



Exposing Errors and Removing Errors: Pushing the Boundaries in Legal English

by Christopher Williams

1. INTRODUCTION

Human beings make mistakes. Lawyers are human beings (I know there are some lawyer jokes that suggest otherwise). Lawyers make mistakes. The life of a lawyer is stressful enough; there is no need to add to that stress by somehow thinking that you cannot make any mistakes. You can and you will.
(Roy Ginsberg 2010)

'To err is human' is an adage we must all agree with. Any system devised by human beings will inevitably be imperfect, and we strive to improve that system by removing the errors we perceive as existing therein. Legal systems are no exception to this rule, each one being the product of a particular combination of cultural and historical circumstances which change over the course of time. The common law system has evolved over the last few centuries, spreading from England, largely as a result of colonization, to a number of countries around the world. As is well known, legal language tends to be inherently more conservative than most other genres of language. But the peculiarity of the common law system, with its emphasis on precedent, has on the whole exacerbated this backward-looking style of writing, and it



is still possible to find examples of legal English today which have changed little since Elizabethan times, such as the enactment clause to be found at the beginning of legislation passed in Westminster, or formulaic expressions which still thrive in many contracts even today:

NOW, THEREFORE, in consideration of the foregoing provisions and the terms and conditions herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the following terms and conditions apply.¹

It is precisely this anachronistic and cluttered style of writing that has given rise to the proliferation of Plain language movements in various English-speaking countries with calls to introduce a more modern, streamlined style of drafting that cuts out all outdated phraseology and excess verbosity and is more comprehensible to laypersons.

After initial resistance in some quarters, legislative drafting bodies in the English-speaking world have started to take on board the recommendations of the Plain language movement, and the laws drafted in recent years in many English-speaking countries reflect this new way of writing that has evolved from 'legalese' to a more modern style of standard formal English. In other spheres of legal English, however, such as contracts and wills, the style still smacks of legalese (Williams 2011). Adler (2008: 21) observes that "most lawyers in private practice continue to draft in traditional style, but with far less skill than parliamentary counsel."

The dichotomy existing in legal English today, i.e. the marked progress in updating the language of legislative texts compared with the relative sluggishness by legal practitioners to modernize the language of contracts, reflects two opposing views of what a legally binding text is meant to do.

However, before entering into the specifics of the question at hand, it should be borne in mind that we will be focusing on particular instances of the 'language of the law' which, according to Assy (2011: 15-16) or Tiersma (2006: 48), only represent a relatively small proportion of legal texts. Indeed, Tiersma (*ibid.*) affirms that the language of the law "is much closer to ordinary English than most people seem to think." But this assertion also comes with a *caveat* from Finegan (2015: 50): "in certain legal contexts, including many with serious consequences for ordinary speakers, legal language is only deceptively close to ordinary language, and those deceptively similar appearances warrant further scrutiny."

The rest of this paper will be devoted to the question of intelligibility of legal texts in the English-speaking world with specific reference to the question of where the 'error' lies. According to one's point of view, plain language helps to remove the errors which have long plagued legalese, or alternatively the introduction of plain

¹ <http://www.minisoft.com/pages/general/products/LICENSE_AGREEMENT.pdf> (29 December 2016)



language principles only enhances the risk of committing errors of interpretation and should therefore be avoided.

2. INTELLIGIBILITY AND LEGALLY BINDING TEXTS: TWO OPPOSING VIEWS ON ERROR

The debate over the question of intelligibility of legally binding texts in the English-speaking world is by no means new. Indeed, from the 14th century until the first half of the 18th century there was sporadic debate about whether French should be used in English courts rather than English, also from the point of view of 'protecting' the uninitiated from falling into error due to their poor knowledge of French. As Pease (2012: 7) observes:

In the sixteenth century Sir Edward Coke actually defended the continued use of French on the ground that the laws must be kept out of reach of the general public "... lest the unlearned by bare reading ... might suck out errors, and trusting in their conceit, might endamage themselves ...". Five hundred years later, one could argue that the public might be willing to risk a little endamage for the sake of comprehensible legal writing!

