

Legal assessors' hints and tips on case preparation and advocacy: mind your language (part 2)

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The legal assessors in 3PB's Professional Disciplinary and Regulatory Team see examples of both good and bad case preparation and advocacy. In these articles for the Professional Discipline and Regulatory newsletter they share with you hints and tips from their experience.

This edition's hints and tips are the second on the theme **Mind your language**. They focus on some of the ways in which people use language differently, and in which words can mean different things to different people.

Professional disciplinary hearings take place before bodies variously termed tribunals, committees or panels; with some regulators the legal assessor is called the legal adviser; and the advocate presenting the case for the regulatory authority is called by titles such as the case presenter or the prosecutor. To avoid repetition, we have in this article used the words tribunal, panellist, legal assessor and prosecutor.

1 Statistics about members of the profession broken down by age and sex

In the previous edition of *Legal Assessors' Hints and Tips* we advised against making things unnecessarily complicated. We drew attention to the need to sort out what you want to say before you say it.

We repeat that advice here in the context of misrelated words. The problem with the heading to this section is, pretty obviously as soon as you think about it, that the participle *broken* ... is in the wrong place. It is meant to relate to the word *statistics* but because of its position it reads as if it relates to *members*. There is a widespread, but quite unnecessary, practice of placing

adverbs and adjectives (or adverbial and adjectival equivalents) in some part of the sentence distant from the word to which they are intended to relate.

If you say “Ms X discussed that she was having difficulties at work with her line manager”, the panellist or witness is likely to think that the line manager is the person with whom Ms X was having the difficulties, not the discussion. If what you mean is “Ms X discussed with her line manager the difficulties which she was having at work”, you should say so. This avoids the ambiguity. Similarly, “Dr B completed a serious incident report concerning the medication error resulting in Patient W’s cardiac arrest at 2230”. The sentence should be phrased so that it is clear from its position in the sentence whether 2230 was the time of the error, the time of the cardiac arrest or the time of making the report.

One context in which this problem arises is in draft conditions of practice presented by the parties for the tribunal’s consideration. Expressing conditions of practice can be difficult. It is not helpful to the tribunal (or the legal assessor) to have to grapple with wording which is avoidably ambiguous or awkwardly expressed.

None of this is particularly difficult. It requires thinking about what you are going to say before you begin the sentence. If it is part of a written note or submission, read it and revise it properly before sending it to the tribunal.

2 They’re out of touch

Generational differences will not always be linguistic. One of our legal assessors had a case where a practitioner declined, for religious reasons, to take part in dressing children up as demons and so forth for Halloween. She was criticised on the grounds that “This is Britain: we celebrate Halloween”.

If you are going to advance a point of this sort, keep in mind that, quite apart from any other objection to that approach to someone’s religious sensibilities, some panellists will think that Halloween, far from being British, is an American import. Frame your argument in a way that makes due allowance for the fact that people’s experiences differ.

3 What do you expect?

Expect is a word which is commonly used in at least two possible meanings, which the speaker often does not appreciate. It sometimes means what one has the right to expect: sometimes what one predicts or judges to be likely.

In the first sense we expect taxi drivers to be courteous and helpful; in the second sense we expect some of them to be surly and bigoted. In the first sense we expect that members of Parliament are people of honour devoted to the public good; in the second sense we expect that some of them are self-serving and fiddle their expenses.

As legal assessors listening to evidence, in particular expert evidence, we see this ambiguity in practice more often than might be thought. The advocate asks “Would you expect that the dentist would use a local anaesthetic when performing this procedure?” The expert answers “Yes”, which may appear to be clear enough but it is not.

Suppose for instance that the procedure is one where a local anaesthetic is usually needed, but not always. The expert may mean “I think he probably did do that”, basing his inference on the fact that it is what usually happens, and possibly also on some other factor that shows it is likely to be what in fact happened. He may on the other hand mean “In my opinion he ought to have used an anaesthetic”. That is not an inference as to what the dentist in fact did: it is a judgment about what the dentist ought to have done.

This gives rise to two difficulties. The first is that, on our hypothesis that the procedure usually requires an anaesthetic but not always, the expert’s answer, understood in the second meaning, is wrong. That may be because the expert has himself conflated the two meanings. He thinks that the dentist ought to have used an anaesthetic because usually this procedure does need an anaesthetic. That however involves making an unstated assumption that this was one of the cases that do require an anaesthetic rather than one of the cases that do not.

The other difficulty is that, even if the expert knows what he means, he may have understood the word *expect* differently from the way the advocate intended by his question. Further, whether or not the advocate and the witness are using the word in the same way, the panellists may not understand the answer in the way it was intended.

Ask your question in a way that makes clear what you are asking, and listen for any ambiguity or misunderstanding in the answer.

4 Must we?

Must and *have to* are words which have a rather similar range of meanings to *expect*. They sometimes express an inevitable inference and sometimes an obligation.

“It is 3pm. He has to be at the hospital.” This may mean: “He left two hours ago. He is surely there by now.” It may also mean: “He has a theatre list beginning at 3.30. It is his professional duty to be at the hospital half an hour before so that he can scrub up and get ready.”

