Legislative Technique

Ambiguity by Misuse of Homonyms
Francis Bennion

The term homonym is applied by philologists to words with the same spelling (or sound) but different meanings. There is obvious risk of ambiguity when a draftsman uses a homonym without being careful to indicate the meaning intended. The risk is compounded when in the same test the draftsman alternates between different meanings.

An example of such alternation came before the House of Lords in *Supplementary Benefits Commission v Jull* [198013 All ER 65. The original draftsman of provisions now consolidated in the Supplementary Benefits Act 1976 had used the term "requirements" in two senses. In relation to a child, for example, the term meant in some places the needs of the child to be physically looked after and cared for, but in others the money required to meet those needs.

The consolidated provisions begin by saying that an adult is entitled to supplementary benefit if his or her resources are insufficient to meet his or her requirements (s 1(1)). *Jull* concerned a mother separated from her husband. He paid her, under a court order, a sum for the maintenance of their six-year old child. This was more than enough to meet what the Act specifies as the child's financial requirements.

The Act then says that a child's requirements are to be aggregated with, and treated as, those of the mother - but only where the mother has to provide for the child's "requirements" (Sched 1, para 3(2)). This phrase "has to provide" proved to be the draftsman's undoing. If it referred to one meaning of the term requirements, namely the child's physical needs, then (since the child lived with the mother not the father and was therefore looked after by her) the mother's requirements fell to be aggregated with the child's. If it referred to the other meaning, namely the child's financial needs (ie the money required to meet the child's requirements in the other sense) then aggregation was not imposed by the Act since the husband paid the money. The latter interpretation meant a larger payment of supplementary benefit for the mother.

Not surprisingly, there were differences of opinion. Initially the Supplementary Benefits Commission aggregated the requirements of mother and child. On an appeal by the mother, an appeal tribunal found the other meaning and increased the benefit. On a further appeal Woolf J upheld the tribunal. The House of Lords, on a "leapfrog" appeal bypassing the Court of Appeal, sided with the Commission and restored their original decision.

The key feature of the case is that nowhere in the House of Lords judgments is there any discussion of (or even reference to) the cause of the ambiguity, namely the draftsman's misuse of the homonym "requirements". This omission is typical. Our courts rarely tackle doubts caused by drafting error in the correct way. The first step is to diagnose the nature and cause of the doubt. Then, it being acknowledged that the text is ambiguous because of a specific defect (in *Jull* the use of a term in two different senses), the second step is for the court to apply appropriate reasoning in resolving the doubt. One would have liked to see the judgments in *Jull* proceed on the following lines.

1. The doubt about whether the mother's income is to be aggregated with her child's is due to an ambiguity. The test of whether the mother has to provide for the child's requirements could refer either to its physical needs or to the financial cost of meeting those needs. As the child lives with the mother the law requires her to satisfy its physical needs, but the financial cost of meeting them falls wholly on the father.

2. Since either meaning is linguistically possible the choice of which to apply must be determined by reference to the policy and objects of the Act.

The result of this approach would probably have been the same as the actual decision arrived at (unanimously) by the House Lords. The advantage to our jurisprudence would have been -a clearer

ratio decidendi taking its place in a more scientific scheme(interpretation of this particular Act. Precision of this kind is necessary if ambiguities are to be processed in a way helpful to those using the Act. The carrying out of such processing efficiently is certainly one of the functions of the highest appellate tribunal.

Crime of Attempt

Do academic lawyers really understand statute law? This question is prompted by some of the responses to my article on the Law Commission's draft Criminal Attempts Bill[1] (130 NLJ *725).* Mr M D Cohen of the University of Sheffield (139 NLJ 1102) says that the phrase "relevant offence" was put into clause 1(l) so that it could be defined in clause 1(3). This is a hysteron proteron, because in truth the phrase was defined in clause 1(3) so that it could be put into clause 1(1). The purpose of statutory definition of this kind is shorthand and nothing more. Its use here avoid repeating a lengthy formula whenever the concept is referred to. Mr Cohen's hysteron proteron leads him to place more weight on the definition than it will bear. He says its use absolves the Law Commission from the duty of *expressly* excluding liability for "imaginary crime".