Coming closer to present day, with the growing influence of the Plain language movement from the 1970s onwards the debate over the need for intelligibility and clarity has intensified, particularly since the early 1990s when some of the precepts of plain language started to be accepted by the 'Establishment' in countries such as Australia and New Zealand. The early 1990s was also a period which saw the introduction of legislation, for example in a number of states in the USA, protecting – on grounds of (un)intelligibility – consumers who had undersigned contracts. In other words, a contract could be considered as invalid if the consumer was unable to understand the wording of that contract.

In focusing on the concept of error in relation to the issue of the intelligibility of legally binding texts, we must first define what is meant by 'error' in this particular context. The closest synonym to 'error' here would seem to be 'mistake', though it is also possible to speak of an 'inaccuracy', a 'defect', a 'flaw', a 'fault', or of there being 'something wrong' with, say, the wording or phraseology of a text, or with the reasoning behind one's choice in selecting a particular word, expression or phrase.

To the outsider, it might seem to be blindingly obvious that if there is the possibility of producing a legally binding text that is perfectly comprehensible to a person of average intelligence and which achieves the result it is meant to achieve from a legal point of view, then that is clearly preferable to producing a document the layperson cannot understand. To a legal practitioner the perspective may be rather different. On paper no one could possibly object to the idea of a legally binding text being written in a way that it can be understood by anyone. But in real life any legally binding text comes with a lot of cultural 'baggage' attached, and there may arguably be valid reasons why such a complex document as a contract may require being



written in a laborious style which scrupulously provides details covering an array of legal technicalities and hypotheses. Butt (2001: 30) frames the issue as follows:

Lawyers write for a potentially hostile audience, in an adversarial atmosphere. Their documents are prone to scrutiny by loophole-seeking opponents. And so lawyers fear (wrongly, in my view) that change may lead to uncertainty, or simplicity to ambiguity. They fear that departing from traditional language and style may lead to defective drafting and the spectre of professional negligence.

We will be dealing at length in the following section with this notion of fear of making mistakes as one of the main driving forces behind the reluctance of many lawyers to embrace plain language. It should also be noted that, in a number of cases, hostility towards introducing plain language in the legal sphere is based on preconceived ideas that reject *a priori* the feasibility of plain legal language as being no more than a utopian dream, however laudable the underlying idea might appear to be. One of the most vociferous detractors of plain language has been the distinguished lawyer and legislative drafter Francis Bennion (1923-2015) who asserts (1993: 18):

In his *Utopia* Sir Thomas More said “All laws are promulgated to this end, that every man may know his duty; and, therefore, the plainest and most obvious sense of the words is that which must be put on them”. In my textbook *Statutory Interpretation* I quoted More’s statement, adding “This might apply in Utopia, but sadly does not hold good in real life” (2nd edn, 1992, p. 21). Was I right? Many CLARITY supporters would say no.

Elsewhere Bennion argues (2007: 65) as follows:

An individual law text needs to be considered in context. No one law text stands alone. It always needs to be read alongside many other law texts, and this cannot be achieved by unaided non-lawyers. That is another mistake by the plain language movement.

It is linked to a yet further error, that persons lacking legal training can safely be trusted to rewrite legal documents in plain language. This can be highly dangerous, as I show later. Redrafting non-lawyers are likely to make the text look good (as they think) while presenting the law or its effect incorrectly, or applying the law wrongly.

This reminds us that lawyers, like medical doctors or civil engineers, are *trained*.

Such affirmations that the Plain language movement does not recognize the expertise of lawyers can be easily demolished. For example, in his critique of Bennion’s article, Adler (2008: 17) points out that “Francis Bennion offers no support for this extraordinary assertion, and I know of no plain language proponent who would deny that law is – obviously – an expertise.”



