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ARE CLARITY AND PRECISION COMPATIBLE AIMS IN LEGAL DRAFTING?

Legal language claims to seek precision. It also aims for clarity. But are precision and clarity mutually exclusive aims? Is absolute precision in legal language possible, or even desirable? What makes a text "clear"? How, if at all, are precision and clarity achieved in "plain" legal language but not in its linguistic opposite, "legalese"? Excerpts from Singapore's Railways Act are examined to give the theoretical discussion more concrete form.

I. Introduction

A. *Law and Language*

LAW and language. Are they inextricably intertwined? Hopelessly entangled? Can we imagine a legal system without language? What is the relationship between law and language? Taking away language from law, what remains? Gavels and guards? Robes and reporters? Is there anything special or unique about the relationship of language to the discipline of law – as opposed to other disciplines?

Abstractly, law and language share three qualities, as both are: (1) rule-governed symbolic systems; (2) uniquely human; and (3) essential to the fabric of society.[1] Of course, as the primary tool of communication and thought, language plays a constitutive role in nearly all human fields and endeavors, from theology to the theater, from zoology to astrophysics. But with law, there is a special relationship.[2] Law employs language to *create* relationships between people and institutions, and these language-defined and language-created relationships can be of enormous import. To illustrate the centrality of language to law, Danet asks us to compare the field of medicine:[3]

1 B Danet, "Language in the Judicial Process" [1980] 14 Law & Society Review 3.

2 Perhaps the discipline of philosophy, or, by definition, (but in a different way), the field of linguistics itself, are more exclusively "language-based" than is law. There may be other candidates, depending on how we define the exclusivity of a language-focused discipline.

3 *Supra,* note 1, at 448.

> Compare the roles of language in medicine and law: to practice medicine is primarily (though not exclusively) to work with physical substances, to relate to human bodies as physical objects. To practice law, on the other hand, is to relate to people as social beings, as "language animals".[4] The substance of law is entirely symbolic and abstract.[5]

If the archetypal tool for a physician is a stethoscope, for an astronomer a telescope, and for a biologist a petri dish, then surely the classic tool for the lawyer is the quill pen – the instrument by which he manufactures written expression.

While language is fundamental to law itself, it also overlaps in a variety of discrete areas, *eg*, perjury, the comprehensibility of jury instructions, the rights of language minorities, freedom of speech, the reliability of eyewitness testimony, defamation, sociolinguistic problems in lawyer-client interactions, language variation in the courtroom, conspiracy, and many others. Another area of overlap – and the focus of this essay – concerns the clarity and precision of written legal language.

B. *The Special Nature of Legal Language*

There are a number of scholarly works on the nature of legal language.[6] The classic early work, *The Language of the Law*,[7] traces the history of legal language over the centuries in a sweeping survey that includes everything from the repercussions of the Norman Conquest to the influence of the Vikings, and discusses the effects of, for example, Law Latin and Law French on the shaping of lexical features of legal discourse. Mellinkoff identifies nine chief characteristics of legal language:[8]

4 Citing G Steiner, "The Language Animal" in *Extra-Territorial: Papers on Literature and the Language Revolution,* (1968); and P Winch *The Idea of Social Science and Its Relation to Philosophy* (1958).

5 Citing W O'Barr, "The Language of the Law – Vehicle or Obstacle?" in *Language in the USA*.

6 See *eg,* D Klinck, *The Word of the Law* (1992); P Goodrich, *Languages of the Law: From Logics of Memory to Nomadic Tasks*; S Levinson and S Mailloix, *Interpreting Law and Literature: A Hermeneutic Reader* (1990); S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1988); J Levi and A Graffam-Walker *Language in the Judicial Process* (1990); JB White, *The Legal Imagination* (1973).

7 D Mellinkoff, (1963).

8 *Ibid*, at 11-19.

(1) *Frequent use of common words with uncommon meanings.* Examples of common words used in the law with uncommon meanings, include "action" (lawsuit), "serve" (deliver legal papers), "party" (person contracting or litigating), and "of course" (as a matter of right).

(2) *Frequent use of Old and Middle English words once common but now rare.* Examples include "thence" and "aforesaid", and the use of "said" and "such" as adjectives.

(3) *Frequent use of Latin words and phrases.* Much of the English language is borrowed from either Latin or French, and there are many Latin words used in the law, *eg, ab initio, ex parte, in forma pauperis, mens rea, nolo contendere, in rem, etc.*

(4) *Use of French words not in the general vocabulary.* Although many French-derived words basic to the legal lexicon, *eg*, arson, felony, jurors, verdict, *etc,* are known generally, other French words are technical legal terms, *eg*, demurrer, estoppel, oyez, voire dire, *etc*.

(5) *The use of terms of art*. A term of art "is a technical word with a specific meaning," according to Mellinkoff. Examples from the law include fee simple, *habeas corpus, res judicata,* and tort.

(6) *The use of argot.* Argot is a kind of specialised vocabulary common to some group. Legal words that are not technical or specific enough to qualify as terms of art, but that are peculiar to the law, include Blackacre, due care, process, reasonable man, and without prejudice.

(7) *Frequent use of formal words.* Legal language contains many ceremonial, overly-polite, or euphemistic terms, *eg*, approach the bench, the deceased, know all men by these presents, may it please the court, *etc*.

(8) *Deliberate use of words and expressions with flexible meanings.* As discussed more fully below in section III, legal language tries at times to be precise, and at other times to be imprecise, or flexible in meaning. Examples of the latter include approximately, clear and convincing, expenses, gross, malice, unreasonable, valuable, *etc*.

(9) *Attempts at extreme precision.* Examples of the former, *ie*, attempts at extreme precision, include phrases that try to keep the restricted restricted, (*eg,* and no other purpose), terms of art that employ absolutes, (*eg,* never, unavoidable), phrases intended to keep the broad broad, (without prejudice, including but not limited to, *etc*).

In addition to these nine "characteristics", Mellinkoff lists four "mannerisms" of legal language: (1) *wordy, ie,* the use of more words than necessary to complete an idea or make a point; (2) *unclear, ie,* long sentences and awkward constructions that make comprehension difficult; (3) *pompous, ie,* an "air of importance out of proportion to the substance of what is said," and (4) *dull, ie,* the law is full of boring, lifeless language.

Mellinkoff has been criticised for "emphasizing the lexical features of legal language to the neglect of sentence and discourse structure and for conflating semantic/syntactic and socio-linguistic categories."[9] In a more sociolinguistic analysis, Klinck sets out to determine if legal language is a dialect, a register, a kind of *diglossia*, (a superimposition of a more prestigious language on another), or even an "anti-language". Inconclusively, he writes:

> I said at the outset that I did not expect to be able to say with certainty what kind of language variety "legalese" is. Each of the categories I have mentioned is more or less appropriate. What I have done is to indicate some of the sorts of criteria relevant to determining whether legal language *is* a separate variety, and, if so, how we might think about the kind of variety it could be. Again, a fundamental issue is whether legal language users are a privileged cultural class, or simply specialists who might use an elaborated language to accomplish specific technical tasks.[10]

Klinck's analysis does have direct implications for the "plain language" debate, as we will see below.

II. The Continuing Argument Over Plain Legal English[11]

A. *Aiken's Early Attack on Plain Legal English*

In an early criticism of the movement for plain legal English, Aiken argues

9 *Ibid.*
10 Klinck, *supra,* note 6, at 142.
11 For a discussion of the history and current status of the plain English movement in Singapore and abroad, see Yeo Hwee Ying, "Plain English for Lawyers" [1997] SJLS at 311.
12 R Aiken, "Let's Not Oversimplify Legal Language" [1960] 32 Rocky Mtn LR 358.

against what he calls the "oversimplification" of legal language.[12] Aiken alleges that legal language needs to keep its Latin and French terms, archaic expressions, terms of art, and often, it seems, even its convoluted syntax to the extent such syntax is necessary for precision. In defense of archaic expressions, Aiken considers the use of the word "Dear _____" in the salutation line of letters, and the standard closings, *eg*, "yours very truly", *etc*.[13]Aiken figures that since we have not – and presumably not even a plain English advocate would so recommend – abolished these forms for the more plain and direct "hey you" in a letter's greeting, or "Author": in closing, so too should we keep archaic legalisms.

