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Any footnotes are shown at the bottom of each page For full version of abbreviations click 'Abbreviations' on FB's website

Page 596

Legislative Technique: Leave My Word Alone Francis Bennion

Why is statute law so often obscure? The draftsman is the usual scapegoat, but judges and academics bear a share of the blame. This is illustrated by the way the concept of recklessness has been treated.

When cars first ventured on our roads, the law was not far behind. As a draftsman, I put myself briefly in the shoes of the man who drafted the Motor Car Act 1903. He designated it as an offence to drive a car "recklessly or negligently". In selecting these adverbs I have no doubt he intended the juries of those days to listen to the evidence and then make their minds up, without benefit of any hairsplitting direction from the judge. And I have no doubt that is what those juries did.

The term "recklessly or negligently", as used by the draftsman of the 1903 Act, is what in these columns I have described as a belt-and-braces phrase (see 1979.001 www.francisbennion.com/1979/001.htm). It is to some extent tautologous, but this is the sort of tautology which is useful. You take two imprecise terms with overlapping meanings and put them together. The overlap means that at the centre the imprecision disappears. There can be no argument that an act is "reckless" rather than "negligent" (or the reverse) because the same consequences follow either way.

By 1930 road conditions had become more complex, and it was desired to divide the offence into two categories, one more grave than the other. So "recklessly" was used on its own (Road Traffic Act 1930, s 11(1)). The draftsman, I am sure, still intended the jury to apply this adverb directly to the approved facts and make their own minds up. Lord Hailsham LC admirably described its meaning in a recent case:

"Unlike most English words it has been in the English language as a word in general use at least since the eighth century AD.... Though its pronunciation has varied, so far as I know its meaning has not. There is no separate legal meaning to the word". ($R \ v \ Lawrence \ [1981] \ 1 \ All ER \ 974, \ 978.$)

The current provisions are ss 1 and 2 of the Road Traffic Act 1972 (as substituted by s 50(1) of the Criminal Law Act 1977). Both refer to driving a motor vehicle on a road "recklessly", but s 1 deals with the more serious offence of causing death by such conduct. Why cannot juries be left to apply this simple adverb, with a meaning unchanged for more than a thousand years, to the proved facts? Instead, judges have felt compelled to give guidance amounting to nothing more than attempted paraphrase. It could amount to nothing more than this, but the attempts have been disastrous. Academic commentators have rushed to elucidate the judicial glosses on a straightforward term. So the law has got itself into a gratuitous tangle.

The case of *Lawrence* provides a vivid example. A woman crossed the road in a built-up area and was killed by a motor cycle. If, as the prosecution evidence showed, the accused was driving at a speed of between 70 and 80 mph he was clearly reckless. If the defence witnesses were believed, and he was doing no more than 40 mph at the most, he was clearly not guilty. All the jury had to do was decide whether they were convinced by the prosecution evidence of speed or not. As Lord Diplock said, the case was about as simple and straightforward as any case can be in which the charge is one of driving recklessly. Yet it took four days to try. The judge gave a direction on the meaning of "recklessly" which the Court of Appeal

described as "confused". They quashed the conviction. The prosecution appealed to the House of Lords, who upheld the Court of Appeal.

Page 597

As a draftsman, what do I say if my intention is to let the tribunal of fact decide the case by referring the evidence to a stated and well-understood criterion? Must I ask Parliament to order the judge to leave the enacted words alone? That might offend the principles of comity between the legislature and the courts. Yet it seems that nothing short of it will do¹.

To Substitute — A New Use?

Readers of this Journal are surely to be treated as experts. The Complete Plain Words says that when writing only for fellow experts the writer's aim of affecting his reader precisely as he wishes may best be achieved by specialised language: "Any issue of any learned journal will yield copious examples".

This opening is prompted by a letter from a reader objecting to my use of "substitute" in a passage ((1981) 131 NLJ 356) remarking that a later Act may supplement, substitute or repeal a provision of an earlier Act. Don't, the reader urges, say "substitute" when you mean "replace". And he refers me to a different passage in *The Complete Plain Words*.