However, it would seem to be futile to focus on cases of prejudice on one side or the other by listing well chosen examples to illustrate one's point. What should be borne in mind is that preconceptions often fuel and distort the debate over the validity of using plain language in the legal sphere.

I will therefore try to downplay as far as possible the subjective elements that colour people's reasoning and to focus on those objective features that lead scholars and legal practitioners to prefer or to reject a more traditional style of drafting legally binding texts with respect to a more modern style on grounds of error.

3. THE PRACTITIONER'S FEAR OF MAKING MISTAKES

We will now examine in more detail some of the arguments put forward for or against the use of plain language in relation to the general theme of this paper, i.e. whether striving for greater intelligibility in drafting legal texts reduces or increases the risk of error.

Besides Bennion, another outspoken detractor of plain language drafting is Jack Stark (2013) who claims:

In short, Plain Language is a disaster because it generates many errors, because it is illogical and ignores the statutory drafting language-game. Drafters who use it may cause irreparable damage to their statutes and thus may cause irreparable damage to their states. They need to rethink their methods.

Stark's criticisms of plain language drafting – specifically of the way the US Code of Federal Regulations was rewritten in accordance with plain language criteria – are rebutted point by point by one of the drafters closely involved in the redrafting process itself, Joseph Kimble, who stresses (Kimble 2013: 45) that "we think drafters should make statutes and regulations intelligible to the greatest number possible of intended readers, especially those who are directly affected." Kimble (*ibid.*) also candidly affirms:

Don't get me wrong: you can find mistakes and flaws in plain drafting. But anyone who enjoys that pursuit would have much more fun with old-style drafting, where ambiguities, inconsistencies and uncertainties flourish in all the verbosity and disorder. I took four examples from the old Federal Rules of Evidence and pointed out 33, 31, 18, and 28 drafting deficiencies in those examples. Finding a flaw in a plain-language statute or rule does not mean that plain language doesn't work or that we're stuck in reverse, with no choice but to draft in the arcane style so roundly criticized for centuries. An occasional mistake does not undo all the good and potential good.

Practitioners' fears of making mistakes if they adopt plain language have been highlighted by Adler (2012: 75) who reports on a questionnaire he presented to 56 British lawyers in 1992 where, significantly, at the top of the list of the 'Perceived



disadvantages of plain English' we find 'Fear of error, ambiguity, or unpredictable effect'. Admittedly times have changed since then, but Adler (2012: 74) asserts that even today "most lawyers write legalese" and the pressure from plain language campaigners "has not been intense and is more often resisted than not."

I have argued elsewhere (e.g. Williams 2010, 2011, and forthcoming) that this fear of making mistakes would seem to be a particularly common trait among legal practitioners working in private practices. This does not mean to say that all legislative drafters endorse using plain language: Bennion is a case in point; Barnes (2006, 2010, 2016) is another. Moreover, there are many cases of lawyers working in private practices who openly favour plain language, but as a whole there is a discernible difference in standpoint between legislative drafters and contract drafters both in terms of the fear of error and also in terms of the need to make a legally binding text intelligible to laypersons. Indeed, the two questions – i.e. fear of error and the intelligibility of a legal document – would appear to be strictly interrelated.