Although opposed to plain English, Aiken is nonetheless dissatisfied with the state of legal prose, but for different reasons than the typical anti-legalese advocate. To halt what he believes is "a rampant and progressing decline of legal literacy", Aiken proposes an eight-point plan as a solution, including the rather facile suggestion that both legal and unabridged English dictionaries be required texts in law schools.[14] He also proposes punishing with a misdemeanor any attorney who issues a document "which flagrantly abuses recognized principles of composition."[15] Of course, this begs the question: what *are* these "recognized" principles of composition. The plain English advocate would undoubtedly have a different set of principles in mind than Aiken.

B. *Hyland's Defense of Traditional Legal Writing*

Hyland's defense of traditional legal writing is more subtle and developed than Aiken's.[16] In a nutshell, though, Hyland believes that lawyers write poorly because they think poorly. The only way to improve the quality of legal writing, then, is to increase the "awareness of the conceptual structure of the law."[17] Stock "plain language" tips such as writing shorter sentences, with fewer double negatives, passive constructions, nominalisations, embedded clauses, *etc*, only treat the symptoms of the disease, *viz*, sloppy

[13] *Ibid*, at 360.
[14] *Ibid*.
[15] *Ibid*, at 364.
[16] See R Hyland "A Defense of Legal Writing" [1986] 134 U Penn LR 599. A rather novel, if unconvincing, defence of traditional legal writing, that was published between Aiken and Hyland's articles, attempted to argue that plain English statutes violated the First Amendment to the US Constitution, which protects freedom of speech, see R Prather, "In Defense of the People's Right to Use Three-Syllable Words" [1978] 39 Alabama Lawyer 394.
[17] Hyland, at 600.

reasoning, instead of curing the disease itself.

Hyland finds in the movement for plain legal language the Enlightenment belief in the virtue of simplicity, Rousseau's vision of the purity of pre-civilisation: "The championing of the average reader's common sense over lawyerly sophistication is an expression of confidence in unaffected human nature, a confidence that is well rooted in the society in which we live."[18] Philosophically, the plain English movement is rooted in a misguided empiricism, a belief that reality consists of what can be directly experienced, according to Hyland.[19] And since concepts are invisible abstractions, their importance is minimised to legal writers, educators, and plain language advocates.

But the inescapably conceptual nature of the law has results for both laymen and lawyers, Hyland argues. First, to really understand the law, to comprehend the variety of legal documents and texts that govern their relations, laymen must know how to think conceptually. If they cannot, then no amount of plain English will help them.[20] The lawyer, meanwhile, must be able to both think and write conceptually if the needs of the law are to be satisfied. But Hyland disregards contemporary legal education as inadequate training for conceptual thinking, compared to the classical study of Latin and Greek, which had "provided an insight into the intimate relation between form and sense, language and argument."[21]

Hyland is less convincing when challenging other explanations for legalese. He asserts (erroneously) that only two such explanations have ever really been given: first, lawyers write badly because it is in their financial interest to do so; and second, because the law is really an intersection of abstract notions, concrete expression is made impossible or at least quite difficult.[22] Hyland believes the "financial" explanation, *ie,* that lawyers use cryptic language to protect a lucrative and monopolistic trade, does not really explain poor legal writing, because "even texts that draw on the arcane language and occult learning of secret cults need not be badly written."[23]

He then supplies an impressive list of supporting texts – from Malcolm Lowry's *Under the Volcano* to Yeats' poetry, to the Symbolists' work – in support of his point. But this refutation – while providing Hyland an opportunity to display a scholarly knowledge of literature – misses the point

[18] *Ibid*, at 609.
[19] *Ibid,* at 610.
[20] *Ibid*, at 618.
[21] *Ibid*, at 622.
[22] *Ibid,* at 604.
[23] *Ibid*, at 604-05.

entirely. It is really irrelevant to the "financial interest" explanation whether legal texts "need not be badly written"; the point is that they *are* so written as a consequence of ulterior, and arguably unconscious motives.

C. *Is the very Notion of "Plain" Language Misleading and Deceptive?*

Proponents of the Critical Legal Studies movement, as well as various critical race theorists and feminist legal theorists, have argued that the law is fundamentally hypocritical and self-contradictory. Although it claims to adhere to formal rules and procedures, and to be impersonal and objective, the law must also admit to the need for interpretation; yet interpretation requires a choice of competing alternatives, and this competition is necessarily both political and subjective. Thus, legal discourse maintains a duality "in which the law asserts its adherence to formal rules and autonomy from other discourses (such as morality and interpretation) and yet admits the same considerations it claims to deny."[24] In claiming its objective status, moreover, the law declares that there is such a thing as the "plain meaning" of legal texts, when in fact this is an impossibility. The "plain language" movement, then, is seen as being co-opted into this self-deception because of its advocacy for plain meaning.[25] Stanley Fish writes:

> To put it in the most direct way possible, ... there is no such thing as literal meaning, if by literal meaning one means meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation.[26]

The impossibility of law having a "plain" meaning is discussed more fully in section III below on the possibility of precision in legal language.

D. *Does Plain English Create Confusion over Judicially-Interpreted Terms?*

The movement for plain English seeks to replace many archaic, formal

[24] S Fish, *supra,* note 6, at 133.

[25] It is perhaps incongruous that the plain language movement is disapproved of by some camps of the Critical Legal Studies movement, because both can be viewed as politically "left-leaning". The plain language movement is often populist and anti-elitist; and CLS is also concerned with the monopolisation of power.

[26] *Ibid*, at 4.

legalisms with more common words. However, some of these traditional words have been interpreted in judicial decisions to carry certain precise meanings. In the common law system of most English-speaking jurisdictions, where the doctrine of precedent gives great weight to the holdings and reasoning of earlier decisions, judicial statements interpreting certain terms may be controlling. When these terms are substituted with plain English words, the legal effect may be lost or confused. Opposing the simplification of language in the Bank of Nova Scotia's mortgage form, Ritter writes:

> [T]he longer established a category of legal instruments is, the more formalized the language of such instruments becomes and as the build-up of case law and statutory alterations of the applicable law increases, the language of the instrument becomes a less and less reliable guide to its actual legal effect and more and more difficult to understand without a knowledge of the hidden context of case law and statute law.[27]

Prather agrees with Ritter, arguing that legalese "evolved because the meaning of a word or phrase frequently had gone to court.... This process has meant that legal language has gradually become more precise and relatively certain."[28]

However, most commentators are more sanguine than Ritter and Prather about judicially-interpreted words.[29] First, only a very small portion of words and phrases have been the subject of comprehensive judicial interpretation.[30] Indeed, Garner estimates that only about fifty legal terms could properly be called "terms of art".[31] And to the extent that a term has been so extensively judicially interpreted, it would probably be classified as a "term of art" and plain language proponents would likely be in favour of retaining it. Second, as Hwang points out, many draftsmen are probably unaware of the cases where the precedents they use have been judicially interpreted, and even if they are aware, it is questionable how much they "actually

27 PA Ritter, "Simplification of Legal Language and the Bank of Nova Scotia Plain Language Mortgage Form" [1981] Faculty of Law Review 171.

28 Prather, *supra*, note 14, at 395.

29 See, *eg*, Law Reform Commission of Victoria, *Plain English and the Law* (1986, Report No 9); J Kimble, "Plain English: A Charter for Clear Writing [1992] 9 Thomas L Cooley LR 1; R Benson, "The End of Legalese: The Game is Over" [1984] 13 NYU LR 519.

30 *Ibid,* Law Reform Commission at 56.

