CHAPTER 3

Analysis of Legal English with Reference to Statutes and Documents

We have seen that legal English is a separate language, it seems best to regard it as a variety of English. It is peculiar and often hard to understand from the perspective of lay public. Even Judges and lawyers are frequently confronted with disputes about the meaning of a particular document or statement, whether it is a statute, a contract, or an insurance policy.

According to Solan:

In these cases the judge’s chore is to decide what the disputed language means, or whether the statement is ambiguous and the words of the statement undermine its meaning. To make this decision, the judge must not only use his knowledge of language to read and write, but he must think somewhat abstractly about the use of language in the document or statement in dispute, and opine about this language. The arguments presented in the judge’s opinion will therefore be linguistic arguments about why the language in dispute should result in one side winning instead of the other.1

1 Lawrence M. Solan. The Language of Judges. Chicago: The University of Chicago Press, 1993, P.11. Solan has written extensively on language and law. The book, The Language of Judges explores the application of modern linguistic theory to law with skill and care. Solan’s thoughtful inquiry draws from contemporary study of language to provide much insight into judicial practice. He educates the reader how linguistics can illuminate legal texts. The book goes beyond its goal of critiquing existing judicial practices to show how the explication of the shared competence of all speakers can provide a basis for improving the quality of judicial discourse.
The law and its language affect the daily lives of virtually everyone in the society. The Supreme Court of India has expressed its opinion that, "there is no part of our national and individual life which is not affected by one statute or other. Local authorities, nationalized banks, public and private corporations are all regulated by statutes. Different provisions of statute continue to affect the life of ordinary citizens from birth till death."\(^2\)

Over four centuries ago Plowden said, "Each law consists of two parts viz., the body and the soul; the letter of the law is the body of the law and the sense and reason is the soul of the law... And law, to a large extent lives in the language even if it expands with the spirit of the statute."\(^3\) One of the major problems is how to use the language to make the statute to correspond with the aspiration of past, present and the future. It is desirable for a statute that it should contain the impact of old traditions, capability to answer needs of the present and flexibility to fulfill the demands of the future. George A. Miller rightly says, "Language is the servant of man and man relies on the old to make the new intelligible".\(^4\)

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Like statutes, documents are also varieties\(^5\) of legal discourse. The language and style of lawyers also differs substantially from one variety of writing to another. Some of the more common legal varieties are pleadings, petitions, orders and statutes, and private legal documents like contracts and wills. As a class, these can be called operative legal documents,\(^6\) in that they create or modify legal relations. In linguistic terminology, they all contain legal performatives.\(^7\) Operative documents tend to have not only very formal and formulaic legal language, but they traditionally adhere to a very rigid structure. The most notorious attributes of legal English tend to occur in operative documents. For example in this court order: ‘the defendants are hereby restrained from causing any kind of interference in the suit property till further orders’.

Another general class can be called expository documents.\(^8\) These typically delve into one or more points of law with a relatively objective

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\(^5\) Basically a variety refers to a category of composition; the members of the category usually share a particular structure as well as level of formality.

\(^6\) Operative legal documents are such documents which have the effect of creating, assigning or transferring legal rights like contracts, sale deeds, wills etc.

\(^7\) John L. Austin. *How to Do Things with Words* (2d ed). Oxford: Clarendon press 1962, p.57. He says that in some instances the act of speaking and the act of doing are the same. The classic example is, “I now ‘pronounce’ you husband and wife”. Thus uttering some verbs as ‘pronounce’, ‘object’, ‘overrule’, etc, have the quality of performing the act of verbs just by saying these, and are called legal performatives.

\(^8\) Expository documents are admissible evidences, consisting of official orders, statements, certified copies of judicial orders or registered documents which can help explain and elucidate the case of the petitioners, defendants or respondents.
tone. An office memorandum explaining a legal matter or letter to a client is an example of this category. Judicial opinions are also expository to the extent that the judge expresses what the law is. Most modern opinions have a relatively formal tone, but the language is largely Standard English rather than legalese. Expository documents tend to conform to a traditional structure, but it is usually less rigid than that of operative documents. The style resembles formal everyday language, although use of legal terminology is almost unavoidable. One study supports the observation that expository documents, specifically letters from corporate counsel to clients are normally not all that complex linguistically.\(^9\) For example, let us consider this judicial opinion:

It is hereby opined that while fixing the seniority of an employee in a department or organisation in which there is no definite set of service rules, the safest principle for fixing the seniority of an employee is “length of service”. Therefore, in the instant case the seniority of the persons involved can be fixed from the date of their joining in the department. The persons having longer service will rank senior than those of having lesser.

A final general category is persuasive documents. This class includes briefs that are submitted to courts and memoranda of points and authorities.

Like expository documents, they tend to be formulaic or legalistic in language, although they use fairly formal Standard English.

Clearly, legal language is not monolithic. Even if we limit ourselves to the written variety, there is substantial variation among different types of documents. Generally speaking, operative documents have the most legalese, as compared to persuasive and expository documents. It is highly ironic that documents with the most legalese like contracts, wills, deeds and statutes are most likely to be read by clients and directly affect their interests. In contrast, those documents with the least legalese like legal memoranda, briefs and opinions tend to be written for judges and other lawyers. Whether this strategy is intentional or not, the distinction surely provides food for thought.

**Legal lexicon and syntax**

To learn legal discourse is in large measure to learn a highly technical and frequently archaic vocabulary, a professional argot\(^\text{10}\), which makes frequent use of specialized legal meanings, medieval English, French as well as

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\(^{10}\) Several writers have claimed that the legal lexicon consists of a great deal of argot. One such writer is Mellinkoff, who uses the term to refer to a specialized language, or means of communication within a group whether or not intended to exclude strangers. Mellinkoff contrasts argot with technical terminology, which is far more precise. (See *Language of the Law*, p.18) These days linguistics tends to use the term in a more restricted sense, referring to a secret language through which a group intends to obscure communication.
persuasive use of Latin terms and phrases. Besides, it is observed that whereas most professional vocabularies are in their surface structure at least, of a strong denotative character, as with those of medicine, business or education, the legal vocabulary can be defined as predominantly of connotative character. Due to its connotative system it is a vocabulary of possibilities comprising a comprehensive system of meanings that are internal or latent within the lexicon itself. Besides, legal definition of words and legal language generally are to be seen also as self or auto referential, the internal discourse or monologue. This characteristic of legal discourse is a product of a distinctive form of lexicalization which bears distinctive semantic overtones and performs socially and ideologically complex functions.

The basis of legal lexicalization can be viewed best in terms of its historical and stratifying dimensions. It is the language of a time-honoured tradition. The law is already written, and has its primary basis in custom. Its vocabulary is governed by doctrines of memory and usage, defined in turn by reference to extensive and obscure etymologies, inert and calcified meanings and procedures and finally an epistemology of sources of law in
which words are transmitted by a dogmatics of quotation, reference, citation and restricted commentary.

**Said and aforesaid**

The most common and ancient legalism in legal discourse is the use of ‘said’ as an article or demonstrative pronoun:

> John promises to pay a deposit. **Said** deposit shall accrue interest at a rate of five percent per annum.\(^{11}\)

Here ‘said’ could easily be replaced by ‘the’ or ‘this’. Used in this way, it is clearly an oddity from the point of view of standard English. ‘Said’ is also used as an ordinary adjective: the ‘said deposit’ is equally possible, and equally archaic. A variant of ‘said’ is ‘aforesaid’. It seems to mean exactly the same as ‘said’, because anything said ‘before’ or ‘afore’:

According to David Mellinkoff, “the purpose of ‘aforesaid’ is to refer to something that has been said, and its chief vice is that you can’t be sure what it refers to”.\(^{12}\)

If a lawyer writes ‘the field aforesaid’, it can have two possible effects:

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\(^{11}\) *J\&K Houses and Shops Rent Control Act, 1966.*  
There is only one field in the document so far, in which case 'aforesaid', is unnecessary.

