

Give a Clue (A Linguistic Whodunit)

By Mark Cooney

"Seems one poor bloke's no longer the life of this party," said Detective Grammar, stepping into the study with a constable in tow. "Anyone care to enlighten me?"

Miss Violet rolled her eyes and sipped her martini.

"I say, old chap, Ketchup's your man," said Mr. Brown.

"What?" barked Colonel Ketchup, puffing his barrel chest.

"I mean to say that the big bag of bluster knows whodunit," said Mr. Brown.

Detective Grammar turned to Colonel Ketchup, eyebrows raised. "I'm all ears, Colonel." He nodded to his constable, who dutifully took up a pad and pen.

Colonel Ketchup set his Scotch on the mantel and squared his shoulders. "I was there, and I saw the whole thing."

Professor Prune looked up from his book.

"The victim," announced Colonel Ketchup, "was killed with a candlestick in the conservatory."

The constable wrote furiously, while Detective Grammar, bemused, took out his pipe.

"If it's not too much trouble, sir, might you elaborate?"

"I said that the victim was killed with a candlestick in the conservatory. Do you have crumpets in your ears?"

"Begging the good Colonel's pardon," said Detective Grammar, "but the Crown Prosecutor might appreciate one more little detail."

"Poppycock! I've said my piece. I won't have my word questioned by some country copper masquerading as a detective!"

"With all due respect, Colonel, the charge can hardly read, *The victim was killed with a candlestick in the conservatory.*"

"And why the bloody hell not?" snapped Colonel Ketchup, red-faced.

"Well, sir, it's passive voice."

"Passive? Passive! I'll have you know that I'm the great-great-grandson of Brigadier General Bartholomew Somerset Ketchup, who led the First Brigade's charge at Waterloo. There's not a passive drop in this bloodline!"

"I'm not questioning your fortitude, sir," said Detective Grammar. "I'm questioning your sentence structure. You've used the passive voice with an implicit actor rather than the active voice with an explicit actor."

Colonel Ketchup's face went blank.

"If I can explain, sir, passive voice means, basically, that the actor in a sentence appears after the action—or not at all. For example, *The victim was stabbed by Mr. X.* In that sentence, Mr. X is the actor. Yet he isn't up front doing the action. He isn't the subject. Instead, he shows up after the verb that describes his action. It's almost as if Mr. X is receiving the action rather than doing it. This style can feel backward and wordy."

"Positively *thrilling*, Detective," snarked Miss Violet. "We're on the knife's edge."

"But what's more troublesome," continued Detective Grammar, undaunted, "is when the writer—or in your case, the speaker—lapses into the passive voice and fails to mention the actor altogether, like this: *The victim was stabbed.* This can cause ambiguity, to put it mildly. So the prosecutor can't very well draw up a criminal charge that reads, *The victim was killed with a candlestick in the conservatory.* The actor—the killer—is missing. It's like a lease that reads, *All common areas must be kept in reasonable repair.* Who's got the duty to keep up the place?"

"Methinks someone's a bit too keen on grammar," said Mrs. Pheasant.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. To contribute an article, contact Prof. Kimble at Western Michigan University Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For an index of past columns, visit <http://www.michbar.org/generalinfo/plainenglish/>.

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“...to avoid ambiguity, writers...should prefer an explicit actor at the start of the main clause, before the verb. Tell who did the action—or who has the duty or power to act.”

“Hear! Hear!” chimed Colonel Ketchup in approval. He grabbed his Scotch glass and threw back the contents.

“If you don’t believe me, maybe you’ll believe the courts. I’ve been reading up on American court cases—”

“Bloody Yanks,” grumbled Colonel Ketchup.

“As I was saying, my research turned up more than 1,000 American cases in which courts referred explicitly to ‘passive voice.’ For instance, the United States Supreme Court has observed, and I quote, ‘When Congress writes a statute in the passive voice, it often fails to indicate who must take a required action. This silence can make the meaning of a statute somewhat difficult to ascertain.’¹ Other courts have also complained that when a statute’s ‘key verb phrase is written in the passive voice,’ this ‘creat[es] ambiguity as to the intended actor.’²

“Sorry, Detective, but we’ve rather lost the plot,” said Mr. Brown.

“The point is, many of these cases involved statements resembling Colonel Ketchup’s. Consider the case in which a county sanitary engineer fined a company for discharging 250,000 gallons of untreated waste.”

Mrs. Pheasant pushed away her plate of Swedish meatballs.

“The court overturned the fine because of passive-voice phrasing. The regulation said only that a violator ‘shall be assessed civil/criminal penalties of \$1,000.00 per day for each violation.’³ It didn’t say who’d do the assessing, and that wasn’t clear enough for the court:

Unfortunately, the sentence is written in the passive voice. It is ambiguous because,

although it indicates that a violator will be fined, it fails to indicate *by whom*. A regulation which purports to empower an administrator to levy a fine must be strictly construed against the state. We hold that Section VII of the 1994 sewer regulations has failed to adequately delegate the administrative penalty authority to any particular county official.... Consequently, the sanitary engineer had no authority to assess this fine.”⁴

“Don’t courts also frown on death by boredom, Detective?” said Miss Violet.