31 B Garner, *The Elements of Legal Style* (1991) at 184.

32 M Hwang, "Plain English in Commercial Contracts" [1990] 32 Mal LR 252 at 260.

rely on that judicial dicta in guiding their drafting."[32]

There have been other insights into lawyer's use of terms of art. In an extensive philosophical exploration of legal language, Morrison rejects what she calls the "anti-reductionist" view.[33] The anti-reductionist position holds that legal language is a technical language, inaccessible to non-lawyers except through an inherently inexact translation process. She considers the thesis that "only lawyers know what the law is because only they speak the language of the law" to be "dangerously false".[34] She argues – with some circularity – that there is no question that law can be "reduced to English" because the law is already in English.[35] Morrison is primarily concerned with rebutting two anti-reductionists, the legal theorist HLA Hart and the philosopher Charles Caton. Legal terms and legal language are not *sui generis* – contrary to Hart's constitutive account and Caton's participative one – but rather "ordinary language terms put to technical use either in the form of different deployment or in the form of one-among-many meanings."[36] In addition to cogently disputing Hart and Caton, Morrison argues that legal language cannot be a *sui generis* technical language because due process, in a variety of contexts, requires that it be intelligible to non-lawyers.[37] Yet here she stumbles by confusing the prescriptive and the descriptive. While we may agree that the law should be reducible and comprehensible to non-lawyers, for due process (or any other reasons), this does not mean that it is so reducible.

E. *Other Critiques and Issues*

Some critics argue that the style of plain English is unliterary in its straightforward simplicity. Of course, the most obvious response to this critique is to stress the different functions of literature and of legal writing. If in becoming more exact, legal writing becomes less elegant, if in becoming clearer, its subtleties or linguistic rhythms are sacrificed, surely this is acceptable for legal writing, as the purpose of legal writing is to create or define relationships between real people with real effect; it is not to

[33] MJ Morrison, "Excursions into the Nature of Legal Language" [1989] 37 Cleveland St LR 271.
[34] *Ibid*, at 272.
[35] *Ibid*, at 286.
[36] *Ibid,* at 319.
[37] *Ibid,* at 318.

entertain, and rarely to enlighten, in the manner of literature.

Yet another response to this criticism is to recall that great literature need not be unplain. Consider the style of Mark Twain, Justice Holmes, George Orwell, Winston Churchill, EB White, and Truman Capote, to name a few.[38] Garner observes that the heritage of plain English is the language of the King James Version of the Bible, with a long literary tradition: "And God said, Let there be light: and there was light. And God saw the light, that it was good."[39]

Although anecdotal evidence has been offered that some clients prefer legalese, several empirical surveys and studies have shown a preference for plain English over legalese. The Plain Language Institute in Canada surveyed 600 residents about legalese, and 64% said "they are frustrated when they read legal documents"; 57% said "legal documents are poorly written and hard to read"; and 33% reported that "lawyers do not even try to communicate with the average person."[40] Other surveys have (perhaps unsurprisingly) confirmed this public dislike of legalese.[41]

A related issue is whether judges are impressed by legalese, since it is judges, of course, that decide cases. Even if plain English is supported by a majority of lawyers, academics, the public, *etc,* it would obviously be of no advantage to clients to use plain English in legal briefs if judges were more positively influenced by legalese. In a relatively straightforward empirical study of the persuasive effect of legalese versus plain English in appellate brief writing, Benson and Kessler asked appellate judges and the judges' research attorneys[42] to fill out questionnaires on legal excerpts.[43] One set of judges was given an excerpt from a brief that was filled with legalese, *eg,* long, complex sentences, argot, terms of art, passive constructions, nominalisations, *etc,* and another set given a plain language version

[38] See Kimble, *supra*, note 27, at 20.

[39] *Genesis* 1:3-4, as quoted in J Kimble, "Answering the Critics of Plain English" [1994] The Scribes J of Legal Writing 53.

[40] See Kimble, *supra*, note 27, at 23.

[41] R Benson, "The End of Legalese: The Game is Over" [1984] 13 NYU Rev L & Soc Change 519.

[42] Research attorneys work for the court and often read briefs and summarise their content in memoranda prepared for the judges; accordingly, they wield considerable influence in the decision-making process. Thus, the extent to which the research attorneys are persuaded by legalese is also relevant.

[43] Benson and Kessler, *supra*, note 27. They carried out the only study that I am aware of on the effects of plain English on *non*-laymen, (in this case, on *judges*). A much more extensive discussion of other empirical studies on the relationship of plain English to *comprehensibility* is in section III.

of the same text. The questionnaire then asked them to agree or disagree with a series of statements, *eg*, "the writer is convincing", "the writer is an honest person", "I believe the writer is a powerful person", "the writer is a successful lawyer", and so forth.[44] Benson and Kessler found a statistically significant difference between the judges' responses to the two excerpts, and were able to conclude that "lawyers run substantial risks when writing documents in traditional legalese, even when the intended audience for those consists entirely of judges and their aides. Lawyers who write in legalese are likely to have their work judged as unpersuasive and substantively weak."[45]

Finally, there are arguably advantages to complex – even mystifying – legal language, simply because it is mystifying. Some sociologists and anthropologists emphasize the symbolic function of language, in addition to its referential function, and hence may support the preservation of some of the law's obscurity.[46]

Klinck argues that one of the four functions of legal language is to be "impressive".[47] The other three seek to be "precise", "durable", and "hortatory". For Klinck, the impressiveness of legal language is partly rooted in its being "full of names that ordinary language lacks."[48] This gives lawyers the appearance of having access to a recondite reality forever mysterious to the "uninitiated".[49] Citing Lon Fuller,[50] Klinck reminds us that formality in language "impresses upon people the seriousness or gravity of the law."[51] The ritualistic nature of some legal language, *eg*, swearing "to tell the truth, the whole truth and nothing but the truth so help me God," buttresses its impressiveness: "There may have once been a substantive reason for distinguishing between a truth and a whole truth. Any such reason is now forgotten but the resounding and awesome phrase conveys the magic and majesty of the oath."[52] And in her discussion of the simplification of mortgages in Canada, Ritter prefers the legalese versions because, *inter alia*, the "'lawyer's language' of the old mortgage at least suggests to a layman that

[44] *Ibid*, at 301.
[45] *Ibid*, at 319.
[46] Danet, *supra*, note 1, at 490.
[47] Klinck, *supra*, note 6, at 237.
[48] *Ibid*, at 238.
[49] *Ibid*.
[50] See LL Fuller & R Braucher "Consideration and Seal" in *Basic Contract Law* (1964).
[51] Klinck, *supra*, note 6, at 239.
[52] LM Friedman, "Law and its Language" [1964] 33 Geo W LR 563 at 571.
[53] Ritter, *supra,* note 27, at 173.

the mortgage is an esoteric document which a lawyer is required to interpret and, in an important sense, this impression is quite correct."[53]

Law has linguistic parallels to religion. The movement for plain English in law has a relationship here to the historical increase in the use of the vernacular in the language of many religions:

> As Tambiah points out, many of the world's great religions have held that religious ceremonies must be conducted in the authorized sacred language, which may not be comprehensible to their congregations. Just as reformist movements in religion call for the use of the vernacular to make religious experience more accessible to the public, so today we have proposals that law be rendered more accessible through linguistic reform.[54]

Rappaport has wryly noted about religious language that "if a proposition is going to be taken as unquestionably true, it is important that no one understand it."[55] The same point could be made about legal language.

III. Plain Legal Language and Precision

Having reviewed some of the arguments in favor and opposed to plain legal English generally, I now move to a discussion of two specific claims that advocates of plain English make about their use of language: that it is both more precise, and that it is more clear. In this section, I focus on the relationship between plain legal English and precision, and in the next section, on plain legal English and clarity.

A. *How can Language be Imprecise?*

Indeterminacy in language can be the result of ambiguity, vagueness, or contestability.[56] Ambiguity results when a term can have more than one different meaning. For example, "trunk" could be the nose of an elephant, an article of luggage, the thickest portion of a tree, the boot of a vehicle, and so on. But the imprecision here doesn't result from any question about

[54] Danet, *supra*, note 1, at 544.

[55] R Rappaport, "Ritual, Sanctity and Cybernetics" (1971) 73 American Anthropologist 59 at 71.

[56] See *eg*, J Waldron, "Vagueness in Law and Language: Some Philosophical Issues" [1994] Calif LR at 509.

what any particular trunk *is,* just which of the different "trunks" a particular word "trunk" refers to. Vagueness, meanwhile, is confusion over the boundaries that lay across some continuum. Waldron's example for vagueness is the color blue.[57] Thus, some shades of turquoise might be considered blue or green, and some of lavender might be labeled blue or purple. So although we may agree that certain shades are decidedly blue, for others there would be some vagueness. Finally, contestability refers to arguments over the social norms or values "that are or ought to be embodied" in a particular word. For example, the word "excessive" is contestable in the Eighth Amendment to the US Constitution,[58] because disagreements over just what is or is not excessive rests on moral values or social norms.

