a document is a critical part of the plain language process.
- One internal form used by an insurance company was incorrectly completed by the company's own employees nine times out of every ten.
- Some 40% of adult Canadians have difficulty reading printed text.
- One study showed that Canadian government documents could only be understood by university graduates (about 15% to 20% of the adult population).
- Another showed that 40% of people could not calculate a 10% tip on a $2.50 lunch. People do not understand percentages. They understand the term *half* rather than *50%*.
- If you are misunderstood, don't assume it is the reader's fault. Ask yourself what you did wrong.

The history of legalese

David Mellinkoff

Emeritus Professor of Law, University of California

- Legal language goes back to the time when English was so wild and disorganised that it was sensible to use Latin.
- Latin does not rely on word order or punctuation for its sense. The habit of writing without either survived the translation into English, which needs both.
- Verbose writing was the norm when the law was nit-picking and harsh. Lawyers used the shotgun technique: they would fire a cartridge of words in the hope that one pellet would hit the target.
- A massive collection of linguistic relics has been preserved. For each word that became precise there are a dozen which have never been precise. Some - like "heir" have become less precise.
- The problem is not just the use of old words, but old patterns of unpunctuated verbosity.
- Nothing is more hurtful to a perfect knowledge of the law than reading it.
- Law students pick up language that they presume is precise and correct and carry it with them to the bench, perpetuating the cycle of legaldegook.
- The great misunderstanding of the profession is the equation of in-talk with precision.
- There's a built-in arrogance in the profession about the need to change. Lawyers believe: "The law works. That's enough."
- Plain language statutes, requiring documents to be written clearly, exert pressure on lawyers to improve.

Approaches to plain language

Rick Coe

Professor of Rhetoric at Simon Fraser University, Vancouver

- "Plain" and "clear" are code

words, and should be written in quotation marks.

- "Plain" language is a variable; it is plain to intended readers.
- "Ordinary" language means ordinary people have rights.
- We used to think that it was writers' responsibility to put their meaning onto paper, and readers' responsibility to decode it. The "plain language" movement continues this outmoded view.
- The expression "our audience" is misleading, in that it suggests homogeneity.
- The Strunk and White approach - rules set down out of context - produces useful guides, but is based on the false assumption that the rules are valid independently of their context. This approach tends to be that of the conservatives.
- A more liberal approach is reader-oriented. Documents are tested on real readers, and are rewritten if not understood. This is naturally more expensive.
- A more radical approach is to engage readers actively in the writing process.
- Each of these approaches has its own political overtones, but all three are needed.

Alberta Law Reform Institute's plain language initiative

Peter Lown and Eric Spink

Alberta Law Reform Institute

- The Alberta Law Reform Institute conducts legal research and recommends that the Alberta Government reform certain areas of the law. It is dedicated to the use of plain language.
- Although Alberta lawyers appreciate the clarity of Institute reports and recognize its attempts to use plain language, they resist the use of plain language in their daily practice. They often say that plain language is a good idea in theory but unworkable in practice. To overcome this, the Institute designed an initiative to change their minds.

Objective

To promote plain, straightforward, legal writing.

Method

By showing Alberta lawyers the advantages of plain language by comparing documents in common use with plain English alternatives.

Hope

That the transformation will catch the lawyers' attention and lead them to study the process of plain drafting.

Process

The documents used included:

- minutes of settlement;
- a restraining order;
- a parental consent form;
- a will;
- a guarantee; and
- a power of attorney.

They were chosen because they affect a variety of audiences, including judges, lawyers, and lay people.

Each document was written by a team made up of a writer, a legal expert, and Institute counsel.

A seven-stage development process was adopted:

- collect examples and materials;
- determine the essential content;
- prepare preliminary drafts;
- review for visual design;
- prepare final draft with explanation of changes;
- test new version;
- contrast old and new versions and explain changes.

Progress

At the time of the conference, the new versions had not been tested, but copies of the old and the new were available, with background notes.

This has been more than a rewording exercise. Writing in plain language involves close examination of the underlying legal concepts, reorganization, and reformatting. Often the exercise raised issues of policy that were debated at length by team members.

Help needed

The Institute invites consideration of the documents.

The two versions of the consent form appear on the next two pages.

Copies of all the documents are available from:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton
Canada T6G 2H5
1 403 492 5291
(fax: 1790)

Albertan government initiatives

Dennis Anderson

Minister of Consumer and Corporate Affairs, Alberta

- Alberta has initiated a five-year plan for the whole government to revise

THE _____ SOCIETY
INDEMNITY AND RELEASE OF LIABILITY

In consideration of my being permitted to participate in the events or activities and/or functions (all of which are referred to as "the events") offered or organized by _____ Society, I hereby for myself, my heirs, executors, administrators, and assigns release and forever discharge _____ Society, their officers, board members, servants, agents and volunteer guides (all of which are now referred to as the "Society") from any and all law suits or actions, claims or demands by reason of any damage, loss, death or injury to myself or to my property arising from my participation in the events notwithstanding that the same may have been contributed to or occasioned by the negligence of the Society.

I agree to save harmless and indemnify the Society from and against all law suits, claims, actions, costs or expenses in respect to any death, injury, loss or damage to myself or my property howsoever caused arising out of or in connection with the events and whether the same may have been contributed to or occasioned by the negligence of the Society.

I recognize and acknowledge that there are inherent risks and hazards involved in participating in the events including, but not exclusively, such hazards as hypothermia, failure of equipment, sudden change in weather, error in judgement of the guide, falling into water and all other hazards associated with canoeing or any other activities and/or functions offered by the Society in which I participate and I agree to assume all such risks and hazards, and I further agree to bear all costs of rescue or medical attention rendered to me personally arising from the events.

I HAVE READ THIS RELEASE AND INDEMNITY AND ACCEPT ITS TERMS.

Dated this ____ day of _____, 19 ___.

NOTE: IF THIS AGREEMENT IS FOR A COUPLE BOTH MUST SIGN.

See Alberta Law Reform Institute's plain language initiative (p.31)

correspondence, forms, contracts, and educational materials. And by 1996 all legislation should be in understandable form. We may not accomplish these goals, but the pressure has forced people's attention to using plain language.

Law and the English language

Madam Justice Beverly McLachlin

Supreme Court of Canada

- The most salutory thing happening in the law is that people are thinking and writing about communication.
- George Orwell was a very powerful influence whose words ring as true today as they did 50 years ago. He asked in an essay on rhetoric: *Are we bad writers because we can't think? Or are we bad thinkers because we can't write?* There is no way to separate thought from language. His essay on *Politics and the English* in *Inside the Whale* should be read annually by lawyers as well as writers.
- There are three particularly virulent vices: cliché, formalism, and insincerity.
- Lawyers sometimes place too much emphasis on the words that are used. It is the understanding of what is meant that is important, not the ritual use of precise words.
- Translation [into English or French] is the great exposer of sloppiness.

CLARITY's research

Mark Adler

Chairman, CLARITY

Mr Adler gave a presentation on CLARITY's recent research, in two parts.

In the the first part he summarised the results of his 1991 client questionnaire, which showed, quite dramatically, that:

- Clients understand much less than we think they do.
- They understand much less than *they* think they do.
- They despise legalese.