But he pressed on. “And how about the case in which political delegates sued a national political party and its agents, alleging a pattern of intimidation. The plaintiffs’ complaint included these allegations:

- ‘Bones have been broken.’
- ‘A gun has been used to threaten a Plaintiff....’
- ‘Plaintiffs have been followed.’
- ‘Plaintiffs have been threatened with future lifetime harassment if Plaintiffs do not vote as directed.’
- ‘Plaintiffs have been threatened to remove their names from this lawsuit or face adverse consequences.’⁵

What’s missing from each of those sentences?”

Colonel Ketchup scratched his head.

“Don’t burst a gasket, old boy,” teased Mr. Brown. “What Sherlock’s driving at is that none of those sentences states who done the dastardly deed.”

“Exactly,” said Detective Grammar. “And that wasn’t good enough for the court. I’ve

got the opinion right here: ‘Plaintiffs’ use of the passive voice renders it impossible to discern who broke the bones of whom, who pointed a gun at whom, and whether any of the more than 100 Defendants were even involved.’⁶ The court concluded that these and other ‘vague allegations’ failed to satisfy pleading requirements because, among other things, they didn’t tell the court *who* has done *what* to *whom*.’⁷

Professor Prune shifted in his chair.

“So to avoid ambiguity, writers—or speakers in Colonel Ketchup’s case—should prefer an explicit actor at the start of the main clause, before the verb. Tell who did the action—or who has the duty or power to act. There’ll be exceptions, mind you, like when the actor’s identity is unknown or unimportant. But when it’s important, as is often the case in court pleadings, contracts, and statutes, prefer the active voice.”

“So in your earlier example,” said Colonel Ketchup in a rush of awakening, “we’d say, *Mr. X stabbed the victim*.”

“Precisely,” said Detective Grammar. “In that version, the actor—Mr. X—is up front doing the action. Good, crisp prose—and clear meaning.”

“And in our hypothetical lease, we’d say, *Landlord must keep all common areas in reasonable repair*.”

“Indeed.”

“And when I describe what I saw in the conservatory—”

Professor Prune bolted for the door.

“Constable!” shouted Detective Grammar. Mr. Brown, barely looking up from the *Times* cricket scores, stuck out his foot. Professor Prune crumpled in a heap. The constable wrestled him to his feet.

“*Bravo*, Colonel,” said Professor Prune. “Oh, yes, now you know how the Crown Prosecutor will want it. Active voice, right, old man? Explicit actor up front doing the action and all that. Yes, *Professor Prune killed the victim with a candlestick in the conservatory*. Smashing job, old chap. Smashing.”

“I might say the same for you and your candlestick, Professor,” said Detective Grammar. “Put him in the wagon.”

“Stiff upper lip, Professor,” said Mr. Brown, paging to the Kempton results. ■

This piece first appeared in Professor Cooney's book, Sketches on Legal Style, published by Carolina Academic Press.



Mark Cooney is a professor at Western Michigan University Cooley Law School, where he teaches legal writing. He is editor in chief of The Scribes Journal of Legal Writing and author of Sketches

on Legal Style. Before teaching, he was a civil litigator, most recently with Collins Einhorn Farrell PC, in Southfield.

ENDNOTES

1. *United States v Wilson*, 503 US 329, 334–335; 112 S Ct 1351; 117 L Ed 2d 593 (1992).
2. *Jefferson Co Bd of Equalization v Gerganoff*, 241 P3d 932, 936 (Colo., 2010).
3. *Uniroyal Chem Co v Kron*, 116 Ohio App 3d 655, 658; 688 NE2d 1116 (1996).
4. *Id.* at 1117–1118 (citation omitted).
5. *Delegates to Republican Nat Conv v Republican Nat Comm*, unpublished opinion of the US District Court for the CD of California, issued August 7, 2012 (Docket No. 12-00927), p 2.
6. *Id.* at 7.
7. *Id.* at 6.

Last Month's Contest

Last month, I invited readers to revise this sentence. (I made a mistake in the content, but it doesn't matter for the contest.)

Evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction.

I asked readers to notice the blast of unnecessary prepositional phrases. There are eight. Below is a version that uses four. And it reduces 37 words to 24.

Evidence of a conviction is not admissible if more than ten years have passed since the witness's conviction or release from confinement for it.

I received one entry that I considered an A. Several others were close, but I thought not quite an A. The winner is James Thelen, Chief of Staff to the Chancellor and General Counsel to the University of Maine System:

A witness's past conviction is not admissible more than ten years after (i) the date of conviction or (ii) the witness's release from confinement for the conviction. [Note: the word *past* could probably go, and I'd avoid romanettes.]

Try your hand at the new one.

—JK

A New Contest

Let's continue on the theme of unnecessary proposition phrases. Get a load of this specimen:

Although the road traveled by Officer King was mostly rural in character, the county received the benefit of deterrence of traffic violations by virtue of the presence of the marked patrol vehicle.

Send an e-mail to kimblej@cooley.edu, with "Contest" in the subject line. The deadline is June 27. I have to be the sole judge of the winners. The first two people to send A answers will receive a book.

For future reference: the online version of the column is usually posted before the print version is mailed. To get the jump, Google "Plain Language Column Index."

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