INTRODUCTION

It seems that there has never been a time since the Norman Conquest when the English of the law has been in tune with common usage. It has always been considered a language apart.

Even though the importance of legislation and rules has dramatically increased, little effort has been made to improve the quality of legal writing. In recent years criticism of legal writing has mounted significantly both in the United Kingdom and the United States.

In the United Kingdom the Statute Law Society has produced two important studies: “Statute Law Deficiencies” in 1970 and “Statute Law: the key to clarity” in 1972. The society has criticized the language of the statutes as legalistic, often obscure and circumlocutious, requiring a certain type of expertise in order to gauge its meaning. In 1973, the British government set up a committee under the chairmanship of Sir David Renton to study the question of preparing of legislation and to suggest reforms aimed at achieving greater simplicity and clarity in statute law.

Social pressure for reform in legal writing has also been increasing in the U.S.A. The Plain English Campaign is perhaps the largest pressure group fighting for such reforms.

Over the past half century, separate but overlapping efforts have been made to improve legal writing and to professionalize legislative and rule drafting. A special development has been the Plain English movement, directed primarily at making legal documents drafted by lawyers, particularly those that affect consumers such as insurance and installment contracts as well as government regulations, easier to read and understand.

During the past two decades a substantial number of states enacted “Plain English” statutes, mandating the use of simplified language in these types of policies and contracts. Some statutes directed government agencies to draft their rules and regulations in accordance with the same principle.

More recently, some authorities have recommended “Plain English” for legal writing in general. The advocates of “Plain English” say that the greatest need in existing legislation is not a more readable style but a fuller grasp of the relevant
substantive considerations, greater systematization, and greater uniformity in con-
cept, approach and terminology. Legislation cannot be permanently embalmed in
static terminology. New laws should reflect the needs of the times.

The legislative context does not, however, always allow the draftsman a free hand.
When preparing amendments, the draftsman must adapt his legislative principles to
the necessity of meshing the new law with the old. In varying degrees this circums-
scribes his choice of arrangement, terms, and style. But even within these limitations,
there is usually room for the play of sound drafting principles. The main benefit will be
greater general clarity. This will come, not from the isolated application of a single
rule, but as the cumulative reward for persistance in complying with all the rules in the
many and individually insignificant places where they apply.

Dale (1977) moreover stresses that the current tendency of governments, to try to
regulate every activity, makes it more than ever necessary to look for, and to adopt
when found, the drafting techniques – whether practised in civil law or common law
countries – which serve the purpose of clarity; and to avoid those which do not.

**Fundamental Principles of the Plain English Approach to Legal Writing**

Over the past half century the representatives of the Plain English approach to
legal writing have worked out the principles of “good legal writing”. Our work follows
the rules set up by Dickerson (1954), Martineau (1996) and Wydick (1998). I have
tried to classify the most essential principles here. The principles that follow are stated
in the second person.

1. **Use the Singular**

   A traditional principle of drafting legislation or a rule is to make the subject of
   a sentence singular rather than plural. Use of the singular is important for several
   reasons:
   1. The singular makes the drafting process simpler because there is no need to worry
      about accidental shifting back and forth between the singular and plural in nouns
      or verbs.
   2. The singular particularizes the effect of the provision being drafted on the individ-
      ual rather than on the anonymous group.
   3. The singular makes it clear that the provision applies to each member of the class
      rather than only to the class as a separate group or body.

2. **Use “The” Rather Than “Said” or “Aforementioned”**

   Wydick (1998, 61) gives an example of the word “said” in its archaic use as an
   adjective. No lawyer in dinner table conversation says: “The green beans are excellent;
   please pass said green beans.” Yet legal pleadings come out like this: “The object of
   said conspiracy among said defendants was to fix retail prices of said products in
   interstate commerce.”

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Lawyers who use “said” claim that it is more precise than ordinary words like “the”, or “this”, or “those”. They say it means “the exact same one mentioned above”. But the extra precision is either illusory or unnecessary, as the above example shows. If only one conspiracy has been mentioned in the preceding material, we will not mistake “this” conspiracy for some other conspiracy, and “said” is unnecessary. If more than one conspiracy has been previously mentioned, “said” does not tell us which of the several is meant. The extra precision is thus illusory. If “the” were put in place of all the “saids”, the sentence would be no less precise and much less clumsy.

