# Legislative Technique

## The Science of Interpretation

Something has gone wrong with the science of statutory interpretation. Or perhaps it would be more accurate to say that something *is* wrong with it because it has never caught up with developments in the science of drafting. Sir Rupert Cross sensed this when recently moved to turn aside from his usual academic work and write his short book ***Statutory Interpretation*** (Butterworths, 1976). He tells us that he suffered from a "malaise" over the true nature of the English rules:

"Each and every pupil told me that there were three rules - the literal rule, the golden rule and the mischief rule....I had, and still have my doubts..." (***Statutory Interpretation,*** page v).

The mischief rule, as we all know, is otherwise called the rule in *Heydon's Case*. The case is still frequently cited, although it was decided nearly four centuries ago. In those days medicine had one remedy for illness: blood letting. The universal rule, whatever the symptoms might be, was to apply a leech. Medicine has moved on, but has statute law?

Professor Cross, while bringing a new and felicitous touch to the discussion of statutory interpretation, still advances *general rules*. So too does the respected author of another recent textbook, Professor Driedger. In ***The Construction of Statutes*** (Butterworths, 1974), he once more expounds the mischief rule, the literal rule and the golden rule. Then he suggests rolling the three together:

"Today there is only one principle or approach,namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act and the intention of Parliament" (***The Construction of Statutes,*** page 67).

This says everything in one neat sentence; and therefore says virtually nothing. It returns us to square one, from which we must start again. If we are to get anywhere this time, we must follow a different tack. But what shall it be?

I suggest we might do worse than take a leaf from medicine's book. We have no wonder drugs to use on recalcitrant statutes. But we can employ scientific method. Medical practice requires three things from the practitioner: a thorough knowledge of his art, an exact diagnosis of the symptoms of the disease, and then prescription of the correct remedy. The BMA does not issue general rules for the treatment of the sick, as authors of textbooks on statutory interpretation issue general rules about that.

In the world of statutes, the parallel to disease is *doubt*. I believe the science of drafting is now sufficiently precise for us to develop equally precise techniques of interpretation. The medical practitioner's thorough knowledge of his art should be paralleled by the legal practitioner's thorough knowledge of statute law: the technique of drafting, the legislative procedures and all that is involved in text-creation and text- validation.

Then it is necessary to analyse the difficulties of the statute user in tackling a particular subject. These may be divided into *text-collation* (the problem of ensuring that you have all relevant texts), *text-comprehension* (conflating the texts, and deciphering their meaning) and *doubt-resolving*. Techniques of *processing* the text bear on all these. Dynamic processing, such as is carried out by courts or administering officials, develops meaning by resolving doubts authoritatively. Static processing provides assistance in the collation and comprehension of texts. It uses devices such as *text manipulation*, bymethods like Composite Restatement.

If doubt corresponds to disease, then we need techniques of doubt-diagnosis. Just as there are many different causes of disease, so there are many different causes of doubt. Some are deliberately created. The draftsman cannot say everything: he has a duty to keep his text as brief as possible. Even if it were not so, he cannot as a creative writer do without implication. He must leave the obvious unsaid (though aware that what is obvious to one person is far from obvious to another). The technique of ***ellipsis*** is a necessary tool of any author, and the draftsman brings it to his aid.

Another tool of brevity is what Lord Wilberforce has happily called ***the mobile phrase***. Legislative power is effectively delegated when judges are asked to decide what is a "special reason" for not disqualifying a motorist, or officials are required to determine whether an applicant is "fit and proper" to be licensed for some activity. Doubt may also rise from ***intentional obscurity*** or from ***unforseeable development*** in language or social habits.

A further area of doubt-formation is the draftsman's fallibility. ***Drafting errors*** are far more widespread than is generally acknowledged, and are of many different types. A description of these, followed by an analysis of how the courts have handled each type, and why, cannot fail to be instructive. This leads into the last of our three areas: prescribing the ***remedies*** for doubt. The subject is a large one, and cannot be further developed here. I explore it in a book, ***Statute Law***, to be published by Oyez this autumn.

*A Canadian View*

A senior Canadian draftsman, Mr Mel Hoyt, recently gave some views on drafting which are of interest throughout the Commonwealth (since we all operate basically the same system). They are published in a report entitled ***Education, Training and Retention of Legislative Draftsmen in Canada*** (1979) 5 CLB 260. The report, in vivid spontaneous English, confirms that problems in this field are the same everywhere. Few solutions are on offer by Mr Hoyt, but that too has a familiar ring.

The universities should do more, Mr Hoyt says. Students should be introduced to legislative drafting in such a way that they will realise there is more to it than a study of case law. It deserves top priority, and skill in it will help lawyers draft wills, contracts and anything else. Students must be convinced that legislative drafting can lead to personal advancement and success in life. Because a career drafting field does not yet exist in Canada, there is little to attract young people to it. When legislative drafting is taught at a university by pure academics it will very likely consist, Mr Hoyt goes on, of a course in research. He thinks this is a mistake. Practice in drafting is what is required, and universities should concentrate on the structural and compositional aspects. Good university courses reduce the training period in the drafting office.

Today laws are passed by the car-load, and they affect millions who are now well enough informed to think they should understand everything that affects them. Mr Hoyt calls this "mission impossible". Draftsmen are responsible for the state of the law, but they are not given a chance. Legislators cannot understand why bills cannot be introduced immediately and corrected in the House later on. In Canada this was not the case even twenty years ago, but now it is standard practice.

Mr Hoyt discusses possible solutions. Since statutes constitute the official medium for curing evils in our society, governments should give drafting higher priority. Draftsmen must adopt simpler language and shorter sentences. There is no need for a sentence to go on and on and on. A statute should be readable. One should not have to apply some kind of crossword mentality to ferret out the meaning of an Act by referring to a dozen other Acts and regulations.

Judges should be trusted. It is modern thinking in England and the United States, Mr Hoyt tells us, that judges should become partners with legislators, and that giving judges the trust and credit they deserve would multiply many times the possibility of fulfilling the legislature's intention. This involves in stating the broad general intention in simple, concise, straightforward style and letting judges give such fair, large

and liberal construction as the remedial purpose of the legislature requires. (Here Mr Hoyt overlooks the practitioner's need to advise his client without recourse to litigation).

In saying that thought should be given to bringing closely related matters under some kind of principal Act whereby the user would be directed in locating all the law on a particular matter, Mr Hoyt might be thought to be referring to the system of Composite Restatement. Yet he goes on to say that no such scheme could be devised, since different users have different needs and it is not conceivable that any such scheme of grouping would be satisfactory for all of them.

Mr Hoyt makes valuable comments on the organisation of a drafting office. It should handle all types of legislative work and not (as in the United Kingdom) be confined to Acts of Parliament. By drafting all the subordinate legislation too the office will achieve consistency and economies of scale. Beginners can be trained on minor regulations. Work on Acts themselves should begin with consolidation.

Few draftsmen are by nature reformers of their own system. They tend to accept limitations that ought not to be accepted, and to despair too easily. Mr Hoyt is no exception. His report is nevertheless of value, and few will wish to deny his conclusion that legislative drafting requires more public recognition because its importance is second to none.

130 New Law Journal (1980) 493