

INSURANCE POLICIES — IS PLAIN ENGLISH THE ANSWER?

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1. Early insurance

The origins of modern risk insurance and their supporting documents are at least 5000 years old. The Babylonians, who flourished about 3000 B.C., used a commercial contract related to insurance. In the twelfth century the financiers of Lombardy, in Northern Italy introduced sophisticated insurance and banking concepts to Europe. A source of information is the mediaeval merchant, Datini of Prato who kept 400 contemporary insurance policy documents. Insurers had a bad reputation even then, as Datini wrote to his wife: ‘When they insure it is sweet to them to take the monies; but when disaster comes it is otherwise and each man draws his rump back and strives not to pay’ (Origo 1963:139). Some features of insurance have not changed since the Middle Ages!

In England lawyers drafted Lloyds marine insurance policies from 1575 onwards. Marine insurance by its very nature covered international risks. The written conventions and uniformity of the policy provisions meant that for centuries there were no major changes in the drafting of policies. Trust was extremely important, therefore there was less need to make the actual words more comprehensible. Inequality between the parties was not a major issue, as the parties were mostly sophisticated insurers, and ship owners or shippers of cargo. In early 20th century the terms of a standard marine policy were set out for the UK and Australia in legislation. In 1983 the UK introduced a new form of policy which stated the existence of an insurance, leaving the details of cover and any special conditions to be attached separately (Cockerell and Green 1994:4). This meant that the parties rarely read the terms of a policy unless they were unusual.

After the Great Fire of London, in 1666, the principles of marine insurance were extended to other risks, and the relationship between the insurer and the insured changed. By 1720 fire insurance was available for dwellings, mostly on seven year contracts. It was harder to categorise risks for buildings than for ships, but, with the industrial revolution and the introduction of steam power, hazardous processes increased and the demand for insurance increased also. Vehicle insurance started in 1883 with bicycle owners. In the 20th century motor car insurance policies have become increasingly important, and are available to unsophisticated buyers.

General fire and vehicle insurers did not have centuries of precedents or statutory forms to follow, as in the case of marine insurance. It was not necessary for a general insurance policy to be in any set form, or even in writing. There was no official uniformity of drafting and the language of policies evolved as legalese. The changes were relatively minor over a long period of time and the policies were not easy to understand. Finally there seemed to be a need for them to be written in a plainer variety of English.

2. The Plain English Movement

Levels of written and spoken style have always been recognised. Greek rhetoricians and later Roman orators used a three part style gradation — grand or high style, middle style, and plain or low.

The term *plain English* was first used in a technical sense by the dictionary compiler Robert Cawdrey in 1604:

A Table Alphabetically, conteyning and teaching the true writing, and vnderſtanding of hard vsuall Engliſh wordes, borrowed from the Hebrew, Greeke, Latine, or French.&c.

With the interpretation thereof by *plaine English words, gathered for the benefit & helpe of Ladies, Gentlewomen, or any other vnskilfull perfons.*

(reproduced in McArthur 1986:15; my emphasis)

In the fifteenth and sixteenth centuries, styles in English polarised between the high, classical, and often pretentious style and the low, popular, colloquial, plain and often crude style. As society grew more complex there were many different levels or 'registers' of English.

In the twentieth century, in England, C.K. Ogden (1920's), G. Orwell (1946) and E. Gowers (1963) were influential exponents of plain English in their attack against convoluted language including 'officialese' and 'bureaucratese', but only Orwell included legalese in this category. Orwell's image of plain English was that it should be 'transparent' like a pane of glass. Berel Lang (1991:2) took up the image:

The imagination, reacting against the partisan networks of history, understandably dreams of a neutral instrument — a medium at once transparent and subservient that would speak for itself but would also do as it was told.

The reformers all professed to be against gobbledygook and jargon, and with the rise of the consumers' rights movement in the 1960's and 1970's there was a push to have insurance contracts written in 'Plain English'. However, the danger in any prescriptive reform movement is that today's Plain English, mechanically applied, will become tomorrow's gobbledygook or jargon.

The Plain English Movement developed differently in different places.

In the USA the movement was mainly from the top down. An act of Congress in 1974 established the Commission on Federal Paperwork, which found that 'federal paperwork hurts most those least able to fend for themselves'. From 1978 USA government regulations were to be 'written in plain English and (be) understandable to those who must comply with (them)' (Redish 1985:129). The Document Design Centre at the American Institutes of Research in Washington established guidelines to follow as well as created new documents, and by 1979, thirty states required 'readable' policies in at least some types of insurance (Redish 1985:30-31).

