Towards Clearer Jury Instructions

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Abstract. *In court cases involving juries, an important Forensic Linguistic issue is that the judge needs to communicate to jurors the law that applies to the case, and instruct them on the way they should view evidence and witnesses, the procedures they must use, confidentiality, etc. However, there is a second audience for these 'Jury Instructions' - the Courts of Appeal. If the jury have not been correctly instructed, this can form the basis for an appeal. This second audience has led to complex Jury Instruction processes that may be poorly understood by jurors. To avoid miscarriages of justice, we need a Jury Instruction process that leads to maximal juror understanding. This paper discusses an attempt at revising instructions, by giving an example of instructions, showing the thinking that led to their revision, and the process and product of revision.*

Keywords: *Jury instructions, jury directions, specimen directions, plain language, plain legal language.*

Resumo. *Uma questão importante para a Linguística Forense, em casos judiciais com recurso a júri, é que o juiz necessita de comunicar aos jurados a legislação aplicável ao caso e de os instruir sobre a forma como devem ter em conta a prova e as testemunhas, os procedimentos a utilizar, questões de confidencialidade, etc. Contudo, estas "Instruções para o Júri" possuem um público secundário: as instâncias de recurso. O facto de o júri não ter sido instruído corretamente poderá dar origem a recurso. Este público secundário conduziu a complexos processos de Instruções para o Júri, que podem ser mal compreendidas pelos jurados. Para evitar erros judiciais, é necessário um processo de instruções para o júri que conduza à máxima compreensão por parte do jurado. Este artigo discute uma tentativa de revisão de instruções, fornecendo um exemplo de instruções e mostrando o raciocínio conducente à sua revisão, bem como o processo e o produto da revisão.*

Palavras-chave: *Instruções para o júri, orientações para o júri, espécime de orientações, linguagem clara, linguagem jurídica clara.*

Introduction: What is a Jury?

In Common Law systems a general principle is that a person accused of a serious crime is found guilty or not guilty by a team of ordinary citizens called a jury. The jury gives

the verdict – that is, the jurors decide what crime has been committed, and whether the accused is guilty or not guilty. The judge decides on the penalty. In reality, things are more complicated, but this gives the general situation.

At various stages in a jury trial (particularly at the beginning and at the end), the judge must explain to the jurors the law that applies to their particular case, and instruct them on the way they should view evidence and witnesses, the procedures they must use, confidentiality, etc. This can be challenging when jurors know little about the law or legal procedure. (An important difference between American courts and most other Common Law jurisdictions is that – simplifying again – US judges are limited to instructing the jury about the law and trial procedure, while elsewhere the judge is required to link the instructions to the facts and issues in the case.)

What are Jury Instructions?

In most Common Law jurisdictions, judges are provided with possible wordings for their explanations of the law and courtroom procedure. I will follow American practice, and call these model wordings 'Pattern Jury Instructions', although they go by various other names.

In the State of Victoria, Australia, where I live, they are officially called 'Jury Directions' (http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#30229.htm) and are part of the 'Charge Book', which is issued to judges. These are the jury instructions which will be discussed later. My attention was drawn to them when I joined, as a consultant, the Charge Book Committee that has responsibility for Jury Instructions in Victoria. This Committee is composed of judges. (I am bound by confidentiality not to reveal the Committee's discussions, so I will limit myself to general issues, and my recommendations.)

In the UK these Jury Instructions are known as 'Specimen Directions', and are part of the 'Benchbook': http://www.jsbni.com/Publications/BenchBook/Documents/BenchBook.pdf. However, these specimen wordings have recently been replaced in many cases by guidelines about what to tell the Jury rather than specific wordings (https://www.judiciary.gov.uk/wpâĂŞcontent/uploads/JCO/Documents/eLetters/Bench+Book+Companion_revised+complete+march+2012.pdf). An example of a set of US Jury Instructions is the recent California set: http://www.courts.ca.gov/partners/documents/caci-2016-complete-edition.pdf.

Why are Jury Instructions important?

Juries need to understand Instructions in order to ensure a fair trial. If the jury does not understand the instructions, they may reach the wrong verdict; in other words, there is an increased likelihood of a miscarriage of justice which could result in an innocent person going to prison (or even being executed in systems where there is a death penalty). Equally it could lead to a guilty person being released to carry out more offences. Miscarriage of justice is by definition unjust, may be damaging for the participants, and reflects poorly on the justice system.

What is the problem with Jury Instructions?

The underlying problem with Jury Instruction is what I call the 'two audience dilemma'. The primary audience for Jury Instructions is of course the jury. However, there is a secondary audience – appeal court judges. One ground for appealing a conviction is

that the jury was not correctly instructed. Judges are highly sensitive to this secondary audience, as they dislike seeing their decisions overturned, particularly where there are vulnerable complainants and witnesses who do not wish to go through another trial.

Tiersma (2001) writes:

> The philosophy of much of the original pattern jury instruction movement was to search for language to which a court or legislature had given its stamp of approval. This approved language was found, for the most part, in judicial opinions and in statutes. …Copying verbatim the language of statutes – and, to a somewhat lesser extent, judicial opinions – was a virtually fool-proof method of insulating the instructions from legal attack on appeal.

