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ABSTRACT

A number of reading specialists are finding themselves testifying in court or writing expert opinions for court cases in such diverse areas as civil rights, criminal law, contracts, warranties, and due process. The validity of readability formulas was tested in the case of David v. Heckler. Another case involved a group of Florida prisoners who claimed they did not have their constitutional right of access to the courts. The state provides a law library, but the reading materials were written at college or graduate levels. California and Oregon adopted laws (upheld after legal challenges) specifying the readability of ballot measures. A number of states have passed plain language laws covering such documents as bank loans, rental agreements, and property purchase contracts. Readability formulas have their limitations--standardization is more powerful than readability, and readability formulas are not measures of writing maturity. Developed to aid reading teachers in selecting the proper reading materials for students, readability formulas are spreading into the courts and legislatures as one objective measure to protect basic rights for all. (Contains 16 references.) (RS)

THE LEGAL ASPECTS OF READABILITY

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THE LEGAL ASPECTS OF READABILITY

An interesting area of the reading field is emerging in which a number of reading specialists are finding themselves testifying in court or writing expert opinions for court cases in such diverse areas as civil rights, criminal law, contracts, warrantys and due process (proper notification of rights).

Some of the reading specialists who have been involved in court cases are:

GeorgeSpache	Alan Farstrup
George Mason	Rudolf Flesch
Lonnie McIntyre	Robert Calfee
John Denton	Edward Fry

Besides the prospect of participating in court cases, all reading teachers and specialists might find some interest in the types of cases in which readability, or reading comprehension if you will, plays an important part. It effects every citizens rights to freedom, equal opportunity, owning property, and physical safety. Teaching children to be literate isn't just some school curriculum appointed task, it is a fundamental prerequisite for participating in a modern society. This article will look at some of the legal aspects of an individuals reading ability and its obverse, the complexity of the prose he or she must read.

Validity in the courts

I would like to begin with a class action suit which Law Professor Robert Benson(1985) called "a case of nationwide significance" . It was significant because an individual Joseph David sued the U.S.Government and won. It is significant because the opinion was rendered by an important federal jurist, Chief Judge Jack Weinstein who is known for Agent Orange and a number of trials with national implications. From a reading and writing standpoint it is important because a readability formula was also on trial.

It seems that when Mr. David's wife died he submitted the proper doctor and hospital bills to Medicare. Like many another Medicare recipient the government paid Mr. David far less than he expected and he appealed.

The letter he received, explaining why he received so little money was written in "gobbledegook" according to Judge Weinstein' , and in terms of the Fry readability formula it was Grade 16 or suitable for persons with a college graduate education. Other appeal letters were written at the 12th and 14th grade levels. Since this was

a class action suit, Legal Services for the Elderly in defending Mr. David was also defending all medicare recipients in the city of New York and they pointed out that 48% of the population over the age of 65 had only an 8th grade education or less. Hence it was reasonable to expect that many, if not most, recipients of Medicare appeal letters could not read them with comprehension. To put it bluntly they were being deprived of their rights to appeal by a letter that was written for the wrong audience.

The government in defending the letter argued that Dr. Fry's formula "exaggerates the reading difficulty of letters since it takes into account numerals and proper names" (David v. Heckler 1984). But Judge Weinstein held "The long strings of numbers used in the letters inevitably do contribute to the difficulty many have in reading them. As Dr. Fry pointed out, by putting the numbers in tabular form, much of the difficulty would be alleviated. Moreover, even were we to ignore the numbers and proper names, the reading level of the letters Dr. Fry examined would still be above that acquired by most of the elderly population of New York... The review letters defy understanding by the general populace." (David v. Heckler 1984). The Secretary of the U.S. Department of Health and Human Services (Heckler) was ordered to take "prompt action" to improve the readability of Medicare communications.