In the UK the Plain English Campaign started from the bottom up, when some 'ordinary' people led by Chrissie Maher shredded official pension forms in front of the Houses of Parliament in London. The Campaign developed into a commercial business which translates into Plain English government and business documents like consumer credit forms and insurance policies.

In Australia a strong push came from document designers themselves. The former Victorian Law Reform Commission and private firms of solicitors assisted the Insurance Council of Australia to develop a general insurance code of practice for use as a self-regulatory code by insurers throughout Australia. It established standards of practice for policy documentation. According to the ICA General Insurance Code of Practice 1994 insurers must:

4.1(a) ... express policy documentation in plain language, and design and present policy documentation with the aim to assist comprehension by consumers ... and before each renewal:

4.1(c) ... provide to consumers information on any changes to the policy being renewed in plain language and in a format aimed to assist comprehension by consumers ...

The Insurance Council of Australia monitors compliance and reports annually on the operation of the Code. It has the power to impose sanctions if it finds breaches of the Code. The insurance industry feels that if the consumers understand their policy documents, they will have more

realistic expectations of their obligations and rights, and money will be saved on litigation and answering queries.

2.1 Definitions

The Australian document designer and insurance lawyer David Kelly offers the following definitions of *plain English* (1986:30):

... the greatest causes of difficulty are convoluted structures, incoherent organisation, and a wrong perspective which ignores the real audience ...

and (1988:22):

... direct and straightforward language which avoids obscurity, repetition and convolution. I do not mean simplified English — English that would be understood by the ‘average’ person — nor do I mean English that avoids necessary technical terms — in which, of course, the law like any complex discipline, abounds.

The American document designer Janice Redish (1985:125-6) says:

Plain English means writing that is straightforward, that reads as if it were spoken. It means writing that is unadorned with archaic multisyllabic words and majestic turns of phrase that even educated readers cannot understand. Plain English is clear, direct, and simple; but good plain English has both clarity and grace ... For a document to be in plain English the people who use it must be able to find the information they need easily, and understand it the first time they read it.

Both of these document designers think plain English should be ‘direct’ and ‘straightforward’. This just begs the question. Simplicity rather than simplification seems to be a goal. Redish also requires the written register to resemble the spoken, with the additional aesthetic requirement of ‘grace’. Bhatia (1983, quoted in Candlin 1990) distinguishes between ‘simplification’ of text, on a lexical and syntactic basis, and ‘easification’ of a text which leaves the text intact, but provides help to readers in navigating around or within the text. Navigation techniques in insurance policies include highlighting and foregrounding key information and adding commentary on text meaning, often by providing notes and a glossary. These techniques are meant to restore the cohesive links left out by the writer, but the question still arises as to what level of comprehension the text of the policy requires.

2.2 Communication with the intended audience

Policy drafters agree that documents should be drafted from the point of view of the reader, not the writer, but the exact level of comprehensibility required is not clear. The intended audience of Plain English, according to Kelly (1988), is not the ‘average’ person. For Redish (1985) it is ‘the people who use’ the legal document. For Kelly, Plain English touches on equity ‘where the form of expression disadvantages and even disenfranchises one of the parties’ (1986:7). For Candlin (1990:114), Plain English is a tool of social engineering helping to redress the inequalities of our multilingual and multicultural society. He argues that style should be approached not just from a linguistic and textual point of view, but should include a cognitive dimension, targeting the process of presenting the text and access to it. Woods (1994:68) doubts the assumption that an ‘... officer, receiving a directive to be mindful of the principles of plain English and perhaps after attending a training session on effective writing, will be able to write in plain English or otherwise produce documents ... which will make information more accessible to clients’. The problem is how to communicate successfully with the intended audience.

There is no doubt that lawyers today are generally more aware of the need to communicate effectively with the lay consumer of a document. There are less archaic words and formulas than in the past. However there are many different schools of thought about the way changes

should be implemented. The Plain English proponents are passionate in their beliefs. Non-lawyers Benson (1985), Penman (1992) and Eagleson (1990b) are very scathing about lawyers. Lawyers, Mellinkoff (1963) in the USA and Kelly (1988) in Australia, who advocate changes, are equally intolerant of their fellow practitioners.

In the case of insurance policies, legislative or voluntary code provisions are forcing insurers to convert their documents into a more accessible form in the USA, UK and Australia. Unfortunately passing a law and carrying it out are quite different. It is hard to define 'plain' English. Improving documents often depends less on shortening sentences than on the motivation and skills of particular lawyers, administrators, bank officials or insurance officers. Total restructuring of a document needs excellent writing, which is rare, and for which lawyers and insurers are not specifically trained. Also the people doing the new drafting need to be, not just ordinarily competent, but experts in the field, to be sure that they are not making unintended changes in meaning.