There is more than one field, in which case 'aforesaid' does not make it clear which one the lawyer means.

Thus, using 'aforesaid' and also 'aforementioned' is a pointless habit, which hides clear thinking. They do nothing to eliminate ambiguity when there is more than one possible antecedent:

John promises to pay a cleaning deposit of Rs 500 and a damage deposit equivalent to one month's rent. 'Said deposit' shall accrue interest at a rate of five percent per annum.13

What does 'said deposit' refer to? 'Said' can indicate any deposit that has already been mentioned, so it could refer to the first mentioned deposit, the second, or perhaps even both. In this context, it is no more and no less ambiguous than writing 'this deposit'. If the drafter wishes to refer to the 'cleaning deposit', he should write that interest will be paid on the 'cleaning deposit'; 'Said' just muddles the issue. Admittedly, there is one way in which 'said' or 'aforesaid' is theoretically more precise than 'this'. Specifically, 'this' can be utilized anaphorically (referring to a specific antecedent in previous discourse) or deictically (referring to

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something outside the discourse).\textsuperscript{14} ‘Said’ and ‘aforesaid’ are exclusively anaphoric, as they can only refer to something that has been mentioned previously. However, within a legal discourse there is virtually no possibility of a demonstrative like ‘this’ being used deictically: ‘this deposit’ or even ‘the deposit’ in a contract or lease can logically only refer to a deposit previously mentioned in the same discourse, not to some other deposit in the outside world. Actually ‘said’ and ‘aforesaid’ are literal translations from Latin terms, ‘dictus’, ‘said’ and ‘predictus’, ‘aforesaid’.\textsuperscript{15}

The records of medieval and Renaissance English courts, which were in Latin, typically introduced the parties by stating their full name, their occupations, and place of residence as in this case from the Court of Common Pleas in 1562:

\begin{quote}
Thomas Pyckeryng nuper de Isham in comitalu predicto generous attachiatus fuit and respondendum Johanni Humfrey generoso...

\textit{Thomas Pyckeryng late of Isham in the aforesaid county, gentleman was attached to answer Johanni Humfrey, gentleman...}\textsuperscript{16}
\end{quote}


Once introduced, the parties were generally referred to by their first names only ‘predictus Thomas’, ‘the aforesaid Thomas’, ‘dictus Johannes’, ‘the said John’. Thus words like ‘said’, ‘aforesaid’, referred back to a person or thing that had been more fully introduced earlier in the discourse.

**Such**

A related anachronism is the legal use of ‘such’. Normally, ‘such’ is an adjective meaning ‘that sort’ or ‘this sort’ For example, if you tell me about your terrific new job, and I reply that I would like to get ‘such employment’. Now let us consider how ‘such’ is used in a legal discourse:

> We conclude that the trial court’s order constituted an abuse of discretion in the procedural posture of this case which compels us to set aside ‘such’ order.\(^{17}\)

Here ‘such order’ means ‘this (specific) order’. ‘Such’ performs exactly the same function as ‘this’ and appears indistinguishable from ‘said’ or ‘aforesaid’. Furthermore, use of ‘such’ is potentially confusing because it might be interpreted to mean ‘this kind of’ (especially in the plural). The legal profession’s long retention of ‘said’, ‘aforesaid’, ‘same’ and ‘such’, cannot be justified as adding precision or clarity to the discourse. A drafter who wants to clearly refer to a noun that has been introduced previously

\(^{17}\) It is an order passed by the Superior Court against the order of a lower court in an appeal, revision or review; a case reported in *Srinagar Law Journal*, 2005, SLJ.
can do so in modern English by the use of ‘the deposit’, or if necessary, ‘the above-mentioned deposit’ or ‘the above deposit’.

**Hereunder, therein and wherewith**

Legal discourse has been characterised by another archaic trait: constructions of the type ‘hereunder’, ‘therein’, and ‘wherewith’. These words were common in medieval English. Rather than saying ‘under it’ or ‘under that’ a speaker of Middle English used to say ‘hereunder’ or ‘thereunder’. And, instead of using ‘with what’ or ‘with which’ in questions, Middle English speakers would say ‘wherewith’. These constructions have died out in English. We encounter them in the works of Shakespeare which people find difficult to understand today.18

Despite the archaic and imprecise nature of these words, lawyers still use ‘hereunders’ and ‘thereins’ in legal discourse. Mellinkoff has pilloried this habit and argued that the above terms are archaic and often imprecise.19

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18 In Shakespeare’s *Romeo and Juliet* Juliet, standing on the balcony pines and says, “O, Romeo! Romeo! ‘Wherefore’ art thou Romeo?”. The modern reader might think that Juliet cannot find her lover in the garden below and—peering forlornly into the dark bushes—is calling out to him: “Where are you’, Romeo”? In fact, ‘wherefore’ is the interrogative form of ‘therefore’ and means “for what reason” or ‘why’. Actually Juliet is looking directly at Romeo and is asking ‘why’ his name is Romeo Montague, marking him as a member of an enemy clan and keeping them apart.

Now let us consider the following provision from a standard textile sales contract:

Delivery to a carrier, or in the absence of shipping instructions, the mailing of a covering invoice after completion of the manufacture shall constitute good delivery or tender of delivery, subject to the Seller’s right of stoppage in transit, and subject to Seller’s security interest ‘therein’ as elsewhere ‘herein’ provided.\(^{20}\)

In this provision ‘therein’ acts like a pronoun. To what does ‘therein’ refer? The only realistic candidate is the noun ‘delivery’. But what do we place in the blank. In fact, if we have to determine the nature of the security from the context, ‘therein’ is entirely superfluous. ‘Herein’ suffers from the same deficiency: To write ‘as provided in this contract’, or ‘as provided in paragraph 2’, would be less arcane and much more informative. In this context, E.A. Driedger has pointed out, that “the words ‘hereinbefore’ and ‘hereinafter’ lead to similar difficulties of interpretation”.\(^{21}\)

**Forthwith**

‘Forthwith’ is a time word that is most imprecise. Like ‘heretofore’ and ‘hereafter’, it is archaic. But it is also unclear. Bryan A Garner, in *A Dictionary of Modern Legal Usage* called it a “fuzzy word with no pretence

\(^{20}\) Sale of Goods Act J&K.

of precision”.22 Professor Mellinkoff has traced its meaning from the Middle English, when it was ‘forthwith’ and meant “alongwith, at the same time with something else”.23 ‘Forthwith’ is not a word we should use unless we are intending vagueness. It is better to specify a time limit if we can. The word ‘immediately’ is suggested as a better alternative to ‘forthwith’. And, it certainly is more common in general usage outside law. Piesse says that ‘forthwith’ and ‘immediately’ are synonyms, ‘stronger’ than the expression ‘within a reasonable time’ and that they mean something like ‘without any delay’, speedy and prompt action and an omission of all delay.24

Do and shall

Two of the more common words in the legal lexicon are the auxiliary verbs ‘do’ and ‘shall’. Both are used in an unusual and somewhat archaic sense. ‘Do’ is used in ‘yes’ or ‘no’ type questions (do you want to go home?) and negative sentences (I do not understand you). ‘Do’ is occasionally used in declarative sentences, but typically only to add emphasis (I do like ice

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Furthermore, ‘do’ in declarative sentences tends to implicitly contrast with the negative proposition that *(I do not like ice cream)*

In legal writing, ‘do’ often appears in declarative sentences, but not with the emphatic or contrastive sense that it has in ordinary speech. Rather, it frequently indicates that the following main verb creates or modifies legal institutions or relations as is evident from the following:

I ‘do’ hereby solemnly affirm and declare on oath before the oath commissioner or magistrate...\(^{25}\)

The same usage is reflected in many enactment clauses, which give legal force to the statute or statutes that follow them:

The people of the state... represented in... Assembly, ‘do’ enact as follows...\(^{26}\)

‘Do’ in such cases marks the verbs as being ‘performatives’. It is similar to ‘hereby’, which also signifies that the following verb is actually performing an operative legal act. Performatives are quite common in legal language because they allow a person to create or modify a state of affairs simply by saying so. Thus, sincerely saying, ‘I hereby promise’ or in legalese: ‘I do promise’, constitutes the act of promising. In contrast, saying

\(^{25}\) Declaration in a court.