Let us examine the two perspectives more closely, starting with that of the legislative drafter. Even if it is hard to generalize, given the large number of countries involved, each with its specific legal system, within the English-speaking world legislative drafting tends to be carried out by legal professionals working for the state or government, irrespective of which government happens to be in power. As Bellis (2011: 14) has pointed out: "Like the classic Puritan, the legislative counsel must be in this world, that is the world of politics, and yet not of it, in order to be effective." Typically, the profession of legislative drafter comes with a relative degree of job security: should some flaw emerge in a law after it has been enacted, it would generally be impossible to pin the blame on one particular drafter. This is because the final text of a piece of legislation will, in all likelihood, have been seen by a large number of people some of whom will have suggested and, in some cases, implemented changes in the wording with respect to the original draft. The text is inevitably the result of a collaborative effort. Furthermore, no two laws will ever be the same, so 'cut-and-paste' techniques cannot usually be applied from one law to the other, except in limited circumstances, such as the enactment clause coming at the start of the law. Finally, in this modern era dominated by information technology and the ubiquity of the Internet, national governments are increasingly sensitive about the need to be seen as being receptive to the demands of the general public by providing easily accessible and easy-to-understand information. In the case of the United Kingdom, for example, the so-called 'good law initiative' (see Williams 2015 for a more detailed analysis) "is an appeal to everyone interested in the making and publishing of law to come together with a shared objective of making legislation work well for the users of today and tomorrow."² As has been observed:

There are now 2 million monthly unique visitors to legislation.gov.uk every month, with 500+ million page views annually. People really are reading Parliament's output [...] and increasingly doing so on tablets and mobile devices.

² <<https://www.gov.uk/guidance/good-law>> (29 December 2016)



The amount of content flowing into the site is considerable: according to Sheridan, the United Kingdom is passing laws at an estimated rate of 100,000 words every month [...] the Office of the Parliamentary Counsel (OPC) of Britain is working to help develop plain language laws that are “necessary, clear, coherent, effective and accessible”.³

Contract drafters, on the other hand, tend to have a different set of priorities. They are “usually lawyers either working individually or for a law firm or for a company or corporation (in-house counsel). In some cases the drafting of contracts may be undertaken by a paralegal, i.e. someone who cannot give legal advice or represent clients in a lawsuit but can draft legal documents, albeit under the supervision of a lawyer” (Williams forthcoming). Should a contract be deemed as flawed in a court of law, the source of error will normally be identifiable as the work of the lawyer(s) and/or paralegal(s) working for a particular law firm or company. The upshot of making drafting errors in such cases may prove to be expensive for the law firm or company in question, and this in turn may jeopardize the professional future of the lawyer/paralegal responsible for the flaw. Not only is it likely that the text will have been drafted by a small number of people: often the readership of a given contract is likewise very small. As Adams (2008: xxix) has observed, “until such time as a problem arises, a contract’s only readers may well be the lawyers who drafted it and, to a varying degree, their clients.” Moreover, given the similarity of scope and structure of many contracts, it may be tempting to adopt ‘cut-and-paste’ strategies to save on time and effort (Hill 2001: 59).⁴ This tends to encourage a more conservative approach to drafting since parts of the contract may simply be identical to countless others drafted before. In this respect advances in information technology have further contributed to facilitating copying techniques, but they have not, by and large, affected the drafting style of contracts the way they have the drafting style of legislative texts by encouraging the use of plain language. Transactions that are repeated with only slight variations to the document in terms of content are also known as ‘cookie cutters’ (Darmstadter 2008: 212). According to Adams (2014), “Risk of a mistake [...] is part of working with contracts. [...] But the risk is greatest if you’re using the traditional copy-and-paste method to create contracts.”

As should be clear, then, from this brief comparison of perspectives, the contract drafter potentially has more to lose – even his/her job itself may sometimes be at stake – by changing the drafting style and introducing plain language into the text. Tried and tested techniques in drafting contracts, no matter how antiquated or unintelligible to non-experts, may well seem a safer option to the legal practitioner if the alternative is the risk of a voided contract should the judge deem the new wording

³ “New interview with John Sheridan about Legislation.gov.uk, Good Law, and Open Legislative Data”, posted 29 December 2013, <<https://legalinformatics.wordpress.com/2013/12/29/new-interview-with-john-sheridan-about-legislation-gov-uk-good-law-and-open-legislative-data/>> (29 December 2016)

⁴ To a far more limited extent it is even possible to apply the ‘cut-and-paste’ technique to judicial decisions: see Kirby (2006).



to be defective or ambiguous. It is precisely this fear of committing an error when a workable solution already exists that makes plain language drafting an unappealing alternative for many legal practitioners even today. The realm of legislative drafting is more and more in the public eye: any law is viewable free of charge to anyone at the click of a mouse, whereas in the pre-Internet days very few laypersons would have spent time and money searching for a particular piece of legislation unless highly motivated to do so. A contract or will, on the contrary, is likely to be of little interest to anyone except to those with a vested interest in the contract or will itself.