Be aware of the possible ambiguity and, if it arises, clarify it.

Be aware also, that this is a feature of the English language. If evidence is being given through an interpreter, it is possible that the participants hearing the question and answer in English understand the evidence in one meaning, when in the witness’ language the question had, unambiguously, the other meaning.

5 What do you mean by *because*?

Because is another word of that sort. If someone asked you what you meant by *because* you would probably think it a strange question. It appears to be a simple word whose meaning is clear. In truth people use it in different ways.

“You initialled the chart because you wanted to cover up your failure to do X?” “You initialled the chart because you were in a hurry and not paying attention?” The two sentences appear to have the same structure, but they do not. The first asks a question about motive; the second asks one about cause and result.

“You initialled the chart, didn’t you, because we heard from Witness A that he saw you doing it?” That also appears to have the same syntax as the previous two examples, but in this case the clause beginning *because* does not ask about anything. The reason, whether in the sense of cause or of motive, for initialling the chart can hardly be that another witness said something at a hearing two years later. The *because* clause here is not part of the question: it is a piece of propaganda designed to persuade the witness to agree that he initialled the chart.

“You initialled the chart, didn’t you, because it is important that the tribunal understands how it came about that the initials are in the wrong box?” Here again the clause beginning *because* is not part of the question; its purpose is probably again propaganda, but ostensibly it is an explanation of why the advocate is asking the question.

Our legal assessors have heard questions formulated along all of these lines. Sometimes one hears them in combination in the same question. Generally, if a question is clear there should be no need to explain why it is being asked. If for some reason you think that desirable, do it as a separate introductory sentence rather than mixing it up in the question.

Additionally, questions of the form “You did X because you thought Z?” are not the best way to elicit an unambiguous answer. The response “No” is consistent with “I did not do X”, “I did not think Z”, “I neither did X nor thought Z” and “I both did X and thought Z, but my reason for doing X was not Z but W”. If you want information, rather than an opportunity simply to voice an accusation, it would be better to express the question differently.

6 Know your vocabulary

In professional disciplinary cases it is unavoidable that some of the words used will be technical. It is often said that one should use plain language where possible and should avoid unnecessary jargon. Ordinary words however are not always adequate to describe technical matters, even when there appear to be ordinary words available. A simple example would be when one is discussing a position in relation to something in a curve such as teeth. To say that an object or lesion is *behind* the tooth is likely to be ambiguous as to whether one means *distal* as opposed to *mesial*, or *palatal* as opposed to *buccal*. In disciplinary cases, as in professional negligence cases, you will need to understand the technical language so that you can understand the case.

You should not assume that everyone else does. The tribunal will not consist entirely of members of the relevant profession. It will include one or more lay people, and in some cases a legally qualified chairman. Even a panellist who is a member of the profession in question will not always be from the specialism with which the case is concerned, and as we said in an earlier edition of *Legal Assessors’ Hints and Tips*, it is not the job of the registrant panellist to explain technical matters to the others. The legislation of some regulatory bodies makes provision for the tribunal to have a professional adviser, but hearings where this occurs are infrequent.

You will want your expert witness to explain to the tribunal the terms he uses, and you may have gone to the trouble of producing a glossary of technical terms, but still bear in mind that there can be unexpected difficulties with jargon which arise during the hearing.

Keep in mind also that experts, like anyone else, can make mistakes with language even in their own specialism. One of our legal assessors experienced a case where a doctor was asked to explain what the *perineum* was. He gave a description of the *peritoneum*.

7 Asking for more

Be careful about the use of comparatives.

Approximate is an adjective which properly means something which comes close to the true value. People often use it to refer to a rough estimate or an imprecise measurement. That usually creates no problem in itself, but it has the result that they then use *more approximate* to mean looser or less precise, whereas someone with a background in the applied sciences would probably use it in the opposite sense. Use such words correctly yourself, and when others use them be aware of the possible ambiguity.

8 Is a plastic hinge indicated?

Some words that look ordinary have a technical meaning which differs from the one they have in ordinary conversation. This creates scope for misunderstanding even with a hearer who is familiar with the technical meaning, because she may not know in which sense the word is used in the question or in the answer.

Indicate is used by health professionals to mean that a clinical presentation suggests a particular course of treatment or management. Its ordinary meanings are different. The advocate may ask about a short entry in the medical records, “Does this indicate somnambulol?” That could be understood as asking whether the note assumes implicitly that the patient is taking somnambulol, or whether it is a fair inference from the facts stated in the note that the patient is doing so (not the same thing), or whether the signs and symptoms which the entry describes suggest that somnambulol would be an appropriate treatment. In

one case the word was understood by a (clinically qualified) witness differently from the way that the advocate intended, but the advocate had not noticed this until the legal assessor pointed it out.

Indicate is not the only word of this sort. Clinical practitioners often use *abortion* to mean any miscarriage, whereas in general usage it usually means one that is brought about deliberately. A lay witness such as a patient may be confused by the prophylactic use of antibiotics if he thinks that a *prophylactic* means a contraceptive. Similarly, an engineer may use *heat* to refer to a form of energy transfer, rather than to a property of a system, and a *plastic hinge* does not mean a hinge made of plastic.

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