However, as with spelling reform or any other language change, what looks completely logical and sensible may never happen, or not in the way the proponents expect. Language is much more complex, subtle and resistant to change than these reformers believe. It can never be as neutral or transparent as the reformers hope. According to Danet (1980:49) the 'indeterminacy in law is in part the indeterminacy of language itself. In short much of the thinking behind the Plain English Movement is naive, both about the complexities of language and about the extent to which linguistic reform can change sociolegal realities.' Cameron (1995:75), in support of this view, says that the Plain English Movement ignores the 'variability of language, the indeterminacy of meaning, the irreducible distance between words and things'.

3. Plain English guidelines for insurance policies

Various guidelines of Plain English have been enunciated for over twenty years, in particular, changes in structure, vocabulary, syntax and discourse strategies. In the following sections I focus on the way these Plain English guidelines have been applied to the claims and fraud provisions in a 1992 fire policy (Appendix 1) and the claims provisions in a recent draft business policy (Appendix 2). To distinguish them from grammatical clauses I have called them *Clauses*.

3.1 Structure

The organisation of documents is as much a problem as the length of the sentences and the difficulty of specific words (Kelly 1986:30, 37). Sometimes a total reorganisation of text is necessary, including attention to layout, typeface, graphics, symbols such as logos and icons, numbers and other sequence markers, punctuation, white spaces round the print, schedules, headings and sub-headings, and *Clauses* and sub-*Clauses*. In the latest Plain English policies, *Clauses*, instead of being presented consecutively down the page, may be presented in columns across the page in the form of tables.

The 1992 Plain English fire policy (Appendix 1) is a small format 16 page booklet with an index inside the front cover. The schedule, which is new every year, is on a separate document. (There is an instruction to fold it and attach it to the back of the policy document!) The main heading is:

General Conditions (These apply to the whole policy)

The *Clauses* are numbered and sub-headed:

- 2. Fraud**
- 3. Claims**

and further divided into sub-*Clauses* (a), (b) etc.

The fraud and claims Clauses are still single sentences, but instead of being presented as a solid block of prose, as in older policies, there are three indented sub-Clauses containing 66 words in the fraud Clause, and eight indented sub-Clauses containing 198 words in the claims Clause. The content, although shorter, is similar to earlier policies, but the structure is further divided in this way for easier digestion.

As in traditional policies, defined expressions like *Policy*, *Building* and *Present Value* use the convention of starting with capital letters. As the pronouns *We*, *Us* and *Our* refer to the defined insurer and *You* and *Your* refer to the defined insured, they also start with capital letters (Appendix 1). However, not everyone supports this convention of capitalisation of defined words, including pronouns. It has been rejected in the more recent fire policies.

Another recent very radical householders' fire policy introduces a new convention of marking defined words, including pronouns, using the symbol + before the defined word. In this policy, the fraud Clause has been omitted because it is now covered under the Insurance Contracts Act 1984. The following claims Clause has been reduced to one sentence of 25 words. It uses underlining for emphasis, introduces a relative clause with the more 'user- friendly' relativiser *that* and finishes it with a preposition:

Making a claim

44 To make a claim, +you must also give us any other information or documents
(including original receipts, valuations and warranties) that we ask +you for.
(Phillips Fox Householders' policy 1996).

3.2 Vocabulary

Archaic or technical vocabulary is an obvious problem in legal documents, but the solutions have not been so obvious.

- **Archaisms**

Plain English drafting has made some changes in traditional vocabulary, but as this was happening slowly in any case, apart from the Plain English Movement, the changes are not very radical. In the fire policy claims Clause (Appendix 1), archaic words like *aforsaid* and *hereby* do not appear. The more formal *in any respect* of earlier versions has been changed to *in any way* in the fraud Clause.

- **Lexical density and terms of art**

Lexical, and especially nominal, density in the legal register often means the use, taken from the above Clause 44, of doublets like *information or documents* and triplets like *receipts, valuations and warranties*. There may be even longer lists or strings of words. This tendency appears in Plain English as well as in traditional insurance policies. These words are not always technical 'terms of art' with distinct meanings, but may be near synonyms retained for reasons of tradition. Even if they are not exactly synonymous, their use is still mainly for reasons of style. Charrow and Charrow (1979:1326) found that if there was no focus in a word list, the subject was unable to paraphrase the list, and therefore unable to understand any of the words in it. The length of the list made no difference. The 1992 fire policy (Appendix 1) retains the doublets *means or devices* and *wilful act or connivance* and the triplet *destruction loss or damage* in the fraud Clause. The triplet in the claims Clause has been reduced to the doublet *loss or damage* and a long string of nouns has been reduced to *proofs and information*. If Charrow and Charrow's evidence is accepted, even the doublets and triplet in this Plain English fire policy would have the effect of making these Clauses too lexically dense to process.