However, the language of judicial opinions and statutes was written specifically for lawyers, and is far distant from everyday conversational language. Historically, the secondary purpose, to avoid appeals, has come to dominate and undermine the principal purpose, to inform the jury. Throughout the Common Law world, the perceived imperative to make Jury Instructions legally watertight has resulted in them becoming less and less intelligible to jurors. This is perverse. It cannot be overemphasised that if the Instructions are hard to understand **they may not fulfil their primary purpose – that of instructing the jury**.

Furthermore, appeal courts have tended to focus on the legal aspect, and ignore the comprehension aspect. Few appeals are made on the grounds that some jurors may not have understood the Instructions – the majority are on legal grounds. This is also unfortunate. We might have clearer Instructions if appeal courts considered comprehension as well as content. It should be possible to produce Jury Instructions which meet the requirements of both audiences more adequately than existing Instructions.

The Auntie Doris Test

My criterion when examining material directed to a jury is the 'Auntie Doris Test'. My Auntie Doris was a lovely person, but not very bright and not highly literate. However, she did serve on a jury. The 'Auntie Doris Test' is: "Would Auntie Doris understand?". If she would not understand a particular jury instruction, it is not fulfilling its primary purpose: to communicate with the jury. Satisfying the Appeal Court may be necessary, but it is not sufficient – it is a secondary purpose.

The Issue

In summary, to avoid miscarriages of justice, we need a Jury Instruction process that leads to maximal juror understanding. It is important not to sacrifice comprehension by the primary audience for the sake of the secondary audience – an appeal court.

This Paper

This paper discusses an attempt at revising instructions, by giving an example of instructions, showing the thinking that led to their revision, and the process and product of that revision. (An effort, often unsuccessful, has been made to practice what is preached, and write this paper in clear everyday language.)

An example

The following is an example of not particularly bad Jury Instructions, given at the start of a trial. These instructions had already been reworded and clarified by the Charge Book Committee, so they lack the extreme complexity documented by Dumas (2000). They concern evidence.

1.5 - Decide Solely on the Evidence

1.5.2 - Charge

Introduction: What is Evidence?

I have told you that it is your task to determine the facts in this case, and that you should do this by considering all of the evidence presented in the courtroom. I now need to tell you what is and what is not evidence.

The **first** type of evidence is what the witnesses say.

It is the answers that you hear from the witnesses that are the evidence, and not the questions they are asked. This is important to understand, as sometimes counsel will confidently include an allegation of fact in a question they ask a witness. No matter how positively or confidently that allegation is presented, it will not form part of the evidence unless the witness agrees with it.

[*Add the following shaded section if the judge believes it is necessary to further explain this point*.]

Let me give you a simple example that has nothing to do with this case. Imagine counsel says to a witness "The car was blue, wasn't it?", and the witness replies "No, it wasn't". Given that answer, there is absolutely no evidence that the car was blue.

Even if you do not believe the witness, or think he or she is lying, there is no evidence that the car is blue. Disbelief of a witness's answer does not provide evidence of the opposite. To prove that the car was blue, there would need to be evidence from some other source, such as a photograph or the testimony of another witness.

Of course, if the witness had instead replied "yes, it was", there would be evidence that the car was blue. In such a case, the witness has adopted the suggestion made in the question. However, if the witness does not agree with that suggestion, the only evidence you have is that the car was not blue.

The **second** type of evidence is any document or other item that is received as an "exhibit". The exhibits will be pointed out to you when they are introduced into evidence. When you go to the jury room to decide this case, some of the exhibits will go with you for you to examine. Consider them along with the rest of the evidence and in exactly the same way.

I believe that these instructions fail the Auntie Doris test. What follows shows the reasoning behind this conclusion.

Current Possible Sources of Miscommunication

Communication Theory

Summarising inadequately part of the enormous field of communication theory (see for example Knapp and Daly, 2011), the following factors are often seen as critical:

- the circumstances of the communication (the context – immediate and wider/ physical, social and psychological).
- the medium, particularly the mode and directionality of communication.
- the linguistic, cognitive and knowledge capacity of the target audience.
- the linguistic, cognitive and knowledge demands of the communication.

Therefore, for successful communication, we need to ask whether, in the circumstances that prevail, there is a match between the demands made by the language sample, and the capacity of the target audience, using the current means of communication. I will now expand on these four factors.

The circumstances of the communication

The judge instructs the jury in the context of the court. This is an intimidating context, with many indicators of power, including forms of dress among the court staff and the judge (judges are beginning to give up wearing wigs in Victoria, but many lawyers still do, in imitation of English formal dress of 300 years ago). The physical context of the court, with its coats of arms, the organisation of the participants, the judge's elevated position and so on are all power laden. Also the social relationship between judge and jurors is one of considerable differences in power. These factors mean that the social construction that many jurors will place on the situation is one of intimidation and unwillingness to communicate with the judge, even in Australia with its common disrespect for authority. Thus, the formal and sometimes arcane procedures of the courtroom will be unfamiliar and uncomfortable for some jurors – indeed some may poorly understand what is happening.