[The full text appeared as *Bamboozling the Public* in the *New Law Journal*, 26th July 1991. A brief report appeared on page 2 of *Clarity* 21 (August 1991).]

In the second part he briefly outlined the early results of the 1992 questionnaire (see page 2).

Using plain language in law firms

Edward Kerr

Partner in Mallesons Stephen Jaques, Sydney

- MSJ is a law firm based in Australia, with about 600 lawyers.

EVENT: _____ **DATE:** _____

CHILD'S NAME: _____ **CLASS:** _____

PARENT/GUARDIAN'S NAME: _____

PHONE: _____ *(Home)* _____ *(Work)*

CHILD'S ALBERTA HEALTH CARE INSURANCE NUMBER: _____

PARENT'S CONSENT FORM

Permission to take part in _____ Junior High Band Trip to Vancouver

_____ School has organised a Junior High band trip to Vancouver from May 17 to 25, 1993. My son/daughter/ward _____ has my permission to take part. I know that School teachers _____ and _____ will be responsible for the supervision, care and control of the students on the trip. I have read the three sheets of information sent by the school, and I have made a note of the trip schedule.

School board and employees not responsible for accidents

When a child goes on a school-sponsored trip there is always a risk of personal injury or death, and property damage or loss. If anything happens to my child or my child's property on this trip, I agree not to hold the teachers supervising the trip, the school principal, or the _____ School Board, responsible. I will not hold them responsible even if they have been negligent. I am responsible for insuring my child and my child's property.

Consent to emergency medical treatment

In an emergency, my child may need medical or surgical treatment. If an emergency occurs, every reasonable effort must be made to contact me. If I cannot be reached, I give permission for either School teacher, _____ or _____, to consent to emergency treatment for my child. They may also make any other decisions that are necessary for the care, control and protection of my child during the trip.

Please check one of the following.

o As far as I know, my child is physically fit and able to travel to Vancouver with the Band. My child has no special medical needs.

OR —

o My child is not suffering from any medical condition that might prevent travelling to Vancouver with the Band. I have described my child's special medical needs on the back of this form.

Signatures

Signed in Edmonton on

_____

(Date)

_____

(Signature of parent or guardian with custody of child)

Witnessed by

_____

(Signature of witness)

_____

(Print name of witness)

See Alberta Law Reform Institute's plain language initiative (p.31)

- They formed a committee to implement the firm's plain language policy. The committee vets all the firm's documents.
- MSJ has spent about $5m in salaries and overtime over the last five and a half years rewriting documents in plain English. Seven lawyers were involved with this full-time from 1988 until 1990. Now about four lawyers devote all their time to revamping precedents. One hundred and eighty documents have been produced in plain language.
- All their documents are on a central data base to which each lawyer has access via a terminal on his or her desk.
- The screen prompts the lawyer with questions. A lot of work goes into programming it. Its best use is for high volume work. Its usefulness grows along with the complexity of the transaction.
- All lawyers attend a two-hour MSJ plain language course. In addition, lawyers are invited to a two-day residential course taught by Robert Eagleson. Forty lawyers can attend at a time, and it is run twice a year. Eventually, all MSJ lawyer's will have attended this longer course.
- MSJ markets plain language by:
  - Visiting clients and asking them their needs;
  - Making submissions to parliamentary enquiries, for example saying that legislation should be in plain language;
  - Preparing pro forma documents. Sometimes clients are not prepared to accept plain language until they see it. This way MSJ kept one major client about to go elsewhere.
- Other firms have poached their precedents, but MSJ tries to treat this as a compliment. It is extremely difficult to protect the copyright.

They have learnt several lessons:

- Don't underestimate the task.
- Management commitment is essential.
- Be sensitive to other lawyers' resistance.

Joan Collins

former director of education at Russell & DuMoulin, now with British Columbia's School Superintendents' Association

- The Continuing Legal Education Society of British Columbia's Plain Language Project is piloting a five-module plain language course at Russell & DuMoulin.
- It is taught for two hours starting at noon, which seems to be the most popular time for short modular training.
- R&DM has also developed a mentor program. The next step is to train the mentors in being mentors.

Wittgenstein on meaning

Dennis Pavlich

Professor of Law, University of British Columbia

Professor Pavlich gave a résumé of Ludwig Wittgenstein's theory of meaning. He sketched the development of Wittgenstein's views from his original "picture of the world" theory to the revised hypothesis (or dogma) that the meaning of a word is the way it was used.

I have always justified my inability to understand Wittgenstein with the naive assertion that he was a world-class purveyor of bovine waste, whose wares were wrapped only in the emperor's new clothes. But regardless of my uncultured prejudice, the *Tractatus Logico-Philosophicus* seems a strange choice of recommendation to an audience of plain language enthusiasts. Its paragraphs may be numbered by the decimal system, but the contents are as obscure as the title suggests.

What do we say when we assert that meaning is the way a word is used? That to find out what a word means we must find out how it is used. Now, the usual way to find out how a word is used is to look it up in the dictionary. So it seems to me that the principle which the eccentric genius so laboriously formulated can be reduced to this:

> **If you want to find out what a word means, look it up in the dictionary.**

For that I went to Vancouver?

Clearer Timeshare Act

Martin Cutts

Principal, *Words at Work*, Cheshire

Mr Cutts gave a presentation on his "Clearer Timeshare Act 1993" (see pages 3-9).

Writing when your audience is a judge

Andrew Sims

Chair, Alberta Labour Relations Board

- He saw his own job as a chairman of industrial tribunals as doing justice between the people in the back row - the litigants - not their barristers.
- There is a difference between people's expectations of judges and the reality.
- Not all judges were born in the 18th century, and not all those who were were bad drafters.

- Counsel often bury their good points in dross. Lawyers should not feel bound - as they traditionally have done - to make every possible point. The important thing is to persuade, and the best way to do that is to use the main points. He is irritated by having to wade through make-weight arguments.

- Judges work under time constraints, and are generally short of time. They spend huge amounts of time reading rubbish, and they dislike it. They are almost universally irritated by dross. They would much rather devote that time to hearing the next case, or go fishing.

- A few judges prefer traditional language, but even they do not find against lawyers because they understand their arguments.

- In any case, pandering to the taste of judges - or their supposed taste - is almost always counter-productive. Judges find grovelling particularly irritating.

- To confuse the judge deliberately in order to win a weak case would be unethical (and rarely successful). The proper course would be to try to persuade the client to settle. [**Michele Asprey** (of Plain Language Writing, New South Wales) referred to another unethical device at odds with plain drafting: that of hiding a point in verbal undergrowth in the hope that your opponent would miss it.]

- He looks for signposts amongst the verbiage. He rarely finds them.

- Lawyers tend to leave things to the last minute, and when they do their arguments are poorly digested.

- If the other side's argument is badly structured, you should not meet it point by point, so adopting the mistakes. It is better to say: "The issues are A, B, C.... The plaintiff's paragraphs 1-3 and 6-9 relate to A.... The defendant's reply is ...." and so on.

- The judge will read the statement of claim first. It should be crisp and memorable.

- The sui generis rule is less of a threat to drafters now that most argument is about statutory interpretation rather than based on common law. The court can now usually do "what it deems just". The courts have been taking a more holistic view of statutes, rather than rely on a narrow interpretation of isolated words.