Under a fire policy there are two methods to work out the amount payable, *indemnity value* which is 'replacement value less depreciation', and *reinstatement value* which is 'replacement value'. The 1992 policy claims Clause 3(h) (Appendix 1) has substituted *replacement* for the older *reinstatement*. The triplet of nouns, which are not exactly synonyms, remains:

Your intention to immediately undertake the *replacement, rebuilding* or *repair* of the Building.

In Section 1 Item 1 of the same policy, which describes what the insurer will pay, there is a comparable verbal construction. Although *rebuild* has been omitted as superfluous, the dense lexical effect of the triplet of verbs, including the repetition of *repair* and *replace*, remains:

We will at Our option *repair, replace* or *pay* the reasonable cost to *repair* or *replace* the Building.

The Phillips Fox Householders' policy 1996 retains the string as nominals. In addition it uses the compound noun constructions *+home buildings* and *replacement cost*:

We will settle a valid claim in relation to the *+home buildings* by paying, at our option, for the repair, rebuilding or replacement cost of the *+home buildings*.

Replacement is just as much a term of art as *reinstatement*. *Home* is a word from either an intimate register, or an insincerely intimate register, and when compounded with *buildings* it requires to be defined. This policy is attempting to diverge from the register of traditional legalese, but the linguistic feature of lexical density remains.

Kelly (1986:25) wanted to keep unavoidable technical terms of art in policies, but offer explanations of their meanings, perhaps in notes. Eagleson (1990b:56) would include, as a second line of attack, definitions or a glossary at the end of a document for highlighted words. However, too many explanations or definitions may confuse rather than clarify meaning. A NZI Insurance motor car policy contains this unhelpful note:

An exclusion is something which is not covered. We have already put most of them in your Policy where you would expect to find them, so you will have read them already.

3.3 Syntax

- **Sentence length**

In spite of the findings Charrow and Charrow (1979), that shorter sentences alone do not facilitate comprehensibility, shorter sentences are seen as a goal of Plain English. The law of the state of Connecticut is an extreme case of a very narrow prescriptive requirement that sentences should be no more than 50 words long, and that the average sentence should consist of 22 words (Kelly 1986:49).

- **Chronological re-ordering of phrases and clauses**

According to Kelly (1986:24) and Eagleson (1990b:43) Clauses should also be arranged in chronological order for easier processing.

- **Main clauses before conditional clauses**

Legalese is full of conditions. According to Greenberg's Universal No 14 (1963:49) 'In conditional statements the conditional clause precedes the conclusion as the normal order in all languages'. Where there are multiple conditions there may be a heaviness constraint that reverses that order. In legalese, no matter how many conditions there are, the conditional clauses come first, sometimes starting with *if*, sometimes using the archaic subjunctive form *be*. The main clause or conclusion comes last, using the indicative *is*. Plain English guidelines would reverse this order by making multiple conditions follow the main proposition (Kelly 1986:18). Eagleson believes that 'general readers find it easier to have the main clause first,' and that 'a series of conditions after the main clause also means that they can be set out in a list to help readers even further' (1990b:43).

Actual practice is different. In the 1992 fraud clause (Appendix 1) the main clause comes first, followed by three conditional clauses in the indicative mood starting with *if*. They are arranged

as sub-Clauses (a), (b) and (c). This sort of simple re-arrangement is not followed in the preceding misrepresentation and non-disclosure Clause in the same policy set out below:

1. Misrepresentation and Non-Disclosure

If You:

(a) failed to disclose to Us before this Policy was entered into every matter [which You know] or [which a reasonable person could be expected to have known to be a matter relevant to Our decision to insure You and on what terms], or

(b) misrepresented any facts to Us before the Policy was entered into,

and if We would not have entered into the Policy for the same premium and on the same terms and conditions [expressed in the Policy] but for the failure to disclose or the misrepresentation, then:

(i) **We may reduce Our liability** in respect of any claim to an amount [which would place Us in the position] [We would have been but for the failure to disclose or the misrepresentation], or

(ii) if the non-disclosure or misrepresentation was fraudulent, we may avoid this Policy.