An Act as passed consists of a long title, a preamble (rarely, except in the case of private Acts), an enacting formula, one or more sections (perhaps divided by cross-headings), and sometimes one or more Schedules. The device of textual amendment, which I prefer to indirect amendment because it retains the relevant law in a single Act, operates in various ways and one of them is *substitution*. Take, say, section 2 of an Act. The original meaning is later felt to be unsuitable. It must be changed. There are various ways of doing this. The technique of indirect amendment operates by means of a new Act which overrides s 2 but does not repeal it. Or the new Act could replace s 2. The new Act's provisions would then operate instead of s 2, which would be repealed. A third method, usable where there is not a great deal wrong with s 2, is to make textual amendments in its wording but otherwise leave it to stand.

The fourth method is to *substitute* s 2. This is a short way of saying to substitute for the original wording a different set of words, still calling it s 2 of the earlier Act. A somewhat specialised operation, with few parallels outside the realm of statute law.

Is it permissible to employ this usage? Again drawing on *The Complete Plain Words*, we see that there are opposing arguments. To substitute, used in this way, may be a new verb, (I am not sure about this, though I am not conscious of inventing it myself.) Newness alone does not disqualify it. Gowers (as currently edited by Sir Bruce Fraser) says: "The usual reason for inventing such words is that they enable us to say in one word what would otherwise need several. . . we ought to examine the novelties on merits, without bias. The main test. . . is whether the new word, or the new meaning, fills a need in the vocabulary. . . those that claim seats hitherto empty may deserve admittance".

The opposing argument is that one should not affront the reader. In *The Complete Plain Words* it is put like this. Lapses from what for the time being is regarded as correct irritate the educated reader, and distract his attention, and so make him the less likely to be affected precisely as you wish. Gowers wrote for the Government official: "On my principle the official has no choice but to conform; for his readers will almost certainly attribute departures from [a rule] to ignorance of it, and so being moved to disdain of the writer, will not be

¹ Since this article was written G R Sneath has discussed the problem at length in the Statute Law Review and suggested a suitable statutory formula - see [1981] Stat LR 17.

'affected precisely as he wishes'". Writers in a learned journal are less closely bound, though they too will not wish to irritate their readers.

One thing is clear. It would not have been right to do as my reader suggests and say "supplement, *replace* or repeal". That would have denoted the second method mentioned above, and I wished to denote the fourth. One must get the word "substitute" in somehow. The formula used by the legislature is on the lines of "for s 2 there shall be substituted the following" (also to be known as s 2). So the only alternative is a lengthy periphrasis.

On balance I feel my use of the verb to substitute in this sense is justified in these columns, if not (as yet) in an official communication. Were we not sometimes a little bold, new meanings would not come into use, and gaps in the technical language would never be filled.

Endless Emergency

I am grateful to another reader for drawing my attention to a singular anomaly.

On September 1, 1939 Hitler invaded Poland, and it was clear that World War II had become inevitable. Two days later it arrived. Parliament meanwhile made suitable preparations. While German troops crossed the Polish frontier a Royal Commission sat in the Palace of Westminster to signify His Majesty's assent to various measures including the Import, Export and Customs Powers (Defence) Act 1939. This gave authority to control the import and export of goods. Since it was a draconian measure, its duration was strictly limited. Section 9(3) stated that the Act was to continue in force only until an Order in Council was made declaring that the emergency which occasioned its passing had come to an end.

Has it by now come to an end? You and I, more than 36 years after VE day, would unhesitatingly answer yes. But it appears that for the authorities in charge of administering this Act, U-boats lurk still in the depths of the Atlantic, Luftwaffe squadrons fill the Kentish skies, and the Führer stalks the Wilhelmstrasse. What other reason could they have for failing to make the necessary Order in Council? It not having been made, the Act continues to operate. What is more, import and export control orders go on being made under it at frequent intervals.

Does not this mock the rule of law? There was a clear duty implied by s 9(3) to procure the making of an Order in Council when the 1939 emergency was safely past. It was safely past many years ago, and the duty has been continuously broken ever since.