\(^{26}\) Legislation by the State Assembly.
'I promised him yesterday', (where it is impossible to add 'hereby') is simply talking about promising, not doing it.

Thus 'do' (in the present tense) often fulfills the same function as 'hereby'. When the legislature says or writes 'we do enact' or 'we hereby enact', it is actually enacting something into law merely by uttering those words. Out of caution or habit, lawyers sometimes use both markers of performativity:

I 'do hereby' nominate, constitute and appoint my husband...; as Executor of this my Last Will and Testament.27

Whether 'do' or even 'hereby' is necessary here is questionable. Normally, it should suffice to write: 'I appoint my husband,... to be my executor'.

Another feature of the legal lexicon is the modal verb 'shall'. In ordinary English 'shall' expresses the future. It is traditionally used only in the first person 'I shall' and 'we shall'; elsewhere, 'will' is preferred 'you will', 'she will'. In American English, 'shall' has become virtually obsolete, so that the sole future modal verb is 'will'. In legal discourse, 'shall' does not indicate futurity, but is employed to express a command or obligation,  

27 Documents and Deeds.
and can thus be paraphrased with 'must'. For example, under California Law, "someone who qualifies as a sex offender 'shall' register with the Chief of Police or Sheriff within a specified time".\(^{28}\) This use of 'shall' is obviously not so much a prediction of a future event as the imposition of an obligation on the offender to register. Let us consider another example from Section 81 of CRPC, which depicts the use of 'shall' as an obligation as well as command:

The Executive Magistrate or District Superintendent of Police or Commissioner of Police 'shall', if the person arrested appears to be the person intended by the court which issued the warrant, direct his removal in custody to such court...\(^{29}\)

Yet, 'shall' is not restricted to obligation or to commanding, it can also make declarations:

This Act 'shall' be known as the Indian Penal Code.\(^{30}\)

Nor is 'shall' limited to legislation; it may for instance also express the terms of a contract:

The publisher 'shall' pay the Author.... an advance....which 'shall' be a charge against all sums accruing to the Author under this Agreement....\(^{31}\)

\(^{28}\) California Penal Code, § 290 (a) (West 1988). The symbol § represents subsection.
\(^{29}\) J&K Criminal Code of Procedure, Section 81.
\(^{30}\) J&K Rambir Penal Code.
\(^{31}\) Copy Rights Act, 1940.
The first ‘shall’ in this contract sets forth one of the mutual set of promises that the parties make to each other in the agreement. It is best paraphrased by ‘promises to’ or ‘will’. The second ‘shall’ is either part of that same promise, or perhaps a type of declaration. In any event, neither is a command, but can be said, it is an obligation or binding. Thus, the function of ‘shall’ seems to depend on the type of document in which it occurs. Generally, ‘shall’ indicates that the verb and phrase that follow are part of what is being enacted, (a statute), promised, (a contract) and so forth. That which is being enacted (a statute) or (a contract), is indicated by ‘shall’.

The overall structure of a publishing contract can be represented as follows:

The Author and publisher ‘hereby promise’ each other the following:

1. The Authors ‘shall prepare and deliver....’
2. The publisher ‘shall publish....’
3. The publisher ‘shall pay ...’

‘Shall’ has another function especially in statutes: it unambiguously indicates that something is intended to be legally binding. As Frederick Bowers noted, ‘shall’ is generally “used as a kind of totem, to conjure up
some flavour of the law". This may be the real reason for its pervasiveness in legal discourse. Hidayatullah, J pointed, “The word ‘shall’ is ordinarily mandatory but it is sometimes not so interpreted if the context or situation otherwise demands”. Dr. Robert Eagleson, a linguist, said about the tendency of lawyers to misuse ‘shall’:

Authorities on drafting .... bemoan of lawyers to use ‘shall’ correctly. Strangely, they never seem to consider that it might be ‘shall’ itself that is the root of the problem.

Thus the lawyers have to limit the use of ‘shall’ in legal discourse for the sake of certainty and clarity.

The and/or rule

Let us now look at another linguistic legal phenomenon: the set of rules governing the interpretation of ‘and’ and ‘or’. The difficulty in interpreting ‘and’ and ‘or’ is well recognised in the law, as the difference between the two is neutralized. According to McKinney:

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34 *Cited in Clarity*, No 11, December 1988, p.6. Clarity is an international organisation of lawyers devoted to simplifying legal language and issue a journal, also called 'clarity'. It has strong memberships in the United Kingdom, Australia, Canada and the United States of America, and it is also represented in many non-English-speaking countries.
Generally the words 'or' and 'and' in a statute may be construed as interchangeable when necessary to effectuate legislative intent.\textsuperscript{35}

The commentator on the statute explains the rationale for the rule as follows:

A common mistake made by the drafters of statutes is the use of the word 'and' when 'or' is intended or vice versa. The popular use of 'or' and 'and' is notoriously loose and inaccurate, and this use is reflected in the wording of statutes. When it is apparent that the Legislature has erroneously used the wrong word, the courts will make the necessary change in the statute in order that it shall conform to the legislative intent.\textsuperscript{36}

The authors of treatises\textsuperscript{37} and judges of many courts recognise similar principles. In natural language 'or' is frequently used to mean one but not both of two items. Because ordinarily 'and' is conjunctive and 'or' is disjunctive. Thus, much uncertainty and confusion is caused in the statutes due to the expression of 'and', when it means 'or' and 'or' when it means 'and'. As Jack Davies points out, "...and/or is not used in legislation by draftsmen who have self-respect, training and iron-wills."\textsuperscript{38} The reason is that 'and' as well as 'or' can be both conjunctive and disjunctive.

\textsuperscript{35} McKinney's Cons Laws of N.Y. Statutes ,p.365.
\textsuperscript{36} McKinney's Cons Laws of N.Y., Statutes, p.365.
Examples of 'and' used as 'or':

1. Any person who attempts to commit any offence and the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence or aids or abets 'and' does any act preparatory the commission of an offence...\(^{39}\)

2. All medicines for internal or external use of human beings or animals and substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals other than medicines 'and' substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine.\(^{40}\)

But in TADA Act the words 'arms and ammunition' are read conjunctively.

Examples of 'or' used as 'and'

In the Oil and Navigation Waters Act 1955, the words 'owner or master' have been used in the sense of 'owner and master':

\(^{39}\) The Official Secrets Act, 1920.

\(^{40}\) The Drugs and Cosmetic Act, 1940.
If any oil to which this section applies is discharged from a ship the ‘owner or master’ of the ship shall be guilty of an offence under this section.