B. *What does "Precision" in Legal Language Refer to?*

Klinck[59] distinguishes between three ways in which legal language attempts to be precise. First, by "extension", in which a word 'x' is recognised as referring to something that is a member of a class of all 'x's, *eg*, "is a dog" is of the "class of all dogs", and so on.[60] As an example of this kind of "recognition" approach to linguistic precision, Klinck gives the infamous statement by US Supreme Court Justice Stewart who was unable to provide an appropriate definition of "obscenity", and instead simply stated: "I know it when I see it".[61] Correctly, Klinck finds Justice Stewart's "legal definition" of obscenity an unusual approach to precision in the legal context, because of its implicit admission that the term is effectively undefinable.

Second, legal language tries to be precise through "intension" or through a derivation of its "sense".[62] Here, definitions are used in the attempt to make a word more precise. To take an example from Singapore statutory law, the Control of Rent Act[63] defines "domestic premises" as "a building or part of a building used wholly or chiefly as a separate dwelling." Whether this type of definition increases precision, or simply substitutes an imprecise

[57] Blue could also be used as an illustration for ambiguity, since it could mean the colour of sadness, for example.

[58] US Const Amend XIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." See Waldron, *supra*, note 54.

[59] For this section, Klinck appears to rely extensively on M Moore, "The Semantics of Judging", [1981] 54 So Cal LR 151.

[60] Klinck, *supra*, note 6, at 222.

[61] *Ibid*, at 223.

[62] *Ibid*.

[63] Cap 58, 1985 Ed.

term ("domestic premises") with other imprecise ones ("building", "dwelling") is arguable, both in the example given as well as in countless other examples from legal language. This issue will be taken up in more detail in section V, below.

The third way in which legal terms are defined is through the simple listing of words.[64] To take a different Singapore statute as an illustration, the Indecent Advertisements Act prohibits the posting of improper ads on "any house, building, wall, hoarding, gate, fence, pillar, post, board, tree or other thing whatsoever."[65] The kinds of venereal disease medicines that cannot be advertised under the Act include:

> any pills, capsules, powders, lozenges, tinctures, potions, cordials, electuaries, plasters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs and waters, chemical and officinal preparations whatsoever

Again, there are countless other examples of this kind of attempt at precision in legal language, particularly in legislation and legal documents such as contracts, leases and insurance policies. And again, it is arguable whether precision is improved through this kind of listing, which is discussed more in section V.

C. *Is "Precision" with Legal Language Desirable?*

Certainly it is widely assumed that precision in the law is desirable. In fact, under American law, it is constitutionally mandated, at least with respect to some statutes: the "void for vagueness" doctrine may allow a law to be struck down if it is too vague in its application. One victim of the "void for vagueness" doctrine has been local ordinances prohibiting "loitering" in a public place, on the grounds that the language in the ordinances is too imprecise to be predictable to citizens occupying public places, and also because such vagueness allows for an abuse of police or prosecutorial power.

Nonetheless, there is actually an important place in the law for imprecision. Indeed, vagueness and imprecision are absolutely indispensable for some

[64] *Ibid*, at 224.

[65] Cap 135, 1985 Rev Ed. The Act, first enacted in 1941, attempts to suppress indecent advertisements and advertisements related to venereal disease.

legal purposes. Fundamentally, since a legislature, or other lawmaking body, cannot predict every possibility, vagueness in language may be needed to permit judicial flexibility in dealing with unpredictable future events. The same argument sometimes holds true for language in contracts, leases, *etc*. George Christie writes that the "importance of the flexibility that vagueness gives to all normative methods of social control can scarcely be overestimated and is recognised by all. It allows man to exercise general control over his social development without committing himself in advance to any specific concrete course of action."[66]

Waldron argues that vagueness and contestibility in the law are often desirable, because this prevents citizens from too "finely calibrating their action in very close proximity to legal boundaries. These may be cases where we think it a mistake for us, as a community, to get into the business of specifying rules too precisely."[67] Thus, although "homicide", "rape", and "fraud" may be defined relatively imprecisely, this could be because we don't want citizens to be considering such questions as, for example, "how close can I get to coercing a woman before it counts as rape?"[68]

D. *Is "Precision" with Legal Language Possible?*[69]

Edelman appears to believe that precision in legal language is possible.[70] He distinguishes the "dictionary" meaning of words from the meaning that the legal profession gives them, claiming that laymen assume (until they are forced to realise otherwise in an encounter with the profession) that the dictionary meaning is the actual meaning. Edelman appears to believe that the ambiguity embodied in the "legal" meaning, while serving the "social" interests of lawyers and judges, is in contradiction to some unambiguous meaning provided by the "dictionary".

66 G Christie, "Vagueness and Legal Language" [1964] 48 Minn LR 885 at 890, quoted in Klinck, *supra,* note 6, at 226.

67 Waldron, *supra*, note 54, at 530.

68 *Ibid.*

69 As discussed above in section I, it is disputed whether language – legal or otherwise – can ever actually be "plain". This subsection continues that discussion further with respect to precision.

70. Edelman, *The Symbolic Uses of Politics* (1972); see Danet, *supra*, note 1, at 467.

71 The legal philosopher Waldron, *supra*, note 54, at 510-11, argues convincingly for the essential imprecision of human language. Words do not "apply themselves", but must be applied by humans to things in the real world; but since there "cannot be a rule to tell us how to apply every rule", at some point human judgment comes into play.

But is Edelman's view of language naive? Does the dictionary contain "unambiguous" meanings uncontaminated by the lawyer's wiles?[71] Cunningham *et al*, offer four reasons why dictionaries are unlikely candidates for improving linguistic precision: (1) information about language in dictionaries is not independent from the users of the language itself, *ie*, dictionaries do not "legislate" language use; (2) lexicography is an inexact art, and necessarily based partially on the subjective views of lexicographers; (3) dictionaries are severely limited by time and space constraints, *ie*, meanings are always changing, and ever-so-subtle gradations exist between different meanings; and (4) dictionaries must provide definitions appropriate to multiple contexts, whereas a linguistic case study can focus on an interpretation for a particular context.[72] But while Cunningham *et al* are skeptical about dictionaries because of these inherent weaknesses, they do believe that professional linguists *can* aid judicial decision-making through, for example, up-to-date corpus-based studies for terms in particular contexts, and other sophisticated analyses.

Mellinkoff believed that law could be truly precise in only two areas: when using what he calls "terms of art", and with some of the law's "argot".[73] But other than these two exceptions, he was quite skeptical:

> The quest for a precise language is as ancient as the search for the fountain of youth, and less capable of fulfillment than the alchemists dream of turning lead into gold. Marvelous it would be if lawyers had fashioned an exact instrument out of language – a substance that Plato found "more pliable than wax".[74] But they have not done so.[75]

What can linguistics tell us about the precision of legal language? Solan observes how Chomsky's theory of a universal, biologically-endowed human grammar, has led linguistics into a search for generalities that unify language.[76] As linguists thereby approach language as a "highly regular and formalizable system of knowledge," while lawyers see it as a "breeding

[72] C Cunningham, "Plain Meaning and Hard Cases" [1994] 103 Yale LJ 1561 at 1614-15.
[73] Mellinkoff, *supra*, note 7, at 393-94. See section I.2, *supra*.
[74] See *The Republic*, Book IX, in 1 Jowett, transl, (1937) *The Dialogues of Plato* at 848.
[75] Mellinkoff, *supra*, note 7, at 393-94.
[76] L Solan, *The Language of Judges* (1993) at 17. Solan is a practicing lawyer first trained as a linguist.
[77] *Ibid*, at 20.

ground for incoherence", some tension seems to exist between the two fields.[77] Yet this tension is only superficial, Solan shows, because even the principles of generative grammar do not answer all questions about meaning. We must ultimately rely on "inferences based on context, worldly knowledge, and other bits of essentially nonlinguistic information."[78]