This 'Plain English' Clause is complex. I have put square brackets around some embedded relative clauses, some of which have further embedded clauses in them. I have also underlined the main parts of the conditions and highlighted the main parts of the main clauses. Two conditional clauses coordinated by *or* are followed by a conditional clause coordinated by *and*. Then comes the main clause which is followed by an alternative consisting of another conditional clause followed by a main clause. Apart from using the more 'personal' first and second person pronouns instead of 'impersonal' noun phrases, this Clause is not an improvement. This example of 'Plain English' is hardly 'easier' to understand. It reflects a muddled understanding of what good Plain English should be.

The 1996 Phillips Fox business policy (part of which is in Appendix 2) achieves the same effect much better:

When are we entitled to refuse or reduce a claim?

11 We are entitled to refuse a claim if the loss, damage or liability is not covered by the policy. We may also be entitled to refuse a claim, or reduce the amount we have to pay, if you do either of the following:

- give us the wrong information or fail to comply with your duty of disclosure.
- breach any of the conditions of the policy.

This obvious contrast supports my argument that there is bad Plain English and good Plain English, and much depends on the ability of the writer.

• **Adjuncts in appropriate places**

Legalese often interrupts ideas by inserting phrasal or clausal adjuncts in inappropriate places. Eagleson (1990b:46) explains the difficulty for the reader of retaining one piece of information while trying to absorb another, when the action and the thing acted on are not kept together. One Plain English guideline requires adjuncts to be removed between the modal *must* and the auxiliary *be* or the lexical verb (Kelly 1986:21), but not all Plain English policies conform. Although the adverbs *immediately* and *promptly* have been inserted in this position in (b) and (f) of the claims Clause (Appendix 1) these exceptions are not problematical because they are so short.

• **Directives, prohibitions and negatives**

For a mandatory provision or directive the 1992 fire claims clause (Appendix 1) uses the modal *must* with a verb, not *shall be* with a nominal e.g. ‘You must notify Us’ instead of ‘Notification shall be given’. The claims Clause in the more recent draft policy uses *must*, but also the more common verb *tell* instead of *notify*:

To make a claim +you must tell us as soon as possible of any loss, damage, or accident, and of any indication that someone may make a claim against +you in relation to an accident.

(Phillips Fox Householders’ policy 1996).

Plain English suppresses the use of the negative in directives (Kelly 1986:23). It also avoids multiple negatives where possible, and especially in questions posed from a negative point of view such as ‘Is your house uninsulated?’ (Eagleson 1990b:51)

• **Passives**

According to Redish, readers try to make sense out of traditional legal documents by translating them into scenes where there are people doing actions (1985:132). One way to do this is by using the active instead of the passive voice. The 1992 Plain English fire policy (Appendix 1) uses the active voice in the main clauses. The passive voice is retained in the same places as in older policies, twice with an agent (my emphasis) in the fraud sub-Clauses, and twice without an agent in the claims sub-Clauses.

2. ... any fraudulent means ... are used **by you** ...
... any destruction ... is occasioned **by your wilful act** ...
3. ... if forcible ... entry ... is suspected ...
... all proofs ...as may be reasonably be required ...

Charrow and Charrow’s research (1979) shows there is no difficulty processing the passive in main clauses. Although the Plain English movement claims that, as a general rule, the more personal active voice is direct and easier to follow, with the agent as subject of the clause, there are important qualifications. Eagleson (1990b:47) believes that if the agent is unknown or unimportant it is better to leave the passive construction. Kelly (1986:23) prefers the active to the passive, but not slavishly. He mentions the agent where possible to remove ambiguity. If the agent is unknown he does not hesitate to use an indefinite pronoun e.g. in the draft Phillips Fox Householders’ policy (1996):

... **someone** may make a claim against +you ... (my emphasis).

In the active construction, the agent appears as subject. The use of first and second person pronouns as subjects facilitates the change from the overwhelming use of the passive to the active, as it clarifies who is doing what (Eagleson 1990b:49). It also attempts to change the tone of the document from impersonal to personal, by adopting an oral language convention.

3.4 Discourse — oral language conventions

Using first and second person pronouns has the advantage of directness, but insurance policies can never be as personal as casual or even consultative conversation (Joos 1962:13). They belong to the impersonal formal style, where there is cohesion, but absence of participation. As noted above the Plain English drafters have tried to invent some intermediate style by using new conventions, like capitalisation of the pronouns *we*, *us* and *our* for the insurer and *you* and *your* for the insured in the 1992 fire policy (Appendix 1), or the use of the icon + before the defined pronouns in the draft policy (Phillips Fox Householders’ policy 1996). These are distracting. They violate the norms of written English, and do not fit into oral language conventions either.