Wydick (1998, 62) calls “aforementioned” “said’s” big brother and says it is just as useless: “The fifty-acre plot aforementioned shall be divided ...” If only one fifty-acre plot has been mentioned before, then “aforementioned” is unnecessary, and if more than one fifty-acre plot has been mentioned before, then “aforementioned” is imprecise.

3. Avoid Lawyerisms

Lawyerisms give writing a legal smell, but they carry little or no legal substance. When they are used in writing addressed to nonlawyers, they baffle and annoy. When used in other legal writing, they give a false sense of precision and sometimes obscure a dangerous gap in analysis. Lawyerisms are the jargon of the legal profession. They have been the curse of legal writing as long as there have been lawyers. Examples are “herein above mentioned”, “hereinafter”, “hereinbefore”, “therein”, “therefrom”, “thereon”, “thereto”, “whatsoever”, “whensoever”, “wheresomever” ... Lawyers are particularly addicted to the prefixes of “here” and “there”. These words are almost never necessary and add nothing to substance. A drafter who discovers one of these words in a draft of legislation or a rule should make every effort to eliminate it or find a less artificial substitute.

Legal jargon can also creep into legislation or a rule in the form of a Latin or law French expression. A lawyer’s words should not differ without reason from the words used in ordinary English. Sometimes there is a reason. For example, the Latin Phrase “res ipsa loquitur” has become a term of art that lawyers use to communicate among themselves, conveniently and with a fair degree of precision, about a tort law doctrine. Mellinkoff notes that in tort law, almost everyone understands the phrase “res ipsa loquitur” (“the thing speaks for itself”) to mean: “Ordinarily, this sort of thing doesn’t happen unless somebody was negligent.”

But too often lawyers use Latin phrases needlessly. Sometimes they do it out of habit or haste; the old phrase is the one they learned in law school, and they have never taken time to question its use. Other times they do it believing mistakenly that the old phrase’s meaning cannot be expressed in ordinary English, or that the old phrase is somehow more precise than ordinary English.
4. Avoid Compound Constructions or Expressions

According to the advocates of the Plain English approach to legal writing all authors on “good legal drafting” use shorter expressions rather than longer and more complicated ones:

<table>
<thead>
<tr>
<th>compound</th>
<th>simple</th>
</tr>
</thead>
<tbody>
<tr>
<td>at such time as</td>
<td>when</td>
</tr>
<tr>
<td>during such time as</td>
<td>while</td>
</tr>
<tr>
<td>during the course of</td>
<td>during</td>
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<tr>
<td>for the duration of</td>
<td>during</td>
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<tr>
<td>sufficient number of</td>
<td>enough</td>
</tr>
<tr>
<td>until such time as</td>
<td>until</td>
</tr>
</tbody>
</table>

5. Do Not Use Redundant Legal Phrases

Another technique to eliminate unnecessary words in legislation and rules is to avoid traditional legal phrases that include redundancies. Although history explains how these redundant phrases got into legal documents, it does not justify their continued use in legislation and rules. Mellinkoff (1963, 38) calls these redundant legal phrases coupled synonyms and explains that they have ancient roots. At several points in history, the English and their lawyers had two languages to choose from: first, a choice between the language of the Celts and that of their Anglo-Saxon conquerors; later, a choice between English and Latin; and later still, a choice between English and French. Lawyers started using a word from each language, joined in a pair, to express a single meaning. For example, “free and clear” comes from the Old English “freo” and the Old French “cler”.

Lawyers often say that a term like “null and void” is a traditional legal term of art. Traditional it may be, but a term of art it is not. A term of art is a short expression that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning. The word “hearsay” is an example of a term of art. First, its core meaning is well agreed in modern evidence law. Second, “hearsay” enables a lawyer to use one word instead of many to say that “a statement is being offered into evidence to prove that what it asserts is true, and that the statement is not one made by the declarant while testifying at the trial or hearing”.

