

Introductory Note by Francis Bennion

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HANSARD - HELP OR HINDRANCE?

A Draftsman's View of *Pepper v Hart*

by Francis Bennion

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When the erring husband is seeking solace elsewhere he explains that his wife doesn't understand him. I sometimes feel the complaint of the legislative drafter should be: 'my judge doesn't understand me'. We draft for judges, but often they seem not to understand us or our ways. Occasionally we are tempted to think they do not try to understand. When yesterday, following his speech to the 10th Commonwealth Law Conference on judicial legislation, I asked Lord Mackay of Clashfern LC whether, if as he admits judges legislate, they could not usefully put their judgments into legislative form he retorted: 'I am certainly not going to start adopting the style of Parliamentary Counsel! What do drafters think of the latest essay in legislation by Her Majesty's Judges? This paper gives one point of view.

It is just forty years since I entered the Parliamentary Counsel Office in London, then situated in a remnant of the medieval palace of Westminster known as Old Palace Yard. Throughout that period, and for some two centuries previously, a United Kingdom legislative drafter worked under the assumption that Hansard could not be looked at by courts when construing his or her compositions. Now, this has changed. By its decision in *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032 the House of Lords overturned what is known as the exclusionary rule. In this paper I examine the decision and discuss some of its consequences for drafters and others.

Drafters, at least in the common law tradition, strive to lay down clear, comprehensive rules. Legislators expect them to do this. Especially, legislators expect them wherever possible to be comprehensive, that is to cover all the ground by express provisions. But of course it is seldom practicable to achieve this aim within the four corners of a parliamentary bill. So what does the drafter do? There are three possible expedients. Power may be given to lay down the detail in delegated legislation. Implication may be relied on. A broad term may be used. I want to concentrate on the third possibility.

The broad term will cover a multitude of possible situations. It is then left to officials administering the Act, or the court on appeal or review, to work out how by the exercise of judgment or discretion the broad term is to be applied in particular types of situation. This was the case in *Pepper v Hart*

itself, where the broad term was 'a proper proportion' (used in relation to a certain kind of expenditure).

Just what do I mean here by 'judgment or discretion'? These are commonplace terms, which we are apt to hurry over. For once, let us take a little time to consider them. I would say that *judgment* is needed where a court or official is given the task of determining whether a specified criterion is satisfied, for example whether a certain thing is 'necessary' or 'reasonable'. On the other hand *discretion* is to be applied where it is left to the court or official to make a determination at any point within a given range, for example in fixing the sentence following conviction of an offence. Deciding on what is 'a proper proportion' of certain expenditure is a matter of judgment.

So in the enactment with which *Pepper v Hart* was concerned the drafter, having gone as far in the direction of particularity as seemed possible, left the rest to be dealt with as a matter of judgment. This is not an analysis any of the judges in the case thought fit to make, probably because it was not the way counsel presented the argument to them, but I submit it is the correct one.

There enters now a complicating factor. Because MPs wish to know exactly how a provision they are asked to pass is going to work in practice, they sometimes jump the gun. They are not content to wait and see how officials and courts will exercise their judgment or discretion in applying a broad term. They want the answer now. And sometimes a Minister is cajoled into giving them the answer now. That again is what happened in *Pepper v Hart*.

So far, at least in the United Kingdom, it has not mattered. The court of construction, always the ultimate arbiter, would take no notice of what the Minister had said. It would construe the Act according to its wording within the overall context (apart from Hansard). In other words it would approach its task of exercising judgment or discretion uninfluenced by what the Act's promoter told Parliament in order to get it passed. *Pepper v Hart* changes all that.

I shall return to the facts and speeches in *Pepper v Hart*. I shall argue that the House of Lords, and indeed the courts below, failed to grasp the essentials of the case and so produced a flawed ruling. First however it is necessary, in order to grasp the significance of that ruling, to consider the reasons which over two and a half centuries were advanced for the exclusionary rule.

