

Denman CLE

The Common Law Principles of interpretation of legislation

Some questions

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1. This paper describes some of the common law principles of interpretation of legislation. There is, of course, an intriguing question that arises as to whether any common-law principles survive the introduction of section 15 AA of the *Acts Interpretation Act* 1901. That section states that:

Regard to be had to purpose or object of Act

(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

2. Leaving aside the question as to whether that section constitutes a codification of the common law, what common law principles exist or persist?
3. It is tritely said that the study of the common law is the study of applied English. This in itself does not lead far. English itself is a mixture of a number of languages. Some 60% from French or its various ancestors or relatives, a fair number of Greek words, a smattering of Norse, a handful of Celtic words and a surprisingly small but more widely used number of Anglo-Saxon words. Despite this, of course, Latin and French are deeply entrenched in the language of law and administration. To further complicate this mix of meaning; English is surprisingly uncodified and the meaning of words has continued to change both over time and place.
4. A study of the common law is also an institutional study. It is a study of the struggle between the King and his subjects and the boundaries of the space which each might rightfully occupy.
5. So how then does the common law help us interpret an Act?

Start with the text

6. The courts have repeatedly stated that *Construction must be text based*¹. This proposition leaves open a number of questions. How does the court interpret the text? Does a court start or end with the text? What does it do with an obvious mistake? Is a legislative oversight in a different category? Can a court look to the consequences of the particular interpretation?

How to interpret the text?

7. Perhaps the single most important principle is that words be given their plain and ordinary meaning. Were meaning plain and consistent, there would be little argument about the meaning of a statute. We would start and end with the comment of Dixon CJ that:

close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts...There is no other safe guide to judicial thinking in great conflicts than a strict and complete legalism²

8. Yet the idea that words be given their plain and ordinary meaning begs a number of questions:
- i. Plain and ordinary to whom³?
 - ii. When do we determine meaning?
 - iii. What of words with more than one meaning?

Plain and ordinary to whom?

9. Lord Hoffman said in *Homburg Houtimport*⁴:

The interpretation of a legal document involves ascertaining what meaning it would carry to a reasonable person having all the background knowledge which is reasonably available to the person or

¹ *R v Young* 46 NSWLR 681, 107 A Crim R 1 per Spigelman CJ although note reference below to *Solution 6*

² 85CLR xiv

³ The meaning of this phrase is itself subject to some question. Does the word *plain* mean anything different to *ordinary*? If so, how are they different? If not, what is the effect of the words *and ordinary*? Does the word have to have a plain and ordinary meaning or does *and* really mean *or*?

⁴ *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715; [2003] 2 All ER 785; [2003] UKHL 12 at [73]

class of person to whom the document is addressed. A written contract is addressed to the parties; a public document like a statute is addressed to the public at large; a patent specification is addressed to persons skilled in the relevant art, and so on.

10. So what do we say of an Act that refers to the word *employee*? The Act is addressed to the public at large. Employee is a normal English word.

There is long standing authority that a finding as to employment is a finding of fact. And should we be in doubt, we can always turn to the *Fair Work Act* that states:

In this Act employee and employer have their ordinary meaning.

11. Presumably with the help of a dictionary, a member of the public can define this normal English word in a way that the Courts have failed to do.

Words with more than one meaning

12. What is to be done when a word has more than meaning? Which meaning is to be preferred? The ACT Supreme Court has said of the word *house* that⁵:

As early as 1881, in *Yorkshire Insurance Co v Clayton* (1881) 8 QBD 421, it was recognized that separate dwelling units or flats, though one above the other could each be regarded as houses for the purpose of rating legislation (see Jessel MR at p 424-5). *Grant v Langston* (1900) AC 383 illustrates that the term "house" usually will denote a dwelling rather than commercial premises, for the purposes of a statute imposing an inhabited house duty. (See Earl of Halsbury L.C. at 390-392). A "public house" was not a "house" for that purpose. The effect of the comments referred to is that, by itself, the word "house" can convey a variety of meanings. It is the context in which the word appears which enables one meaning rather than another to be selected. The various legal and other dictionaries to which I was referred illustrate this same point.

Meaning When?

13. Are words in legislation to be interpreted in accordance with their meaning as at the time of enactment or today? And as Zines asks⁶; "what

⁵ *IN THE ESTATE OF KATHLEEN THERESA PURCELL, deceased BRYAN FRANCIS PURCELL v. FRANCES ANNE PURCELL and FELIX JOHN PURCELL S.C. No. 21 of 1990 Wills* (1991) 103 FLR 271 [1991] ACTSC 126 (7 February 1991) at [22]

⁶ L Zines, *The High Court and The Constitution* 4th Edition p 17.

is the meaning of meaning?' Is it the meaning of the term or the meaning of the qualities that a thing must have to fall within that meaning (the so called connotation/denotation principle)? On this basis a reference to vehicle in 1901 would include a spacecraft (its connotation or essence) although its denotation (an example) in 1901 would not. Or does, as Zines opines, this merely restate the issue?

The reading of all words

14. A parallel or perhaps subsidiary principle to text based interpretation is that all words are to be given meaning and effect. This is sometimes called the presumption against surplusage. As stated in *Project Blue Sky*⁷:

a court construing a statutory provision must strive to give meaning to every word of the provision.