- The lawyer's first audience in drafting a contract was the contracting parties. If they understood it it would not come before a judge at all (unless they were Americans, who will litigate anything because they love the smell of greasepaint and the roar of the crowd).

  (There was lively debate between those who draft for the judge, and go into details to avoid a perverse decision, and those who preferred to state their points in general terms. **Edward Good** (of Legal Education Ltd, Virginia) said that if you do have to enumerate you can do it clearly. Joseph Kimble replied that that could have you enumerating to infinity. **Bryan Garner** (of Lawprose Inc, Texas) made a related point in another seminar, when he said that French contracts were shorter and clearer than English ones because they were not based on paranoia arising from bad cases. **Mark Adler** responding to Garner, pointed out that the precedents did not bite on plain documents, which judges had to consider on their merits.

Peter Butt

Associate professor of law, University of Sydney, and Director, Law Foundation Centre for Plain Legal Language

- Lawyers should adopt the same principles of good writing when writing for a judge as when writing for anyone else: brevity and clarity.

- There is one exception. A judge can be expected to understand legal terms of art without explanation.

- The evidence we have, mostly from the US, is that judges largely prefer plain language.

- Even so, *Stylewriter* editing software had been used to vet judges' opinions, with surprisingly unflattering results.

Joseph Kimble

Associate professor of law, Thomas Coolley Law School

Professor Kimble gave a résumé of the series of studies he has organised into the attitudes of judges and attorneys to plain language (see *Clarity* 24 [June 1992] p.11 and 25 [Sept 1992] p.19).

He said:

- The evidence that judges prefer plain language continues to grow. So far about 1500 attorneys and judges had taken part, and the overwhelming majority had preferred plain language to legalese. The study was now authorised in a fifth state.

- The study suggested that:

  - lawyers are more attached to archaic formalisms than to other traditional aspects of legal language;

  - the objections to plain language are more emotional than intellectual;

  - more than 80% of judges consider plain language more persuasive than traditional writing;

  - more than 80% of judges have

the impression that plain documents have been written by more prestigious lawyers than have the equivalents written in tradional style.

- He was working on another study which he expected to show a gap between belief and reality.

- Legal briefs (in the American sense) and judicial opinions should not be written as though they were law review articles. It is not desirable to quote every case on the point. The argument should cite only two or three main cases. The writer should start with a good summary paragraph.

- Why do so many briefs and opinions sound like law review articles? The best students work on the university law review, and are appointed judges' clerks, and write opinions as though they were law reviews.

- Too much unnecessary detail was going into documents, and they should be vigorously pruned.

- New judges in the US and Canada are being taught to write decisions. In particular, they were trained to edit out the dross they were in the habit of including. One Canadian rookie judge on such a course had his draft opinion covered in red ink by his mentor judge. Long passages were marked "WGAS". He asked what this meant. "Why,-boy," drawled the older judge. "It means 'Who gives a shit?'"

Edward Good said that the West Publishing Co sends judges bound volumes of their judgments, and this had been interpreted by at least one judge as an encouragement to verbosity: the longer his opinions, the fatter would be the book with his name on the spine.

Dr Peter Buitenhuis (of the English Department at Simon Fraser University, British Columbia) said that over the last 10 years he had helped train about 1,000 judges. Only one had insisted on traditional drafting; the others espoused plain language.

Unravelling communication problems in workers' compensation

Kennth Dye

President, Workers' Compensation Board of British Columbia

- Someone is getting hurt in BC every 51 seconds. There are 400 claims a day. There is a tremendous potential for miscommunication.

- Law, government, and business were created to be of service, yet their communication skills are so bad that they are doing disservice.

- We found that 82 form letters sent out by the Compensation Services Division were curt and clinical. A team of eight people took writing courses and rewrote the letters.

- The Appeal Division has scrapped 658 of its 1,700 forms, and is rewriting the others in plain language.

- We have just completed a style guide and are now preparing a glossary. These should standardise the use of language across the Board. We found we had four meanings for *location.*

Bias in legal language

Lynn Smith

Dean of Law, University of BC

- A woman judge hadn't thought gender-neutral language was important until she said she wanted a jury *foreperson,* rather than using the word *foreman.* Only then was a woman elected.

- Supreme Court of Canada decisions are now all written in gender-neutral language.

- A lot of lawyers' letters begin *Dear Sirs.*

Plenary session

- **John Mark Keyes,** a federal parliamentary drafter in Ottawa, regretted that the conference had been English-centred, rather than about plain language generally. **Phillip Knight,** the conference organiser, said that as it was there had been plenty of material to keep everyone busy, and the Institute had decided that it would not have been practicable to widen the scope in this way. Nor did he consider himself competent to interfere with the use of other other languages.

- **John Ward** of the National Consumer Council, England, said that it was important, but not easy, to get public clamour for plain language. But the Plain English Campaign is doing sterling work with its exquisitely tasteless Golden Bull Awards, well supported by press interest. Organisations come forward to accept their awards in good part, and promise to do better in future.

- **Mr Ward** also said that one remarkable thing about the conference had been the contrast it had shown between the parliamentary drafters of Canada and Britain. The former took an active and positive part in the conference. The latter hide in the corridors of Whitehall.

- **Mr Knight** reported that the Plain Language Institute, which had run the conference, was under threat of closure. Its funding expires in March 1993 and they did not yet know if it would be renewed, despite the encouragement of the provincial Attorney-General, who had spoken at the conference and the intended appearance of the Minister of Justice (which had been prevented by a political crisis). He invited delegates to write to the minister supporting the Institute (and CLARITY has done so).

Dr Robert Eagleson

a plain language consultant now with Mallesons Stephen Jaques in Sydney, entertained the conference at dinner with a report of the massace of the English language by lawyers

Extract from a transcript of the original version of Little Red Riding Hood, which had been written by a lawyer

Once upon a time, and from time to time, and when, where, and so often as shall be, there was a person who, not being a boy pursuant to subsection 93(1)(b) of the Natural and Unnatural Persons Act as amended, notwithstanding sub-paragraph 152(1)(b)(ii) of the same Act, was a girl described in the schedule hereto (hereinafter called "Red Riding Hood")....

One fine morning on or about the date specified ... the mother of the said Red Riding Hood instructed her, "Take this cake and bottle of wine in a basket described in clauses 175T and 209F of the temporary regulations for containers, carriers and other instruments of conveyance. Notwithstanding the provisions of subsection 14 of section 3424 of the Wayfarers Wandering in Buchart Gully Act 1732, go straight to your grandmother's house....

A 1991 wooden-spoon-winning letter sent by the Brisbane City Council to one of its citizens

You being a person who is for the purposes of the said Dog Registration and Control Ordinances an owner of the dog hereinafter described, are hereby notified that I, John Richard Wood, the Manager of the Department of Recreation and Health of Brisbane City Council, being satisfied that a dog, namely a femal brindle, Bull Terrier cross bred dog, named

BOZO

Registration Number 22566 kept at premises situated at 27 Amy Street, Hawthorne, is a dangerous dog other than by reason of the fact that that dog is of a condition such as is injurious or dangerous to the health of a person did on 8 August 1990, direct pursuant to paragraph (1) of the said Ordinance 33 that the dog be for the purposes of Division 3 of Part 4 of the said Dog Registration and Control Ordinances a dangerous dog....