“Redundant doubling” was sometimes used for clarity, sometimes for emphasis, and sometimes just because it was the literary fashion. Doubling became traditional in legal language and it persisted long after any practical purpose was dead.
Some common legally redundant expressions are:
alter or change
full and complete
last will and testament
null and void
order and direct
save and except

6. Be Consistent

Another traditional principle of “good legal writing” is to be consistent in the use of words. Consistency in this context means being repetitive, that is using the same word rather than a synonym. In non legal writing, the use of a synonym rather than being repetitive, known as “elegant variation”, is considered undesirable, but only as a matter of style. In legal writing “elegant variation” is undesirable because of the construction problems it may create. In the drafting of legislation or a rule, consistency in the use of language is an absolute necessity.

Courts take the position that if the enacting body uses one word one place and a slightly different word in another place, the enacting body means something different in the latter than in the former. In the world of statutory construction, there is no “elegant variation”, only substantive variation. The drafter of legislation or a rule must be consistent in the use of words and avoid the trap of „elegant variation“. The drafter must choose the best word the first time it is used, and then use it consistently.

The following are examples of synonyms that the unwary drafter may use:

case – action, suit, proceeding
decide – determine, rule
file – submit
person – individual
reside – live
rule – regulation

Obviously, the list is endless. Because it is endless, the opportunities for the drafter to be inconsistent are endless, too.

7. Use Short Sentences

Long sentences are common in legislation and rules in part because their use by lawyers in all types of legal writing is traditional. Two additional factors are particularly applicable to the drafting of legislation and rules. One is the fear of the drafter that, if all parts of a provision are not in the same sentence, a court construing the provision might not realize the relationship between the parts and might construe one sentence without regard to its companion sentences.
The second reason lies in the legislative process itself. Although a sentence in legislation or a rule may start out as a single thought simply expressed, as the sentence is reviewed by other persons, groups, and committees, additional ideas are added to the original one by subsidiary clauses added to the original sentence with or without punctuation marks such as commas or semicolons. Proponents of a subsidiary clause are more interested in incorporating their idea into the legislation or rule than with the length or readability of the entire sentence. If the original writer is responsible for revising the original draft to reflect the additions, the drafter should not abandon good drafting, including short sentences. The task may be more difficult, but for that very reason it is important. If simple expression is too much for the drafter, the likelihood that those to whom the legislation or rule applies or who must administer it will not understand it and the courts are likely not to construe it correctly. In some types of legal writing, such as that which is merely descriptive, the use of short sentences may result in objectionable choppiness. This is less of a problem in legislation or rule because it primarily gives commands or states conditions. Choppiness in this type of writing is seldom a disadvantage but rather is to be preferred because it will aid understanding.

Unfortunately a lot of articles are in the form of a continuous single sentence. Lawyers believe that it is easier to construe a single sentence than a series of sentences and that there is therefore less potential for uncertainty. One may wonder how well based these beliefs are, since in order to fit all the component parts of the rule into a single sentence, draftsmen frequently have recourse to complex patterns of subordination and embedded non-finite clauses. This syntactic complexity renders legislative texts incomprehensible to all except the specialist reader and increases the possibility for uncertainty.

8. Use Base Verbs

The use of a nominalization in place of a verb is a disease common to lawyers (Martineau 1996, 77).

Nominalization is, of course, not wrong. In legislation and rules, however, the drafter should avoid nominalizations because the nominalization is always a longer word than the base verb and the nominalization always requires supporting words, usually an article and a verb. Thus, a provision that with a base verb reads “the administrator shall consider the application” becomes with a nominalization “the administrator shall give consideration to the application” or “the court shall determine” becomes “the court shall make a determination ...”

The inevitable result of the longer and additional words is that the statute or a rule is more difficult to read and understand.
9. Use “May” to Grant Discretion or Authority to Act

The use of “may” is limited to the grant of discretion or authority according to the representatives of the Plain English approach to legal writing (an aggrieved party may appeal a final judgment or the governor may fill a vacancy).