The register used to write insurance policies can never be genuine dialogue. It is inherently insincere, or ‘synthetic personalization’ (Fairclough 1989:62). An example of this inappropriate

register is contained in a ‘ Plain English’ car insurance policy. In an effort to consider its readers the following redundant statement appears:

Customer Information

Please Read This First ...

1. We will give you this copy of our Policy when you propose for insurance. It tells you about what is covered and what is not, claims procedure, excesses and other conditions.

The next section continues in a chatty colloquial register under the heading:

Let’s get introduced ...

We are NZI Insurance Australia Limited and we aim to give you the highest possible standard of service, treating you fairly and honestly at all times.

You are the person named in the current schedule as the Insured. You are the customer, the most important part of our business.

Personal dialogue conventions are used inappropriately in this policy. These include the pseudo-intimate opening formula, the use of the demonstrative *this*, the emotionally coloured verb *aim*, and the adverbs *fairly* and *honestly*, and emphatic devices like the superlatives *highest possible*, and *most important*. This is not plain English. It is replacing legalese with advertising hype. The insurer is confusing the information function with marketing techniques.

The policy in N.R.M.A. Insurance Limited v. Collier & Anor (1996)

includes a politeness formula:

Please remember, under this section of the policy the most we will pay is the sum insured.

In dialogue *please* might have the effect of softening a directive, depending on the context, but in an insurance policy it claims to represent a personal relationship between the insurer and the insured which does not exist.

Fairclough (1989:23) goes further. He argues that there are political implications, when, as in advertising and mass media communication, the discourse is one way only. The Insurance Company is identified with the corporate *we*, while the insured person is addressed directly as *you*. He claims that these communication techniques disguise the manipulative relationship of authority over the mass of people beneath a facade of a personal and equal relationship (Fairclough 1989:22). Insurers, unlike the bureaucracies of the state, are not in positions of this kind of power, but the reformers of the Plain English movement should be aware of the dangers of this sort of language engineering.

4. Tests of the effectiveness of Plain English

To summarise so far, the guidelines of the Plain English Movement adopted in drafting insurance policies include changed format and new conventions flagging defined terms. There has been very little change in the amount of lexical density or number of terms of art, but some restructuring of Clauses to avoid the complexity of embedded clauses, multiple conditions and multiple negatives, and some avoidance of the passive. Change of tone from impersonal to personal has been an aim by using first and second person pronouns. However testing the comprehensibility of the reformed documents compared to those drafted in traditional legalese is not without problems.

Testing for comprehensibility of documents is a very inexact science. There are various inexpensive, rather mechanical, tests, widely used in the U.S.A, like the readability formulas which count the number of pages, the number of words in each sentence and the number of syllables in each word, on the basis that shorter must necessarily be easier to understand. These

tests have been the subject of criticism. Latin or Romance origin words, which are usually longer, are presumed to be in a higher register and more difficult to understand. A short text in legalese may, with shorter technical words, attract an artificially easy score, although Benson (1985:554) claims that the texts used in the tests are long enough to overcome this problem. According to Danet (1983:5), overlong words and sentences should be regarded as symptoms rather than causes of incomprehensibility. Extremely long sentences do cause memory overload, and therefore difficulty, but there is no direct correlation between the length of a word or a sentence and its comprehensibility. Complex structure or discourse factors such as links between sentences may be more relevant. Restructuring is vital, and simplification of words may not work to make a document more comprehensible.

General comprehension tests may be inappropriate for insurance policies, as buyers do not need to read the whole policy. Comprehension tests can be developed for specific parts of a policy.

5. The current position

Is Plain English a key to unlocking the mysteries of the law? The doctrine of belief in the efficacy of Plain English has become an accepted catch cry. There is a danger that the catch cry will harden into a dogma which will become the new orthodoxy. Are the tenets of Plain English as rigid as the language it is replacing? The proponents of the Plain English movement are enthusiastic to the point of zealotry and sometimes they produce converts:

Now, reform is on its way, borne by inexorable forces that promise to bring an end to legalese as the predominant language of the law within our lifetime. These forces arise as the intellectual foundations of legalese crumble, self-interest is exposed as the sole rationale for the language ..

(Benson 1985:568)

Woods (1994:67) gives credit to early Plain English reformers who began to change people's perceptions, attitudes and behaviour, but she warns of the danger of 'establishing an unopposed and uncritiqued orthodoxy of theory and practice'. The 'uncritical application of so-called principles or guidelines of plain English will not lead to production of accessible documents and reading materials'. Although there is some consensus about the necessity for redrafting rules there is no magic formula to translate a document from 'gobbledygook' into Plain English, and a new kind of confusion may be being created.