Jack Davies comments that the difference between ‘and’ and ‘or’ is often of serious substantive consequence. Perhaps because the words are so small, their significance is often missed.41

**Antiquated morphology**

Many of us are vaguely familiar with archaic pronouns like ‘ye’ and ‘thou’, or anachronistic verb forms such as ‘giveth’ or ‘takest’. Archaic morphology can give a quaint flavour to a phrase, as in ‘Ye olde wine shoppee’. Legal discourse has retained several morphological forms that have died out in ordinary speech, for example: we still encounter the verb form ‘witnesseth’ in contracts of insurance: “This policy witnesseth that ...”42 In fact, ‘witnesseth’ is now often stripped of any context and placed at the beginning of contracts, as a totemic signal that roughly means, ‘This is a legal contract, the following are its terms’. Another archaic morphological form is ‘sayeth’ in the stock phrase ‘Further affiant sayeth not’. Similarly, lawyers have preserved obsolete word order in certain set phrases as in a common opening in pleadings:

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41 Legislative Law and Process, 1979, p.137.
42 The example is from an insurance policy analyzed in David Crystal and Derk Davy. Investigating English Style. 1969, p.203.
'Comes now plaintiff…'

Perhaps archaic phrases have been preserved to provide majestic flair to legal discourse.

**Poor organisation**

Lack of clarity in thoughts leads to disorganised discourse and language becomes confused and inconsistent. As Bennion has pointed out, "if any enactment is sloppily drafted, text becomes confused, contradictory or incomplete in its expression".43

The structure of discourse can have a profound impact on how well people understand it. It seems self-evident that a story told in chronological order is easier to follow than one where the events are related randomly. Anyone who has watched a film with a lot of flash backs realizes how hard it can be to piece the story together. Logical presentation of other types of material is equally essential: for the most part, it makes sense to present the most important things first, the general before the specific and the overall statement or rule before any conditions or exceptions.44 These principles are

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patently violated in the following statute, where a fairly trivial exception to the service rule begins with the second word:

Whoever, other than special Government employee who serves for less than sixty days in a calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents…45

This statute would be far better organised if it began with the general (whoever knowingly acts…) and subsequently dealt with the specific exception (a special government employee); other hallmarks of good organisation include dividing complex material into sections and subsections, adding headings when appropriate and using numbered list.

Consumer legal documents are notorious not only for poor organisation (frequently placing the most important provisions at the end of a long document, where they can readily be overlooked) but also for downplaying critical contract terms in the smaller font.46 Less crucial matters are placed in smaller letters in out-of-the way locations; footnotes are usually in smaller type and at the bottom of the page or at the end of a document, called an ‘endnote’. We thus logically assume that provisions in small type at the end of a contract have little importance. Placing critical

consumer information in that position is obviously not the best way to communicate, and if done purposely, can be quite deceptive. For example, in a Deed of Gift the last significant clause is written in small type at an insignificant place:

In witness whereof the parties hereto have said and subscribed their respective hands the day and year first herein above written.

To summarise, poor organisation of legal discourse reduces comprehension.

**Ambiguity and equivocation**

Ambiguity is the chief curse of the language of statutes and other documents. It often has very serious ramifications for the justificatory discourse. Commenting upon the defects in the language, Francis Bacon has said, "The greatest sophism of all sophisms is the equivocation and ambiguity of words and phrases."

Dryden speaks of the same thing in verse:

As long as words a different sense will bear,
And each may be his own interpreter.
Our airy faith will no foundation find,
The word's a weather cock for every wind.

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A distinguished American writer on legal writing, Reed Dickerson called ambiguity “perhaps the most serious disease of language”\(^{49}\). The law reports are littered with cases dealing with ambiguity of one kind or another. This ambiguity does not limit to one possible interpretation of a sentence. There are three types of ambiguity:

1. **Semantic.** According to Dickerson, the most serious problem of language is ambiguity in the traditional sense of equivocation.\(^{50}\) A word is equivocal when it has more than one definition. For example, according to A. I. R. 1992, ‘building’ communicates many meanings. Building is held to include roads, drains etc. laid within factory premises and also include a roofless structure. If a draftsman chooses to describe a situation with unnecessary extensiveness, it is bound to affect the simplicity and brevity of the language. It will invite obscurity and repetition. Cardozo comments:

   "Our survey of judicial methods teach us, I think the lesson that the whole subject-matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong..." \(^{51}\)

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\(^{50}\) R. Dickerson. 1986, p.32.

2. **Syntactic.** A syntactic ambiguity is one that arises when there is uncertainty what a word modifies in the statute, rule, or legal document. For example, 'when the governor nominates the head of a department, 'he’ shall appear before the committee that oversees that department'. While the requirement of a committee appearance probably applies only to the nominee, it could mean the governor. The potential for confusion can be easily eliminated if the 'he’ is replaced by ‘the nominee’.

3. **Contextual.** Contextual ambiguity arises when it is unclear which of two or more alternatives is intended. This type of ambiguity occurs when a statute, rule or legal documents imposing a duty refers in one section to ‘persons’ and in another to ‘residents’ or in one section to filing a document within 30 days and in another to filing the same document within 60 days, without any obvious reason for the difference.

The determination of whether a statute is ambiguous is a linguistic issue that must be resolved as a prerequisite for deciding the applicability of the rule. Because litigants are not all too shy to use the existence of ambiguity to their advantage, as it has been found that almost always, the
linguistic intuitions of the litigants about ambiguity are used for their personal interests.

**Impersonal constructions**

The legal discourse tends to be phrased in a highly impersonal manner, especially in documents like statutes. An illustration of this impersonal style is the tendency to steer clear of first and second person pronouns 'I,' 'we' and 'you'. Rather than beginning an argument to judges by saying 'May it please you', a lawyer typically starts with 'May it please the Court'. In this way a lawyer addresses the judge or judges in the third person and using a noun instead of a pronoun.

The legal documents are almost always in the third person: 'the offender shall register...'. The same normally occurs in pleadings: 'Plaintiff alleges' rather than 'I allege' and contracts 'Buyer shall pay seller', or 'the party of the first part shall pay the party of the second part', in place of 'I shall pay you'. Other examples of impersonal constructions include the common phrase 'it shall be unlawful' or the provision that certain sorts of acts are 'punishable as misdemeanor'. Research suggests that the
profession's frequent reliance on impersonal constructions is another factor that makes legal documents harder to understand.\textsuperscript{52}

One reason for using the third person in documents like statutes is that they are meant to be of general applicability and address several audiences at once. The third person also promotes an aura of objectivity greatly desired by law makers. Judges are reluctant to say that 'I find' something to be the case; such a finding seems too personal and vulnerable. An alternative is 'we', which is often used in formal or scientific writing by a single individual.\textsuperscript{53} This seems more impressive and objective, and it resembles the plural of majesty and may appear pompous. Thus many judges prefer the third person: 'This court finds'. It appears as an objective and powerful finding, made not by one frail human being, but endorsed by a venerable and powerful institution. Goodrich noted, "use of the third person suggests that judges are not mere mortals, but the embodiment of law and justice".\textsuperscript{54} This usage thus helps legitimate the judicial system by making it appear to be above the fray of human emotions and biases. Furthermore, lawyers are always eager to show respect to judges and thus

\textsuperscript{53} See Randolph Quirk et al. \textit{A Comprehensive Grammar of the English Language}. 1985, p.350
\textsuperscript{54} P. Goodrich.\textit{Languages of Law: From Logics of Memory to Nomadic Masks}. London; Weidenfeld, 1990, p.191.
use impersonal language when addressing them: ‘Has the court made a ruling yet?’ or ‘May I approach the bench?’