And from the Primary Producers Act 1958

35 H. The provisions of sections 43 and 48 shall with such modifications as are necessary extend and apply to and in relation to this Division and, without affecting the generality of the foregoing, in particular with the modifications that - (a) a reference to eggs or to eggs or egg products or to eggs and egg products shall be construed as a reference to citrus fruit.

What does "plain meaning" mean these days?

by Barbara Child

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The Shifting Status of Legislative History

As a teacher of writing and a believer in both the power of words and their ability to convey meaning, I have been glad to see the growing attention to statutes as sources of law and to the text of statutes as the source of their meaning.

We have, of course, watched the progression of more and more reliance on legislative history as a source of statutory meaning. Its high point was perhaps Judge Patricia M. Wald's study of the 1981 U.S. Supreme Court term, concluding first that "no occasion for statutory construction now exists when the Court will not look at the legislative history", and conclusing as a result that the plain meaning rule has "effectively been laid to rest".[1]

Lately that reliance on legislative history has been questioned more and more. The nature of the questioning has given me pause. For instance, I read of the D.C. Circuit this year refusing to enforce a statute that had been deleted from the U.S. Code by a scrivener's error. It makes me wonder whether "plain meaning" is not only alive and well but running amok.[2]

It has made me question my own blithe preaching to students about plain language, implying an ability to guard successfully against inadvertent ambiguity. It makes me remember Professor Llewellyn teaching us a long time ago that for every canon of construction that thrusts there is a companion that parries.[3]

So this past summer I set out on a reading mission to discover what "plain meaning" means these days. I want to share with you my findings - and what messages I find beneath the surface of the theories.

Here are the questions I explored:

1. Assuming that determination of meaning always involves context, what is the appropriate context to consider?
2. To what extent should legislative history be part of the context?
3. If the ordinary meaning of the words in a statute differs from their technical meaning (or their meaning as terms of art), which meaning should prevail? Put another way, whose definition should prevail: the layperson's? the lawyer's? or the substantive specialist's?
4. Finally, are there lots of easy cases (statutes that pose virtually no interpretation problems) and only a few hard ones (those requiring us to have a theory or rules of interpretation in the first place), or is every case potentially a hard one?

The rise of plain meaning theory

I begin with Justice Scalia's theory, which Professor Eskridge has named the "new textualism".[4] Justice Scalia and his companion theorists such as Seventh Circuit Judge Frank H. Easterbrook regard legislative history as irrelevant unless the plain meaning of the statute is patently absurd.

Justice Scalia articulated his position first in the D.C. Circuit and then for the first time on the Supreme Court in his concurring opinion in the 1987 case of *INS v. Cardoza-Fonseca*[5], in which he

[1] *Some observations on the use of legislative history in the 1981 Supreme Court term* (68 Iowa Law Review 195 [1983])

[2] *Independent Insurance Agents v. Clark.*

[3] *Remarks on the theory of appellate decision and the rules or canons about how statutues are to be construed* (3 Vand. Law Review 395, 401-6 [1950]).

[4] *The New Textualism* (37 U.C.L.A. Law Review 621 [1990]).

[5] 480 U.S. 421, 452-55. See also (eg): *Burnham v. Superior Court of California* (110 S.Ct. 2105, 2117-19, [1990]); *Employment Division v. Smith* (110 S.Ct. 1595 [1990]); Scalia: *The rule of law as a law of rules* (56 U. Chicago Law Review 1175 [1989]).

> criticised the majority for examining extensively the history of section 208(a) of the Immigration and Nationality Act in order to conclude that its standard for deporting an alien differs from that of section 243 (h).

Here is his theory of plain meaning expressed in his concurring opinion in *Green v. Bock Laundry Machine Co* [6]:

> The meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which, by a benign fiction, we assume Congress always has in mind.

Justice Scalia is not alone in this position. Justice Kennedy refers to judges "rummaging" through the history[7]. Judge Easterbrook has called it "pawing"[8]. For them a government of laws means a government of rules, and it would be ridiculous to think of the text of a statute as merely evidence of what the legislators intended. The plain meaning of the rule, the statute, comes from its structure, with help, if necessary at all, exclusively from the canons that attend to grammar, punctuation, and logic.

Justice Scalia and Judge Easterbrook would like to be the cheerleaders of legislative drafters. They have confidence that if they draft carefully they can produce a statute with certain meaning, meaning that can be objectively determined.

Legal process theory

Their textualism, or formalism, pushes to an extreme the traditional legal process theory, which told us that plain meaning should govern unless negated by strongly contrary legislative history, which would be helpful especially if the text was ambiguous. According to this theory, the statute is what matters, not the legislature's intent. Put another way, we assume that the legislature has expressed its intent in the statute.

The old Legal Process theory of the 1950s reflected the belief that legislation is the product of reasonable people with reasonable purposes, *and* that it is to be reconstructed in the context of specific cases. This was the thinking of Professors Hart and Sacks, and of Professor Dickerson. For them, the history is evidence of the legislature's general intent. It is usable to resolve ambiguities by identifying the purpose or policy behind the statute and then deducing the result most consonant with it. They believed in a creative, dynamic interpretation in which the interpreter retrieves pre-existing meaning from the text.

Today's revised version of Legal Process theory is represented by Professor W. David Slawson[9], who would like to assure us that we have the ability to write unambiguously, and that indeed ambiguity is rare in statutes. He has nothing but scorn for a court acting as if the law is what the legislature intended and a statute only the best evidence of intent. He worries about human nature being more interested in intent than in meaning. He thinks legislative history should be used only to resolve the rare ambiguity, not to reduce vagueness, which is purposeful.

I must say I cheer when I read his reminder of what some days I think everybody else has forgotten - the difference between the inadvertent ambiguity (the word or phrase that might mean this or might mean that) and the purposeful vagueness that casts a wide net over a whole continuum of meanings and makes language flexible, freeing us from having to think of and write down every single particular that may ever be intended to be covered.

Critical legal scholarship and postmodernism

Today one critique of the Legal Process theorists comes from the Critical Legal Scholars, who accuse them of creating a construct to prove that we have such a thing as objective, neutral law, without ever questioning the effect of this construct on the many outgroups whom it does not protect. For the Critical Legal Scholars, there are no easy cases. Every statute is indeterminate in its meaning and susceptible to quite various interpretation depending on the interpreter. For the "Crits", God save legislative history, for it may be the only hope of keeping judges honest.

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[6] 490 U.S. 504 [1989].

[7] *Public Citizen v. Dept of Justice* (491 U.S. 440 [1989]).

[8] *What does legislative history tell us?* (66 Chi.-Kent Law Review 441 [1990]).

[9] *Legislative history and the need to bring statutory interpretation under the rule of law* (44 Stanford Law Review 383 [1992]).

believe that the judicial reader plays an inevitably creative role in shaping the interpretation of the text. The schools differ, however, in their judgment of this role as malign or benign. For Critical Legal Scholar Professor Mark Kelman, for example, judicial interpretation is dangerously influenced by unacknowledged, pernicious interests, mainly class interests. For postmodernist Professor Stanley Fish, the process is not pernicious. Rather, judges are appropriately in the business of interpretation. The text constrains but it is never plain or pure. The judge interprets it in an interpretive community that is usually principled and rational.