We must also take into account the ideology of judges. Heffer (2015: 290–2) provides some important examples where judges have failed to provide adequate responses to questions from juries. As he states:

> What we find again and again in these exchanges between judge and jury is a genuine attempt by the lay jury to accommodate to the legal-institutional context, while judges often remain locked into a discourse of authority that prevents them from hearing and actively responding to the voice of the jury. (2015: 292)

In other words, there is an unwillingness by some judges to encourage jurors' clarification questions and to answer them thoughtfully.

The mode and directionality of communication

The normal **mode** of communication is that a judge directs the jury **orally** – through speech, but in fact this is often achieved by reading aloud prewritten material, particularly the model directions provided in the Charge Book. However many judges provide further advice and information. In Victoria written material is provided to jurors, but currently the written forms of most Jury Instructions are not provided, partly from

tradition, and partly because not all instructions are relevant to all cases. Judges may exercise their discretion and supply written versions. There are procedures and a new "Jury Guide" which are being adopted to address this issue, but the process of making the Instructions available in written form is still far from complete. Unlike reading, listening happens in real time, and if a piece of information is missed or misunderstood, there is no second chance. The written mode could provide the individual jury member with the chance to revise and reread.

The *direction* of communication is predominantly one-way from judge to jurors. Section 1.4.2 of the Charge Book reads:

> If at any time you have a question about anything I say, please feel free to ask me. It would be best if you did this by writing it down, and passing it to my tipstaff, [insert name], who will hand it to me.

There are also strict limitations on jurors asking questions of witnesses. The system assumes that jurors will be passive recipients and observers in the trial and, where jurors wish to be involved, they must write out their question, hand it up to the judge and let the judge decide what to do with it. This does not provide jurors with the opportunity to ask clarification questions at the time they have a doubt, and places a barrier on the sort of spontaneous two-way communication which enhances informal oral communication. Communication is more effective if meaning is negotiated and transferred through an interactive process.

The linguistic, cognitive and knowledge capacity of the target audience

Juror Education and Literacy

In principle, Juries are randomly selected. However, in practice, jurors are selected in part on the basis of availability for service. People who work in the professions are less likely to be available (for example I have been excused jury service because I was teaching postgraduate courses that demanded my particular expertise). Despite some changes in legislation to reduce exemptions, there may still be a bias in jury selection against the more educated and literate members of society. Unfortunately, I have been unable to find recent statistics on exemptions.

Cognitive issues

Familiarity

With regard to the knowledge base of jurors, many will be unfamiliar with the law and the workings of the court system. Psychological studies attest to the role of knowledge in comprehension. If two people share a knowledge base in a particular area, their communication is greatly facilitated. Sometimes a great deal can be communicated very concisely, since so much can be assumed. Cognitive psychology (Sweller, 1988) has demonstrated that it is more difficult to process information in working memory if the subject matter is unfamiliar, since most processing operates at a shallow level, working with familiar matter. Processing which requires attention is far more demanding, and the human mind is limited in its capacity to handle large amounts of unfamiliar material.

If knowledge is particularly specialised, full communication about it with a person who does not share that knowledge may be difficult, or even impossible. Even if the public understand every individual word of a Jury Instruction, the lack of a shared 'frame'

or conceptualisation of the world may lead to communication problems. There is supporting research that shows that unfamiliar language (such as legal jargon) increases the cognitive load (Sweller's (1988) 'extraneous cognitive load').

Capacity and Duration

There is a large cognitive psychology literature on the processing constraints imposed by the human brain. Note particularly the work of Pinker (2013), and researchers such as Pienemann (1998) who use processing constraints to understand second language development. There are cognitive limits on **attention**, **capacity** and **duration**. Comprehension tasks may overwhelm either cognitive processing capacity, or the ability to sustain attention. Our 'neural hardware' imposes limits on both the speed and accuracy of processing new information; for example Kahneman (1973) discusses the notion that perceptual and cognitive operations draw on limited attention resources. See also the overview in Gibson and Pearlmutter (1998). Cognitive complexity in Jury Instructions will increase cognitive load.

Mother Tongue Effect

In Australia, according to the 2012 census, 18% of Australian residents spoke a language other than English in the home. Such second language speakers appear on juries and therefore Jury Instructions need to be constructed with this in mind. Research literature (Pavlenko, 2011; Abrahamsson and Hyltenstam, 2009) shows that those who learn a second language after the age of 12 rarely attain full native like automated proficiency. Particularly interesting is "non-perceivable non-nativeness" (Abrahamsson and Hyltenstam, 2009) where people can "pass" as native speakers. This increases the cognitive demand of jury instructions, and may reduce the likelihood of comprehension.

The linguistic, cognitive and knowledge demands of the communication

Cognitive Demands

Familiarity

Many jurors will have limited knowledge of the legal system and courtroom processes. They may be intimidated, confused and overwhelmed.

Capacity and Duration

Jury instructions are often long, and the process of jury instructions usually takes at least an hour, and sometimes several hours (the website referenced at the beginning of this paper reveals just how many instructions there are, even if not all are used on any given occasion). Furthermore jury instructions are often cognitively complex, and their conceptual structure may be obscure.