5.1 Reasons for resistance to Plain English

• The legal profession attitude factor

Insurers and lawyers have specialised technical expertise, and although they should be able to write well, this is not always the case. Insurance policies are now required to be drafted in 'plain English'. Lawyers may feel that inertia and lack of interference are safer when dealing with a familiar document. There is the risk of making a mistake which might make the situation worse than it was before. No document is perfect, no set of circumstances is exactly the same as another, and in disputes the courts will interpret policy wordings. Translation into modern standard English from archaic words and outdated constructions may inadvertently change the meaning of the text against the intention of the parties. It may leave something out or include something which was intended to be left out. On the other hand it must be said that it may sometimes resolve existing ambiguities to the satisfaction of all parties.

Judges have not been as unanimous in their welcome of actual Plain English attempts as they have trumpeted the need for them. Meagher JA, in the NSW Court of Appeal, is critical of Plain English insurance policy drafting:

The difficulty chiefly arises because the policies ... from the insurer could not be more perplexing if they had been specifically drafted in order to generate ambiguity.

(Edwards Dunlop & Co. Ltd v. C.E. Heath Underwriting 1990)

He complained in another case, ‘Apparently “plain English” means confused thought and split infinitives’. He commented on an insurance policy:

This policy is supposed to be expressed in ‘plain English’. If the attempt to reduce documents to ‘plain English’ is going to end in having to wrestle with documents like the policy in the present case, the sooner the attempt is abandoned the better.

(N.R.M.A. Insurance Limited v. Collier & Anor. 1996).

Meagher JA’s opinion reflects many lawyers’ sincere belief that Plain English alternatives are not enough to make difficult documents comprehensible to everyone.

English lawyer Sir Ernest Gowers (1963) expressly exempted legal drafting from the necessity to be readily intelligible, euphonious or elegant. He said it was usually cumbrous and uncouth, but warned of the danger of losing the special meaning words may have acquired by legal convention and previous decisions of the Courts. Many conservative lawyers in the common law world hold as an article of faith that the documents they use should be as precise and unambiguous as possible. They feel that the Plain English movement may be sacrificing some of these beliefs.

On the other hand, American lawyer and campaigner for plain English, David Mellinkoff (1963), while stating that most legal prose can be made more intelligible than it is, warns that intelligibility is not synonymous with brevity, and sometimes in appropriate circumstances precision may need to be sacrificed. It is not an accident that I have used the coloured terms *zealot*, *convert* and *belief*. There is an element which is not purely rational in the Plain English debate, and attitudes and practice vary, even among lawyers.

- **The magic factor**

There is a certain rhythmic, solemn, almost poetic quality about traditional legal prose, perhaps reflecting the days when most of society was illiterate, but still needed to enter into binding agreements. Today written has superseded oral language for contracts. Rhythmic poetic language is normally reserved for literature, but traces are found in many rituals, as in religion, where the solemnity of commitment needs to be expressed. The need for ritual carries through to the solemnity of any binding promise, as between parties to a contract.

- **The power factor**

The consumer movement is seeking to empower the ordinary citizen who is struggling with the intricacies of the law and the bureaucracy of government, banks and insurance companies. Lawyers have the mystique and power of an elite in-group, which, as long as it has its own secret language, excludes the outsider. The register of legalese is like the lawyers’ badge of identity, and, after years of indoctrination, the lawyers feel comfortable with it. In their turn the lawyers fear that, if their documents become too easy for the lay person to read, they will lose their mark of group distinction and exclusivity, and therefore their power (Benson 1985). This shows that there is something more than rationality involved in the resistance to ‘lowering’ the register.

The insured consumer may be disadvantaged by coming from a different language or cultural background, or by having a different intellectual capacity from the insurer. However the evidence of various testing procedures has not yet established that it is possible to compensate for this by changing the drafting style. Plain English documents are drafted by a team of experts in the subject matter and in drafting. Although readers are considered, they have no direct input into the content or style.

- **The economic factor**

To look at more practical concerns, the person or firm paying for the redrafting may feel it is not worth it. With the pressure of budgets and deadlines it is hard to measure the benefit directly on an economic rationalist scale.

5.2 The Difficulties of writing good Plain English

It is very difficult and time consuming to write **good** Plain English policies. Lawyers and insurers are not usually trained in those techniques, and people who are trained may lack the technical knowledge to adequately express what needs to be said. Vocabulary is not necessarily the main problem for comprehensibility. The original concepts still need to be expressed in a way that works, both to make the policy more accessible to the consumer and to carry out the intentions of the parties, while observing the requirements of the law.

