IT'S TIME LAWYERS STOPPED WRITING LIKE LAWYERS

By Professor Peter Butt

The problem

"The moment you read something you can't understand, you just know it was written by a lawyer." So said Will Rogers, the American comedian, echoing a common sentiment. For centuries, the way that lawyers write has been a source of ridicule. Long sentences, contorted syntax, quaint terminology—all have been the subject of caricature and condemnation.

But why do lawyers write that way? Why do they use such long sentences—sometimes hundred of words long? Why do they use such archaic and pompous language? Why such contorted syntax? Why two or three words, when one would do? What possible justification can exist for a style so tortuous, so complex, and so inelegant?

An example

Let me give you an example of this tortuous, complex and inelegant style. Suppose a landlord and a tenant want to enter into a lease. They agree that the tenant will have the duty to repair the leased premises. They go to a lawyer to prepare the lease for them. When drafting the "repair" clause, the lawyer could write: "The tenant must repair the premises". Legally, this should suffice. There would be no need to define "the premises", because they would be defined elsewhere in the lease. There would be no need to list the various *parts* of the premises, because the term "the premises" necessarily includes all parts of the premises. And there would be no need to expand on the term "repair", because it is an ordinary English word, with (as the lawyer should know) a meaning elucidated by many judicial decisions. Yet compare that wording—"The tenant must repair the premises"—with the verbal excesses that adorned the repairing covenant in a leading English court case:

> "The tenant shall when where and so often as occasion requires well and sufficiently ... repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof ... and all floors walls columns roofs canopies lifts and escalators ... shafts stairways fences pavements forecourts drains sewers ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever ...".

This is pure gobbledegook, serving only to obfuscate. It makes the clause far harder to read than its subject-matter requires. The verbosity was probably prompted by a desire to be legally precise. If so, it failed, because the clause still ended up in court in a dispute over meaning. This demonstrates one of the great misconceptions of "traditional" legal drafting—that somehow a complex, verbose style is more precise than modern, plain language.

Why perpetuate gobbldegook?

Lawyers will tell you that their traditional style is “necessary” for legal precision. They will say that they have to use particular words and phrases, even though incomprehensible to clients. Otherwise, they say, you risk litigation over meaning. It’s all a matter a “precedent”. Judges in the past have imbued certain words and phrases with particular meanings, and we must use them even today to ensure legal certainty.

But even if that argument were sound—which it is not, as we will see later—it does not justify features of “traditional” legal writing such as interminably long sentences, contorted syntax, and the use of two or three words where one would suffice. It does not justify the “sandwich” construction, where the parts of a sentence are separate by subclauses and sub-subclauses, and even sub-sub-subclauses—as if deliberately to scatter the key elements of the sentence far and wide like some form of verbal jigsaw. And it does not justify such eccentricities as the wearisome “whereases”, or the signature-clause oddities such as “In witness whereof the parties hereto have set their hands and seals on the day first hereinbefore mentioned” (why not just “signed and sealed on [date]?”). In short, it does not explain why legal documents are so excruciatingly painful to read.

No, if we were to be truthful, we lawyers (and I say “we”, for I am one of them) write the way we do mostly out of habit. This is the style to which we have become accustomed. We encounter it first as law students, reading yesterday’s dusty texts and musty judgments. Then, feeling that we must “write like a lawyer”, we perpetuate it in our student essays and assignments. And then we take it with us into legal practice, where it is confirmed by the practices of our peers. In short, the traditional legal style has little to commend it except habit.

The plain language movement in law

But a new style is sweeping the legal world. It is called “plain legal language”. It aims to make legal documents understandable by those who sign them. We are beginning to see it in documents such as insurance policies, mortgages, and leases. In many countries—Australia, Canada and the United Kingdom, to name a few—we are also beginning to see it in statutes; indeed, statutes in some countries “mandate” its use, particularly in consumer documents. Its hallmarks are obvious: non-technical language, short sentences, active voice, and readers’ aids such as notes, diagrams and flow-charts.

This plain language movement has two fundamental premises. One is that legal concepts—even complex legal concepts—can be expressed in normal, idiomatic language. (To be sure, *some* technical words and phrases may be worth retaining, because they encapsulate meaning in ways that are more precise than non-technical language; but they are very few.) The second premise is that people have a right to be able to understand the laws that govern them and the documents they sign. In short, the plain language movement is part of the consumer movement of modern times.

Modern research proves the benefits of plain legal language

Modern research has proven the many benefits of plain language in law. For example, it has shown that plain language is more "efficient" than traditional legal language. Plain language saves time and money. Numerous organisations have attested to huge financial savings in moving to plain, simple documents. These savings have been verified by careful studies over the past 10 years or so.

Again, modern research has shown that judges prefer plain language—not that that should be the sole reason for adopting it. Surveys of judges in a number of United States jurisdictions prove this.

And—importantly from the lawyers' perspective—modern research has shown that plain legal language is legally "safe". Its adoption has not opened the floodgates of litigation. Indeed, the opposite has occurred: studies have shown that, on the whole, plain language documents cause less litigation.

In short, lawyers need not fear this move to plain language. Their skills and expertise will still be needed. Their years of study will not be wasted. But their clients will be able better to understand the documents their lawyers prepare. Citizens will be able better to understand the laws that govern them. Organisations such as banks and insurance companies will save large sums of money. And legal certainty will be retained, for the benefit of all.

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He will be visiting Malta in early December at the invitation of the Institute of Legal Studies when he will be running two workshops on plain legal language. For further information on the workshops please contact the Institute of Legal Studies at **info@ils.com.mt**