Overall there is a strong possibility of a mismatch between the cognitive demands of jury instructions, and the cognitive capacity of jurors.

Linguistic Complexity

A useful but incomplete way to summarise some of the *language structure* aspects of complexity is to see these as a result of: (a) the number of, and (b) the relationships between:

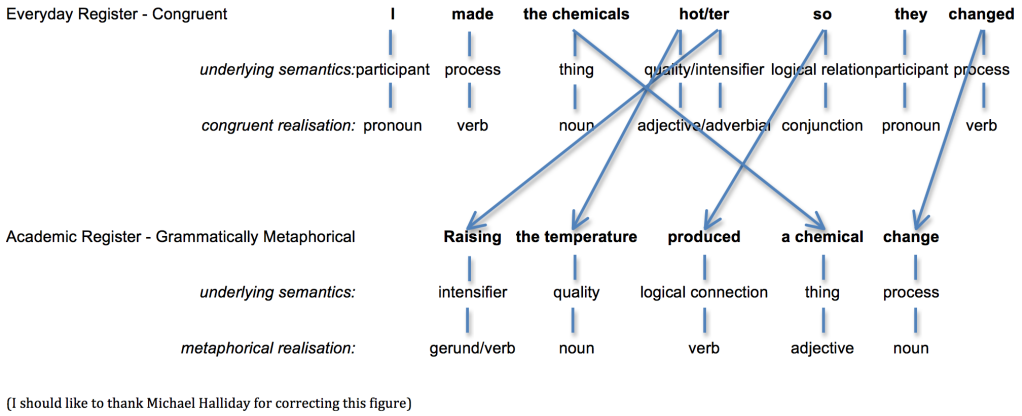
- the morphemes in a word;

- the words in a phrase;
- the phrases in a sentence;
- the clauses in a complex sentence;
- the sentences in a section of text;
- the sections of a text

There is a substantial psycholinguistic literature on the linguistic challenge posed by Jury Instructions – for surveys and references see English and Sales (1997) and Lieberman and Sales (1997). The following is a list of features which experimentation proved can cause difficulty (partly based on an early and extremely influential study by Charrow and Charrow, 1979: 1360).

- nominalisations/grammatical metaphor;
- technical vocabulary;
- doublets, triplets and longer 'lists of words';
- 'as to' prepositional phrases (e.g. "The order in which the instructions are given has no significance as to their relative importance.");
- unusual positioning of phrases;
- whiz and complement deletion;
- negatives, particularly multiple negatives;
- passives, particularly in subordinate clauses;
- subordination, particularly multi-layered subordination;
- use of a noun phrase to replace a clause (rank shifting);
- poor genre structure;
- poor formatting – particularly numbering.

The first of these features, 'nominalisations', comes from an out-dated understanding. Halliday and Matthiessen (2004: 613–658) have proposed the notion of 'ideational grammatical metaphor', which explains nominalisation, and greatly extends it to other parts of speech. There is a basic semantics to word classes. I was taught in primary school that *nouns* are things or entities; *verbs* are 'doing' words, used to refer to processes; *adjectives* are words that modify nouns, showing certain attributes of the entity; *conjunctions* are words used to show relationships between sentences and clauses, etc. Obviously my primary school teacher was oversimplifying, but she had a point. However, what Halliday and Matthiessen showed was that as languages become more written and more technical, these basic relationships are often distorted. The following example consists of two sentences with very similar meanings, but one is expressed in a form where the word classes are used with their basic meanings intact – therefore they are in Halliday's terms 'congruent', and a second sentence where those basic word class meanings are changed, and become 'metaphorical'. The first sentence is the sort of language a child doing a classroom experiment might use, while the second sentence is the way a scientist might describe the same phenomenon.



(I should like to thank Michael Halliday for correcting this figure)

Table 1. Example of Grammatical Metaphor.

The difficulty of grammatical metaphor has several sources. First, grammatical metaphor involves a distortion of the relationship between the basic meaning of parts of speech such as verbs, adjectives and nouns (processes, attributes and things), and their meaning when used metaphorically. This increases processing load, which partly explains their lower frequency in spontaneous speech, child language, pidgins, and languages that do not have a literate tradition.

Another source of difficulty is that metaphorical forms are often morphologically complex, even in a comparatively common example such as *leadership* (lead+er+ship) (verb to noun to abstract noun), as well as technical terms such as *unimpeachability* (un+im+peach+abil+ity). Additionally, in English we tend to construct grammatical metaphor using words from Greek or Romance sources (*impeach* is from French), rather than the often more commonplace Germanic forms.

Another aspect of grammatical metaphor is that it enables the construction of complex noun phrases containing chains of nominalisation to package complex concepts. The complex noun phrase increases the cognitive processing load, or as Charrow and Charrow (1979: 1321) state, "shortening a whole subordinate clause into a single nominal usually increases the complexity of the deeper grammatical and semantic structure. The meaning of the sentence becomes less clear, and the mind must work harder to decode it." For example, *drug abuse* is normally understood as misusing narcotics (abuse *of* drugs) – it could however also mean the bad language found in the drug culture (abusive language *associated with* drugs) – the noun phrase deletes the nature of the relationship between the two concepts. Furthermore this packaging of information into complex noun phrases increases the 'density' of the information, and there is research evidence that this in turn increases comprehension difficulty (Felker *et al.*, 1981: 43).