It is worthwhile here to borrow a point made in another context by Waldron about the relationship between precision and *specificity*. Although he is not concerned with plain English *per se*, Waldron observes that it is mistaken to believe that increasing specificity necessarily decreases vagueness.[79] To illustrate, consider the term "tree" versus the term "living thing". Although a tree is more specific than a living thing, we can foresee more argument over what a tree is (*eg*, is a bush, shrub, *etc*, a tree?) than over what is or is not "living". But, the relationship is sometimes inverse, *eg*, the specific word "chair" is less vague than "piece of furniture".[80] Thus, "vagueness has to do not with the size of the category in question, but with the determinacy of its borders."[81]

E. *Does Plain Legal English Improve Precision?*

The effect of plain legal English on the precision of language in insurance policies was demonstrated in *Graham* v *Public Employees Mutual Ins Co*.[82] The 1980 explosion and volcanic eruption of Mount St Helens in Washington left several homes destroyed by mudflows and water. The insurance policies that covered these homes had been re-written in plain English form to exclude any loss "resulting directly or indirectly from ...earth movement" generally. The original un-simplified policies, meanwhile, had specified that the policy excluded loss "caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting...." Although under the original policy coverage would almost certainly have been denied, the effect of the plain English policy was problematic for the court, since volcanic eruptions were not specified as excludable. Since a "mudflow" arguably precedes a volcanic eruption, (as viscous magma rises to the

78 *Ibid.*
79 Waldron, *supra*, note 54, at 22.
80 *Ibid.*
81 *Ibid.*
82 [1983] 98 Wn.2d 533, 656 P.2d 1077. See L Squires, "Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause?" [1984] 59 Wash LR 565.

surface), and since the homes in *Graham* were destroyed not by volcanic ash or lava, but by the mud formed as a result of flooding caused by "torrential rains from the eruption cloud", the court considered it an issue of fact for the jury whether there would be coverage under the plain English policy.[83] Squires suggests that the *Graham* ruling "appears to give substance to the caveat familiar to plain English advocates: if legal boilerplate is removed, a court may find an instrument ambiguous and thus subject to reconstruction."

While uncertainty (leading to litigation) was increased – because precision was decreased – by the resort to plain English in *Graham*, in other contexts a change to plain English may enhance precision. For example, in the Revised Statutes of British Columbia, 1997, a new "*Code for Words of Authority*" provides exact definitions of the terms "must", "may", and "will".[84] The much-confused word "shall" has been dropped from the statutory language. Knight points out that "shall" had been used as a default expression for every possible authoritative situation or meaning.[85] The multiple interpretations given to "shall" is colorfully illustrated by Brian Garner's metaphor: "To allow 'shall' its traditional promiscuity while pretending, as we have for centuries, that preserving its chastity is either hopeless or unimportant... breeds litigation, as attested in 76 pages of small-type cases reported in *Words and Phrases*, all interpreting the word shall."[86] While authoritative terms can be chosen with greater exactitude under the new code, room for ambiguity still exists. For example, "must" can still be misused as a "false imperative" just as "shall" was misused.[87] But on balance the code's precision should reduce litigation.

IV. Plain Legal Language and Clarity

Plain legal language advocates argue that greater clarity[88] is achieved without legalese. Opponents of plain legal language respond first that for the average

[83] *Ibid,* at 567. The parties settled before this could be determined.

[84] P Knight, "New Words and Old Meanings" [1998] 56 The Advocate 27 at 30.

[85] *Ibid,* at 29.

[86] See Garner, *supra*, note 29, at 28.

[87] Knight, *supra*, note 82, at 31.

[88] Clarity really includes a range of attributes: brief, simple, comprehensible and concise. Precision, meanwhile, refers to an exactness of expression, to an absence of ambiguity, to an attempt at reducing contestability. Precision battles ambiguity and vagueness so that later battles (specifically, litigation) will be less likely fought. Other aspects of precision, according to my usage, include "accuracy", and "completeness" or "thoroughness". It is most important to emphasise, then, that I am not using "clarity" as *synonymous* with "plain English", *ie,* in the sense that to be "clear" is to be "plain". Rather, I mean to divide plain English into two areas: clarity and precision.

layperson, noticeably greater clarity is *not* attained with plain English, and second, that precision is often sacrificed to achieve clarity, as we have seen.

A. *How is Clarity Measured?*

Legislation mandating plain English has used different tests to determine linguistic clarity and comprehensibility. The "Flesch Test", for example, is used in some jurisdictions. A Flesch score is derived using a mathematical formula that considers the number of words *per* sentence and the number of syllables *per* word. A sentence such as "The judge ruled in his favor", would receive a very high Flesch score, for example, while a sentence such as the following would receive a very poor score: "The honorable, sagacious and erudite judicial officer, a man of immense intellectual capability, appointed following numerous fruitful years of legal practice in admiralty specialization, determined after careful consideration to adjudge favorably to the plaintiff." As the Flesch test is "objective", *ie*, it produces a specific mathematical figure, some lawmakers have found it appealing to determine if a particular consumer document, for example, is within the bounds of plain English. Others, however, have been more critical of the test, since it is easy to imagine highly comprehensible sentences that are quite long, and complex ones that are monosyllabic and comparatively short. In other words, the Flesch score is a rather crude measurement of comprehensibility.

B. *Is Plain Legal English Clearer?*

Some have argued that a plain English style does not even improve comprehensibility to a worthwhile extent. As discussed earlier, Hyland believes that the conceptual demands of the law prevent plain English from being too effective, that is, if a reader of a legal document cannot *think* conceptually, then it doesn't much matter whether the document is written in legalese or in plain English. Hyland believes, then, that plain legal language is not really more "clear". He writes:

> Of course, the general function, importance, or effect of a legal concept in a particular situation can be described in short words and simple sentences. But the courts, when there is a difficulty, must rely on the

[89] Hyland, *supra*, note 14, at 618. He adds: "The situation in Poland after World War II is instructive: the Polish government apparently attempted to draft all laws so clearly that workers and peasants could easily understand them, but it soon became clear that, without legal concepts, the application of the law was capricious and unpredictable."

> legal concept to determine the meaning of the plain words, or their decisions will be wholly arbitrary.[89]

In effect, clarity in the sense of being able to accurately comprehend a law may be hampered by English that is "too plain", according to Hyland. In prohibitions against murder, the plain words "killing will be punished" are surely "plainer" than the subtleties introduced by penal codes and judicial interpretations. But if you are forced to murder someone in self-defense, or take someone's life negligently, this "plain" prohibition is surely less "clear" than one which details rules regarding defenses, *etc* to murder.

Aiken generally agrees that clarity is not enhanced with plain English. He concludes his attack on plain legal English with the statement that it must be "regretfully acknowledged that the 'average layman' has little understanding of either law or literature, and that his understanding of the former would be enhanced slightly, if at all, if law were to be couched in his language."[90]

C. *Empirical Studies on Plain English and Clarity*

In one of the earlier empirical studies of the relative comprehensibility of legal documents written in plain English, Davis investigated consumer credit contracts.[91] Questionnaires asking about contract terms were given to two groups, those who had read an un-simplified contract and those who had read revised forms of the same contract. In addition to simplifying the

90 Aiken, *supra*, note 10, at 364.

91 See J Davis, "Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer Credit Contracts" [1977] 63(1) Virginia LR 841.

92 *Ibid*, at 865. This included redrafting the simplified contracts by reducing average word length and sentence length and removing as much legal jargon as possible, as well as defining the remaining legal terms more colloquially.