Another aspect which tends to reinforce the conservative nature of many lawyers vis-à-vis legal drafting with a view to minimizing risks and mistakes is the kind of training they receive in law schools. Given that the majority of students attending law schools aim to become lawyers, not surprisingly the writing skills taught at most law schools tend to focus precisely on the kind of legalese that these would-be lawyers will come across in their profession. As Justice Michael Kirby (2006) puts it: "once people have fallen in love with the 'wheretofores', and the 'whereupons', it is almost impossible to rescue them and to capture their hearts as well as their minds, and bring them back to expressing things simply as they basically do in the kitchen."

However, as we have briefly seen earlier on in this paper, there are also many practitioners who forcibly argue that such a stance is untenable and that plain language contract drafting would be beneficial to all.

The major reason put forward for adopting plain language legal drafting is precisely because errors are to be found in the traditionally written texts, hence persisting with the old way of drafting is considered to be counterproductive. This is the view not only of Butt and Castle (2001: 89) and Adams (2013) but also of other major exponents of the Plain language movement such as Kimble (2000) who provides a detailed example of how the abstruse legalese of traditional contract drafting is riddled with flaws and ambiguities.

4. CONCLUSIONS AND FUTURE PROSPECTS

Fear of error vs the need for clarity and intelligibility: these are the two forces pulling in opposite directions in the legal drafting sphere today. As we have seen, the battle in the field of legislative drafting would seem to have been largely won by those advocating plain language in the English-speaking world, though in the United States the legislative drafting style has changed relatively little over the years. Contract drafting in the English-speaking world, on the other hand, remains to a large extent mired in the pedantic phraseology of yesteryear. Traditionalist legal practitioners argue that 'If it ain't broke, don't fix it', and since this type of anachronistic wording is widely accepted in the courts they see no incentive for change. From the plain language perspective, as we have seen, traditional contract drafting not only hinders comprehension but inevitably leads to the proliferation of errors within the text: hence contract drafting is indeed 'broken' and is badly in need of being 'fixed'.



Moreover, despite the criticisms raised by detractors of plain language such as Barnes (2010) concerning specific instances of faulty wording in plain language texts, as a whole it would appear that plain language legislative drafting has not created any major problems, and that most judges seem to be happy with the more modern style of drafting.

If one looks at some of the antiquated expressions still to be found in contracts or wills today (“I hereby give, devise and bequeath ...”), it is hard to believe that, say, in fifty years’ time such formulae will still be the norm. But how will change occur? One possibility is that changes in public perceptions of the role of lawyers may provide the incentive for the legal profession to brush up its image and the way it conducts its business. This is already happening to some extent through the massive popularity of the Internet and of social media, and it is starting to impact on the way lawyers do business. According to a 2009 survey reported in Pease (2012: 3), 78 per cent of US private practice lawyers and 71 per cent of in-house counsel have joined an online social network, and 23 per cent of private practice lawyers and 20 per cent of in-house counsel use their online social network for professional purposes. These figures are bound to rise in the coming years. It may well be the case that the younger members of the profession will feel increasingly pressurized to convey a modern image, and this may well impinge on their style of writing legal documents, outweighing the fear of making mistakes and creating the right cultural conditions for them to adopt a more modern style of drafting that their clients can readily understand and publicly show their approval of via the social media. In short, fear of losing business in this modern, digitalized world may be the key to change, overriding the age-old fear of committing errors by adopting a more modern and comprehensible drafting style. Such a scenario would be beneficial not only for the legal profession but for society as a whole.

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