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Linguistic Issues: Is Plain English the Answer to the Needs of the Jurors?

Leon D. Lazer
Touro Law Center, llazer@tourolaw.edu

Is Plain English the Answer To the Needs of Jurors?

BY LEON D. LAZER

As Chief Justice Rehnquist noted in a recent capital case, "A jury is presumed to follow [the judge's] instructions. Similarly, a jury is presumed to understand a judge's answer to its question."[1] These presumptions, combined with rules that prohibit impeachment of juries, make it virtually impossible to overthrow a jury verdict on the ground of jury confusion or lack of comprehension. Whether in federal or state courts, reversals on the basis of comprehensibility criteria are just about nonexistent.

By and large, lawyers and judges do not accord significant weight to comprehensibility issues. Lawyers focus on the slant of the charge, while judges concentrate on legal correctness to avoid reversals. Nevertheless, a multitude of studies spanning more than a quarter century suggest that there is substantial doubt about the competence of jurors to understand, remember and integrate the evidence and the law as it is thrust upon them in modern-day trials. Proposals for solution to, or better perhaps, alleviation of the problem, have evolved from emphasis on improved linguistics to more radical measures to transform the current state of juror passivity to one of juror activity.

Ancient Antecedents

The problems have rather ancient antecedents. In the early days of English law, juries had broad powers of investigation and inquiry, even to the point of speaking to each other and to witnesses out of court before trial. Beginning in the sixteenth century, powerful lawyer guilds sought to control juries, in part by limiting what they could do and what they could hear in the way of evidence.

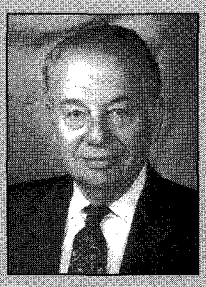
At the birth of our republic, juries still had broad powers over issues of law and fact. As Chief Justice Jay declared to a jury in *Georgia v Brailsford*[2] in 1794, "You have nevertheless the right to take upon yourself to judge of both and to determine the law as well as the fact in controversy." It was not until Justice Harlan's lengthy opinion in *Sparf v. United States*[3] a full century later that the Supreme Court finally bedded whatever issue of division still remained by holding that in criminal cases the rule was the same as on the civil side: it was the duty of the jury to receive the law from the court and to apply it as given by the court.

When the need to deliver correct instructions on the law coalesced with advancing methods of recording trials, the result was an increasing number of reversals based on erroneous charges and the emergence of the pattern jury movement. By dint of the labors of then New York Supreme Court Justice Bernard S. Meyer and his Pattern Jury Instructions Committee, New York received its first volume of Pattern Jury Instructions in 1965; Criminal Jury Instructions followed. The emphasis, of course, was on legal correctness. In this respect, pattern jury instructions have achieved remarkable success. The PJI Committee is aware of only three reversals based on challenges to the correctness of its charges during the 36 years of its existence.

A Foreign Tongue

Although the comprehensibility of jury instructions is much the focus of current discussion, as early as 1930 Jerome Frank observed that "everyone who stops to see and think knows that these words might as well have been spoken in a foreign language."[4] It took until the mid-1970s, however, for comprehensibility to draw attention. A number of studies concluded that jurors had considerable misapprehension about the meaning of instructions.

The now-famous study by Robert and Veda Charrow[5] reached the conclusion that standard jury instructions were not well understood and that the fault lay largely with certain linguistic "constructions," the alter-



LEON D. LAZER is chair of the New York Pattern Jury Instructions Committee. He is a professor at Touro Law Center, a retired justice of the Appellate Division, Second Department, and special counsel to Lazer, Aptheker, Feldman, Rosella & Yedid, P.C., in Melville. A graduate of the City College of the University of New York, he received his J.D. from New York University Law School.

ation of which would dramatically improve comprehension. The Charrows' list of offending "constructions" included nominalizations (nouns constructed from verbs); "as to" phrases; misplaced phrases in sentences (mostly prepositional); difficult lexical terms (*e.g.*, "imputed"); multiple negatives; passive mode in subordinate clauses; word lists (*e.g.*, "give, bequeath and devise"); discourse structure (organization); and embeddings (numerous subordinate clauses in a sentence).

The original studies were conducted largely with volunteers and prospective jurors, but the Forston study[6] used experienced jurors. The techniques applied were audio recordings of charges, videotapes of brief trials, pattern instructions and questionnaires. A few examples of the findings in these and other studies are illustrative.

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Disturbing Findings

Forston found that 86% of criminal jurors were unable to respond accurately when asked what constituted proof of guilt; less than half correctly answered questions on proximate cause. Strawn and Buchanan[7] found that 43% of the volunteer jurors believed that circumstantial evidence was of no value, while half did not understand that the defendant did not have to provide evidence of innocence.

Amiram Elwork, James Alfini and Bruce Sales[8] found that 51% of answers by jurors in a hypothetical murder case were correct, although some panels were only 40% correct on other questions.

