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**New York Law Journal**

New York Law Journal

August 6, 2012 Monday

**LENGTH:** 665 words

**HEADLINE:** Replace 'Prudent' With 'Careful'

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**BODY:**

It's time we replaced "prudent" with "careful" in our negligence charge. Our current negligence charge reads:

Negligence is the lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.

Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.

New York PJI: 2:10

I contend that the majority of our average jurors will not have heard the word "prudent" prior to hearing it read as part of this charge at trial. It will strike our average jurors as technical jargon which they don't understand. Given the inherent difficulty of the typical negligence case - the proximate cause hurdle - we should do everything we can to make the negligence standard as clear as possible for jurors.

The Jury Trial Project conducted by former Chief Judge Judith Kaye in 2005 revealed that many jurors view trials as "complex" endeavors. Employing the jargon word "prudent" as a key component of our negligence charge only adds to rather than simplifies the perceived complexity of trial.

The still useful rhetorical advice given in Strunk & White's *The Elements of Style* advises us to use Anglo-Saxon rather than Latinate words. This advice applies with double force to the still Latin-clogged verbiage of the law. As much as some lawyers like to feel part of an exclusive club by use of opaque phrases like *res ipsa loquitur* or *certiorari*, these words and others don't increase our ability to win a trial, in fact they diminish our persuasive power in direct proportion to the extent that they're used.

More than 40 years after the emergence of the "plain English for lawyers" school of thought, too much of the language of the legal profession remains plagued by Latinisms, passive construction, and other linguistic defects collectively known by the deservedly derisive term "legalese".

"Prudent," I submit, is legalese, a legal jargon term that is not familiar to our average jurors. "Careful" in contrast, is good, plain, clear English, understood by anyone immediately; it requires no explanation. In our negligence trials we should be talking to jurors about the "reasonably careful person" rather than the "reasonably prudent person" because anyone will immediately grasp what we mean to convey by "reasonably careful" while "reasonably prudent" causes a mental stumble, a lack of understanding.

Substituting "careful" for "prudent" will also better serve theme-based strategies for trial. As a simplified example, which theme is the more persuasive to sound in jury selection, opening, cross, and close - "the law requires the defendant to be a prudent driver", or "the law requires the defendant to be a careful driver"?

This works equally well for the defense who can assert, for example, that the law requires the plaintiff to behave the way a reasonably careful person should behave in not putting herself in harm's way, or in making sure she uses a seat belt.

Many of us remember Saturday Night Live comedian Dana Carvey's "church lady" character; Carvey screwed up his face like a prune, wore frumpy clothes, and always delivered his character's signature line: "wouldn't be prudent!" Carvey had an astute sense of language and chose "prudent" precisely because the word is musty and old, frumpy like his character's clothes, a word no longer in common use.

The best lawyers strive to scrub legalese from their working vocabulary. Part of a trial lawyer's art is the skillful choice and purposeful arrangement of words, sentences, ideas and the admissible evidence, all to serve our goal of persuasion in a particular case. "Prudent" is archaic legalese; it's a word that creates opacity rather than clarity. It's high time we removed it from our crucial jury charge.

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**LOAD-DATE:** August 6, 2012