93 For example, standard seller-inserted clauses specifying conditions of default that "almost never occur" were deleted. *Ibid*, at 863. It is worth noting that although there are a variety of US federal and state statutes requiring disclosure of various information in consumer credit contracts, Davis hypothesised that eliminating much of this information would, on balance, actually benefit the consumer by minimizing information overload and improving overall readability. For example, Davis deleted three items from the simplified version that are mandated by the Truth-in-Lending Act: the method of calculating rebate on pre-payment, the credit insurance authorization, and the deferred payment price – on the grounds that their "potential utility seemed too small to justify the added information load." To ensure that each of these three variables (readability or "plainness", unnecessary seller-inserted information, and extraneous statutorily-required information), *independently* influenced

language to eliminate legalese,[92] Davis was also concerned about information overload. Accordingly, the revised contracts only contained information that Davis considered necessary for the typical consumer credit situation.[93]

Davis found a statistically significant increase in understanding from all of his simplified contracts, although eliminating legalese improved comprehensibility more than eliminating extraneous information. Davis divided his subjects demographically, and, notably, discovered that the improvement in comprehension varied considerably from group to group.[94] For example, the greatest improvement (43%) in understanding from the original to the simplified contract was realised by African-Americans (all ages) and by 18-21 year olds (all races). Of those subjects whose educational background included "some graduate work", there was, perhaps not surprisingly, only a 2% improvement in understanding from the original to the revised consumer credit contract. Comparing household income, Davis found that generally lower-income groups benefited more from the revised contracts than higher-income participants, but that even the highest income group realised some gain (2%).[95]

A well-designed empirical study of jury instructions was carried out by Charrow & Charrow.[96] Actual prospective jurors were selected as study participants, and several standard California jury instructions were read to them. Comprehension was determined using a "paraphrasing" test, in which the participants were asked to repeat in their own words what they had heard as instructions. This paraphrased version was then compared with the original to test for accuracy. Charrow & Charrow also analyzed the language of the original jury instructions to see if certain forms identified as "legalese" were common. Finally, they re-wrote the jury instructions in plain English, and repeated the paraphrase test to see if comprehension was enhanced.

Charrow & Charrow hypothesized that: (1) there would, indeed, be a significant problem with jury miscomprehension, (2) the linguistic constructions responsible for the failure in comprehension would parallel the constructions

consumer comprehension, in one of his studies Davis isolated variables by only removing certain information from some contracts. *Ibid*, at 887.

94 *Ibid*, at 870-71.

95 *Ibid*.

96 V Charrow & R Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions" [1979] 79 Columbia LR 1306.

97 *Ibid*, at 1358.

normally identified with "legalese", and (3) comprehension would be improved by eliminating the legalese. Each of their three hypotheses was supported by their study.[97]

There was another interesting finding of the Charrow & Charrow study. Many lawyers believe that jury instructions are poorly understood because of the unavoidable complexity of the legal issues involved. As we saw in section II, Hyland is a proponent of the idea that legal language *must* be complex because legal concepts are complex. However, Charrow & Charrow ascertained that the more conceptually complex an instruction was rated (by panels of attorney raters), the higher the relative score of participants on the paraphrasing test for the revised version.[98] In other words, conceptual complexity was overcome with the use of plain English. Charrow & Charrow conclude: "these results cast doubt on attorneys' assertions that it is the conceptual complexity of a jury instruction that creates comprehension problems and that therefore rewriting instructions will not help."[99]

Lamenting the relative absence of empirical studies[100] investigating whether comprehensibility actually improved with plain English, Masson & Waldron conducted a study using sets of standard legal contracts.[101] In addition to the original un-revised document, Masson & Waldron prepared three modified versions of each contract. (The standard legal contracts included a mortgage, an agreement for the sale of property, a bank loan, and a renewal of a lease). The first modification only removed or replaced legalistic terms, *eg*, hereinafter. The next step was more significant, shortening sentences and replacing difficult words with simpler ones, in addition to making the documents more "oral" in style, *eg*, by replacing the reader and writer with the personal pronouns "you" and "I". The final draft of the revised documents

98 *Ibid*, at 1334.

99 *Ibid*.

100 There is an unfortunate failure on the part of the researchers conducting these empirical studies – Masson and Waldron included – to acknowledge earlier empirical studies on the effects of plain English on comprehensibility. Granted, some of the studies appear in less-well-known journals. Moreover, as some articles appear in legal journals and others in social science journals, and as these are rarely cross-indexed, they may have been missed if research was done only in one discipline. However, as early as 1984, Benson was able to claim that "there exist scores of empirical studies showing that most of the linguistic features found in legalese cause comprehension difficulties." (*Supra*, note 27, at 531) Neither Masson & Waldron nor some of the other researchers discussed in this section were able to cite many of these studies. In some cases, none were cited at all.

101 M Masson & MA Waldron "Comprehension of Legal Contracts by Non-Experts: Effectivenes of Plain Language Redrafting" [1994] 8 Applied Cognitive Psychology 67.

102 *Ibid*, at 70.

defined specialized legal terms used in the text.[102] All four versions were then read by non-lawyer subjects and reading time and comprehension compared across the versions. Masson & Waldron found that there was little improvement with the first and last revised version, but that some progress was made in understanding and reading time with the second revised draft.[103] This led them to assert that although "simplifying drafting style increases comprehension.... very little is achieved by simply removing archaic terms and legalese."[104] Even with the second revised draft, though, Masson & Waldron were disappointed with the overall comprehension, concluding that it "remained relatively poor...and misconceptions were apparent across all versions of the documents."[105] At best, then, they conclude that plain language drafting will only be partially successful in making the law more broadly accessible to laymen.

Another collection of studies found plain English documents to be less comprehensible. Penman sought "empirical proof that plain English *per se* would lead to better comprehension."[106] She devised three studies, two using insurance documents and one using a residential tenancy agreement, to see whether comprehension increased with the plain English versions over the "unimproved" documents. In the first insurance study, a complex investment insurance document was re-written by a plain English expert into three "plain" styles, and then eighteen people were asked to read the original and the three revised documents. Interestingly, it was discovered that "basically all readers found all four versions of the policy document difficult."[107] The fundamental problem with all four documents, including the plain English one, concerned the complexity of the legal concepts, and thus, according to Penman, plain English was of little benefit to comprehensibility.

In the second study, a more everyday type of insurance policy was selected, *viz*, a common auto insurance document, and the plain English version compared with prototypes designed by Penman. Several questions were put to the study participants, *eg*, "if your car is stolen do you have to report it to the police," and "how much will your insurance company pay if your trailer is stolen."[108] The plain English document proved to be inferior as a generator of correct answers to these questions than the prototypes.

[103] *Ibid*, at 75-77.
[104] *Ibid*, at 77-78.
[105] *Ibid*, at 79.
[106] R Peynman, "Plain English: Wrong Solution to an Important Problem" [1992] 19 Australian J Communication 3 at 5.
[107] *Ibid*, at 6.
[108] *Ibid*, at 7.

Penman's third study compared a government sponsored plain English residential lease handbook with a "non" plain English handbook. Again, questions were asked of participants concerning the effect of rent increases, tenant damage, unpaid rent, *etc*. And again, the plain English document was not as good in producing correct answers. Penman concludes from these studies that plain English does not solve the problem of understanding, and that "just because a document appears simple is no guarantee that it is actually understandable from the reader's point of view."[109]

One possible flaw in Penman's studies and her reasoning is that it is not clear that she is actually comparing plain English to legalese in the second and third studies. The first study is comparing an original legalese document to plain English versions, but the results of this study are both less conclusive (plain English is not shown to be worse, its just not better), and it is less empirical (participants explain their thoughts as they read the versions, and seem confused by all four; but there is no list of questions testing for comprehensibility). In the second and third studies, meanwhile, it seems she is comparing plain English to her organisation's "prototypes". From her article, we are left to guess the style of these prototypes, but as her organisation is interested in the improvement of communication, we can surmise that she is actually comparing her revised, and plain, version, with more established ones. If her attempts at plainness are in fact better, she would perhaps serve us better by discussing her prototypes in more detail than in criticising plain English itself. Until these problems are resolved, there is nothing definitive in her studies disproving the greater comprehensibility of plain English, as far as can be determined.

V. Conclusion: Case Study from Singapore's Railway Act

[109] *Ibid*, at 9.

[110] Of all the English-speaking countries, I would hazard the guess that Singapore's legislation is – on average – comparatively better linguistically; that is, one does not come across as many examples of horrendous legalese in Singapore legislation as one does in other countries. This could be a consequence of the support given to plain language by both the Attorney General, whose office is responsible for drafting legislation and by the Chief Justice and by Senior Minister Lee Kuan Yew. It could also be because much of Singapore's legislation has been taken and adapted from other countries, particularly the UK, and in so adapting opportunities may have arisen to clean up the language. But this is only an unconfirmed hypothesis.