All these aspects of grammatical metaphor make language harder to understand, and increase the cognitive load, particularly when some grammatically metaphorical terms may be less familiar to less literate people. Essentially, we need to use language that is as congruent as is practical.

Other aspects of the difference between formal written language and conversational language can lead to complexity. (For many linguists, conversational language is the yardstick.) For example, a written instruction might say "Insert a two dollar coin in the upper slot"; someone leaning over your shoulder might simply say "Put the money in

there". Some legal texts use language that is more distant from everyday conversation than almost any other form of language. Writing also permits long complex sentences. As we noted, these have been proven to be more difficult to understand, particularly when written language is presented orally.

Technicality

Some jury instructions include legal jargon (see the examples that follow), which is by definition not known to all lay people. Plain language advocates suggest avoiding it where possible and when it is absolutely necessary providing a definition. In legal language we also find everyday words used with specialist meanings; for example, looking at non specialist and specialist definitions, we find:

	Legal Definition (The Law Handbook)	**Common Definition** (Cobuild Dictionary)
"exhibit"	A document or thing tendered as evidence in a court hearing ...	Something that is put on show to the public in a museum or art gallery

Table 2. An Example of Specialist and Non-Specialist Meanings.

There are related considerations including 'word frequency'. The more common a word is, the more likely it is that people will encounter and know it.

Discourse Insights

An important aspect of communication is conceptual organisation above the level of the sentence. There is ample evidence that communication is enhanced if:

- ideas are presented in a *logical sequence*;
- the *organisation* of the ideas is made *explicit*;
- the *connections* between the ideas are made *explicit*;
- *redundant* information is removed.

Procedure

Work on lay-legal communication (particularly Rock, 2007) has suggested that the interaction of the participants can play a crucial role in understanding. Rock (2007: 253) states in her work on improving the police communication of cautions: although "providing a standardised scripted explanation is enticing ... This book demonstrates that making meaning is not one-size-fits-all". The findings from her research demonstrate convincingly that meaning needs to be negotiated, and that it is desirable that comprehension be checked by asking jurors content questions about the meaning, to test whether they have understood, and then following up with further direction if necessary.

Similarly, recent recommendations concerning the comprehension of police cautions (Communication of Rights Group, 2015) suggest "To demonstrate ... understanding, we recommend the adoption of an in-your-own-words requirement that is already used in some jurisdictions. After each right has been presented, police officers should ask suspects to explain in their own words their understanding of that right".

However desirable, in fact an in-your-own-words procedure in court is probably impractical, because it would entail a number of difficulties. Is the judge to ask each individual juror? What if some, but not all, jurors have understood? It may also be unfair

for jurors who have poor levels of confidence or verbal capacity. The fear of being put on the spot and being asked to explain a legal concept in their own words may create a fear of embarrassment, which will add to cognitive load and so impede understanding.

It is also worth considering the difficulty of explaining some of the relevant concepts in lay language. Asking a person to explain something in their own words, when judges have been clinging to a particular formulation because they know that formulation is right, but are less sure about any other formulation. Asking jurors to express a legal proposition in their own words basically invites jurors to depart from that formulation. A judge is then faced with the choice of reiterating the correct version of the formulation, thereby eliminating the point of asking for the juror's own words, or endorsing the reformulation and running the risk of the reformulation being found on appeal to be missing a critical component. Therefore, such an approach would be a radical departure and for good reason might meet resistance from judges (note also the quote from Heffer previously).

A less ambitious encouragement for judges to interact and negotiate meaning with jurors might be more feasible, and might lead to enhanced communication.

Possible Means of Improving Jury Direction

Cognitive Issues

The cognitive load and cognitive capacity issue suggests that jury instructions need to be rewritten following 'cognitive economy' principles, and particularly that **length is important**. Everything being equal, short instructions will be more easily understood than long ones.

Suggestions from the Plain Language Movement

The Plain Language movement is a world wide movement in favour of clarifying the language used in areas such as the Law and Administration. The recommendations include the linguistic features we have discussed above, but also extend much more, to document design, text structure, and conceptual organisation. In Australia for example see: https://www.opc.gov.au/about/docs/Plain_English.pdf. A highly developed outline for plain language is: http://www.plainlanguagenetwork.org/. (Cutts, 1993, 2000) cogently addresses the issue of plain legal language, as does previous work by Robert Eagleson in Victoria (Law Reform Commission of Victoria, 1987).

Linguistic Issues

The linguistic issues already mentioned are addressed by the Plain Language Movement. Their recommendations include the following:

Words – foreign or unusual words be replaced by words that are more comprehensible;

Phrases – because the concepts 'grammatical metaphor' and 'noun phrase structure' are not part of normal language understanding, the advice is usually expressed in terms of avoiding nominalisations and long lists of nouns;

Syntax – advice is usually framed in terms of sentence length, rather than sentence complexity. (We have seen much more sophisticated ways of viewing this.)