Both Critical Legal Scholars and postmodernists have a strong interest in hermeneutics, the philosophy of interpretation. Hermeneutics tells us that truth is the common understanding reached by the interpreter and the text together in reference to a particular case. Interpretation is a dialogue between interpreter and text. Even the "best" interpretation will vary over time and among interpreters. History is not static, waiting to be mined, but is a source of ideas and possibilities. Meaning is invariably indeterminate. Interpretation is a necessary part of the process of creating meaning. In other words, the interpreter creates rather than discovers meaning. There is no such thing as an easy case, or a statute with only one meaning, plain on its face.

Now, here I have to tell you an aside. It is an echo in my head, reminding me of what my drafting students say when I tell them about Professor Slawson's critique of the "objective theory of contract" in which the courts bring to bear on the contract, especially the form contract, extrinsic information about what the "reasonable" person would take this piece of paper to mean regardless of what the conniving seller wrote in the small print. My students say, "Then what difference does it make what we write?" And I have to work very hard to keep them from throwing up their hands.

Let's face it. It is the Crits they are worried about, not the postmodernists. And even if every case is potentially a hard case, there are odds. Rejecting Justice Scalia's notion of plain meaning does not require adopting Humpty Dumpty's version of the universe in *Alice in Wonderland* in which "every word means whatever I say it means - and I may change my mind at any minute without notice." No. There is a lot of comfortable room between Justice Scalia and Humpty Dumpty.

A debate on indeterminacy

Enter Professors Kenny Hegland and Anthony d'Amato, whose debate in print gave me my juiciest summer reading [10]. It's not every day you can find a law review article that has you laughing *out loud* on nearly every page. Kenny Hegland will do that for you. I recommend him, especially when you are feeling low, feeling, like my students, like throwing up your hands because it doesn't matter what you write. For Kenny Hegland, it does matter. For him, there are plenty of easy cases.

He reminds us that we don't all "see" something different when somebody says "dog". Not even when somebody says "justice" or "fair". We do know that ambiguity and misunderstanding are possible, and so we take pains. We are willing even to indulge in some redundancy to reduce ambiguity, and that is alright with him. Even though we attach different meanings to different words, we know that close is usually good enough. You may see a black dog; I may see a brown one. You may see a poodle, I a doberman. That's okay.

For Professor Hegland, there are lots of easy cases, sure winners, and cases you know better than to file. As a writer and teacher, he offers two analogies. As a writer, he refines his topic sentence as he writes the rest of the paragraph. As a teacher, he refines his sense of the "A" answer on the essay exam as he reads through the set of papers. Those refinements do not erase the value of the original formulation, which directed the inquiry and set the parameters of revision. In other words, difficult calls don't invalidate the criterion.

Professor D'Amato believes every case is a hard case. That is the nature of lawyering for him. Ambiguities and misunderstandings for him are constant, pervasive. There are no easy cases because it is always possible that the rule will be changed, because the facts are never entirely known, because both sides can make compelling arguments based on the same rule. Professor D'Amato tells us he is less interested in law and more in justice. (Spoken like a true Crit.)

Instead of analogies about topic sentences and grading papers, he asks us to contemplate that ingenious device, the curved spikes that will allow us to enter the parking lot but not leave with our tires intact. He says plain meaning theory is like those curved spikes. In most cases, it works fine, but when it does not it can produce a disaster. (Should you have to stay in the parking lot even if a mugger approaches or your passenger suffers a heart attack?) Likewise, the rigidity of the plain meaning formalists and their lack of human reasonableness results in a cost spread out over many cases, a

[10] See:

Hegland, *Goodbye to deconstruction: the easy case of the under-aged President* (84 Nw. U. Law Review 250 [1989]);

D'Amato, *Pragmatic Indeterminacy* (85 Nw. U. Law Review 148 [1990]);

Hegland, *Indeterminacy, I hardly knew thee* (33 Arizona Law Review 509 [1991]);

D'Amato, *Counterintuitive consequences of "plain meaning"* (33 Arizona Law Review 529 [1991]);

Hegland, *Looking for certainty in all the wrong places* (33 Arizona Law Review 577 [1991]).

few of which are as expensively counter-productive as keeping the heart attack victim in the parking lot.

For Professor D'Amato, even the plain meaning of a red light has potential ambiguity. Where are you precisely when you no longer are legitimately driving through the yellow light but instead are running the red one? He is not satisfied to say that plain meaning works most of the time. That is not good enough because the workability may be only apparent. And if it does not work all the time, the plain meaning people have a duty to show when it does not work, and they cannot do it. From this, Professor D'Amato concludes that we need instead to look to the normative value of justice to decide cases.

Now, here I hear my drafting students again, saying: "Then it doesn't matter what we write." Well, consider this: To make his point, Professor D'Amato looks with scorn at what he calls the runaway formalism of the 1985 case of *U.S. v. Locke*[11], in which the Supreme Court enforced the literal meaning of a statute requiring land claims to be filed "prior to December 31", thus disallowing a claim filed *on* the 31st. Every other source of interpretation but the literal reading of the phrase "prior to December 31" would have allowed filing on December 31.

In discussing this case, Professor D'Amato calls to mind Lon Fuller's story of the master saying to the servant, "Drop everything and come running"[12]. What if the servant happens to be rescuing a child who is drowning in a rain barrel? Shall we punish the servant for refusing to drop the child? Professor D'Amato concludes that insisting on plain meaning induces a state of mind that thrives on arbitrariness and forces lawyers to nitpick to achieve justice. He also proclaims his theory of pragmatic indeterminacy, in which an infinite number of exceptions is possible to every rule, and therefore, they are really part of the rule, and in turn, therefore, no rule is ever fully stated. (And a Bronx cheer to Justice Scalia.)

Likewise the number of relevant facts is always infinite. Therefore, no matter how general or specific the language of the rule, there is the same potential for uncertainty. Increasing the density of rules only increases the appearance of legal control over our lives. This is his rejoinder to Justice Scalia's belief that the more general rules, the more predictable court decisions become. Professor D'Amato thinks that tinkering with rules to make them either more general or more specific does not aid predictability, although he does concede that general rule statements are more likely to track our conceptions of justice.

In their debate, Professor Hagland has had the last word so far. He says that knowing there are sometimes injustices does not lead to throwing out law. One form of justice, after all, is the correct application of law. He is tired of D'Amato's nitpicking and harping about their being no easy cases. For him, what matters is whether the ordinary judge is constrained by law, and for him, the answer is a resounding "yes". He complains about the deconstructionists ridiculing people for being uncomfortable with uncertainty. And he reassures me about the pleasure I take in comparing theories. Theories, he says, are helpful ways to try to increase certainty and make our complicated life easier to get through.

The practical reason theory

The theory of "practical reason" to me most appropriately responds to the literal-minded nonsense producers. This theory is reflected in Professors T. Alexander Aleinikoff and Theodore M. Shaw [13], who propose a new canon of construction, a constraint which they call "due process of statutory interpretation". It would require a court to identify some plausible purpose consistent with their reading of statutory language. Making good linguistic sense would not be sufficient for an interpretation to comply with this test.