[111] Those with only a casual awareness of Singapore, *ie*, knowing that it is a very small island nation, may at first blush suspect the passage of a "Railways Act" rather quixotic – analogous, perhaps, to a "Seagoing Vessels Act" for Mongolia. But there is, in fact, one major passenger railway line that cuts through the middle of the island, connecting to Malaysia, and northward to Thailand and beyond. Singapore's extensive and modern mass rapid transit line, (the "MRT"), is covered by separate legislation.

To more concretely discuss the theoretical arguments discussed above, a section of Singapore's[110] "Railways Act" will be analysed.[111] That is, I will dissect elements of the statutory language to determine if clarity and precision are achieved, and whether either or both of these goals can be increased without inhibiting the other.

A. *Clarity & Precision – Penalty for Opening or not Shutting Gate*

The 1905 Railways Act[112] provides for a fifty-dollar penalty for either opening – or not shutting properly – a gate leading to a railway crossing.[113] The relevant section ("Paragraph 79") states:

(1) If any person for whose use or accommodation any gate or chain shall

(2) have been set up by any railway official on either side of a railway or

(3) any other person shall open such gate or chain or pass or attempt to

(4) pass or drive or attempt to drive any cattle carriage or other animal or

(5) thing across the railway at a time when any engine or train

(6) approaching along the same shall be in sight or shall at any time omit

(7) to shut and fasten such gate or chain as soon as he and any cattle

(8) carriage or other animal or thing under his charge shall have passed

(9) through the same he shall be liable to a fine not exceeding fifty dollars.

The purpose of this section is not difficult to surmise. The railway admin-

[112] Ordinance (No 4 of 1905).

[113] The current version of this section (Cap 263, 1985 Rev Ed) does include some changes: the fine has been increased to a hundred dollars, and there are a few simple grammatical improvements, including the addition of some punctuation to the paragraph. However, the section is basically the same today as it was in 1905.

istration obviously has an interest in keeping objects off the tracks when a train is crossing. Although an earlier provision addresses the liability of owners generally for stray animals on railway lines and lands, paragraph 79 is directed at wilfully bringing animals, vehicles, *etc* onto the tracks, at the place where a gate has been set up across a railway, while a train is approaching.

Paragraph 79 is far from being a model in clarity. It has no punctuation. The entire paragraph uses only one sentence. This sentence contains 123 words. A whopping 78 words separate the subject of the main subordinate clause ("person", at line 1)[114] with its second main verb ("omit", at line 6). The true subject of the sentence, "he", (line 9) doesn't appear until near the very end of the 123-word sentence. Certainly, examples of much worse statutory language abound. But, the average and below-average reader would nonetheless have to re-read paragraph 79 at least once to grasp its full coverage. (An above average reader could probably get the gist of the paragraph's meaning with just one reading). Indeed, because of ambiguities in the statutory language, the ability of even a lawyer to comprehend the full implications of the paragraph is in doubt.

An obvious immediate problem with the section is that it is prohibiting two different kinds of things, and trying to do so in just one breath: (1) it wants to keep things off the track when a train is coming; and (2) it wants people to shut gates behind them so that stray animals, playing children, *etc*, do not wander easily onto the tracks. While both of these things relate in some sense to the opening and closing of "gates" that may control access to the railway, the nature of prohibition (1) is surely different enough from that of (2) to justify a separate sentence. That is, the demands of the language needed to tell people to "stay off the tracks" is distinct from the statutory language required to tell them to "shut the gate".

The demands of the former, *ie,* (1), are illustrated by another problem with the statute: the use of the clause "at a time when any engine or train approaching along the same shall be in sight." (Initially, we could eliminate the redundancy "at a time when", to just "when"; this increases clarity – by making the paragraph more concise – yet doesn't sacrifice any precision). But the central problem remains: the use of the words "in sight". Surely the drafters do not want to use a standard of *visibility* to the requirement to keep the tracks unobstructed. After all, according to the statutory language,

[114] I have added line numbers for ease of reference, here and in the excerpted portions below. These line numbers do not appear in the original.

it would be permissible to start driving cattle across the tracks if a train could be heard immediately approaching, but could not be seen, either because of a curve in the line, thick fog, *etc.* Likewise, with a very long straight track on a clear day, a train may be visible approaching quite slowly, but still be many miles away. But according to the statutory language, it would not be permissible to open the gate and quickly walk one's dog across the tracks, for example, even if the train was so far away.

In addition, the provision applies to two subjects: (1) "any person for whose use or accommodation any gate or chain shall have been set up by any railway official on either side of a railway," (lines 1, 2); and (2) "any person" (line 3). But surely "any person" includes within its scope the limitations of "any person for whose use or accommodation...." So why include the former?

The statute is both under-inclusive and over-inclusive in other ways. Strictly speaking, for example, the statute prohibits someone from *leaving* the railway tracks once legally upon them, if a train suddenly becomes visible after someone has begun crossing over, since to do so would entail opening the opposite gate *while* a train was in sight. Of course, rules of statutory interpretation might be relied upon to avoid such a silly result. But if imprecision can be drafted away in the beginning, there will not be a need to depend on (sometimes unpredictable) judicial common sense.

Also, the statute tries to be precise about what should be kept off the tracks, specifying "cattle carriage or other animal or thing". Of course, a "thing" includes "cattle carriage or other animal". In fact, it includes, well, "every-thing", presumably. So do we need "cattle carriage or other animal"? Do they add precision? Clarity? It is not uncommon for statutes to do this, *ie*, give central examples from a class of items, and also state the name of the class. Since the legislative drafters envisioned cattle and carriages as the major concern, they were specified. But since they really wanted to cover all eventualities, they added the catch-all, "thing". However, one major risk is that a rule such as *expressio unius est exclusio alterius* could be used to defeat the statutory purpose.[115]

Thus, a plain English version of the above section might provide:

[115] Alternatively, the rule of *ejusdem generis* might be used to argue that the general word "thing" – that follows from the specific examples given – should be given a meaning limited to the context provided by the specific terms.

(1) A railway gate or chain set up by a railway official must be properly shut and fastened by the person opening such gate or chain.

(2) When a person should reasonably be aware that a train is approaching, he must not improperly obstruct the railway line, including, but not limited to, driving vehicles or animals onto the tracks when the train is approaching.

If a person violates either section (1) or (2), he shall be liable for a fine not exceeding fifty dollars.

Is this version clearer? Instead of 123 words, there are now 84 – a third less. In addition, clarity is improved because the paragraph is cut into three sentences, each dealing with a separate concern. Punctuation has been added to aid in comprehension. The subject of each sentence is placed closer to its verb, and the subject of each sentence, (the "doer" of the action), appears much closer to the beginning to the sentence. This more quickly gives the reader a context in which to place any subordinate information. Unnecessary words and phrases have been omitted, although the original did not contain any classic "legalese" terminology.

In improving clarity, precision was not sacrificed. Indeed, it was improved in several ways. First, the problems with over- and under- inclusiveness, discussed above, have now been resolved. To take one example, if a train can be heard approaching quickly, but happens to not be visible for some reason, under the plain language version it will (sensibly) be prohibited to begin driving one's vehicle through a gate onto the tracks, except in the most exceptional circumstances, because of the new "reasonableness" standard. As an aside, it is worth noting an irony here: the *statute as a whole* was rendered more accurate – in the sense of likely permitting what it wants to permit and prohibiting what it wants to prohibit – by the addition of less accurate *terminology*.