Discourse

More attention has been paid in recent years to text organisation. (It may be worth pointing out that, no matter how well organised and presented, a letter written in the

Luo language would be largely unintelligible to 99% of the world's population.) A good example is the following recommendations from the French body COSLA (translated and modified slightly from http://www.plainlanguagenetwork.org/).

- Construct the text carefully – use headings, a body, figures and annexes for minor information;
- Take a respectful and helpful relationship to the reader;
- Present clearly the writer's objectives – particularly obligations upon and warnings to the reader;
- Organise the argument logically and effectively.

A Summary

Decades of plain language research have shown that comprehension is improved if Jury Instructions are:

- brief
- clear, and
- orderly.

Brief, because there is a very human tendency to 'switch off' if formal instructions are long – think of airline safety instructions before a flight. Clear, because complexity makes language more difficult. Complexity may have different sources, including the linguistic elements mentioned earlier, and:

- technicality
- formality, and
- the differences between speech and writing.

(In Systemic Linguistics, this is the issue of High Register).

Orderly, because many texts are poorly organised, for instance:

- cramming concepts together, rather than addressing them one by one, and/or
- putting them out of logical sequence, and/or
- not making explicit how they connect (coherence).

This operates at the level of the whole text, rather than sentences. There is a wealth of additional material at: http://www.plainlanguagenetwork.org/.

Recasting

This information suggests something much more than language simplification is involved – it is looking more like recasting. What is meant by recasting? It involves entirely rethinking and reconstructing, by:

- extracting the meaning/concepts, then
- finding the best way to logically organise the concepts, then
- expressing the concepts in the most comprehensible way.

The revised version may have little resemblance to the original. Rather than traditional low-level modification, this process is very similar to high level translation from one language to another – extracting meaning from the source language, moving through abstract semantic space, and finding words to express the concepts and meanings in the target language. Like translation, the revised text can never be exactly the same in

semantic content – rather, as in Skopos translation theory (Reiss and Vermeer, 2014) – these intra-lingual translations should be fit for the purpose.

This moves beyond most of the current thinking about plain legal language. It is only at the last stage, 'expressing the concepts in the most comprehensible way', that the cognitive and plain language issues come into play – the new version would need to follow plain language principles; be as short as possible; remove redundant information; avoid cognitive overload; and be well organised. In other words, be brief, clear and orderly.

Procedure

Documents such as the Charge Book could include suggestions for judges about ways to interact and negotiate meaning with jurors.

A Worked Example

The Problem

Let us then look at the Jury Instructions in the State of Victoria. As noted above the current Jury Instructions are accessible at http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#30229.htm. What are the problems with the current instructions, and what might be done? The example used earlier is fairly typical of the existing Jury Instructions. It is clear that previous efforts have been made to clarify them. (The formatting from the original has been maintained.)

> ***Section 1.52 - Judicial College of Victoria (2013) Victoria Criminal Charge Book.***
>
> **1.5 - Decide Solely on the Evidence**
> **Introduction: What is Evidence?** …
> The **first** type of evidence is what the witnesses say. It is the answers that you hear from the witnesses that are the evidence, and not the questions they are asked. This is important to understand, as sometimes counsel will confidently include an allegation of fact in a question they ask a witness. No matter how positively or confidently that allegation is presented, it will not form part of the evidence unless the witness agrees with it.

Syntactic Complexity in the sentences

By syntactic complexity, I refer particularly to the number of clauses, but also to subordination and coordination. Rather than provoke a debate among grammarians, I have presented this graphically.

It is the answers
that you hear from the witnesses
(modifies 'answers')
that are the evidence,
(modifies all preceding)
and *(it is)* not the questions
(that) they are asked.
(22 word sentence)

Other linguistic complexities

- the italicised deleted elements in all 3 sentences, which reduce transparency
- "They are asked" – passive

Syntactic Complexity in the sentences

This is important to understand

as sometimes counsel will confidently include an allegation of fact in a question

(that) they ask a witness

(22 word sentence)

Other linguistic complexities

- the number of elements/phrases in: "as / sometimes / counsel / will include / confidently / an allegation / of fact / in a question" – complexity at the clause level.
- "as" meaning 'since' or 'because' is rarely used in casual speech – it is high register.
- "allegation of fact" is highly grammatically metaphorical – unpacked it is something like 'they say that x is a fact'.
- deletion of "that" in "a question [that] they ask a witness" – obscures the relationship.

Syntactic Complexity in the sentences

No matter (short for *'It does not matter'*)

how positively or confidently that allegation is presented

it will not form part of the evidence

unless the witness agrees with **it**.

(25 word sentence)

Other linguistic complexities

- "unless" is a concealed negative (it means 'if not', producing a triple negative with 'no matter' and 'not form').

- "is presented" – passive.
- "how positively or confidently that allegation is presented" – adverbs precede and are distanced from the verb.
- the final "it" is sufficiently far from "allegation" that its reference becomes unclear.

Conceptual Issues

The core information here is 'evidence is what the witnesses say' BUT the last sentence makes it clear that what the lawyers say also counts, if the witness agrees to it. In other words, it is misleading. So, we need to concentrate on the core facts, to avoid cognitive overload. Most of the rest is for emphasis, not clarity. Some of it is completely redundant information such as 'they ask a witness'.

