

**Is 'good' communication achievable in jury instructions? Applying communication theory to instances of instructions in jury trials - By: PATRIZIA ANESA**

Posted by Michael Lambarena on June 04 2009 21:06:30

**Is 'good' communication achievable in jury instructions? Applying communication theory to instances of instructions in jury trials.**

Stating that 'good' communication plays a crucial role in everybody's personal and professional life would be to state the obvious. However, this well-established concept constantly seems to call for a reflection upon basic questions, such as: how can we define 'good' communication? What are the criteria that can be applied in order to identify it and to discern it, if possible, from 'bad' communication? Is it possible to achieve it? How? Between whom? In which circumstances? What are its consequences?

If we ask people around us what their idea of 'good' communication is, they will provide an unlimited series of answers, all showing a different aspect of the multifaceted concept of good communication. 'Good' may mean effective, successful, persuasive, informative, comprehensible, acceptable, understandable, efficient, subtle, pleasant, clear, convincing, etc. The exploration of such a complex concept is inevitably related to several factors, of which the setting, the participants and the message represent only the most easily identifiable ones. If defining the concept of good communication in general terms is certainly a very difficult task, exploring the possibility of such a definition in a more specific context is an equally complex process.

This study will focus on the legal field, by exploring a specific type of communication event represented by a criminal trial by jury within the U.S. system. I will take into consideration the phase of the trial related to the jury instruction process and I will principally analyse jury instructions as texts, focusing on two fundamental parameters according to which these kinds of texts can be evaluated, i.e. their comprehensibility and their applicability. Even though they cannot offer a holistic representation of the concept of good communication, they can constitute two important variables that can influence the quality of communication in a specific process.

## **Jury instructions**

In this study the internationally known case of California vs Orenthal James Simpson, which took place in 1995, will be used as the primary source for this analysis.

In order to position the jury instruction process within the framework of a prototypical trial by jury, it is interesting to show a schematised representation of the main phases constituting this type of trial (adapted from Cotterill 2003: 94):

- Jury selection
- Opening statements
- Witness examination
- Closing arguments
- Jury instructions and summing up
- Jury deliberation
- Verdict
- Sentencing/release

In these kinds of proceedings the verdict is reached through the jury's application of the law, according to the jury instructions received. The standard procedure is represented by the presiding judge reading out the instructions to the jury. Drawing on Heffer (2008: 47-52), 'jury instruction' is intended in this paper as the overall communication process in which the instruction of the jury takes place, whereas the expression 'jury instructions' refer to the specific texts that are delivered to the jury in a specific trial.

More specifically, jury instructions include references to the substantive law to be applied to a specific case and they are generally delivered prior to the jury deliberation. It is important to note that other types of instructions may be given at different times during the trial and they may include references to how the evaluation of the evidence should be carried out, and instructions

regarding the jurors' conduct and certain technical aspects of deliberation may also be given (Heffer 2008:50-52; Jonakait 2003:198-199).

These types of texts generally tend to follow a set of pattern instructions, which consist of a series of standardised instructions compiled by committees of (mainly) legal professionals[1]. On the one hand, their aim is to guarantee uniformity in the process of providing jury instructions and assure that proven instructions are delivered, and on the other hand this procedure allows a saving in the time and costs related to the drafting of instructions.

In order to attempt to judge the quality of the communicative process taking place in this context, it is important to identify who the receivers of these instructions are and who these texts are written for. The answer is complex, because the instructions are generally read to the jury, who represent the immediate audience and could be defined as the addressed receivers, but the appellate courts constitute (potentially) the final target. Indeed, from a legal point of view, instructions can be challenged on appeal and therefore it is plausible to imagine that the receivers the committees have in mind, while drafting these texts, are other members of the legal community, i.e. appellate court judges. Their knowledge of the law and legal principles is hardly comparable with the knowledge of the field possessed by the jurors, whose background is by definition not identifiable on a priori grounds.

As a consequence, jury instructions are characterised by a high level of complexity and technicality, which does not seem suitable for jurors, as they (generally speaking) do not display specific legal competence and expertise. Predictably, this approach does not facilitate understanding on the part of the immediate receivers.

### **Elements affecting the comprehensibility of jury instructions**

The comprehensibility of jury instructions constitutes the foundations on which a verdict in a jury trial should be reached. Some of the aspects that are often described as the main causes imputable to this failure are the complexity of language and the use of legal jargon, the level of abstractness and the mode of presentation (see inter alia Tiersma 1999, 2006).