B. *Conclusion: Clarity versus Precision?*

Are clarity and precision mutually contradictory aims or mutually supportive ones? A few commentators have (explicitly) touched upon the possibility of conflict between the two stated aims of the plain legal English movement, *viz*, clarity and precision. Sir Ernest Gowers argued that legal language had special demands of precision, justifying the sacrifice of clarity in some

[116] E Gowers, *The Complete Plain Words* (1985 Pelican ed), quoted in Benson, *supra*, note 27, at 559.

instances. Legalese is "caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to one, the further you are likely to get from the other."[116] Gowers' views on legal language would be less surprising had he not been a major exponent himself of clarity and plain language in writing. His 1962 book, *The Complete Plain Words*[117] is a classic plain language treatise. In fact, Gowers' comments on legal language led Benson to assert: "It was as if the Sunday preacher had unveiled himself as Judas Iscariot."[118]

While Mellinkoff agrees that precision and clarity are not inevitably accordant, he is more willing, compared to Gowers, to occasionally forfeit the former for the latter. He writes:

> In a more immediate, controllable sense, complete precision is sometimes also incompatible with some of the other desirables of law language – durability, intelligibility, brevity, for instance. And it cannot be accepted as an axiom that all else must always be sacrificed for the sake of precision.[119]

Kimble, too, accepts the potential for conflict between the two aims, and seems to prefer clarity over precision in most cases.[120] He provides the following heading to a section of his article discussing the potential conflict between clarity and precision: "Most of the time, clarity and precision are complimentary goals," and he questions the point of being precise, but

[117] *Ibid*.
[118] Benson, *supra*, note 27, at 559.
[119] Mellinkoff, *supra*, note 7, at 398.
[120] Kimble, *supra*, note 37, at 53.
[121] *Ibid.* In another article, Kimble uses authentic examples to prove that clarity produces more precision, that "simplifying often leads to greater accuracy". (*Supra*, note 27, at 17). In support of this proposition, Kimble cites three changes: (1) Citibank rewrote its promissory notes to remove many uncommon "events of default"; (2) Sentry Insurance eliminated six (out of eight) definitions of different kinds of vehicles; and (3) Sentry Insurance changed its policy of requiring family members to obtain permission from the car's owner before borrowing the car. Yet while these may be good examples of improvements in *clarity*, I think Kimble is wrong to say that *precision* has been enhanced in any of the three examples. If Citibank is faced with one of the admittedly rare situations of default, then its new plain language policy will not provide for it; the same holds true for Sentry's vehicle definitions. Surely precision *has* been sacrificed, to some degree, for clarity, in the Citibank and Sentry Insurance Company examples. On balance, these sacrifices may be more efficient, but Kimble should admit that they are indeed sacrifices.

unclear, since the result would be a kind of worthless "precise mud".[121] And this "precise mud" metaphor is implicitly reaffirmed by Eagleson, who writes: "Plain language of itself is no guarantee of a sound underlying legal solution. It must be coupled with clear thinking.[122] But at least plainness of language makes it more difficult for errors in judgment to go undetected."

The Law Reform Commission of Victoria seems to take the more radical view that the two goals are *never* in conflict. They categorically conclude: "precision and clarity are not competing goals."[123] The Commission continues:

> Precision is desirable in order to minimise the risk of uncertainty and of consequent disputes. But a document that is precise without being clear is as dangerous in that respect as one which is clear without being precise. In its true sense, precision is incompatible with a *lack* of clarity.... In summary, neither precision nor simplicity should be sacrificed on the altar of the other.[124]

In sum, then, three alternative views about clarity and precision in legal language have been expressed. They are (1) fundamentally incompatible, (2) usually compatible, or (3) fundamentally compatible. Which one is more accurate?

In this article, an assortment of examples of legal language has been presented. The relationship between clarity and precision has been shown to be complex and multifaceted. Compare, for example, the different results discussed above in the Revised Statutes of British Columbia, 1997, in the insurance policy in the *Graham* case, and in my plain language revision of paragraph 79 of the 1905 Singapore Railways Act.

Most fundamentally, laws are an attempt to proscribe certain kinds of future human action. But as the range of human action within a given sphere is wide – sometimes infinite – it is impossible to predict all of the kinds of actions that may occur, but that lawmakers want to control. A basic predicament involves over- and under- inclusiveness: how do we use natural language to best make evident what we do and do not desire to prevent? Which route is taken in any given situation depends very much on the context: is over- or under- inclusiveness a greater risk? What syntactic and lexical

[122] R Eagleson, "Plain English – A Boon for Lawyers" in *The Second Draft* (1991) at 12-13.
[123] *Supra*, note 27, at 48-49.
[124] *Ibid*, at 48.

options does the English language provide us with in a given topical area? Simply put, does the language have a *term* for some range of activity? Note that even in my plain language version of the 1905 Railways Act, I felt it necessary to keep both "gate" and "chain" because I could not find a suitably encompassing word for both terms. Since some accesses to railways are blocked by a chain, and others by a gate, it is probably better to keep both terms rather than to use a phrase like "access control device". Clarity (brevity) is thus sacrificed (minimally) for precision.

To conclude with an illustration of the complexity of the relationship between clarity and precision, let's consider the railway administration's concern over the reporting of certain kinds of accidents. The current version of the Railway Act is reproduced below:

> "[A]ccident" means an accident attended by the loss of human life or grievous hurt, within the meaning of the Penal Code, to any passenger upon any train or to any person engaged in the working of the railway or by serious damage to property, or an accident of such a description as is usually attended by such loss, hurt or damage.[125]

Let us imagine that we are not at all concerned about clarity, but only about precision. In fact, imagine that precision is our *only* concern. We don't care about cost, or the amount of shelf space we consume in law offices and law libraries with the statute books. We don't care about the wrath of plain language advocates, or the devastation of forests caused by colossal paper consumption. Precision is all that matters. How would we re-draft the provision? To eliminate as much ambiguity as possible, wouldn't the provision become extremely long? Wouldn't it be *infinitely* long, since all possible scenarios would have to be covered with increasing numbers of examples? For example:

An "accident" occurs when:

(1) The train hits a truck and a passenger on the train dies from the resulting fall.

(2) The train hits a car and a passenger on the train dies from the resulting fall.

(3) The train hits a cow and a passenger on the train dies from the

[125] Cap 263, 1985 Rev Ed.

resulting fall.

(4) The train hits another train and a passenger on the train dies from the resulting shock.

(5) The train hits a truck and a passenger on the train dies from being thrown out a window and striking a steel pipe.

(6) The train hits a truck and a passenger on the train dies from being thrown out a window and striking an iron pipe.

(7) The train hits a truck and a passenger on the train is grievously hurt from being thrown out a window and striking an iron post.

It should be evident how this could continue, *ad infinitum.*

Is an infinitely long provision "clear"? Are the aims of clarity achieved along with precision? Well, as we have defined clarity, certainly some aims are not achieved. Brevity and conciseness, for example, are absolutely sacrificed. What about simplicity? In one sense, because of the boundless length of the new provision, it is no longer "simple". But in another sense, if the *language, syntax, etc* used is "simple" in our new version, then it could be arguably "simpler" than the original.

The other element of clarity as defined for purposes of this essay is "comprehensibility". Arguably, if simple language is now used, and a proper index allows for rapid and easy access to that part of our infinitely long provision that covers a given factual scenario, then comprehensibility is improved, at least using the meaning of "comprehensibility" employed in the various empirical studies on plain language discussed above. That is, "comprehensibility" for purposes of those studies generally tested whether a layperson got a "correct answer" to a question based on a particular legal provision. But as our infinitely long provision would include every conceivable question, or factual situation, then correct answers would be inevitable.

Thus, if precision is our only goal, some elements of clarity are improved while others are not. Similarly, if "clarity" is our only goal, then whether precision increases depends on what aspects of clarity we are seeking to maximise. Obviously if brevity is our only aim, we will just employ an extremely simple sentence, *eg,* "accidents shall be reported", with a corresponding drop in both precision and in other aspects of clarity.

It is also quite important to note the following fact: in many cases of plain language re-drafting, clarity has nothing at all to do with precision. Eliminating empty formalisms from legal prose does nothing to reduce precision. Avoiding Latin and French expressions, except where they represent terms of art, using numbered sections, large print, highlighting techniques, and a table of contents, for example, enhance clarity with no effect on precision.

is, neither of the two (out of three) more extreme positions taken by the commentators, above – that clarity and precision are fundamentally compatible or, alternatively, fundamentally incompatible – can be supported. Nonetheless, there are times when one will have to be sacrificed to the other. Which one is relinquished depends on the particular context, and the demands of the legal language at issue. Of course, legal drafters should strive, nonetheless, to achieve both aims simultaneously to the extent circumstances allow.

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