The Woolf reform of civil procedure: a possible end to legalese?

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Abstract

The word « legalese » first appeared a hundred years ago to describe what was seen as the unintelligibility and verbosity of the English jargon used by lawyers. Under the influence of the Plain Language Movement, an effort was made to make legal words and writing more accessible to lay people, which culminated in the implementation ten years ago of the Woolf Reform in England and Wales. This movement is twofold i.e. aims at simplifying legal words or expressions as well as the drafting of sentences itself. Words such as "writ", "garnishee order" and "ex parte" are now respectively known as "claim form", "third party debt order" and "without notice". Legal writing itself has become more grammatically correct. Through the etymological study of a corpus of litigation related vocabulary and pleadings excerpts, we will try to demonstrate that the legal language and writing is very much influenced by its historical context, the cultural evolution of the legal profession and the development of legislation. Legal vocabulary and writing is not static and the current move towards legal precision and clarity should pursue its evolution in the future.

1 Introduction

In his play King Henry VI (Part II, IV, ii 86-87), Shakespeare got one of his characters, Dick the Butcher, to say: "The first thing we do, let's kill all the lawyers". Lawyers have always been long suffering targets of criticisms for the complexity or unintelligibility of the legal jargon they use. Bentham talked about "lawyers' cant" (1827: 296). Others refer to "legalese", a word which appeared in 1914 to describe the complicated language of legal documents. In our study we will focus on its evolution in England and Wales in the specific field of litigation. Litigation (a word which bears Latin origins) means the fact of trying to resolve a dispute in court.

We chose to consider the changes affecting the language of litigation for one reason. A major procedural reform - named after its main drafter Lord Woolf - came into force on 26th April 1999 which substantially changed the legal language used in England and Wales for centuries. If the various steps leading to the reform gave rise to a lot of publications prior to the implementation of the reform, its post-linguistic aspects have hardly been commented upon. However for those teaching legal English or English law at University the effects of the reform are substantial: as well as a fundamental change of procedural rules, the vocabulary of

law was extensively changed and judges and lawyers alike were prompted to write plainer legal documents.

After considering the origins of legalese and the ways in which it can be restricted we will discuss the main changes brought to litigation by the Woolf reform. Through the study of the wording of pre- and post-reform pleadings extracts (pleadings or statements of case being the documents filed by the parties with a court), we will consider whether the unintelligibility of legal language is on the wane.

2 Historical and cultural evolution leading to legalese

Cutts describes "plain language" as opposed to "legalese" as follows: "The writing and setting out of essential information in a way that gives a cooperative, motivated person a good chance of understanding the document at the first reading, and in the same sense that the writer meant it to be understood" (1995: 3). There is however some logic in the way the legal language of England and Wales developed into a legal jargon.

2.1 Emergence of a legal jargon

Pre-1999 legal language was a melting pot of foreign languages. In "the Nature of Legal language" Tiersma recalls that: "The English language can be said to have begun around 450 A.D., when boatloads of Angles, Jutes, Saxons and Frisians arrived from the Continent. These Germanic invaders spoke closely related languages, which came to form what we call Anglo-Saxon or Old English. Although the Anglo-Saxons seem to have had no distinct legal profession, they did develop a type of legal language, remnants of which have survived until today". For Hitchings "English (is) 'promiscuous', a whore among languages" (2008: 5) and for Butt and Castle legal English is "larded with law Latin and Norman French" (2006: 1). The word "law" has Scandinavian origins (Burchfield, 1995: 12). As well as the impact of foreign words in legal English the Anglo-Saxon influence gave rise to many alliterations (Kurzon, 1994: 7) such as "to have and to hold" and "each and every" and tautologies are frequently found in legal documents.

On top of its foreign influences various actors take part in the making of legal language. There is a common law tradition whereby law evolves through court "precedents" also known under the Latin expression "stare decisis". In Gulliver's Travels, Swift commented: "[Stare decisis] is a maxim among lawyers, that whatever has been done before may legally be done again" (1959: 249). Hart and Blanchard say that this is "the doctrine of standing by, or adhering to, decided cases […]" (2007: 21 & 22) . Therefore judges take part in the creation of legalese.
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The legislator's role in the development of legal jargon is limited but not negligeable. Wording used by the legislator has to be interpreted and enforced in court. Of course legal practitioners (by which we refer to solicitors and barristers) contribute to legalese. They still address each other in court as "my learned friend". "Latin that was the lingua franca of the learned" (Bennion, 2008: 316). Bentham, a proponent of the "conspiracy theory" believed that legal language serves "as a cover and as a bond of union" between lawyers who are conservatives (vol. 4, 1827: 296). Melinkoff shared this opinion: " What better way of preserving a professional monopoly than by locking up your trade secrets in the safe of an unknown tongue?" (2004: 28). For Stark lawyers are mercenary: "jargon helps professionals to convince the world of their occupational importance, which leads to payment for service" (1984: 97).