## **Complex and technical language**

The complexity of the language and the pervasiveness of technical jargon in jury instructions is a widely discussed topic regarding these types of texts. Assuming that briefly presenting complex legal concepts is a sufficient means of enabling the jurors to understand and apply them seems to fail to consider the profile of the 'average' juror. For instance, the following passage seems quite unlikely to be immediately understood by somebody who does not (in broad terms) possess a legal background:

Express malice is defined as when there is manifested an intention unlawfully to kill a human being. The mental state excuse me when it is shown that a killing resulted from the intentional doing of an act with express malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. The word, "aforethought" does not imply deliberation of the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.[\[2\]](#)

Furthermore, this hyper-technicality also regards concepts relating to other disciplines, especially of a scientific nature:

You have heard testimony about frequency estimates calculated for matches between known reference blood samples and some of the bloodstain evidence items in this case. The random match probability statistic used by DNA experts is not the equivalent of a statistic that tells you the likelihood of whether a defendant committed a crime. The random match probability statistic is the likelihood that a random person in the population would match the characteristics that were found in the crime scene evidence and in the reference sample. These frequency estimates are being presented for the limited purpose of assisting you in determining what significance to attach to those bloodstain testing results. Frequency estimates and laboratory errors are different phenomena. Both should be considered in determining what significance to attach to bloodstain testing results.

## **Abstractness**

Another issue related to the comprehensibility of jury instructions regards their level of abstractness. The standardisation process constitutes the basic concept of pattern jury instructions as it represents a valuable tool to make the instruction writing process more time and cost effective. However, the use of abstract and

widely applicable terms and expressions seems to generate a lack of concrete and personal references regarding the case being examined.

The limited use of context-related and situational elements increases the impossibility of understanding and contextualising the legal principles that are presented, and of applying them to the specific case. For instance, general terms such as 'plaintiff' and 'defendant' are often used:

If you find that before this trial, the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove consciousness of guilt.

The replacement of such terms as 'defendant' with a proper noun is one of the several strategies that may decrease the level of abstractness and impersonality, as a clear and consistent identification of the parties involved can help the jurors to follow the instructions being delivered.

### **Mode of delivery**

Another aspect that is often identified as one of the main reasons why understanding jury instructions is a complex task is related to the way they are presented. Jury instructions can be seen a type of text that is written and meant to be spoken, as it is originally in a written format and it is generally read out to the audience. This mode of delivery of the instructions does not seem to facilitate their understanding, as reading a written text aloud increases difficulty in following it. However, variations are possible, according to the presiding judge. For example, in the case being analysed, the jurors are provided with a written copy of the instructions, as underlined by the judge:

It is also my personal policy that you will have these instructions in their written form in the jury room to refer to during the course of your deliberations.

In this case jurors can access these instructions in the deliberation phase, but they are not provided with a written text while the judge is reading it.

It is clear that understanding a text that is being read may not be a simple task; this process is particularly problematic when the concepts being presented display a high level of complexity, as is evident in the following passage

Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt, and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt. If, on the other hand, one interpretation of such evidence appears to you to be reasonable, and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

The concept may seem clear in its written form, as it is possible to follow the development of the logical reasoning, but if a passage of this type is read out, its complexity becomes much higher.

Jury instructions often include the explanation of certain terms that assume a particular meaning within a specific context, as in the following example:

The word "willful", as used in this instruction, means intentional. The word, "deliberate" means formed, or arrived at, or determined upon as a result of careful thought and weighing of the considerations for and against the proposed course of action. The word, "premeditated" means considered beforehand.

It is interesting to note that in this case the term willful had already been previously used by the judge on another two occasions in the reading of the instructions. Associating a definition with only a specific instruction may be particularly problematic, considering that it is the only definition of the term that the audience has been confronted with. Moreover, the sequential definition of other legal terms may fulfil legal requirements and conform to non-modifiable legal concepts, but it may result in an increase of complexity and confusion on the part of the jurors.

Furthermore, it has often been suggested that, without denying the importance of maintaining a specific institutionalised and official framework, the use of a more accessible type of language should also be combined, to some extent, with a more informal style. Indeed, an active involvement of the jurors is a fundamental prerequisite of a more successful communication process, because "[m]odern jurors are more likely to follow their charge if they feel themselves to be part of a cooperative enterprise geared toward finding the truth than if they feel like foot soldiers being ordered about by an imperious commander" (Tiersma 2006: 3). For example, The National Center for State Courts suggests that "[t]he judge also should encourage jurors to ask questions about the instructions before they begin deliberating"[\[3\]](#).

## **From 'comprehensible' to 'applicable'**

Heffer (2008: 48) remarks that "the legal profession has mostly failed to communicate the law effectively to juries". It seems plausible to assume that this failure may be determined by a lack of comprehensibility of these instructions on the part of the jurors and, moreover, from the fact their applicability encounters a series of difficulties. Indeed, jury instructions should not only be clear and understandable, but also applicable. Are they presented in such a way that it is feasible for the jurors to put them into practice? Even though a comprehensive answer to such a crucial issue is not a feasible objective, it is however possible to highlight some of the aspects that may impede the applicability of jury instructions.

These texts contain concepts whose application is not immediately possible from a cognitive point of view, as emerges in the following example:

The rule of evidence suggests that certain information is not admissible and therefore should not be taken into consideration.

Even if we assume this point has been understood, its application appears almost unfeasible, as information cannot be ignored on command. A similar problem emerges in the following instruction:

You must decide all questions of fact in this case from the evidence received here in court in this trial and not from any other sources.

In particular, the O. J. Simpson trial received incredible media and public attention and, therefore, ignoring any other source of information does not seem an achievable task.