Reasons for the exclusionary rule

In precluding recourse to Hansard, the exclusionary rule is an exception to another rule, known as the informed interpretation rule. For the sake of brevity I will simply state this in the form in which it is set out in the second edition of my book *Statutory Interpretation*.¹

(1) It is a rule of law (the 'informed interpretation rule') that the interpreter is to infer that the legislator, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result).

(2) Accordingly, the court does not decide whether or not any real doubt exists as to the meaning of an enactment (and if so how to resolve it) until the court has first discerned and considered, in the light of the guides to legislative intention, the *context* of the enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case.

¹Code s 201. For the reasons underlying the rule see pp 427-429.

(3) For this purpose Parliament intends the court to permit the citation of any publicly-available material which, in accordance with the interpretative criteria, the court considers it proper to admit (whether unconditionally or *de bene esse*).

The exclusionary rule makes Hansard reports an exception to the informed interpretation rule. Why should it do so? I find that nine different reasons have been given.

Not known to other House or Sovereign The exclusionary rule was probably first stated by Willes J in *Millar v Taylor* (1769) 4 Burr. 2303 at 2332.² The sole reason he gave was that the history of the changes undergone in the first House by the Bill which on passing became the Act in question 'is not known to the other house, or to the sovereign'. This reason no longer applies, since parliamentary debates are now fully and accurately reported.

Parol evidence rule In an 1859 case Byles J said: 'I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the act; for, that would be to admit parol evidence to construe a record'.³ The term record has a technical meaning, and includes Acts of Parliament.⁴ 'Records are the memorials of the legislature, and of the courts of justice, which are authentic beyond all matter of contradiction'.⁵ Historically they could not be contradicted by parol evidence, which includes, in addition to its literal meaning of oral evidence, writing not consisting of a specialty or record.⁶ An Act of Parliament is both a specialty and a record.⁷ In a valuable discussion of the point, the Canadian academic D G Kilgour says there can be little doubt that, in its basic form of not admitting oral evidence to contradict a written formulation, the parol evidence rule had a direct influence upon the development of the exclusionary rule because judges felt that statutes were to be construed in the same manner and by the same techniques as other writings.⁸

²T R F Plucknett *A Concise History of the Common Law* (5th edn, 1956) p 335; *Viscountess Rhondda's Claim* [1922] 2 AC 339 at 383; *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032 at 1052.

³*Earl of Shrewsbury v Scott* (1859) 6 CBNS 1at 213.

⁴'Thay to abide enacted as thinges of recorde' : *Rolls of Parliament IV* (1433) 424/1. See *Sadlers' Company Case* (1588) 4 Co Rep 54b; Blackstone, 2 *Commentaries* (1766 edn) 344.

⁵Jowitt, *Dictionary of English Law* (1st edn, 1959) p 1487.

⁶*Rann v Hughes* (1764) 7 TR 350-351n; *Gibson v Kirk* (1841) 1 QB 586.

⁷*Cork & Bandon Railway Co v Goode* (1853) 22 LJCP 198; *Collin v Duke of Westminster* [1985] QB 581.

⁸D G Kilgour, 'The Rule against the Use of Legislative History: "Canon of Construction or Counsel of Caution?"' 30 *Can Bar Rev* (1952) 769 at pp 787-789.

Parliamentary privilege In relation to proceedings on bills, parliamentary privilege is largely, if not entirely, codified in article 9 of the Bill of Rights (1689).⁹ This provision, which still applies in most Commonwealth countries, states that Parliament resolves: 'That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament'.¹⁰ It is declaratory of the law of Parliament, which may in fact go wider.¹¹ It is also part of the general statute law binding on the courts. Article 9 is badly drafted and ambiguous, since 'freedom' may qualify only 'speech' or it may also qualify 'debates and proceedings in parliament'. Is it merely the *freedom* of parliamentary debates and proceedings that ought not to be impeached or questioned or is it the debates and proceedings in their entirety?¹² Authority up to the decision in *Pepper v Hart* shows the latter proposition to be the correct one.¹³ Thus to question what is said in Parliament, e.g. by the sponsor of a Bill, in a 'court or place' out of Parliament is to contravene article 9.