Besides, impersonal form in certain contexts creates doubt about the legal consequences; for example draftsman uses the expression, ‘Notice shall be issued’ instead of ‘A shall issue the notice’. By use of expression, ‘Notice shall be issued’ a doubt arises as to who shall issue the notice. Jack Davies also gives an example of misplaced duty: draftsman uses the expression—“school buildings shall have fire alarms”. Since building is not accountable, the problem arises who shall be responsible in this case—the school board, the school superintendent, the local fire department etc. Jack Davies rightly comments: “until the writer of a bill focuses on who must carry out the legislative purpose, he has skipped a key part of law writing. To work, he must give orders to and impose sanctions on some human”. Several experts on legal writing have argued that impersonalization makes legal discourse less human. The law is about real people in real situations. Perhaps to preserve the majesty of the law, legal language sounds more like the voice of a machine, talking about impersonal

56 Davies, p.137.
processes. Richard Lanham, author of a highly regarded guide to writing writes:

Human beings, we need to remind ourselves here, are social beings... We become uneasy if, for extended periods of time, we neither hear nor see other people. We feel uneasy with the official style for the same reason. It has not human voice, no face, no personality behind it. It creates no society, encourages no social conversation. We feel that it is unreal.\footnote{Richard Lanham. \textit{Revising Prose}. Charles Scribner, 1979, p.66.}

Thus, the impersonal nature of the law's voice makes the legal discourse less humane.

\textbf{Referential pronouns: eschewed species}

In legal discourse pronouns seem to be eschewed species. One of the most salient ways in which lawyers try to enhance precision is by avoiding pronouns, they prefer to repeat nouns, hoping to avoid ambiguity. In fact manuals on legal drafting caution that pronouns can create ambiguity and recommend repeating a noun instead.\footnote{See Reed Dickerson. \textit{The Fundamentals of Legal Drafting} p.102; see also Lawrence M. Solan. \textit{The Language of Judges}. 1993, pp.121-28, for an extensive discussion of the legal profession's attempts to avoid pronouns.}

Avoiding pronouns makes sense in documents such as contracts of sale where it is essential to carefully distinguish the rights and obligations of two or more parties. It is unclear which party is ‘I’ and which party is ‘you’. Here, the contract is indeed a type of two-way communication in
which each party speaks to the other, each promising to do certain things. Yet there is a consumer contract where we can easily employ pronouns with no real loss of precision. A consumer contract is not a two-way conversation: it is a one-way manifesto from the business to the consumer. There is no negotiation and the consumer is not involved in drafting it. Instead, it is handed to the consumer on take-it-or-leave-it basis. It is called a “contract of adhesion”\(^{59}\) in legal parlance. It is ‘I’ or ‘we’—the business—that is doing all the speaking and dictating of terms, and ‘you’—the consumer—that is doing the listening. Thus, the first and second person can be written in consumer contracts. Crystal and Davy have observed:

> It is not simply that referential pronouns are avoided only when their use could raise genuine confusion; they seem to be eschewed as a species. And in environments in which even the most bizarre misreading would be unlikely to find an undesirable meaning, the lexical item is solemnly repeated...\(^{60}\)

To summarise, lawyers and judges have a notion that pronouns are semantically degenerate. That is, while they contain some information, they do not contain enough on their own to name the individual to which they


\(^{60}\)Investigating English Style. 1969, p.193.
are intended to refer. Thus, pronouns are a natural source of ambiguity and uncertainty.

**Camouflaging: obscuring the actor through passives and nominalizations**

One common undercover strategy is to camouflage something illegal or wrongful conduct by making it look unimportant. Despite claims about the precision of legal language, some of its attributes are strategically imprecise. For example, passives and nominalizations often obscure the identity of the actor, whether done intentionally or not, it can only reduce precision.

The basic sentence in English consists of a noun and then a verb, optionally followed by another noun: ‘The man injured the girl’. We know that ‘the man’ is the subject of the sentence and the actor, because it precedes an active verb. And we know that ‘the girl’ is the person or object that was injured, because this noun phrase follows the verb. All we have to do is reverse the noun: ‘The girl injured the man’ to change the girl into the subject and man to the object. Since we tend to anticipate that whenever a noun occurs at the beginning of the sentence, it will be grammatical subject,
as well as the actor (the person doing the action). With such basic sentences it is difficult to camouflage and obscure the actor.

Yet it should come as no surprise that frequently lawyers wish to obscure or at least downplay the fact that their client was the actor who engaged in some kind of wrongful conduct. Their aim is obfuscation, not precision. Two major linguistic devices that can function to obscure the actor are passive verbs\(^{61}\) and nominalizations.

Active sentences like, ‘The man injured the girl’ can be converted to passives in a few easy steps:

1. Move the object (the girl) to the beginning of the sentence;
2. Move the original subject of the sentence to the end, behind the verb, into a propositional phrase that begins with ‘by’;
3. Change the active verb (injured) into the appropriate passive form (was injured)

Performing these actions will produce the passive sentence—‘The girl was injured by the man’.

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\(^{61}\)A passive sentence is, in a way, the opposite of an active sentence, in which the grammatical subject is also the actor. In contrast, the grammatical subject of a passive sentence is the ‘object’ of the action, rather than being the actor. And rather than regulating in a direct way, the stylistic impersonality of the utterance controls by means of attitude, it depicts a de-personalised state of affairs in which the significant syntactic constructions are nominalization and passive. There is no explicit command structure, no request or imperative from a speaker to an addressee, but rather a familiar objectification of behaviour which generalizes beyond the context.
What happens to the original subject in a passive sentence, the actor (the man) is found in what is sometimes called the 'by phrase' (by the man). To say critically, such a by phrase may be left out. It is possible to say that ‘the girl was injured’. Thus the possibility of leaving out the actor explains much of the profession’s affection for the passive construction.

Even the United State’s Supreme Court has noticed this feature:

When Congress writes a statute in the passive voice, it often does not indicate who must take a required action. This silence can make the meaning of a statute somewhat difficult to ascertain.62

Of course, passives can occur for more legitimate reasons as well. The function of deemphasizing the actor may explain why passives are common in statutes and court orders. Legislators and judges want their commands to appear maximally objective, to give them the greatest possible rhetorical force. For legislators to state, ‘we shall punish those who skateboard on sidewalks,’ seems too personal, perhaps even vindictive. A passive sounds more authoritative: ‘Those who skateboard on sidewalks shall be punished’. The same holds true for court order. To appear as authoritative as possible and to avoid the first person, judges typically start an order not with ‘I order...’ but with “it is ordered, adjudged and

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There is no need to state who the actor is because it is evident from the context. Passives are also justified in court order as in ‘the petition for a writ of certiorari is granted’. The topic here is the petition, so it logically comes first.

Another syntactic device also can have the effect of de-emphasizing or obscuring the identity of the actor. This is the phenomena of nominalization. Research indicates that nominalizations are usually more difficult to process than their corresponding verbs forms. For example, let us consider the language of credit contracts: ‘In the event of default on the part of the buyer....’ The word ‘default’ can be either a noun or a verb: here, it is noun. It is far more effective to use the word as a verb, which allows a simpler and shorter sentence while communicating exactly the same message: ‘if the buyer defaults.’ And because this is consumer contract, it makes sense to use personal pronouns: ‘if you default...’ In this way using verbs, instead of their normalized equivalents, is almost always a more direct and effective way of making a point. Like passive constructions, nominalizations allow the speaker to omit reference to the

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63 Rules of Legal Drafting.
64 A nominalization is a noun derived from another word class, usually a verb. For example, the noun form of the verb ‘injure’ is ‘injury’.
actor. Rather than having to admit that, 'the defendant injured the girl at 4.30 P.M.', the defendant's lawyer can write: 'the girl's 'injury' happened at 4.30 P.M.' In fact, the lawyers depersonalize the incident even more by leaving out mention of girl entirely: 'the injury happened at 4.30 P.M.'