This due process of statutory interpretation has the same ring to it as Professor Eskridge's call for "clear statement rules" to govern the use of legislative history, restricting it to solving the problem when there are two plausible meanings, when there is a probable drafting error, or when the text is unreasonable in view of a reasonable understanding of legislative purpose and policy.

And Professor Daniel A. Farber [14] reminds us that the vice of formalism is an excessive confidence in the power of "the word" as well as distrust of judges' ability to use good judgment. The formalists are out of luck with a large chunk of text. They have no way to decide whether to use ordinary or technical meaning. They can't cope with conflicting provisions or conflicting canons. They want the judge to start with the statute in isolation, which is the very opposite of what you do as drafter.

Professor Farber makes the point by recounting Judge Richard Posner's demolition of Professor Frederick Schauer's definition of

[11] 471 U.S. 84.

[12] *The case of the Speluncean Explorers* (62 Harvard Law Review 616, 625 [1949]).

[13] *The costs of incoherence: a comment on plain meaning, West Virginia University Hospitals Inc v. Casey, and due process of statutory interpretation* (45 Vand. Law Review 687 [1992]).

[14] *The inevitability of practical reason: statutes, formalism, and the rule of law* (45 Vand. Law Review 533 [1992]).

"plain meaning". Professor Schauer says that plain meaning is the competence that makes it possible for him to converse with an English speaker with whom he has nothing in common but their shared language. Judge Posner counters with the story of an employee who is told "to bring all the ashtrays you can find" and who follows the order by ripping ashtrays off the wall. If Schauer's definition is sound, the employee has done the right thing. To understand why it is not the right thing requires more than shared language. It requires understanding about the purpose and limitations of the request.

Creative, dynamic interpretation requires seeking from the history the assumptions behind the statute. Having done that, the judge has a special duty to interpret statutes in accord with reason, which mediates between general standards and specific cases. There is no such thing as applying a standard without engaging in interpretation.

Conclusion: metaphor, ambiguity, and good intentions

My summer reading prompted two memories from my days as a poetry and fiction writing professor.

I remember student authors' inclination to pipe up during class discussion of their work. They would say, "But that's not what I meant." Or: "Wait a minute. I intended to say ...." Whereupon I would remind them that it was their job to write the story and someone else's to read it. They could not go about trailing their readers or sitting on a reader's shoulder to prompt. "Write it and then get off the page," I would tell them. "No explanatory footnotes either. Let it go; it is out of your hands."

My second memory was of a film I saw once of Robert Frost giving a reading. He read his famous *Stopping by woods on a snowy evening,* and afterwards someone in the audience asked him about saying he had miles to go before he slept. Wasn't he really talking about dfeath? the questioner wanted to know. Frost replied that he meant what he said, which was that he had to get the hell out of the woods. To me, the glint in Frost's eye was clear. Of course, he was talking about death. And, of course, he wasn't going to tell the poor fool in the audience about it if he was too literal-minded to figure it out for himself. It was Frost's job to write about sleep, and it was the reader's job to get an idea about death. If Frost had written that he had a lot of things to do before he died, not many people would have thought him a very good poet.

Now, of course, poetry is the realm of metaphor. Statutes are not. If you have something to say in a statute about death, you know better than to write about getting out of a wood and going to sleep. But it is the context of Frost's poem that gives us the confidence in our interpretation. And statutory context functions in essentially the same way.

Maybe what it comes to is that I believe Professor D'Amato describes the world I live in. It is a world in which rules are written that say such things as this: Evidence that a witness in a civil trial was convicted of a felony "shall be admitted" for impeachment purposes if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Does "defendant" here refer to a plaintiff, as well as a defendant in a civil case who has previously been a convicted criminal defendant, or could it refer exclusively to the defendant in the civil case? This ambiguous rule is Rule 609(a) of the Federal Rules of Evidence. In *Green v. Bock Laundry Machine Co,* the Supreme Court, incredibly, determined that the word "defendant" referred to the defendant in the civil case, and having done that, initiated a rule change to give any witness the benefit of the balancing test. The change was consistent with Justice Blackmun's analysis of the legislative history in his dissent in *Green v. Bock Laundry.*

Professor D'Amato and I live in a world in which a statute intended to help welfare families by disregarding $50 of "child support" as income leaves unclear whether child support includes Social Security payments (ordinary meaning) or means exclusively payments from the non-custodial parent (technical meaning). In *Sullivan v. Stroop* [15], the Court used the technical definition - to the detriment of the custodial parent, the intended beneficiary of the rule.

We live in a world where statutes get written leaving it for somebody to decide whether expert witness fees are recoverable as attorney fees or not, and where, when it's a Justice Scalia doing the deciding, the "plain meaning" of the Civil Rights Attorney's Fees Awards Act may be allowed to override the legislative history, the statutory scheme, and the purpose of the statute, which is what happened in *West Virginia University Hospitals Inc v. Casey* [16].

All this reminds me of an experiment I perform in my classroom every semester when we talk about ambiguity. I have the students look at the picture opposite. Many of them have seen it before, but not all. And, so far without exception, semester after semester, there are always some who see only one face and some who see only the other. In fact, *you* may be looking at this picture and wondering what I'm talking about. You may be seeing only the young woman with the necklace, the fine features, and the downcast eye looking away. Or you may be seeing only the crone with the babushka over her hair, facing more forward. If you see only one or the other, it may help you free

[15] 110 S. Ct. 2499 [1990].
[16] 111 S. Ct. 1138 [1991].

Reprinted by kind permission of West Publishing Company from Reed Dickerson, *Teacher's Manual for Materials on Legal Drafting* 54a (1981).

yourself from your set vision if I tell you that the young woman's chin is the old woman's nose, and the young woman's necklace is the old woman's mouth. It may help you, and it may not. Semester after semester, try as they might, some students take nearly an hour, even with help and the best of intentions, to see the other face.

It is the most powerful lesson I know about ambiguity. I like Kenny Hegland a lot, but I mistrust his vision of the universe. The very nature of ambiguity is that it is inadvertent, and thus it is common, and above all, we can never be sure whether what we have written is ambiguous or not. We don't often read court opinions in which the court writes that "this statute is ambiguous, and we have decided to resolve the ambiguity this way". Instead, we read an opinion that says the provision is not ambiguous. Doubtless, it means X. And then we read the reversing opinion in which a higher court says the provision is not ambiguous and it means Y. One sees the young woman. Another sees the old.

As writers we do the same thing. We know perfectly well we have written X, and we are shocked when somebody reads Y. And when what we write is statutes rather than poetry, it won't do for us to sit back with a glint in our eye and enjoy ourselves while the readers deconstruct our metaphors. As drafters of law, it seems to me we should be grateful for such a thing as legislative history, for it saves us from that terrible, impossible goal of perfection every single time we write a word.

Even though Justice Scalia, Judge Easterbrook, and the other plain meaning formalists might seem to be your cheerleaders, not only crediting you with the ability to draft unambiguously but also exhorting judicial interpreters to take you at your word, beware. Beware because you draft steeped in understanding of political and legal context to which the plain meaning theorists would deny your interpreter access. As a drafter, I think I would be more cheered by those who authorize creative, dynamic interpretation, who will not insist on dogged literalism that flies in the face of reason, common sense, and the readily discernable intent of the legislature. I would not want someone holding me to X when my X was clearly a slip of the pen. This is so because I know that all the exhortations and the best intentions in the world will not keep me from an occasional slip of the pen - will not, that is, keep me from being human.