15. Nevertheless there are limits. When faced with the argument in *Solution 6*⁸ that the legislature had unambiguously given the NSWIRC the power to vary or void so called commercial contracts, Spigelman CJ stated that:

The identification of precisely what the Commission is empowered to void or vary must be determined in accordance with principles of statutory interpretation. In contemporary Australian jurisprudence, a purposive approach to interpretation is to be adopted, not a narrow literalism.

16. To similar effect has been the reluctance of the courts to read down (or up) legislation that has an anomalous effect. As Campbell held in *Gante*⁹,

Jordan CJ expressed the same notion by saying “a court is entitled to pay the legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense”: (*Hall v Jones* (1942) 42 SR (NSW) 203 at 208). From the strength of the language which these judges employed to describe the sort of consequences which will cause a possible construction to be rejected, it is apparent that an anomaly arising from what, on all other tests of construction, is the correct construction of legislation, must be a very serious one, before the court is justified in using that anomaly as a reason for rejecting what otherwise

⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382:

⁸ *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW* [2004] NSWCA 200 ; (2004) 60 NSWLR 558 at [81]

⁹ *Gante v Whalland* [2001] NSWSC 1101 (12 December 2001)

seems the correct construction. Were courts to act otherwise, they would risk taking over the function of making policy choices which properly belongs to the legislature.

17. A practical example of this exercise is the use of the word 'and' when what is meant is 'or'. In *Wavish*¹⁰ for example, the definition of obscenity included (a) tended to deprave and corrupt persons...; and (b) unduly emphasising matters of sex, crimes of violence, gross cruelty or horror". In that case, the word 'and' was held to be disjunctive.

The implication of other words

18. In similar vein, McHugh J approved the words of Lord Diplock in *Jones* to hold that a court would not imply words into statute unless the following circumstances were present:

First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

Continue contextually

19. Perhaps the second most important common law principle is that words have to be understood contextually. As Lord Steyn has stated,¹¹

it is a universal truth that words can only be understood in relation to the circumstances in which they are used. Adapting one of Wittgenstein's memorable examples, one can imagine parents telling a baby-sitter, who agreed to look after their five year old twins for some hours, that if the children become troublesome 'teach them a game'. The parents return to find the baby-sitter playing poker with the children. Poker is a game. Did the context give a more restrictive colour to the word 'game'? Wittgenstein thought the answer was Yes. Judging by my own grandchildren I am not so sure.

20. To press the analogy; would the answer be the same if permission were

¹⁰ *Associated Newspapers Ltd v Wavish* [1956] HCA 69; (1956) 96 CLR 526 (25 October 1956)

¹¹ Steyn, Johan, "*The Intractable Problem of The Interpretation of Legal Texts*" [2003] SydLawRw 1; (2003) 25(1) Sydney Law Review 5

given to let the children *play* and the children were found playing with knives?

21. Steyn states that it is not necessary to:

identify an ambiguity as a pre-condition to taking into account evidence of the setting of a legal text. Enormous energy and ingenuity is expended in finding ambiguities. This is the wrong starting point. Language can never be understood divorced from its context. In the words of Oliver Wendell Holmes, a word is not a transparent crystal. The true purpose is to find the contextual meaning of the language of the text, ie, what the words would convey to the reasonable person circumstanced as the parties were¹².

22. Yet what is the context? The statutory context? The context of the creation of the statute such as second reading speeches and explanatory memoranda. Does it extend to extra legislative evidence? Why should not bureaucratic recommendations, ministerial speeches or Cabinet papers not be examined? And if so, why shouldn't their writers be cross examined? And if so, would this not lead to an impermissible blurring of the boundaries between the Executive and the Judiciary?

Conclusion

23. It was once fashionable to praise or condemn judges as black letter lawyers. The epithet was referable to the literalism of their interpretative process. That debate occurred in that mythical world where legislatures could themselves understand their own legislation and had even read it.

24. Since then has come much of the Commonwealth's legislative gigantism. Weinberg J has said of that trend that:

I have heard it suggested that the last time any Parliament passed an Act that was well drafted was in 1893 when the United Kingdom Parliament enacted the *Sale of Goods Act*. Perhaps that is an exaggeration. At the same time, I would dearly love to see those responsible for having inflicted upon the courts, the legal profession, and the public such excrescences as the *Social Security Act 1991 (Cth)*, with its more than 1367 sections, punished by

¹² *Solution 6 v Industrial Relations Commission (NSW)* 60 NSWLR 558 at [81]

forcing them to read, and attempt to make sense of, their own handiwork¹³.

25. With that trend, and perhaps with the compositional change in parliaments, the process of interpretation has become more complex. In that process, the hermetic reasoning of the black letter lawyers has been found wanting.

26. With that complexity has also come a greater opportunity for the introduction of value judgments to the process of interpretation. This approach might best be summarised by Goldberg J who spoke of:

one case where the tribunal's rejection of a young woman's application for refugee status meant she would be returned to her country to an almost certain death. "I asked myself: 'How do I go home tonight and when Rachel says, How was your day? I reply, Well, I had a case today where I sent a woman home to be stoned to death for adultery.' " Goldberg says he ultimately did find a way to avoid this result by applying the law¹⁴.

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¹³ Justice Mark Weinberg, *The Australian Justice System – what is right and what is wrong with it?*, National Judicial College of Australia Conference on the Australian Justice System in 2020 Sydney, Saturday 25 October 2008

¹⁴ Leonie Wood, *Beyond the bench*, *The Age*, July 3, 2010
<http://www.theage.com.au/national/beyond-the-bench-20100702-zu6y.html#ixzz1WZU3VNkZ>