Now let us consider this sentence from the standard publishing agreement, where the use of nominalization is justified:

If there is an 'infringement' of any rights granted to the Publisher ... the Publisher shall have the right, in its sole discretion to select counsel to bring an action to enforce those rights...66

The use of the nominalization 'infringement' seems calculated; it names no actor and thus covers anyone, who might happen to infringe. One might suggest replacing this nominalization with a verb. ‘if any person infringes any rights...’ or ‘whoever infringes’, yet here the cautious drafter might become concerned by the possibility of infringement by something like a corporation which may or may not legally be subsumed under the terms ‘any person’ or ‘whoever’67, the drafter wants to include every possible infringer, which is achieved by the nominalization.

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66 Copy Rights Act 1940.
Overall, it is best to use straightforward active verbs rather than nominalizations or passives. The basic sentence type containing a subject, active verbs and object, is easiest for people to process.\textsuperscript{68}

**Relationships among words**

Words do not exist in a vacuum; they are related to each other in a variety of ways. Although legal English is like ordinary English in having synonyms, homonyms, etc., it sometimes modifies these relationships among words in interesting ways.

**Homonyms**

Homonyms are words that have same spelling, same pronunciation, but divergent meanings: examples are ‘can\textsuperscript{1}/kæn\textsuperscript{1}/ and ‘can\textsuperscript{2}/kæn\textsuperscript{2}/. And homographs are words, having same spelling, different meaning and different pronunciation: for example, sow\textsuperscript{1}/sɒ\textsuperscript{1}/ and sow\textsuperscript{2}/sɔ\textsuperscript{2}/. One of the reasons that a homonymy is of interest to the legal discourse is that there are many words that have a legal meaning very different from their ordinary significance. In other words, a great deal of legal vocabulary looks like ordinary language, but has a quite distinct meaning, and are called legal

homonyms. They can easily engender confusion. While a strictly legal phrase like ‘cy press’ is plainly a term of art, legal homonyms seem like ordinary words but are not. For example, the sentence ‘I intend to file a complaint.’ In ordinary language, this would mean simply that I will write my grievance on a piece of paper and give it to the proper authority. Legally it means that I plan to begin a legal case, which is a vastly more serious and costly threat. Some other legal homonyms are:

*Action*: not a physical movement, but a lawsuit.

*Brief*: a noun referring to a type of legal document, not an adjective, and despite the name, virtually never brief.

*Continuance*: the postponement of a proceeding until a later date; if a judge continues a hearing, it will not continue, but will stop and start up again later.

*Notice*: formally notifying a person of something, as in giving notice of a claim against that person. It is legally effective, as a rule, regardless of whether anybody actually notices it.

*Personal property*: Property other than real property, including not only used clothing and furniture, but also automobiles and large trucks.
Prayer: usually the last part of the pleading in which the party requests the court to grant or deny the relief sought by the plaintiff.

This list is far from complete, but these illustrate that legal homonyms can be confusing.

Synonyms

Synonyms are different words with the same meaning. Legal discourse tends to avoid linguistic variety, yet the obsessive use of word lists by many lawyers seems to indicate a great love for synonyms, or at least near-synonyms. Practically, lawyers use lists of synonymous words for no good reason as in 'rest, residue and remainder', 'give, devise and bequeath', 'aid and abet', 'due and owing', 'goods and chattels', 'full faith and credit', 'ordered, adjudged and decreed', 'null and void', 'possession, custody and control', 'right, title and interest', 'true and correct', 'save and except', so forth. Whatever subtle distinctions there are between these words, those differences are irrelevant in legal world. For example, 'jointly and severally' is a phrase found rarely in ordinary English. Yet it features prominently in legal documents. An example is from a lease:

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69 For other examples, see Mellinkoff. Language of the Law.
Where two or more persons are included in the expression ‘the landlord’ and ‘the Tenant’, covenants expressed to be made by the Landlord and the Tenant shall be deemed to be made by such persons ‘jointly and severally’.

Some synonymous phrases, such as ‘null and void’, might be justified as more emphatic than simply ‘void’. The same holds true for ‘any and all’ or ‘each and every’, as well as the oath to tell ‘the truth, the whole truth, and nothing but the truth’. In contrast it is hard to imagine how ‘save and except’ adds anything to ‘except’ or how ‘order, judge and decree’ differs from simply ‘order’. These are in the words of Mellinkoff nothing more than “worthless doubling”.70 Robert Dick describes this as “killing one bird with three stones”.71

Antonyms

Words that have opposite meanings are generally called antonyms. They have most semantic features in common, but typically differ in one critical respect. Thus, ‘black and white’ are both adjectives that refer to colour. Similarly, ‘hot and cold’ both refer to temperature. These word pairs are closely related semantically, but they differ with respect to one property. For example, ‘hot’ refers to the presence of heat, and ‘cold’ to its absence.

In legal usage many pairs of words are turned into antonyms, even though they have no such relationship in ordinary language. As an example, from the Constitutional Law is the term ‘taking and regulation’. If a Government action regarding property is held to be a ‘taking’, then the Government must provide compensation. If it is not a ‘taking’, it is deemed to be a mere ‘regulation’ regarding the property, which does not require compensation. Although ‘taking and regulation’ are hardly antonyms in ordinary speech, but have become so in legal discourse.

In this way legal lexicon differs in many ways from ordinary speech and writing. These differences do not promote the main goal of language, i.e., clear and effective communication. They actually facilitate in-group communication while greatly reducing comprehension by the public. Since the legal discourse is in English, courts are often confronted with the issue of whether a word should be given its ordinary or its technical legal meaning. Often it helps to consider whether the document was written by a lawyer, in which case the technical legal usage should probably prevail, or by a lay person, who would most likely have intended the ordinary meaning.
Stretched definitions

Stretched definitions give a word a meaning beyond what the reader would expect. This unhelpful technique is particularly pernicious where the word has a well-understood ordinary meaning. Sometimes the technique produces unintended humour, as in Australian statutes that define ‘fish’ to include ‘beachworm’, ‘fingerprint’, and ‘toeprint’ also. Another example of a definition which is so widely worded, as to create uncertainty:

Industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft, or industrial occupation or avocation of ‘workmen’.

Reacting on the width of the definition of the term ‘industry’ Justice Krishna Iyer, has remarked that “a definition is ordinarily the crystallization of legal concept promoting precision and rounding off blurred edges but, alas! the definition viewed in retrospect has achieved the opposite…” He has called the definition of industry as “clumsy, vapourous and tall and dwarf.”

The stretched definitions impair communication between drafter and reader. They can trap the drafter and as well as the reader. Stanley

72 Fisheries Management Act, 1994.
73 Industrial Dispute Act, 1947.
Robinson and Reed Dickerson call stretched definitions, Humpty Dumptyism, echoing Humpty Dumpty's scornful assertion: "When I use a word, it means just what I choose it to mean—neither more nor less."\textsuperscript{76}

**Conjoined phrases and lists of words**

One of the typical and distinctive features of legal discourse is joining together words and phrases with the conjunction 'and' and 'or'. These conjoined phrases have long history, going back at least as far as early-Germanic times. Generally, conjoined phrases seem to be a creature of habit, used in contexts where a single word or phrase would do just as well. A technical linguistic term for conjoined phrase is 'binomial expressions' like 'any and all' etc. Legal writers tend to use the same limited set of such expressions repeatedly, whereas in other prose styles there is more variation.\textsuperscript{77} Linguists refer to this property of language as recursion: "given any grammatical sentence of the language, it is always possible to form a sentence that is longer"\textsuperscript{78} and all you need, is an 'and'.