Some writers on legislative drafting suggest that the phrase “in its discretion” may be added to “may” to emphasize the intent to grant discretion. This is bad advice (Martineau 1996, 81): In addition to adding words and being redundant, the use of “in its discretion” on some occasions and not on others may lead a court to conclude that more discretion is intended to be granted by the phrase “may in its discretion” than by the simple “may”. Discretion is discretion. The only limitations imposed on it are by the express terms of the legislation or rule, and not implied by the use of the redundant “in its discretion”.

Another common use of “may” is to express eligibility or entitlement (a classified employee with 30 years of service may retire at age 55 or a committee member may be reimbursed for actual and necessary expenses while on committee business). The use of “may” in these circumstances is ambiguous in that the provision could be read to establish the discretion in someone else such as an employer or administrator. To avoid this ambiguity, the drafter should not use “may” but should state the eligibility or entitlement in those terms (a classified employee with 30 years of service is eligible to retire at age 55 or a committee member is entitled to be reimbursed for actual and necessary expenses while on committee business).

10. Use “May Not” to Prohibit an Action

The principal error of the traditional form lies according to the advocates of the Plain English Movement in expressing the negative in the actor. Literally, a provision that begins with “no person” is not addressed to anyone, when the exact opposite is intended – the provision applies to everyone. The negative thus properly belongs with the action, not the actor. The proper way to express the prohibition is to say “a person (or other actor) may not”.

When a drafter of legislation or a rule wishes to prohibit an action, a common method is to combine the mandatory “shall” with the negative “not” and say the actor “shall not ...” (a person shall not discharge a toxic substance into the air). This form is incorrect (Martineau 1996, 81). Technically the words “shall not” only mean that a person does not have a duty to engage in the action. The use of “no person shall” is just as incorrect because the phrase means only that there is no one who has a duty to engage in the action.

The proper way to express a prohibition to act is to say “may not” in connection with the action prohibited (a person may not discharge a toxic substance into the air). The effect of the words “may not” is to deny the actor the power or the authority to engage in the action. The denial of the power or authority accomplishes all that is necessary to establish the legal prohibition against a person performing an act.
11. Use “Shall” Only to Impose a Duty to Act

The advocates of the Plain English approach to legal writing recommend to use “shall” only to impose a duty to act.

The provisions “the president shall report annually to congress”, “the governor shall submit a balanced budget to the legislature”, “a person shall pay a tax each year”, and “an attorney shall keep client funds in a separate account” are all the examples of commands for the actor named in the provision to take an action.

“Shall” should not be used to declare a legal result (Martineau 1991, 79). In 28 U.S.C.A. 1498 (d) it provides that „A Government employee shall have a right of action against the Government ...” This usage is known as a “false imperative” because it does not give a command to someone to do something but rather declares a legal result. Legislation or a rule is selfexecuting. If it says something “is”, it is. Thus, if in a statute a word has a certain meaning, it is only necessary to say that the word “means ...” This usage is the indicative mood. To say that a word “shall mean” is incorrect.

Wydick (1998, 66–67) says that “shall” is a big troublemaker and many lawyers do not realize how slippery “shall” is, so they use it freely, unaware of the traps they are laying for their readers.

Conclusion

Plain English Campaign has attacked unclear legal language both in the UK and the USA. Plain English Campaign’s call for clearer legal language is nowadays recognised in hundreds of legal documents. It should be obvious that the more difficult the content is to understand, the harder lawyers should work to express it clearly. Legal language will never be the same as everyday English. Lawyers need to express themselves more carefully than people in everyday situations. The lawyer cannot afford loopholes or confusion. Legal writers should not, however, underestimate how much they can do to clarify complex information.

SUMMARY

The article has put forward the arguments for using plain legal English. As the law is about real people in real situations, the ability to understand the law is a basic right and a basic need.

Clear legal writing depends not only on a clear understanding of the law and a clear interpretation of the law but also on a clear expression of the law. This is why a set of guidelines has been worked out to help legal writers express their ideas clearly and accurately. It is likely that the legal pressure on lawyers to write plain English is going to increase.
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