The right to use a a readability expert in court was questioned in an case in California and the appeal court held "the trial court erred in refusing to admit the testimony of Dr. Rudolph Flesch who, on his offer of proof proposed to show by application of the Flesch readability test..." (State Farm v. Alstadt 1980).

Criminals Rights

A group of Florida prisoners claimed that they did not have their constitutional right of access to the courts. The state did provide a law library but Dr. George Mason analyzed 130 different materials and found that they were written at the college or graduate levels and 50% of the inmate population had reading levels of 7th grade or below. The court held that in addition to a law library the inmates should be provided with access to legal council. Judges sometimes exercise considerable writing skills themselves and this one held that providing law books only to this population was a little like handing surgical tools to an untrained layman. (Hooks v. Wainright 1982)

In a similar case in Michigan Dr. Lonnie McIntyre used the Gunning, Fry, Rader and Flesch readability formulas to demonstrate the difficulty of legal materials and like the Florida case the prison

was to modify its library, legal services and administrative grievance programs to provide meaningful access for inmates. (Hadix v. Johnson 1988)

In an Alabama case a readability test was done on the rights and waiver form used in criminal arrest (Rutledge v. State 1983)

Rewriting Improves Gobbeltygook

An interesting case in Oregon showed that rewriting can make things legal. The Oregon Environmental Council sued the state department of Agriculture to stop using a pesticide against the Gypsy moth. In part they argued that the environmental impact report was not sufficient and readable. The Department rewrote the report and the judge lifted the injunction. The Council appealed but the appeal courts held that the government had satisfied the readability requirement. (Oregon Environmental Council v. Kunzman 1983)

Ballot Measures

In many states the general population is asked to vote on various measures. If they can't read and understand the measure as it appears on the ballot, how can they make a meaningful choice? The state of Oregon has taken a lead in cases concerned with the readability of ballot measures. For example in Christie v. Paulus (1981) the court held "for state measures, the Secretary of State by rule shall designate a test of readability and adopt a standard of minimum readability for a ballot title" This was supported by a similar Supreme Court Case (Gtech v. Roberts 1986).

However merely passing a law or getting a state supreme court ruling isn't enough to settle the incomprehensible ballot measure forever. In 1974 California passed a Political Reform Act that the written analysis accompanying ballot propositions which is mailed to all voters "be written in clear and concise terms which will be easily understood by the average voter". Common Cause and a UCLA Law Professor who helped write the act brought suit to enforce it when it was found that 83% of the population didn't have sufficient schooling to comprehend measures appearing between 1974 and 1980. (Benson 1985)

Warranties and Warnings

A tragic accident occurred when one Mr. Burgos mixed two different kinds of drain cleaner and looked down the drain to see why it wasn't working. The chemical mixture erupted in his face and at least partially blinded him. He sued the manufacture of one of the drain cleaning products saying that he hadn't been warned. The

drain cleaner manufacturer responded that he did indeed have a warning, it was clearly printed on the can. A readability specialist testified that the warning was written at the 8th grade level. The manufacturer further pointed out that though Mr. Burgos had only a 6th grade education 30 years ago he was currently subscribing to U.S. News and World Report which had a readability level of 12th grade and to the Chicago Daily News in which articles varied from 8th grade to the 16th grade.(Burgos v. San-Teen Products 1983)

The Federal government has tried to protect the public by requiring plain English in

Magnuson-Moss Warranty Act
Truth in Lending Act
Civil Rights Act of 1964
Employee Retirement Income Security Act of 1974
Electronic Funds Transfer Act.

Beginning with New York in 1975, a number of states have passed Plain Language laws covering such common documents as bank loans, rental agreements, property purchase contracts. These states include

Connecticut	Hawaii
Minnesota	New Jersey
New York	

The importance of these laws is that if any contract, warning, warranty, in fact any written communication, is produced at an unreasonable readability level, then the offended party may sue, and if vindicated, recover damages.

A major New York bank feared the worst when it had to simplify its loan note for the general public because the new more readable note was not tested phrase by phrase in court. Just the opposite occurred, they had less suits when the people understood what they were signing.