Moreover, besides the fact that the comprehension of all the instructions is unlikely to be satisfactory, the jurors are also instructed on how to use the information they are given:

Consider instructions as a whole and each in light of all the others.

If we consider the impossibility of processing automatically all information, this instruction is not easily, if at all, applicable, especially in light of the fact that instructions are generally read out and the jurors often lack the possibility of accessing the written text.

Similarly, jurors are also reminded that:

The order in which the instructions are given has no significance.

Even in this case jurors seem to be asked something that is unlikely to be achievable and important cognitive concepts seem to be neglected. For example, the rule of primacy states that, in general terms, people are more easily persuaded by what they hear first. Similarly, the rule of recency implies that people remember best what they hear last. Therefore, even if the instruction itself may display a certain level of comprehensibility, its degree of applicability seems minimal.

Another passage calls for a reflection on the actual possibility of applying jury instructions on the part of the jurors:

You must accept and follow the law as I state it to you, whether or not you agree with the law.

The reason why this instruction is not likely to be immediately applicable is twofold: first of all, the process of accepting and following the law is inevitably dependant on the capability and the possibility of understanding the instructions that are delivered. In other words, the jurors may not be able to accomplish such a task if they are not given the appropriate tools to understand the law. Secondly, this instruction does not take into consideration that the degree to which the jurors agree with the law is likely to influence the way they may apply it. In this perspective it seems that instructions of this type "simply fly in the face of human cognitive processes" (Jonakait 2003: 204).

## **Discussions**

If we assume that good communication is a type of communication that achieves a certain (pre-determined) purpose, in the case of jury instructions the 'explicit' purpose of informing the jurors seems to fail. On the other hand the 'implicit' purpose of guaranteeing that a challenge of the instructions would be unsuccessful seems more achievable.

In the particular context of jury instructions, reasoning about the aims of the texts is fundamental, as a lack of understanding of the instructions themselves and a lack of their application may lead to erroneous decisions, at least according to the legal principles that should theoretically be applied.

One of the main requirements drafters of jury instructors (and the final deliverers of these texts) should take into consideration is the importance of adapting the text to the immediate audience and introducing elements that could increase their comprehensibility. Attempts to introduce this kind of practice are constantly

implemented and it is worth noting that "it is much easier to criticize existing instructions than to write new ones which are not only in ordinary English, but legally accurate as well" (Tiersma 1999: 29). If the co-existence of these two apparently irreconcilable aspects becomes the final goal of jury instructions, achieving good communication in the process of delivering instructions proves to be an extremely complex task.

In this respect the achievability of this goal seems to derive from a multiplicity of factors. Firstly, the text produced must follow specific criteria that allow their comprehensibility and give feasible tools for guaranteeing their applicability. Secondly, the means through which the text is delivered also plays an essential role: providing jurors with written instructions to be followed during the reading process, encouraging them to ask for clarification when needed and re-explaining concepts without using the identical words that have been previously read, are some of the possible strategies. In other words, it is essential to put the jurors in the right conditions to fulfil their role and, from this perspective, the role of the writer, the deliverer of the instructions and the jurors seem to be equally important in achieving 'better' communication.

## Author



**Patrizia Anesa** is a doctoral student at the Department of English Studies, University of Verona, Italy. Her research interests lie mostly in the area of specialised discourse, with particular reference to legal language and courtroom communication. Her current work focuses on the dynamics of expert-lay communication in jury trials.

## References

Elwork, Amiram / Sales, Bruce D. (1985) Jury Instructions. In: Kassin, Saul M. / Wrightsman, Lawrence S. (eds) *The Psychology of Evidence and Trial Procedure*. Beverly Hills, CA: Sage, 280-297.

Heffer, Chris (2008) *The Language and Communication of Jury Instructions*. In: Gibbons, John / Turell, M. Teresa (eds) *Dimensions of Forensic Linguistics*. Amsterdam / Philadelphia: John Benjamins.

Jonakait, Randolph N. (2003) *American Jury System*. New Haven, CT: Yale University Press.

Tiersma, Peter M. (1999) Jury Instructions in the New Millennium, *Court Review*, 36(2), 28-36. Available at <http://aja.ncsc.dni.us/courtrv/cr36-2/CR36-2Tiersma.pdf>

Tiersma, Peter M. (2006) Communicating with Jurors: How to Draft More Understandable Jury Instructions, National Center for State Courts, Williamsburg, VA. Available at <http://www.ncsconline.org/Juries/communicating.pdf>

[1] By means of an example see Judicial Council of California Criminal Jury Instructions, CALCRIM, 2008. Available at [http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/calcrim\\_juryins.pdf](http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/calcrim_juryins.pdf)

[2] In the study all exemplifications of instructions refer to: Ito, J. 1995. Judge Ito's Instructions in O.J.'s Criminal Case. *Lectric Law Library*: 154-70. Available at <http://www.lactlaw.com/files/cas62.htm>

[3] <http://www.ncsconline.org/Juries/InnPlainEnglishFAQ.htm>

This article was uploaded to <http://www.languageatwork.eu> in July of 2009 and published under a "Creative Commons license Attribution Non-commercial (by-nc)" for more information please go to: <http://creativecommons.org/about/license/>