

On the Papers

WHO DONE IT? CONTROLLING AGENCY IN LEGAL WRITING— PART I

GEORGE D. GOPEN

The author is Professor Emeritus of the Practice of Rhetoric at Duke University.

When Agatha Christie writes an engaging mystery, the question of agency is so compelling that we refer to the book as a “Who Done It?”. Where agency is concerned, the aim of a legal brief should be quite the opposite—not to mystify, but rather to clarify. It is probably obvious that the macro-issues of who was responsible for doing the major actions in a case must be attended to with energy and care. It may be far less clear how important the question of agency is in every clause of every sentence. This article begins a discussion of how to control a reader’s perception—or non-perception—of agency at the micro-level of clauses and sentences.

The agent of a clause or sentence is quite simply the person or thing that performs the action. If the sentence is written in the active mode, the agent and the grammatical subject are one and the same; if it is written in the passive mode, the agent may be elsewhere or missing altogether. Most often, but not always, writers need to let the reader know who is doing what. In other words, writers

have to name the agent explicitly and, even more important, they have to place that agent in the right location in the sentence.

In a previous article (*Whose Story Is This Sentence?* *Litigation* 38:3, Spring 2012, at 17), I have argued that readers of English perceive the grammatical subject of a sentence as the agent that performs the action, and they perceive the action as being whatever the verb announces it to be. While this may not be the case 100 percent of the time for 100 percent of readers, it is, I argue, the default value expectation, happening more than 90 percent of the time. If that is the case, you, as a writer, are identifying the agent of the action every time you use the active voice: The agent is the grammatical subject of your sentence. For your readers to understand your thought, that subject-verb combination must represent the agent-action you are trying to convey.

This poses a real problem for writers, because they tend to know in their own minds quite clearly who did what. It

seems obvious to them that a reader will perceive the proper agency as long as a sentence contains all the correct information. However—repeating something I have said before in this series of articles—it is insufficient to produce a sentence that is merely capable of being interpreted the way you wish. You must structure the sentence so that it will be highly likely to lead most readers to perceive your thought. To do that, you have to know what readers expect to find where. You have to know what I call “reader expectations.”

When you use the passive, you are in danger of having the identification of agency become ambiguous. The passive is not bad; it is only dangerous. (I will later devote a whole article to the good uses of the passive.) For now, we can define the passive as a mode through which the object of an action can become the grammatical subject of a sentence that describes it.

- 1a. Jack loves Jill.
- 1b. Jill is loved by Jack.
- 1c. Jill is loved.

In (1a), Jack is the agent—the lover; and Jill is the object of that action of loving—the lovee. When that which might have been the grammatical object of a verb becomes the subject of that sentence, the agent can remain present through the use of the word “by”—as in (1b); or the agent can disappear altogether—as in (1c).

Look what can happen when writers are so aware of agency that they lose sight of what readers will perceive. Consider this example:

- 2a. A study was performed on the causes behind the decrease in the identification of child abuse among emergency room service by the social services staff.

I have used this example hundreds of

times in legal writing workshops. I ask the participants “who is the agent?” and “what action is the agent doing?” Their response is invariably the same. Take a moment before reading further to answer those questions yourself.

There is always general agreement that the agent here is the Social Services staff. That is correct. There is also overwhelming agreement (usually more than 95 percent) that the action done by that staff was either “to perform a study” or “to study” something: The social services staff studied why hospital staff were not identifying child abuse in the ER.

That is perfectly possible. It is also perfectly probable. But equally possible, and equally probable, is that someone from the outside studied why the social services staff were decreasing their identification of child abuse in the ER. And equally possible—but we hope less probable—would be that someone from the outside was studying why someone from the inside was decreasing in identifying the fact that social services staff were abusing children.

This ambiguity can be neatly resolved by making the social services staff the grammatical subject of whatever verb would express the action they actually performed:

2b. The social services staff studied the causes. . . [or]

2c. X [from outside] studied why the social services staff were decreasing their identification of. . . [or]

2d. X [from outside] studied why Y [from inside] were not noticing that the social services staff were abusing children. . .

If all three of these are equally possible, and two of the three are equally probable, why then do 95 percent confidently vote for only the first of the three interpretations? I suggest this is the case because in English we read from left to right and through time. People begin trying to

answer my question—“What did the agent do?”—by starting at the beginning of the sentence. Immediately they encounter “A study was performed.” Because that constitutes a reasonable answer to my question, they tend to cease searching.

I believe this signals an important general tendency we have as readers: We tend to cease any act of interpretation as soon as we are allowed to do so. The moment a sentence makes some sense, we presume that is the sense it was intended to make. We are often wrong to assume that whatever interpretation we come upon first is the one the writer intended; but we are safer in making that assumption when we are reading the prose of an excellent writer. Alas, there are precious few excellent writers among us these days.

Excellent writers control when agency should be made clear and when it should be repressed altogether. There are good, logical, ethical, and sensitive reasons for not stating agency:

- No one knows or cares who did the action.
- The identity of the agent is irrelevant and would be a distraction if mentioned.
- Everyone knows who did it, even without your telling them.
- To mention who did the action would be unkind, insensitive, impolitic, or downright cruel.

Most of the time, however, your reader will do well to know precisely and without much effort who is doing what.

Sometimes agency is not the issue of the moment and would act as a distraction if suggested. This is often the case when the agent is not known:

3a. The window was broken.

3b. Somebody broke the window.

If the broken state of the window is the issue to be considered, (3a) is superior to (3b). Articulating the agency of

“somebody” raises the mystery of who that somebody was: “Somebody—I don’t know who, but will they ever hear from me when I find out—broke the window.” If that mystery is a distraction from the importance of the broken state of the window, the agency should be suppressed, as it is in (3a).

In English, we have two main ways of suppressing agency:

(a) We can articulate the action not as a verb but as a noun. Then no one has to be around to do that action: It just happens.

- Then X and Y discussed the issue.
- Then discussion ensued.

(b) Alternatively, we can substitute the passive for the active, which will then allow for the jettisoning of the agent:

- X broke the window.
- The window was broken by Chris.
- The window was broken.

(There is a third possibility, known as the “ergative” mode, in which the action is described by its effect instead of by its being done: “The door opened.” This occurs so rarely that we need not further attend to it here.)

Whenever you need to suppress agency, I urge you to use the passive. (This is only one of a number of excellent uses for the passive.) That will allow you to keep the action articulated not by a noun but rather by a verb. Readers will far more easily perceive what the action is if, when they go to the verb to find it, it is still there.

In the next article in this series, I will explore the damage that can occur to the identification of agency when we articulate action in nouns instead of verbs. I will also consider the ethical questions that arise when agency is suppressed by any means: “Mistakes were made.” ■