States are even more in agreement on the readability of insurance policies. At least 28 states now require that personal auto and home owners policies pass a readability criterion. A frequent criterion is a score between 40 and 50 on the Flesch scale which is about 10th grade reading level. Life insurance policies are not far behind and even though not all states have insurance readability laws, many nationwide insurance companies have uniform policies which are used in all states. Failure to make policies readable has resulted in some suits (State Farm v. Emerson 1984)

Limitations of Readability

Readability formulas will not do everything for everybody. For example a school district in Georgia was challenged on the use of the California Achievement Test as an exit examination. Dr. Robert Calfee argued that the readability of the reading passages were more difficult than the readability of the curriculum material used in the schools and hence the test was unfair. Dr. Snyder, one of the CAT designers argued that the standardization process obviated these concerns. The court held with Dr. Snyder and so would I. (Anderson v. Banks 1982) Standardization means that many students have attempted to read that exact passage and answer the questions based on it. Standardization is more powerful than readability because it shows how that exact passage can be understood by a similar population. Whereas a readability formula score is a less direct measure of the comprehensibility of the test passage based on generalized linguistic factors.

Another limitation of readability formulas is that they are not measures of writing maturity. There is a pending suit in New Mexico where a school district attempted to assess the writing ability of some Hispanic paraprofessionals. To do this they applied a readability formula to samples of the paraprofessionals writing. This is clearly a misuse of a readability formula because they were never intended for this purpose. The New Mexico school district that wants to measure writing ability should not use a readability formula.

Lots of very bad writing, for example, some elementary school writing has very long sentences which would tend to yield a high readability score. Take a good look at this sentence:

"I went to the store and I bought an ice cream cone which gave me a belly ache so my mother put me to bed"

This is not mature writing. It is a run on sentence and poor English. Readability formulas assume reasonably standard English grammar and usage. If it ever became known that writing was to be judged as high quality because sentences were longer God Help Us. We already have some of that problem with the "professions" and that is what some of these court cases are all about. There is certainly nothing wrong with mature writers using <u>some</u> longer sentences; what readability research has demonstrated is that <u>on the average</u> writing communicates better with shorter sentences. If you are interested in some comments or improving writing, a writers guide if you will, see my article on "Writeability" in the IRA monograph on Readability (Zakaluk and Samuels 1988)

Conclusion

The foregoing cases and laws illustrate just some of the legal

applications of readability formulas. Other court cases have included

Immigration and Naturalizations form (Association v. Immigration 1987)
Apartment Renters appeal rights (Foggs v. Block 1983)
Rail Road Brakeman's Book of Rules (Edmons v. Southern Pacific 1979)
Communications to employees (Rodgers v. U.S. Steel 1979)

Professor Robert Benson at Loyola Law School was kind enough to do a computerized search of the Lexis legal data base in 1989 for cases involving readability and found 20 Federal cases and 18 State cases. I am sure that there will be many more in the coming years as lawyers and citizens wake up to the fact that their rights are being trampled upon by uncommunicative documents.

So wether you are a pensioner or a prisoner, a borrower or a voter, an environmentalist or an insurance buyer you are apt to be affected, affected legally, by some concept of readability.

Readability is of course a double sided concept on one side is the ability of the reader and on the other side is the difficulty of the reading material. Teachers and the education profession as a whole certainly labor long and hard at improving students reading ability and lately have been putting more emphasis on their writing ability. But now poor and unnecessarily difficult writing isn't just a matter of scorn or inconvenience, as many of these court cases have shown, it is downright illegal.

Readability formulas were originally developed to aid reading teachers in selecting the proper reading materials for their students. Readability formula use gradually spread to textbook selection in other subject areas and to such general applications as newspapers. It is interesting that now the use is spreading into the courts and legislatures as one objective measure to protect basic rights for all of us.

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