2.2 Persistence of a legal jargon: attempts to reform

Little by little the legislator, judges, legal practitioners as well as more recently various organisations pointed out the inadequacy of retaining an over complex legal jargon and the need to adopt a more modern approach to legal language and writing.

The authorities encouraged the use of English in litigation. The Mayor of London passed an order to that effect in 1356 (Baugh & Cable, 2002: 149). In the Nature of Legal Language Tiersma recalls that the 1362 Statute of Pleading (strangely enough passed in French) required litigation to be carried out in English. According to the Acts and Ordinances of the Interregnum further similar statutes were passed in 1650 (in. Firth & Rait). But for Pollock and Maitland these attempts at reform occurred too late: "It could not break the Westminster lawyers of their settled habit of thinking about law and writing about law in French […]" (Vol. 1, 1898: 85).

Language (and its foreign influences) was one problem, verbose phraseology was another one. In 1982 the British government issued a White Paper ordering departments to make their forms and documents easier to understand (Cutts, 1995: 6). In 1984, 1989 and 1990 the National Consumer Council respectively published booklets called "Plain English for lawyers", "making Good Solicitors" and "Plain Language – Plain Law" (in. Asprey, 2003: 62).

An effort from judges and lawyers was necessary. For Hart and Blanchard: "the law is not inflexible. A court may overrule its own decisions" (2007:22). This was the wish expressed by the famous House of Lords judge Lord Denning who was against too strict an application of precedents (1979: 314). The Law Society and the Bar Council which are the respective professional bodies of solicitors and barristers have taken part in the fight against legalese, sometimes with other associations or organisations part of the Plain Language Movement often attributed to Chase who complained about "gobbledygook" in official texts (1954: 17).

3 The Woolf reform of civil litigation and its application 10 years on

A famous exchange once took place between a judge and a person who was criminally charged: "Judge: The charge here is theft of frozen chickens. Are you the defendant? Defendant: No, sir, I'm the guy who stole the chickens". This shows how complex legal language appears to the lay person. In the introduction to his June 1995 interim report Lord Woolf set himself an "overriding objective" which was " to improve access to justice". He believed that: "The key problems facing civil justice today are cost, delay and complexity" (1995: 7).

For Harrison: "The civil procedure reforms were culturally part of the New Labour project" … although they were initiated by the Conservative government in 1995. Lord Woolf, and behind him, the government, wanted: "a change of culture throughout the stem..." (1996: 31). The scope of the reform far exceeds that of our study so we will only focus on the aspects of the reform which relate to legalese. We will see that the Civil Procedure Rules aimed at making access to justice easier which implies plainer legal language. In order to give our opinion on this issue we will examine a number of terms and sentences from pre- and post-1999 litigation.

3.1 Layout and limits of the reform

Dyer described the Woolf reform as "the biggest package of reforms to the civil justice system for 100 years [...] in an attempt to make litigation cheaper, speedier and more user-friendly".

Being a keen admirer of the French civil procedural code, Lord Woolf was inspired by the French inquisitorial system in which the judge runs the litigation as opposed to the parties (1995: 7). According to the 1996 Woolf final report: "Litigation must be conducted not for the convenience of the lawyers, but for the convenience of the parties" (1996: 10).

An "overriding" objective is set out in Rule 1 of the Civil Procedure Rules whereby the courts must "deal with cases justly" which involves "ensuring that the parties are on an equal footing". As well as the over-complexity of procedural rules, Lord Woolf (as quoted by the Civil Justice report commissioned by the Hong Kong government) saw the "sometimes archaic and impenetrable language" used in litigation as a "major barrier to legal access". He blamed the "use of specialist terms and an over-elaborate style of language" in the former Rules. He believes that their "complexity [...] lies in their sheer length and the number of words used" (2001: notes 95 & 96 – par. 127 & 128).

The post-1999 Rules imposed a change of vocabulary and advocated the use of simpler and shorter sentences. Plainer words making sense in England should also be used. Rome was not built in a day and Adamyk reports that Lord Woolf himself acting as a judge in the 2002 House of Lords case Ashworth Hospital Authority v. MGN Ltd., forgot his wish to see plainer legal language employed. He used the Latin expression "inter alia" in his judgment (2006: 13). But conservatism may come from the litigants themselves. Bennion believes that in divorce law but not exclusively, lawyers and litigants have found it difficult to adapt to new vocabulary. Indeed some of the former terms (such as "decree nisi" and "decree absolute") are "embedded in our culture".