Testing their jurors with rewritten instructions, the studies demonstrated that understanding could be substantially improved. Other studies in Arizona, California, Michigan, Nevada and Wyoming, with real jurors, have found significant deficiencies in juror understanding. The title of a 1998 article in the *Vermont Bar Journal*, "It's Unanimous: Jurors Don't Understand Instructions,"[9] undoubtedly was an overstatement—but there are serious shortcomings.

Nevertheless, no study, and apparently no case, has yet established that linguistic misunderstanding of correct charges has actually affected the quality of justice. The few reversals seems to have been based on ambiguity. Interestingly, the remarkable recent Wyoming study,[10] in which half of the District and County judges participated, revealed that while all of the participating judges believed their instructions were understood, they would have found differently than the juries did in half of the civil cases. Professor Bradley Saxton, who supervised the study, concluded that some of the particular issues on which the questionnaires revealed incorrect answers may have been material to the verdicts they reached.

Juror Inattention

Significantly, 36% of the lawyers who participated in the Wyoming study thought that the instructions were not presented in an animated fashion and 25% thought that even when the instructions were animated the jury was inattentive. That inattentiveness or lack of interest—the "eyes glaze over" syndrome—is attributed by some to the passive role our juries play in the current trial model. In its approach, the "jury reform" movement views difficult linguistics as only a part of a much larger comprehension problem deriving from jury passivity that results in loss of interest, distraction and boredom.[11]

One writer has asserted that "our legal system pays lip service to the notion that the jury is the trier of fact and therefore functions as a kind of expert in its own domain. However, we do not treat jurors as experts. If we did, we would accord them much greater freedom in certain areas. We would permit their notetaking and question-asking and we would provide them instructions that are not so arcane and convoluted as to be unreadable by most people."[12] The oft-replayed videotape analog is the class that lasts several weeks during which the students listen to concepts foreign to their experience, are not permitted to take notes or ask questions, and then are given a written examination.

Engaging the Jury

The jury reform movement that argues for increased juror participation and activity is a rather recent creature. It has resulted in the creation of commissions, studies and reforms in a number of states. New York has been active. Chief Judge Kaye and Chief Administrative Judge Lippman appointed a committee of lawyers and judges to make recommendations that would enhance the jury process. Among the many committee recommendations were interim summations and instructions, juror notebooks, juror notetaking and furnishing copies of the instructions during deliberation.[13]

Very few states have proceeded beyond the study and recommendation stage. Arizona has, by rule, enacted far-reaching changes on the theory that "active learners make better learners." The Arizona changes include juror questions of witnesses, juror discussion of evidence during the trial, judges' dialogue with jurors

on impasse, permitting summations to follow the charge, giving guidance during deliberations, and juror notebooks and notetaking.[14] Colorado and Utah have also implemented rule changes. Other changes recommended by some commentators include use of illustrations during the instructions and—heaven forfend—having the judge descend to the podium to give the instructions.

While the rule changes have not incurred much resistance in Arizona, retired Arizona Judge B. Michael Dann, a major player in the reforms, is pessimistic about the chances for widespread dramatic alteration of the conventional trial model. Resistance to proposals for greater juror participation and improved communication with jurors, he believes, derives from the investment that lawyers and judges have in the historical and current model of the adversarial jury trial and the inherent distrust of juries that is part of the model.[15] In an era where even the idea of juror notetaking and juror questions often inspires vigorous objection, the prospect of significant change in the current model remains doubtful.

Slow Process of Change

So where are we? If the mass of social science evidence is to be believed, juror comprehension of judicial instructions leaves much to be desired. There also is evidence that language change can have a positive effect on comprehension, but whether language change, standing alone, can substantially alleviate the problem is now questioned.

Although activating our now-passive juries may make some of us feel better because it democratizes the process, whether it will actually increase understanding of instructions and better the quality of justice is a theory that has yet to be proved. In any event, we must await the results in the few places where substantial change has taken place. Considering where the nation is more than a quarter century after the first linguistically oriented comprehensibility studies occurred, these mills grind slowly.

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1. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citations omitted).
2. 3 U.S. 1, 4 (1794).
3. 156 U.S. 51 (1895).
4. Jerome Frank, Law and the Modern Mind (Peter Smith ed., 1970).
5. Robert P. Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979).
6. Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. Rev. 601 (1975).
7. David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478 (1976).
8. A. Elwork, et al., Making Jury Instructions Understandable (Michie 1982).
9. Ann Saxman, *It's Unanimous: Jurors Don't Understand Instructions*, 24 Vt. B. J. 55 (1998).
10. Bradley Saxton, *How Well Do Jurors Understand Jury Instruction?* 33 Land & Water L. Rev. (1998).
11. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 Ind. L. J. 1229 (1993).
12. Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 Tenn. L. Rev. 701 (2000).
13. Report to the Chief Judge and Chief Administrative Judge (January 1999).
14. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 Judicature 280 (1996).
15. *See* note 11, *supra*.