Lawyers conjoin not only nouns, but other linguistic categories as well. The strings of verbs in the following language from a standard publishing contract are worth considering:

While this agreement is in effect, the author shall not, without the prior written consent of the publisher, ‘write’, ‘edit’, ‘print’, or ‘publish’ or cause to be ‘written’, ‘edited’, ‘printed’ or ‘published’, any other edition of the work, whether ‘revised’, ‘supplemented’, ‘corrected’, ‘enlarged’, ‘abridged’, or otherwise.79

Even prepositions, seldom paired in ordinary language, are routinely strung together in legal documents. For example, a publisher promises in a contract to publish a work ‘in accordance with and subject to the agreement’. A standard textile sales contract promises that the credit limit of the buyer may be fixed or varied from time to time “at and in accordance with the sole discretion and opinion of the Seller, or its factor…”80 This doubling of prepositions serves little purpose; ‘under the agreement’ or ‘at the sole discretion of the Seller’ seems quite sufficient.

Any one who goes through some current statutes or other legal documents will soon discover that this tendency is as vital now as it was in the past. By 1835, an Englishman, Arthur Symonds, severely criticized the verbosity of lawyers and parliamentary draftsmen. He lampooned their

80 Farnsworth and Young.p.164
affection for long word lists by suggesting that in legal English the phrase ‘I will give you that orange’ would be rendered as follows:

I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck and otherwise eat the same or give the same away as fully and effectually as I the said A,B, am now entitled to bite, cut, suck or otherwise eat the same orange or give the same away with or without its rind, skin, juice pulp and pips, anything hereinbefore or hereinafter any other deed or deeds, instrument or instruments of what nature or kind so ever, to the contrary in any case, not withstanding.81

Perhaps lawyers want to anticipate and deal with every possible future contingency. Another reason for conjoined phrases and word lists is that they have certain rhetorical value. They may give an air of elegance and significance, as Charles Dickens in *David Copperfield* has recognised:

In the taking of legal oaths, for example, deponents seem to enjoy themselves mightily when they come to several good words in succession, for the expression of one idea; as, that they utterly detest, abominate, and abjure, and so forth... We are fond of having a large superfluous establishment of words to wait upon us on great occasions, we think it looks important, and sounds well.82

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81 Arthur Symonds. *Mechanics of Law-Making*. London: Edward Churton, 1835, p.75. Symonds was an experienced legislative drafter with perceptive views on legal writing. He has lamented of legislation as “the clumsiest pieces of workmanship which the unskilled labour of man ever made.”

To summarise, we can say that conjoined words and phrases are endemic in legal discourse. One would logically presume that they convey subtle shades of meaning to cover every contingency, but in actuality there is absolutely no relevant difference among these terms.

Unusual word order

Lawyers often adopt an unusual word order. Some typical examples taken from traditionally drafted documents are:

- 'for the time being entitled'
- 'as well before as after any judgement'
- 'as in this deed provided'
- 'the title above mentioned'
- 'therin appearing'
- 'will at the cost of the borrowers forwith comply with the same'
- 'title absolute'

Examples such as these cause little trouble for lawyers. But they trouble the non-lawyer, unfamiliar with such linguistic eccentricities.
Separating parts of a verb

A particular source of difficulty is the device of widely separating two parts of a verb, which causes loss of sense as in this clause:

In the event of any breach by the Cardholder of this agreement the Bank ‘may’ in circumstances where the Principal Cardholder does not comply or to procure compliance with the terms of a notice served by the Bank upon the Principal Cardholder ‘require’ repayment in full of the outstanding balance on the Account.83

The verb combination here is ‘may require’, but the modal auxiliary ‘may’ is separated from its associated main verb ‘require’ by twenty-seven words. The whole discourse contains only fifty-three words, so the verb is split by more than half the total words. In such a discourse it is no wonder the reader is thrown in confusion. It would have been better first to state what the bank has power to do, and then to specify the circumstances in which it is entitled to exercise that power. The result would look something like this:

The bank may require repayment in full of the balance on the account if the cardholder breaks this agreement and the principle cardholder does not comply with the terms of a notice served by the bank.

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83 Terms and Conditions for operating Bank Accounts.
Furthermore, normal punctuation techniques can be applied to such discourses as an aid towards revealing the meaning and the sense.

**Foreign words and Phrases**

Lawyers more commonly than ordinary writers delight in foreign words and phrases—usually Latin or French-Law. Many of these words and phrases have long since disappeared from ordinary English speech and writing. Lawyers themselves may only half-understand them. Examples are:

- 'de bene esse': for the time being.
- 'en ventre sa mere': conceived but not born.
- 'force majeure': an event which can neither be anticipated nor controlled.
- 'interalia': among other things.
- 'inter se': among themselves.
- 'inter vivos': between living people.
- 'pro tanto': to that extent.
- 'res ipsa loquitur': the reason is self-evident.
- 'toties quoties': as often as required.
- 'ultra vires': beyond the powers.

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It is best to abandon phrases of this kind. Almost always they can be discarded for an equivalent in modern English.

**Negation**

Legal discourse has an unusual amount of negation. The profession’s favouring of the negative may be related to the age old notion that whatever is not explicitly forbidden is permissible. Consequently, the law is primarily about what people ‘cannot’ do, and is logically phrased mainly in the negative.

Negatives include not just words like ‘not’ or ‘never’, but any element with negative meaning, like the prefix ‘mis’—in ‘misunderstand’ or ‘un’—in ‘unreal’ and even semantic negatives like the word ‘deny’. Multiple negation is also frequent in legal discourse: an example is ‘innocent misrecollection is not uncommon’. It contains three negative elements in a five-word phrase. Another example is from Company’s Act:

The shareholders may ‘not’ transfer shares to persons who are ‘not’ shareholders ‘unless’ the Foreign Investment Review Board has approved the transfer.

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85 Rules of Legal Drafting.
Judges also tend to favour injunctions that are negative in form rather than positive. An example is cited from court order:

The respondents are directed ‘not’ to cause any kind of interference in the lawful enjoyment of the suit property. Respondents are further ‘restrained’ from causing infringement of his civil rights like easement etc. There shall be ‘no’ order as to costs.86

It is easier to tell the people what they cannot do, rather than what they can. In fact, the preference for the negative is reinforced by the rule that a positive or (mandatory) injunction is automatically stayed on appeal, while one that is negative or (prohibitory) remains in force.

Although commands, orders and related speech acts are often in the negative, there are many legal genres, such as judicial opinions, briefs, or letters to clients, which do not favour the negative. Whether greater use of negation is a general characteristic of legal style therefore remains an open question. Research indicates that the more negatives a sentence contains, the harder it is to process.87

**Incommensurability**

The problem of incommensurability is still undeveloped in philosophical literature, but it is very important for any kind of legal determinacy. It was

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86 Procedural Court orders.
first raised by John Mackie. He argued that the strength of considerations in favour of two sides of a legal problem "may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other." Thus the idea of incommensurability is that some things, whether values, options, books, or people, cannot be compared in terms of 'better/worse' and 'best'. It is a relation that holds between X and Y if and only if it is impossible to measure both X and Y on some common scale.

Incommensuracy of dimensions is a pervasive feature of vague expressions, such as 'crowd', 'heap', 'bald', etc. In this context let us consider Joseph Raz's example of a choice of careers, with a particular job as a teacher (job A), and a particular career as a lawyer (job B) as options. Job A may be preferable to job B for some person in some respects (say, for convenience, just in respect of working hours), and less preferable in others (say, just in respect of pay). If there is no way to calibrate these two dimensions of working hours and pay in the same units, then there may be no answer to the question, "which job is 'preferable' in respect of both attributes considered together? I will call such options incommensurable. Because of their incommensurability, job A and job B are borderline cases.

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for the comparatives ‘preferable’ and ‘better’. So incommensuracy of dimensions is a form of vagueness of the comparatives of abstract evaluative expressions (such as ‘good’, ‘beautiful’, …”).

Thus Raz’s mark of incommensurability is that neither of two options is better than the other.