Whilst reflecting on 10 years of the Woolf reforms, Zander, an emeritus Professor at the London School of Economics and also a Queen's Counsel, commented that Lord Woolf's general vision of the new litigation landscape did "more harm than good" save "in regard to the adversary culture". Focusing on the legalese issue Harrison notes: "Revision of language is more easily implemented than reform of substantive laws and improvement in the provision of court services. It ticks boxes, shows that action has been taken […]". This is rather negative. In a nutshell these critics say that behind a mere change of vocabulary the reform would not have achieved much. But let us have a look at some practical examples to see what linguistic benefits – if any – the Woolf reform had.

3.2 Practical examples

The reader will find two annexes below. Annex n°1 is an extract of a document we have compiled setting out a number of words used pre-1999, their etymological roots, their post-1999 counterpart and their modern meaning. Annex n°2 consists in two sets of extracts from two litigation documents. The first one is a 1991 Writ endorsed with a Statement of Claim. The second one is a 2010 Claim with separate Particulars of Claim. Each document emanates from a Plaintiff (pre-1999) or Claimant (post-1999). Documents n°1 and 3 are extracts of court forms which are usually completed by the Plaintiff/Claimant and set out the grounds on which he relies in support of his claim against a Defendant. Documents n°2 and 4 were both drafted by the same reputable barrister who has 30 years' experience. For obvious reasons the names of the litigants are not disclosed.

Annex n°1: glossary and etymology

Used in Rules of the Supreme Court (pre-1999)	**Etymology and initial meaning (from www.etymonline.com)**	**Used in Civil Procedure Rules (post-1999)**	**Meaning (from Blacks Law Dictionary)**
Action	Old French: fighting	Claim	proceedings in a court of law'
Plaintiff	Anglo-French: complaining	Claimant	party who complains or sues in a personal action
Writ	Old-English: something written, piece of writing	Claim form	precept in writing, couched in the form of a letter (...) issuing from a court of justice, and sealed with its seal, addressed (…) to the person whose action the court desires to command (…) as a commencement of a suit
Pleadings	Old French: agreement, discussion, lawsuit	Statement of case	formal allegations by the parties of their respective claims and defenses, for the judgment of the court
Statement of claim		Particulars of claim	written or printed statement by the plaintiff in an action (…) in court, showing the facts on which he relies to support his claim against the defendant, and the relief hich he claims"
Subpoena	Medieval Latin: under penalty	Witness summons	Blacks: "the process by which the attendance of a witness at court is being required (…). It is a writ or order directed to a person, and requiring his attendance at a particular place and time to testify as a witness'

Affidavit	Medieval latin: he has stated on oath	Witness statement	written or printed statement or declaration of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath
Decree nisi	Decree: old French: to pronounce a decision Nisi: latin: unless	Conditional order	one which will definitely conclude the defendant's rights unless, within the prescribed time, he shows cause to set it aside or successfully appeals
Decree absolute	Decree: see above Absolute: medieval French: to set free, make separate	Final order	when a rule nisi is finally confirmed, for the defendant's failure to show cause against it, it is said to be 'made absolute

Upon considering Annex n°1 we cannot help sharing Bennion's view that the litigant may not have been favorably impressed by the replacement of "Plaintiff" by "Claimant", "Writ" by "Statement of case" and so on. Regarding this change of vocabulary Harrison wondered "whether the language being replaced is really outdated; whether the replacements do indeed reflect the way people think and whether their introduction will make it easier to follow what is happening in court".

Annex n°2

Document n°1: extract from 1991 Writ	**Document n°2: extract from a 2010 Claim**
This writ of summons has been issued against you by the above-named Plaintiffs in respect of the claim set out herein. Within 14 days after the service of this writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office mentioned below the accompanying if Acknowledgment of Service stating therein whether you intend to contest these proceedings. If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment is without stating therein an intention to contest the	'Brief details of claim (...) Value The Claimants expect to recover more than £250,000.0l. Defendants ' name and address: ... Amount claimed (details) Court Fee (details) Solicitor's costs (details) Total amount (details) Does, or will, your claim include any issues under the Human Rights Act ‘l998'? x Yes x No Particulars of Claim (attached) Statement of Truth

proceedings, the Plaintiffs may proceed with the action and judgment may be entered against you forthwith without further notice. Issued from the Central Office this ... day of ... 1991. Note: This Writ may not be served later than 4 calendar months (or if leave is required to effect service out of the jurisdiction, 6 months) beginning with that date unless renewed by order of the Court. Important: Directions for Acknowledgment of Service are given with the accompanying form.	The Claimant believes) that the facts stated in these particulars of claim are true. l * l am duly authorised by the Claimant to sign this statement Full name Name of Claimant's solicitors firm signed by ... position or office held: Solicitor C|aimant's or Claimant's solicitor's address to which documents or payments should be sent if different from overleaf including (if appropriate) details of DX, fax or e·mail".