CLARITY'S annual supper and meeting

Friday, 30th October 1992

Breaking with tradition, we reserved a room in a restaurant this year. At £20 a head inclusive, this cost less and was more convenient than using The Law Society's facilities, and it was generally considered a success. Twenty members and one guest attended.

We were pleased to welcome David Lewis as our speaker. Mr Lewis, now principal of the Information Design Unit, helped found the Information Design Association, from whose secretaryship he reired in April. He also set up Europe's first degree course in design information, at what is now Coventry University. He has been a member of CLARITY for some time.

David Lewis's presentation

Stereotyped legal documents

When I worked in the civil service the civil servants made problems with language and blamed them on the lawyers. The lawyers themselves were more amenable.

Legal documents form a "genre". This is more than just the words, but includes the layout and the type.

People have stereotypes about what documents of certain genres are like, and their prejudices are triggered by legal documents.

Although the basic principles of good design have been known for hundreds of years, lawyers ignore them, and stick to the stereotype when drafting documents.

What is design? The look and feel of a document, and even its smell. The amount of white space, whether the edges of the type are straight or ragged, the typeface and whether it is bold or not, and so on.

In the clumsy words of a bad but useful phrase, "Design helps to articulate the semantic structure of the document."

Lawyers have concentrated on the words at the expense of the feelings with which people immediately react. You should remember the pre-reading impact of your document.

The history of design

Spaces between words, punctuation, and sensible line breaks are all comparatively late design features; they help the reader understand. But there are many more you could use.

Medieval hand-written documents were laid out with a sophistication comparable to that of desktop publishers, using colour and different writing styles. Early printers copied this. The Talmud offers a good example: the main text appears in the centre of the page, framed by the different commentaries, each in its own typeface.

But as printers became busier, layout was simplified in the interests of speed and mass production. Typewriters followed. They had only one font; they have no bold or italic, and only one size. Capitalisation and underlining were the only ways to distinguish one piece of text from another.

Now desktop publishing programs allow us the pre-technological range of options, but these are underused.

People know about the rules promulgated by the CLARITY poster, but they don't use them. Why? Civil servants and lawyers pride themselves on their ability to construct complicated sentences, which they consider a professional skill on the strength of which they are judged by their peers. Peer pressure is holding CLARITY back. Someone had even asked him at a training conference if his plain language work had not affected his ability to have complicated thoughts.

Design suggestions

Headings should be left-justified. Centring disrupts the reading pattern and slows down the reader skimming the document for a particular heading. The difference is barely noticeable with a healthy and sophisticated reader, but with unsophisticated readers and those with sight problems the difference is considerable.

Bold type is neater than underlining. If bold type does not stand out sufficiently, increase the size.

"Times" on a laser printer is the wrong size. Typefaces vary slightly in design from size to size; they should not just scaled up or down. But Times has been scaled, and it does not look right.

Whether Times (the style of the body of this text) or Helvetica (the style of the headings) is easier to read depends on the size, the leading (the amount of white space between lines), and what you are used to. There is no clear evidence that one is better than another, or that sans serif styles (of which Helvetica is one) does not work for extended blocks of text. But sans serif makes a good heading.

There are many books on desktop publishing which give the basic rules, but none of them are very good. ■

The rest of the meeting is reported on page 47 »»

From the committee

Committee membership

Alexandra Marks leaves...

We were sorry to lose Alexandra Marks from the committee at the end of October after three years' service, but on behalf of all members we congratulate her and Steve on the birth of their first child, Joanna, on 21st December.

We sent a potted fig plant as a modest combined expression of appreciation and welcome.

A full appreciation of Alexandra's work for CLARITY appeared in *Clarity* 24.

... and Alison Plouviez joins

We welcome Alison Plouviez onto the committee. Her appointment to replace Alexandra Marks was approved at the annual meeting.

Mrs Plouviez qualified as a solicitor as a mature student in 1986, after working for several years in the voluntary sector.

Following a period in practice, she joined The Law Society five years ago as secretary to the then recently established Wills and Equity, and Employment Law, Committees. She is now preparing a second edition of the Society's *Probate Practitioners' Handbook*, the first edition of which she edited and co-authored in 1991.

Alison Plouviez is committed to the use of plain language, good document design, and the creation of easy-to-use materials for lawyers and the public, and to increasing the public's understanding of the law.

She now lives in Hastings with her family and works part-time for the Society.

Treasurer sought

Justin Nelson would like to give up his responsibilities as treasurer, if a replacement could be found.

Precedent library

This has been moribund for some years, but now Christopher Smith has agreed to take over responsibility for it.

Obsolete documents will be discarded, and those remaining will be edited. New documents will be commissioned. Members are invited to send any they think may be of use.

All documents will be edited by two people in an effort to ensure that they are adequate for their job and comply with the principles of plain drafting. They will then be returned to the original author for final approval.

Lists of the documents approved will be published in *Clarity*, and Chris Smith will keep the complete list. He will supply the documents on payment of a nominal fee (to be fixed) to cover photocopying, postage, and stationery. As CLARITY is uninsured, and this is a non-profit-making venture, no responsibility for negligence will be accepted: precedents will be supplied on the understanding that users will ensure that the precedents satisfy their own clients' needs.

We have some editing volunteers from previous calls, but new ones would be welcomed. If you are interested in helping and have not already given us your name, please write to Mr Smith giving your speciality.

Christopher Smith is head of the legal department at the European office of NCH, a US chemical corporation. His time is divided equally between administration (co-ordinating the group's European legal affairs) and English legal practice (particularly in the fields of mergers and acquisitions, employment law, company and commercial law generally, and environmental law).

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Journal

Layout

This issue contains some trial changes to the format, on which the editor would appreciate comments. In particular:

The glossy paper has been restricted to the outer pages, to reduce eyestrain whilst leaving us with an apology for a cover.

Sans serif (Helvetica) type has been substituted for Times in the headings and subheadings.

Main headings have been written in white instead of black, on a slightly different shaded background. The use of boxes has been reduced.

Subheadings have been left-justified instead of centred.

Columns remain justified, to pander to the editor's dislike for ragged right-hand margins. Word-spacing and hyphenation is adjusted where practicable to reduce excess white space within lines.

Contents

This issue is much longer than any of its predecessors. We have received enough material to permit publication of items which in the past would have been too long; now they can be included without swamping the other contributions. The editor is especially grateful to Barbara Child, David Elliott, and Martin Cutts for their substantial pieces.

Editor's honorarium

The rest of the committe proposed paying the editor £250 for each issue of *Clarity* produced, as nominal compensation for his loss of earnings during production.

Poster

We are sorry that the deadline for improvement suggestions given in the September issue was too soon after the distribution date, which was later than had been anticipated. But we did allow extra time.

The first edition has now been printed. Five hundred have been produced so far.

A copy is to be distributed to each member with this issue of the journal. We regret the need to fold them but it would not be practicable to supply each one in a tube.

We plan to distribute the remaining copies to law schools, barristers' chambers, and solicitors' firms. While stocks last, individual copies are available on request.

No doubt further improvements will be suggested, and if they justify redoing the artwork a second edition will be produced.