6. Conclusion

The ideal of clear plain written English has been admired from the earliest times, but it was not until the rise of the consumer movement in the 1960's and 1970's that anyone attempted to put this ideal into practice by introducing systematic changes to legal drafting techniques. Insurance policies, notoriously difficult to understand, were an obvious target for the Plain English Movement reformers. After more than twenty years it is possible to look at the reformers' efforts to see how far they have succeeded in effecting improvements in the comprehensibility of insurance policies.

I have examined some of the prescriptive guidelines of Plain English and demonstrated that some Plain English policy drafting is better than others, both from the point of view of the consumer's comprehension, and from the point of view of conforming with the law and the insurers' intentions. There appears to be no unequivocal evidence that an insurance policy drafted in Plain English is necessarily easier to understand than a traditionally drafted one. The difficulty is the concepts themselves, rather than the language in which they are expressed.

Opposition to reform has come from many lawyers, who fear the obvious threats to their power and exclusivity of knowledge. Consumers may also have an underlying resistance to reading their policies, or if they do read them, to being party to an artificially forced personal relationship, especially if the documents are no more truly 'user friendly'. The Plain English Movement is changing insurance policy documentation, and will continue to do so, but only time will tell if the changes are improvements, or simply represent a new set of rigid parameters to replace those being discarded. The goal of making insurance policies comprehensible to consumers may remain elusive.

CASES CITED

Edwards Dunlop & Co. Ltd v. C.E.Heath Underwriting Pty Ltd 1990 ANZ

Insurance Cases 60-946.

N.R.M.A. Insurance Limited v. Collier & Anor 1996 ANZ Insurance Cases

61-337.

APPENDICES

APPENDIX 1

Post-Plain English — 1992 Fire Insurance Policy

NZI Insurance Australia Limited - Householders' policy

GENERAL CONDITIONS

(These apply to the whole Policy)

2. Fraud

We are entitled to refuse to pay a claim without prejudice to any other right We may have under this Policy if:

- (a) any claim is in any way fraudulent, or
- (b) any fraudulent means or devices are used by You or anyone acting on Your behalf to obtain any benefits under this Policy, or
- (c) any destruction, loss or damage is occasioned by Your wilful act or connivance.

3. Claims

On the happening of any event likely to give rise to a claim You must:

- (a) take all reasonable precautions without delay to minimise the loss or damage and to prevent further loss or damage,
- (b) immediately inform the police if the property insured is lost or damaged or if forcible and violent entry or malicious damage has occurred or is suspected,
- (c) notify Us verbally as soon as possible,
- (d) complete and lodge a claim form as soon as practicable and submit in writing to Us all particulars of the claim,
- (e) not authorise the repair of the property insured without Our consent,
- (f) promptly forward to Us any writ, summons, communication received concerning the event or claim and You shall not negotiate, admit or repudiate liability without Our written consent,
- (g) provide us with all proofs and information as may reasonably be required together with a statutory declaration (if requested) of the truth of the claim and any matters connected therewith.
- (h) advise Us in writing within three months from the date of loss or damage of Your intention to immediately undertake the replacement, re-building or repair of the Building, failing which Our liability is limited to the Present Value of the Building.

APPENDIX 2

Post-Plain English — 1996 Business Policy

Second draft: David Kelly & Geoff Masel (Phillips Fox)

Claims

6. As soon as practicable you must do each of the following:
 - 6.1 give us details of an event which may give rise to a claim and send us a written confirmation within 30 days.
 - 6.2 take all reasonable steps to prevent or reduce any further loss, damage or liability.
 - 6.3 if property has been lost or stolen, or damaged by vandalism or maliciously, tell the nearest police station, and obtain a police report if we ask you to.
 - 6.4 tell us of any prosecution or inquest that is to take place.
 - 6.5 give us any writ, summons or other relevant communication.

Claims: property damage

7. You must not authorise repairs to or replacement of property without our consent.

Claims: business interruption

8. At your own expense, you must give us books of account documents and any other evidence that we reasonably ask for to investigate or confirm a claim. If you have professional accountants regularly acting for you, they must produce the details we ask for. You must also give us a statutory declaration if we ask for it.

Claims: liability

9. As soon as practicable, you must do each of the following:
 - 9.1 Give us written notice of all relevant details of an event which may give rise to a liability.
 - 9.2 do your best to preserve anything that may be useful as evidence in connection with a claim. As far as practicable, you must not alter or repair relevant premises, fencing, machinery, furnishings, fittings, appliances or plant without our consent until we have had an opportunity to inspect.

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