The problem of decision in the incommensurable values comes up regularly in the legal system on moral issues. The judges argue that generally the cases on moral values are incommensurable. Griffin has explained the problem in this way: if one novel has slightly too much plot and too little character, and the second has too little plot and too much character, the problem is incommensurable. Griffin has argued that most values are incommensurable and it becomes difficult for judges and lawyers to choose between two options in order to decide the case. Finnis claims that “if judicial reasoning involves at least two values, and these are not commensurable, then on many occasions it would be incorrect that one decision is the unique right way to resolve the dispute, that one decision is

91 Griffin, pp.108-9.
better than all the potential alternatives"92. According to Dworkin incommensurability argument has remained improved. He argues that incommensurability is a matter of substantive argument within a practice93, so that vague expressions are resolved and the incommensurable legal cases might turn out commensurable.

**Analysis of the language of product warnings**

Product liability is a recent development in the legal discourse. Products can be dangerous for a variety of reasons. The manufacturer or sellers of products are held liable, if they do not warn consumers of risks or dangers associated with their use. Besides, we will probably never occupy a utopia in which every object that we use in our daily lives is completely safe for all users. Indeed most of us would not want to live in a sanitized world completely devoid of risks and dangers. And as long as risk and danger exist, we will need warnings.

There are many products that serve a useful function, but they can pose risk to users under certain circumstances, even if the product is designed and manufactured as carefully as possible. In such cases, it makes sense to allow the product to be sold, but there is obviously a need of an

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adequate warning to be given to users. To be effective and to render safe a product, the language of a warning must clearly communicate all relevant risks to the consumer. But often warnings are not adequate linguistically.

Although it is self-evident the product warnings are good, but legal system should generally require more of them:

a product is defective because of inadequate instructions when the foreseeable risk of harm posed by the product could have reduced by the provision of reasonable instructions or warnings by the seller... and the omission of the instructions or warnings renders the product not reasonably safe.94

In the words of one of the American courts “an adequate warning is in such a form that could reasonably be expected to catch the attention of a reasonably prudent man in the circumstances of its use”, and whose content is understandable and conveys clearly “a fair indication of the nature and extent of the danger to that person.”95

One of the basic features of an adequate warning is that it must be calculated to come to the attention of the user. Sometimes a warning is placed in an ordinary print or out of the way location and this is not sufficiently prominent to draw the attention of the user. Thus one court held that a warning about leaking gas in a motorcycle, placed in ordinary print

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94 Trade and Merchandise Marks Act and Rule.
on page 13 of the user’s manual was not sufficiently prominent to draw the attention of the user.96 In other words, this is simply not an effective way to communicate a potentially serious danger. The same point is true in the context of consumer documents like promissory notes, credit purchase agreements, and releases of liability, where the most important provisions from the consumer’s perspective are often found in tiny type on the back of the document or other out of the way location. Not only must a warning attract the attention of the user, but its message must be comprehensible.

The legal standard regarding comprehensibility of warnings is linguistically less clear. A warning requires to be understandable to the ordinary intelligent person or the average person. It seems this standard does not properly account for the differing audiences of warnings. The law does generally recognize that warnings on prescription medicine may be directed to an audience of medical professionals, who are also known as ‘learned intermediaries’. Such warnings can therefore be communicated in ‘medicalese’ rather than ordinary language, because the prescribing doctor is expected to administer the drugs correctly and explain any risk to the

96 Stapleton v. Kawasaki Heavy Industries, Ltd, 608 F.2d 1019, 5th Cir. 1978, pp.571, 573; see also M. S. Jacobs “Towards a Process Based Approach to Warn Law”. N C Law Review, Vol.71, p.121. Jacob comments that warnings must convey their message in a manner intelligible to the average consumers and be adequate with respect to the consumer’s experience and his or her literacy level.
patient. But with most products, where the warning is communicated directly to the end user, we should do better than just warn consumers who are average or above average in terms of language and literacy skills. Surely below average consumers also have the right to safe products. In this context there is no legal deliberation in the linguistic sense to explain medica!e or difficult language.

Research reveals that comprehension is a significant problem with the language of safety warnings. Experts have observed that words such as ‘accidental;’ ‘contact’, ‘consult’ and ‘persist’, all common in warnings, cause comprehension difficulties. Studies on literacy confirm that a large number of people do not have the reading skills needed to understand the language of warnings and directions on the products they use every day. Clearly, any standard of comprehensibility aimed at the average or reasonable user will not adequately warn a substantial portion of the population. At least, it seems to me, the standard of language should be understandable to a substantial majority of users.

98 L. Marsa. “Illiteracy can be Hazardous to your Health”. Los Angeles Times. 31 July, 2000, Section SI.
Further, warnings should not be too weak or indirect. A medication in very small letters that it 'may' damage the kidneys. This language is too equivocal, it should have said that it 'will' damage the kidneys. The warning also uses the phrase 'in large amounts', but does not specify further, leaving the consumer to guess how much of the medication could be taken before the damage began to occur. Consequently, we can say that such warnings are inadequate. Linguists have made similar points about overly weak warnings: for example Dumas has analysed cautionary language on cigarette packages, which at one time advised purchasers that "smoking 'may' be hazardous to your health". It is obviously more effective to state, as did subsequent warnings, that "it 'is' hazardous to your health". Her study also reveals that the phrase "Cigarette Smoke Contains Carbon Monoxide" is not very effective. It presupposes knowledge that is not provided by the warning, namely that carbon monoxide is bad for you. The warning also depends on an inferential chain of reasoning: that carbon monoxide is bad for you, that you should not therefore breathe it in, that cigarette smoke contains carbon monoxide, and that therefore you should not smoke cigarettes. Shuy has also observed in the context of the

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language of warnings that "the good writer does not provide information about X, then information about y, and then expect the reader to infer the connection between X and Y".\textsuperscript{100} If smoking is bad for health, the warnings should say so.

Another problem in the language of product warnings is indirection. Indirection is the problem of saying too little. Equally problematic are warnings that say too much. As the philosopher Grice has observed a general rule for conversation—the 'maxim of quantity'—is that speakers should say enough for purposes of a particular exchange but not too much.\textsuperscript{101} This principle applies to the language of product warnings pointing out too many dangers, especially those that are less serious or likely to occur, has the effect of diluting or trivialising more important warnings. On a more practical level, a product may not have space for a label listing all dangers. In such situations the following language is adequate:

'Caution: For safe operation see owners manual'

Perhaps a more serious issue is that many manufacturers provide a mixed message that undermines clear communication. For example,


cleaning product ‘Safety Kleen’ is prominently displayed on all sides of the bottle. The bottle has a label in much smaller letters that warned of the danger of using it in a poorly ventilated area. The label might have been adequate, but here the product name dilutes the warning and renders it inadequate. Thus several linguistic factors play their role as communication and non-communication.

Type-size is also way of emphasizing or downplaying information. Important or urgent messages are spoken loudly or shouted for emphasis in speech. In a written text, large letters carry out that function. But we are faced with an apparent contradiction between the name of a product in large print and a warning in much smaller letters, we tend to give more credence to the emphasized message.

Overall, the legal standards imposed on warnings are a mixed bag. They have not given any substance to the requirement that the warning be adequate in a linguistic sense.

**Conclusion**

As we have seen from the analysis that legal English differs in many ways from ordinary English. Each of these differences must promote the main goal of any language: clear and effective communication. Legal language
often strives towards greater formality, it naturally gravitates towards archaic language. Not surprisingly, it has many obsolete English words and grammatical constructions, as well as out dated Latin and French terms.\(^{102}\)

It is evident from the analysis that such features do absolutely nothing to enhance communication; in many cases they impede it by introducing ambiguity or lowering comprehension. So why do these anachronisms and other stylistic features persist? Unless these features have a legitimate function that cannot be otherwise conveyed, they have little to commend them. And I will be exploring some implications and solutions to this dilemma in chapter 4.