Have the Law Commission this duty in fact? We had better clear up that question before exploring Mr Cohen's point further. The Law Commission certainly have a statutory duty to carry out systematic development and reform of English law "including in particular the codification of such law" (Law Commissions Act 1965, s 3(1)). The Criminal Attempts Bill is presented in pursuance of this duty, it being expressly stated in the accompanying commentary that it "codifies the law" (Law Com No 102, p87). Craies says that to codify is to declare in the form of a code *the whole* of the law on a particular subject (7th edn, p 59). Lord Scarman, first Chairman of the Law Commission, says that in the field of criminal law especially a code must condescend to detail so as to ensure that its provisions are not overlaid by judicial decisions accessible only to the legal profession (cited Zander, *The Law-Making Process,* p 285). So we may take it that the answer to our question is yes. The Law Commission have the duty of expressly excluding liability for attempting "imaginary crime" just as they have the duty of expressly setting forth all other elements of the crime of attempt. It was suggested in my earlier article that in numerous respects the Commission have failed to carry out this duty.

But, says Mr Cohen, in the case of "imaginary crime" at least the duty is met by use of the defined phrase "relevant offence". He cites the Law Commission's own statement to this effect. The truth however is that the Commission's statement is inaccurate, and has deluded Mr Cohen. The defined phrase is a red herring. Let us get it out of the way of the argument. The Law Commission's description of the crime of attempt begins with the words "If, with intent to commit a relevant offence, a person does an act...". It would be better if it began with the words "If, with intent to commit an offence . . ." and a later provision excluded offences of the type cut out by the definition of "relevant offence". Grammatically, the effect would be precisely the same. The red herring would however be netted.

Now we can see more clearly the inaccuracy of the Law Commission's statement. To say "If, with intent to commit an offence. . ." as the entire description of the mental element required for attempt is certainly not to exclude *expressly* an intent to commit an imaginary crime. There is no mention of imaginary crime. Is such an exclusion to be implied from the language used? Here we come to the nub of the argument. If D intends to have sexual intercourse with a willing virgin of sixteen (wrongly believing that to do so is criminal) does he remove her clothing "with intent to commit an offence"? We see that the phrase is elliptical, and grammatically capable of either meaning. If D, being truthful on all occasions, were asked by an officious Peeping Tom; "Do you intend to commit an offence"? he would answer "yes". It is to avoid doubts of this kind that the codifier has a duty to state the whole of the law expressly. Here the Law Commission have manifestly failed in this duty.

Professor Glanville Williams is one of our greatest living authorities on the criminal law, and his

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[1] Since the above was written the Government have introduced the Criminal Attempts Bill into the House of Commons, The description of the crime of attempt (cl 1) has been completely recast, and is now much simpler. The term "relevant offence" is abandoned, and an express provision (cl 1(3)) is now included to deal with the "imaginary crime". These are welcome improvements, which meet the first objection made in my previous article. The other objection; namely that the purported codification of this offence omits many statements required by a true codification, remains.

views are to be treated with deference. Yet even he is not it seems immune from the incapacity which afflicts academic lawyers when they attempt to handle statutes. For some reason I do not understand he was at pains in his reply (130 NLJ 968) to my article to stress how much he disagrees with the views I expressed. Yet his reply showed that in fact he concurred with my main point, which was to express anxiety at the lack of detail displayed in the Law Commission's Bill. Nevertheless Professor Williams's criticisms were significant (despite his seeming intention) in reinforcing my point.

In a classic judgment, Lord Herschell held that a codifying Act should be interpreted according to its natural meaning and not by recourse to the decisions codified. Otherwise "its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated" *(Bank of England v Vagliano* [18911 AC 107,145). He went on to say of a codifying Act:-

> "The purpose of such a statute surely is that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions…."

In his critique of the Law Commission's draft, Mr Ian Dennis of University College, London says, "The effort at brevity is admirable" ([19801 Crim LR 762). This illustrates the prevailing misconception held by academic lawyers (among others). There is nothing admirable about brevity in setting forth the basic elements of a criminal offence. On the contrary, what is needed is to spell out in detail every aspect of the offence. If academic lawyers lose by the certainty thus achieved they should not grumble. Happy hunting grounds of scholarly disputation may indeed be forfeited, but to shoot an academic's fox is to perform a service to society. All lawyers, whether in the Law Commission, in a seat of learning, or on the bench, need to remember that if law is not plain and certain it lacks an essential attribute. This is particularly true of criminal law.

131 NLJ p192