Meanwhile, a student edition is to be prepared for next academic year: it will cover two sides of A4 (to fit a ring binder) and will include a September- August calendar.

CLARITY-mark

One or two organisations have approached us recently asking if we could give CLARITY's seal of approval to their documents. We propose the following scheme:

For a flat fee a CLARITY vetter will consider a document, and either give approval, or refuse it with a brief note of the reasons. The fee will normally be £100 - at least for the time being - but a higher amount will be quoted if the document is particularly long. The £100 will go to CLARITY, but it is anticipated that any excess required for a long document will be paid to the vetter.

Vetters will not refuse approval because they would have drafted the document differently. They will apply the normal principles of plain drafting, using the guidelines in the CLARITY poster. They will be asked to give their answer within two working days. They may:

- Approve the document as drafted;
- Approve it subject to minor improvements; or
- Reject it with a brief (and not necessarily comprehensive) note of the reasons.

If the document is rejected, CLARITY will offer a drafting consultant to put it right. The consultant will contract directly with the applicant for his or her services, and will charge a commercial rate, paying 10% to CLARITY as commission. To avoid any suggestion that the vetter may be tempted to be over-critical in the hope of personal gain, it is proposed that someone else should act as the consultant unless no-one else is available or the applicant particularly asks the vetter to do the work.

The consultant will guarantee to put the document into a form acceptable to the vetter, and the approval will then be given without further charge.

Two practical problems arise. The burdens and benefits of the work arising under the scheme should be distributed as fairly as possible. And a consistently high standard must be ensured. The committee therefore proposes a register - to be kept at the Surbiton office - of those willing and able to take part in the scheme. Anyone may go on the register who has contributed a document accepted without significant improvement for the precedent library. Incoming vetting and work will be circulated amongst those registered, as fairly as reasonably possible whilst matching the documents to those with appropriate specialisations.

Suggestions for improving this scheme would be welcomed, and it is likely that changes will suggest themselves when we see it working.

The applicant will be responsible for ensuring that the document does the job intended.

The vetted documents will belong to the applicant, whose confidentiality will be respected, though we will keep a copy of each document on file. Consultants will of course retain the right to re-use their own drafting ideas on other documents.

Our 10th anniversary

CLARITY will be ten years old on Tuesday, 8th June. This will be the anniversary of the appearance in The Law Society's *Gazette* of John Walton's letter announcing the formation of CLARITY.

We are planning a short, after-office-hours ceremony, to which the press will be invited.

We are also considering the launch of an annual Plain English Day, to be marked by a lecture.

Further details will appear in the April issue.

Annual meeting

»» continued from p.44

Chairman's report

The chairman gave a brief report on developments since *Clarity* 25.

Treasurer's report

Justin Nelson was unable to attend, and sent his apologies. We had £5,808 in the account. Each issue of the journal had been costing about £600 to produce and distribute.

Election of committee

The existing committee was re-elected, with the exception of Alexandra Marks, who was retiring. Alison Plouviez was elected in her place. [Fuller details appear on p.45.]

Professional publication of *Clarity*

The meeting approved Richard Castle's suggestion that we should approach commercial publishers with the suggestion that the journal be professionally produced and marketed. CLARITY would retain editorial control, but the journal would be more vigorously promoted.

Clarity's layout

There was some discussion about improving the format. [See p.45.]

Thomas Coolley Law Review summary of plain language developments

Copies of Joseph Kimble's article were available for those who wanted it. A few remain.

Clearer Timeshare Act

Information about Martin Cutts' project was given, and contributions were invited. [Further details appear on pages 3-9.]

News about members

Associate Professor Peter Butt spent the autumn term at the Univerity of Bristol School of Law before returning to the Centre for Plain Legal Language in Sydney at the end of his sabbatical year.

Professor Roy Goode is chairing the government-appointed Pension Law Review Committee.

He will be researching, amongst other things, people's understanding of their pension rights.

Professor Patricia Hassett, an attorney in her home state of New York, was called to the English bar in November. She is a member of the Inner Temple.

Geoffrey Palmer has been knighted since resigning the New Zealand premiership and is now professor of law at the Victoria University of Wellington.

Murray Ross has left Withers and is now legal advisor to the Jupiter Tyndall Group plc.

Membership statistics

By country

England	355
Wales	5
Scotland	1
Channel Islands	1
Belgium	1
Holland	1
France	1
Switzerland	2
Germany	1
Canada	16
USA	6
Cayman Isles	2
Australia	13
New Zealand	4
Hong Kong	5
Malaysia	1
Thailand	1
Total	**416**

The spread around the world is gratifying, but we would welcome more members outside England. The United States in particular is sadly under-represented. But CLARITY is supported, and this journal read, more widely than these figures suggest. We have contacts, for example, in Sweden and Denmark, and we have reports of the journal being passed from hand to hand.

By activity or profession

Some members are listed under more than one profession. And we do not have a complete record of each member's activities. We think that most of the "unknowns" are solicitors, and there are probably more part-time parliamentary drafters, journalists authors, and teachers than we have recorded. The number of judges is disappointing, though we are pleased to welcome Judge Cook, a family law specialist, who has joined as we go to press.

Solicitors	178
Barristers	23
Foreign attorneys	32
Parliamentary drafters	5
Judges	2
Authors	37
Teachers	50
Journalists	4
Students	3
Other	16
Unknown	130

Welcome to new members

Australia

Kate Corcoran; attorney, Mallesons Stephen Jaques; Sydney

Canada

Jonathan Davies; attorney-general's department, Nova Scotia; Halifax

Cheryl Stephens; attorney, legal education consultant, and publisher of a plain English newsletter; Vancouver

Peg James, an Alberta attorney, has been nominated as our contact at the CLE Plain Language Project of Vancouver, an existing member.

Don Revell, chief parliamentary drafter for Ontario, was welcomed in issue 21 but inadvertently omitted from the mailing list; our apologies to him.

Mark Vale, plain language consultant and teacher of Toronto, has joined CLARITY in his own right, having previously been associated with us as director of CLIC.

England

Mrs **G. Brown**; retired solicitor; manager, Citizen's Advice Bureau; Surbiton, Surrey

Mr **E.J.C. Burroughs**; solicitor, Walkers; Doncaster, South Yorkshire

Judge **Michael Cook**; circuit judge; Surrey

Michael Daiches; barrister; London

John Forrest; retired solicitor; Blackburn, Lancashire

Stewart Graham; mature law student; Chessington, Surrey

Maurice Guyer; solicitor, Vickers & Co; Ealing, London W13

David Higgins; solicitor, Prudential Life & Pensions; Reading, Berkshire

Alison Plouviez; solicitor, Legal Practice Directorate, The Law Society; London WC2

Dean Poster; solicitor, Nabarro Nathanson; London W1

Martin Richardson; Director of education & training, Berwin Leighton; London EC4

Jenny White; barrister; Electricity Association; London SW1

Alison Wilcockson; solicitor and lecturer; Nottingham Trent University

United States

Barbara Child; Director of Legal Drafting, University of Florida College of Law; Gainesville

Jeanne Pasmentier; attorney; Division of Consumer Affairs, New Jersey

Please contact

Justin Nelson about membership, finance or book reviews
and
Mark Adler about this journal