

Penalty Points - a Transitional Problem

by Piers Darkly

In our firm the partners have their special lines. My own seems to have become road traffic - no doubt because I never managed to pass the driving test.

Our client Mr Walley is a sales rep. Normally he is a careful driver. He tells me (and it is no surprise) that he is totally dependant on his licence. I acted in April this year for Mr Walley on his first-ever traffic prosecution. He went down for a row of offences, but we saved his precious licence.

Last week Mr Walley came to me again. He was in a mild panic. A barrack-room lawyer at his place of work had told him that under the transitional provisions of the Transport Act 1981 his April convictions spelt ruin. Could I please reassure him?

I got down the Act and tried to work the thing out. In April Walley's licence was endorsed for four offences committed on the same occasion. Having left his glasses at home, he had inadvertently driven into a play street, where he badly frightened some little girls playing hopscotch in the roadway. When stopped by a police patrol he indignantly (and very rashly) refused to take an eye test. At all material times Mr Walley was stone cold sober. That did not save him from four separate convictions, all with compulsory endorsement under s 101 of the Road Traffic Act 1972.

The Transport Act 1981

First I looked up section 19 of the 1981 Act. This told me that on any future conviction for an offence involving disqualification Walley was almost certain to lose his licence if his accrued penalty points (together with any imposed on the new conviction) totalled 12 or more. I turned to the tariff in Schedule 5 to the 1981 Act. It produced the following penalty points for Walley's April offences-

Driving with uncorrected defective eyesight.....	2
Refusing to submit to test of eyesight.....	2
Contravening prohibition on use of street playground....	2
Reckless driving.....	10

Then I went back to s 19(1) of the 1981 Act. This told me that for a person who commits these four offences on a single occasion after 1 November (the commencement date for the new penalty points system)

'the number of penalty points to be endorsed ... shall be the number or highest number that would be endorsed on a conviction of one of those offences.'

Clearly this requires an endorsement of 10 points, which would cover all four of the offences. Would it be the same for Walley's convictions last April? I knew it would not. I remembered very clearly reading somewhere that pre-November convictions were on a flat rate of 3 points only.

I checked my memory by referring to the transitional provision in s 19(7) of the 1981 Act. This, I gathered from Mr Walley, was what the barrack-room lawyer had put his finger on.

The wording of s 19(7) made my hair stand on end (what little is left of it). Obviously I needed to consult Charles Mycraft.

Our statute law specialist

As I said, all our partners have their special lines. Mycraft is by way of being both a British bridge master and a British chess master. So naturally he has slipped into occupying the position of the firm's statute law specialist. It is to him we go when we find ourselves defeated by the recondite confections of the parliamentary draftsman. Mycraft is like the man Emerson wrote about who invented a better mousetrap. To say that on statutory interpretation his fellow-partners have beaten a path to his office door would be an understatement.

Mycraft chuckled as he read s 19(7). Indeed it seemed to me, in my jaundiced frame of mind, that he positively relished this opaque product of the legislative alembic.

'A choice piece of asifism' said Mycraft. 'One of the richest I've seen this week'.

When I meekly enquired what asifism might be, Mycraft told me it is a device based on make-believe. Parliamentary draftsmen are devoted to it.

'It saves them time and it saves them trouble. It shortens the Bill, which pleases their political masters. The snag is that it adds greatly to the time and trouble spent by every practitioner who has to find out what the product means. Look at you for a start.'

Mycraft went on to tell me the cautionary tale of Farmer Giles and Len, his slow-witted cowman.

'Asifism arises when the draftsman says something like "the Cows Act shall apply to bulls as if they were cows". That saves him having to spell out in direct language what is to be the statutory fate of bulls. Just pretend they are cows, and leave the Cows Act to deal with them.'

The trouble is that bulls are not cows, as the slow-witted cowman discovered. When Farmer Giles went away for a couple of days he told Len to take especially good care of the new bull. 'What should Oi do with un?' (Or words to that effect).

Here Farmer Giles allowed his impatience to get the better of him, and perpetrated a bit of asifism. The farm treated its cows very well indeed so he simply told Len to treat the bull as if it was a cow.

When milking time came, Len rounded up the surprised bull and tried to connect it to the milking machine. Farmer Giles was very good about visiting him in hospital afterwards, and seeing to the compensation. He fully accepted that if he had spared the time to spell out to the cowman exactly what he wanted him to do with the bull the accident would never have happened.

Section 19(7)

The transitional provision set out in s 19(7) of the Transport Act 1981 tells us that a pre-November endorsement order 'counts as an order made in pursuance of subsection (1) for the endorsement of 3 penalty points'. In other words the order is to operate as if made under s 19(1). But it could not really have been made under s 19(1). In many cases s 19(1) requires endorsement of a different number than 3.

'This,' said Mycraft, 'is absolutely typical of asifism. We are told to pretend that a thing was done that in real life could not have been done. Something has to give somewhere. We are meant to infer some suppressed premise. But what is it?'