> The **second** type of evidence is any document or other item that is received as an "exhibit". The exhibits will be pointed out to you when they are introduced into evidence. When you go to the jury room to decide this case, some of the exhibits will go with you for you to examine. Consider them along with the rest of the evidence and in exactly the same way.

Lexical Issue

It was noted earlier that the word 'exhibit' has a legal meaning that differs from the everyday meaning. It therefore needs to be replaced or defined.

Syntactic Complexity in the sentences *(the combination of clauses)*

There is one particular sentence that is highly problematic:

> When you go to
> the jury room
> to decide this case
> some of the exhibits
> will go with you
> for you to
> examine
>
> (23 word sentence)

I will look at this Jury Instruction in a slightly different way, because although there are syntactic complexities, I feel that the number of phrases or groups is the worst problem.

Syntactic Complexity in the sentences *(the combinations of phrases/groups)*

The **second** type
of evidence is
any document
or other item
that is received
as an "exhibit".
The exhibits will be pointed out
to you
when they are introduced
into evidence.
When you go
to the jury room
to decide
this case,
some of the exhibits
will go
with you
for you
to examine.
Consider them
along with the rest
of the evidence
and in exactly the same way.

- There are many subordinate clauses.
- Passives: 'is received', 'will be pointed out', 'are introduced'.
- unnecessary *high* language – why 'other item' rather than 'other thing'.
- legal jargon 'introduced into evidence'.

Conceptual Issues

The last two sentences anticipate the end of the trial, which may be a long time later. So, better to do it during final instructions. Redundant information: 'to you', 'when they are introduced into evidence', 'exactly'.

Suggested Revision

Ideally, as I suggested in a previous paper on plain language (Gibbons, 2001), various versions should be trialled with potential jurors, and tested out to see which communicates best. This approach has been used to test out revised Jury Instructions in several jurisdictions, including Oregon. However, this was not permitted in this case. What follows are some suggested revisions that I submitted. They were made with the lawyerly help of Matthew Weatherson of the Judicial College of Victoria. (The participation of a lawyer, particularly when elements are being removed, is essential in such work.) These revisions would not be acceptable in this particular form, but I use them to illustrate possible ways of improving communication with jurors. I believe they pass the Auntie Doris test.

What is evidence?

There are two kinds of evidence.

First - what the witnesses say or agree to. It is not what the lawyers suggest.

Second - exhibits.

These are things that we will show you. I will tell you when there is an exhibit, and we will give it a reference letter or number.

Overall
The number of syntactic elements and the complexity of the relations between them are considerably reduced. However, my revision still includes some syntactic complexity. I struggled with this but decided that there were some concepts that needed to be linked.

The paragraph that begins "First"
The misleading disjuncture between the first sentence and the last has been removed.

"This is important to understand, as sometimes counsel will confidently include an allegation of fact in a question they ask a witness. No matter how positively or confidently that allegation is presented . . . ". This element has been deleted because it includes no vital information. It seems to be there for emphasis, but in fact may be less powerful than the simple clear statement that replaces it. This also means that technicalities such as "counsel" and "allegation of fact" are removed. In the final sentence triple negation is reduced to single negation.

The paragraph that begins "Second"
This version unclutters the conceptual content of the first two sentences of the original. It removes "some of the exhibits will go with you for you to examine." because this information is only needed at the end of the trial. The final sentence is removed, because it adds no information. The revised version improves the identification of what 'exhibit' means in the language of the courtroom.

We should notice however that radical recasting can be seen as a necessary but not sufficient step to improve jurors' understanding of Instructions. Other changes in the medium and means of communication might be desirable, through addressing courtroom procedure. Some recommendations follow.

Addressing Procedure

Comprehension checking
Since an 'in your own words' approach would be a radical departure and for good reason might meet resistance from judges, a more conservative guideline might be the following:

Recommendation for inclusion in the Charge Book:
Question jurors about the meaning of the Instructions, to ensure they have understood. If they have not, try again.

Negotiation of meaning, and responding thoughtfully to jurors' questions
Less radically, constructive dialogue with judges might persuade them of the value of interacting and negotiating meaning with jurors, which in turn might lead to improvements in interactive practices, particularly responding thoughtfully to jurors' questions.

Recommendation for inclusion in the Charge Book:
Listen carefully and respectfully to jurors' questions, and answer them thoughtfully.

Narrative

Heffer's (2005) work also demonstrates the effectiveness of the use of oral **narrative** in improving understanding. The original already includes a narrative element, but it might still be valuable to include a recommendation to this effect.

Recommendation for inclusion in the Charge Book:

Use narrative and everyday experiences to explain Instructions.

Multimodal Instructions

Finally, Marder (2015) makes the obvious point that it is desirable to provide jurors with a written version of the jury instructions, so that they can revisit them if the need arises. As we saw, in Victoria written forms of all Jury Instructions are not always provided. With modern technology, and the use of multimodal techniques, for example by providing links to the jury instructions online, it should be possible to overcome this difficulty.