Our conclusions drawn on the study of documents n°1 and 2

The 2010 Claim form is easier to complete. The legal language used in document n°2 is more straightforward. Document n°1 contains words such as 'writ', 'issue', 'service', 'to satisfy the claim' etc., which are not easy to understand by the lay litigant. The only difficulties in document n°2 are to differentiate between Claimant (who must fill in the form or instruct a solicitor to do so) and Defendant (i.e. his opponent) and to know whether the Claim raises any Human Rights issues.

Document n°3: 1991 Statement of claim	**Document n°4: 2010 Particulars of claim**
In additional furtherance of the aforesaid authority issued by the Seventh Defendant acting as aforesaid the said Mr Smith on (date) 1991 telephoned the first-named P1aintiff's wife in an attempt to ascertain the first-named Plaintiff‘s movements and shortly thereafter trespassed upon the first- named Plaintiff‘s home premises for the purpose of removing the said vehicles retained by the first-named Plaintiff in the circumstances aforesaid when he well knew that if the true purpose of his visit had been made known to the first- named P1aintiff‘s wife she would have forbidden him to enter the said premises and whilst there wrongfully intimidated her and improperly alleged that it was a criminal offence to withhold information from him concerning the whereabouts of the said vehicle and in so acting (in particular following upon the incident described in Paragraph (number) above) and by his unauthorised presence on the said premises placed her in fear for her own safety and that of her family and thereby assaulted her.	1. The First Defendant is the developer of a site at (address) ('the Development"). 2. The Second Defendant was and is a firm of solicitors practising from (address). 3. The Claimants named above and listed in the Schedule attached exchanged contracts on or about (date) 2007 to purchase flats to be constructed as part of the Development. Further particulars are set out in the Schedule. 4. The Second Defendant acted tor the First Defendant in the said conveyancing transaction. 5. Clause (number) of the respective Contracts of Sale provided (…). (...) 14. The First Defendant has neglected and/or refused to return the deposits, moneys claimed and interest due by the deadline imposed (4 p.m. On (date) 2009) or at all. 15. Further or in the alternative, the Second Defendants' act of releasing the deposits held to the First Defendants mortgagees prior to Clause 5.3 of the Conditions of Sale being complied with constituted a breach of the duties owed by the Second Defendant as stakeholder to the Claimants such as to make the Second

	Defendant liable to account to the Claimants for any loss sustained by them as a result of the First Defendant's inability to repay the deposits and accrued interest (...).

Our conclusions drawn on the study of documents n°3 and 4

The 1991 extract is one single convoluted sentence. It is unintelligible by the lay litigant and would even require concentration from the trained lawyer. The concentration of 'furtherance', 'aforesaid', 'thereafter', 'said' and 'thereby' is a perfect example of pre-1999 legal jargon. Conversely sentences in document n°4 are much shorter and therefore more striking. The words used are simpler. However we may still denounce a number of alliterations ('was and is', 'and/or') or tautologies which may put off the lay litigant.

4 Conclusion

Mark Twain is alleged to have said: "I'm sorry this letter is so long, but I did not have time to make it shorter". This is often ironically used in relation to the legal profession (in. Cox, 2007). Another perception of lawyer talk is that: "It's not the obviously technical terms, which can be a pain to understand. It's the less obvious terms, the ones which have developed everyday senses (...) like 'cause', 'answer', 'process', 'title' (…)" (Crystal. 2002: 116).

Even though the Woolf reform of 1999 (initiated by the Conservative government) might be construed as a publicity stunt from the New Labour government which aimed at showing its will to make justice easier of access for lay people, our study (which is the first one carried out post-Woolf on the linguistic aspect of the reform since its implementation) tends to show that at least from a language approach, this purpose was partly reached although there is still room for improvement. All the actors to the reform have shown that they are not as set in their ways as one could expect and it looks like legalese is on the wane. For those studying legal English (and those teaching it) this represents a major improvement as finally legal documents in England and Wales might become more approachable and easier to understand.

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