One might safely assume that s 19(7) was intended to override s 19(1) at least to the extent of providing 3 points in the ordinary case. But what of a case like Walley's, where several offences were committed on the same occasion? Was s 19(7) also intended to override the provision quoted above stating that only the offence with the highest points score was to count?

Though one cannot now be sure, a single endorsement order was probably made last April to cover all four of Walley's offences. This may well have been so in fact. But were there not in law four separate orders? Endorsement is ordered under s 101(1) of the Road Traffic Act 1972. This says that

'where a person is convicted of an offence ... the court shall order that particulars of the conviction ... shall be endorsed on any licence held by him...'

The provision applies separately in relation to each offence. Its wording suggests that each offence imports its own endorsement order. If so it follows that s 19(7) is to be applied separately to each one of Walley's four convictions. As well as overriding the number of points specified generally by s 19(1), on this reading s 19(7) is also intended to override the limitation on the points to be allotted for single-occasion offences.

I began to see what the barrack-room lawyer was getting at. On this basis Walley's April convictions give him a penalty points total of 4 times 3. This would take him in one bound to the triggering figure of 12.

'The only way to sort it out' said Mycraft 'is to discover the suppressed premise.'

At this point I rather expected our revered partner to produce a magnifying glass from his waistcoat pocket and drop silently to the carpet. Nothing so interesting occurred. Instead Mycraft outlined the method he calls interstitial articulation.

Interstitial articulation

Mycraft explained that within the interstices of a provision like s 19(7), there must be secreted an implied message. This, if it can be discovered, will supply the answer to the conundrum of the provision's intended meaning. The interpreter's object is to articulate this message in such words as the draftsman himself might have used if he had chosen to spell it out. This means as it were reconstructing the relevant provisions.

In Walley's case there were two possibilities. Under s 19(7) either his April convictions produced 12 penalty points or they produced 3. The 'interstice' to be attacked is located in a phrase in s 19(7): 'an order made in pursuance of subsection (1) for the endorsement of 3 penalty points'. As explained above, this as it stands is self-contradictory. It could not apply literally because in many cases an endorsement order truly made in pursuance of s 19(1) would produce a different point score than 3. In Walley's case for example the point score would be 10. This self-contradiction makes it logically necessary for the interpreter to fabricate a different version of s 19(1) as applied by s 19(7).

To begin with though, we must treat the s 19(7) phrase just quoted as being slightly different from what it actually is. The revised phrase might be: 'an order made in pursuance of [a modified version of] subsection (1) for the endorsement of 3 penalty points'. There are then two possible modified versions of s 19(1) to choose between. In Walley's case they respectively produce 12 points and 3 points.

Version of s 19(1) producing 12 points

'Where a person is convicted of an offence ... and the court does not order him to be disqualified ... but orders particulars of the conviction to be endorsed under section 101 of the 1972 Act, the endorsement

ordered shall include-

(a) particulars of the offence, including the date when it was committed; and

(b) 3 penalty points;

and if a person is convicted of two or more such offences the number of penalty points to be endorsed in respect of those of them that were committed on the same occasion shall be the same as if they had been committed on different occasions.'

Version of s 19(1) producing 3 points

'Where a person is convicted of an offence ... and the court does not order him to be disqualified ... but orders particulars of the conviction to be endorsed under section 101 of the 1972 Act, the endorsement ordered shall include-

(a) particulars of the offence, including the date when it was committed; and

(b) 3 penalty points;

but if a person is convicted of two or more such offences the number of penalty points to be endorsed in respect of those of them that were committed on the same occasion shall be the number that would be endorsed on a conviction of one of those offences.'

It will be seen that the two versions are identical apart from the italicised words at the end. In the first version these italicised words confirm that s 19(7) applies to each offence separately, yielding 3 points for each (even where they were committed on the same occasion). In the second version the italicised words repeat what is contained in s 19(1) as it stands, confirming that they are intended to negative the argument that s 19(7) is to be applied separately to each offence.

Conclusion

I realised that Mycraft's articulation of the two possible versions gave the argument something to bite on. But where did we go from there?

'You are now' said Mycraft expansively 'in a position to apply the usual principles of statutory interpretation in order to determine which version is the more likely to have been intended by Parliament.'

If Walley had been convicted after 1 November he would have suffered 10 penalty points. As it is he will suffer either 3 or 12. Which was more likely to have been intended?

It is not easy to say. 12 is nearer to 10 than 3 is, but surely Parliament would not intend to allot more points for a pre-Act offence than one committed after its commencement? Especially when to do so lands the hapless victim with points enough for instant disqualification.

'That is what we call purposive construction' said Mycraft genially, looking at his watch. 'It also has the merit of giving as much effect as possible to the literal meaning of s 19(7). And now, if you will forgive me... I see we have spent just under two hours on this engaging little problem. I wonder how many times that is being repeated up and down this fair land of ours...'

I wrote to Mr Walley and told him that, while the matter was not free from doubt, we thought his barrack-room lawyer was wrong. I ventured to express the hope that the relief this occasioned him would ease the pain at having to meet the enclosed account for four hours of partners' time.

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