Recommendation for inclusion in the Charge Book:

Provide access to written forms of the Instructions, so that jurors can consult them.

Conclusion

We have seen that the current situation, where many Jury Instructions do not adequately instruct jurors, has arisen because the need to address a secondary audience, the Appeal Court, has overridden the needs of the primary audience, the jurors. As noted earlier, this is a travesty. We have seen that a process of radical recasting, rather than working at a superficial linguistic level, can improve the likelihood that more of the Instructions will be understood.

We have also noted that interactive and multimodal approaches could produce further improvements. My suggestions are only a starting point for negotiation with judges. In the end, perfect communication is in practice impossible. However, **improving** communication is certainly possible, and it is hard to find a logical reason not to do so, when so much as at stake.

Twist in the Tail

My time with the Charge Book Committee ended without the Committee adopting these suggestions. They decided to focus on other issues.

Notes

[1]I should like to thank Matthew Weatherson of the Judicial College of Victoria, and Judge Pamela Jenkins for their invaluable comments on this paper. Remaining errors are mine alone.

References

Abrahamsson, N. and Hyltenstam, K. (2009). Age of Onset and Nativelikeness in a Second Language: Listener Perception Versus Linguistic Scrutiny. *Language Learning*, 59(2), 249–306.

Charrow, R. P. and Charrow, V. (1979). Making legal language understandable: A psycholinguistic study of jury instructions. *Columbia Law Review*, 79(1306–1374).

Communication of Rights Group, (2015). Guidelines for communicating rights to non-native speakers of English in Australia, England and Wales, and the USA. *Available online at http://www.une.edu.au/__data/assets/pdf_file/0006/114873/Communication-of-rights.pdf*.

Cutts, M. (1993). *Making Sense of English in the Law*. London: Chambers.

Cutts, M. (2000). *Lucid Law*. High Peak: Plain Language Commission.

Dumas, B. (2000). US pattern jury instructions: problems and proposals. *International Journal of Speech, Language and the Law*, 7(1), 49–71.

English, P. W. and Sales, B. D. (1997). A Ceiling or Consistency Effect for the Comprehension of Jury Instructions. *Psychology, Public Policy, and Law*, 3(381–401).

Felker, D. B., Pickering, F., Charrow, V. R., Holland, V. M. and Redish, J. C. (1981). *Guidelines for Document Designers*. Washington DC: American Institutes for Research.

Gibbons, J. (2001). Revising the language of New South Wales police procedures: applied linguistics in action. *Applied Linguistics*, 22(4), 439–470.

Gibson, E. and Pearlmutter, N. (1998). Constraints on sentence comprehension. *Trends in Cognitive Sciences*, 2(7), 262–268.

Halliday, M. and Matthiessen, C. (2004). *An Introduction to Functional Grammar*. London: Hodder Arnold, 3 ed.

Heffer, C. (2005). *The Language of Jury Trial*. Basingstoke: Palgrave.

Heffer, C. (2015). Authority and Accommodation: Judicial Responses to Jurors' Questions. In L. Solan, J. Ainsworth and R. Shuy, Eds., *Speaking of Language and the Law: Conversations on the Work of Peter Tiersma*, 289–292. New York: Oxford University Press.

Kahneman, D. (1973). *Attention and Effort*. Englewood Cliffs, NJ: Prentice-Hall.

M. Knapp and J. Daly, Eds. (2011). *The SAGE Handbook of Interpersonal Communication*. Thousand Oaks, CA: SAGE.

Law Reform Commission of Victoria, (1987). *Plain English and the Law. Report No. 9*. Melbourne: F. D. Atkinson Government Printer.

Lieberman, J. and Sales, B. (1997). What social science teaches us about the jury instruction process. *Psychology, Public Policy, and Law*, 3, 589–664.

Marder, N. (2015). Jury Instructions Written for Jurors: a Perennial Challenge. In L. Solan, J. Ainsworth and R. Shuy, Eds., *Speaking of Language and the Law Conversations on the Work of Peter Tiersma*, 292–296. New York: Oxford University Press.

Pavlenko, A. (2011). *Thinking and speaking in two languages*. Clevedon, UK: Multilingual Matters.

Pienemann, M. (1998). *Language Processing and Second Language Development: Processability Theory*. Amsterdam: John Benjamins.

Pinker, S. (2013). *Learnability and Cognition: The Acquisition of Argument Structure*. Cambridge, MA: MIT Press.

Reiss, K. and Vermeer, H. (2014). *Towards a General Theory of Translational Action Skopos Theory Explained*. Abingdon: Routledge.

Rock, F. (2007). *Communicating Rights: The Language of Arrest and Detention*. Basingstoke: Palgrave Macmillan.

Sweller, J. (1988). Cognitive load during problem solving: Effects on learning. *Cognitive Science*, 12(2), 257–285.

Tiersma, P. (2001). The Rocky Road to Legal Reform: Improving the Language of Jury Instructions. *Brooklyn Law Review*, 66, 1081–1088. (Excerpt reprinted in Solan, L., Ainsworth. J. & Shuy, R. (eds) (2015). Speaking of Language and the Law: Conversations on the Work of Peter Tiersma. New York: Oxford University Press. 271–276).