This seems to apply to such an act as is rendered permissible by the ruling in *Pepper v Hart*. To allow an advocate to cite in court, as an indication of the intended legal meaning of an Act, a statement made in Parliament by the minister sponsoring the Bill for the Act, surely must involve 'questioning' the ministerial statement in the court. This questioning will inevitably take place when the advocate explains to the court how the statement helps his case, when his opponent puts to the court a contrary view, and when the judge joins in the exchanges and ultimately gives his own verdict on the argument.

The House of Lords decided otherwise in *Pepper v Hart*, though only Lord Browne-Wilkinson gave full reasons for their view.¹⁴ He did not discuss the argument as to the narrower and wider interpretation, but assumed the narrower was correct. The only gesture he made in the direction of the earlier authorities was to say 'No doubt all judges will be astute to ensure that counsel does not in any way impugn or criticise the minister's statements or his reasoning'.¹⁵

⁹The short title 'Bill of Rights' was given by the Short Titles Act 1896 s 1 and Sch 1. Although the year 1688 is often appended, royal assent was actually given in December 1689.

¹⁰This is the wording and punctuation of Article 9 as set out in 9 Statutes at Large (1764 edn) 69.

¹¹Erskine May, *The Law, Privileges, Proceedings and Usage of Parliament* (21st edn, 1989), p 90. In *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032 at 1067 Lord Browne-Wilkinson held that nothing cited in that case had 'identified or specified the nature of any privilege extending beyond that protected by [article 9 of] the Bill of Rights'.

¹²As to what are proceedings in Parliament for this purpose see *In re Parliamentary Privilege Act 1770* [1958] AC 331, from which it appears that actions taking place outside the precincts of the Palace of Westminster, e.g. the sending of a letter to a Minister by an MP, may be included.

¹³Blackstone *Commentaries* (17th edn, 1830) I p 163; *Stockdale v Hansard* (1839) 9 Ad. & El. 1 at 114, 209; *Bradlaugh v Gossett* (1884) 12 QBD 271 at 275; *In re Parliamentary Privilege Act 1770* [1958] AC 331 at 350; *Church of Scientology of California v Johnson Smith* [1972] 1 QB 522 at 529; *Pickin v British Railways Board* [1974] 2 WLR 208 at 228; *R v Secretary of State for Trade, ex p Anderson Strathclyde Plc* [1983] 2 All ER 233 at 239 (concurring in the Australian case of *R v Jackson* (1987) 8 NSWLR 116 at 120). See also Lord Denning in *Public Law* (1985) 80 at 87.

¹⁴Pp 1059-1061.

¹⁵P 1061.

The main ground for Lord Browne-Wilkinson's decision on this point was that in judicial review cases 'Hansard has frequently been referred to with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner'. He instanced *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696. The difficulty here is that no objection appears to have been made to the citation of Hansard in *Brind*. It is not usual to treat a case as authority for a point that was never raised in it.

The other point Lord Browne-Wilkinson relied on was that if the opposing argument were correct 'any comment in the media or elsewhere on what was said in Parliament would constitute "questioning" since all Members of Parliament must speak and act taking into account what political commentators and other (*sic*) will say'. This overlooks the limiting effect of the words 'any court or place' in article 9. It is submitted that the *ejusdem generis* principle applies here to limit the word 'place' to places, such as tribunals, which are of the same genus as 'court'.¹⁶

Comity between courts and Parliament There is held to be a requirement of comity, meaning mutual respect, between courts and legislature as two branches of the constitution. Lord Hailsham of St Marylebone LC said-

'From the constitutional viewpoint, I do not think it appropriate with a view to the comity between the different branches of Government, and their independence of each from the other, that the actual proceedings in Parliament should be the subject of discussion (and thereby inevitably criticism) in the courts both from the Bench and by counsel . . . [It] would be constitutionally most undesirable.'¹⁷

In *Pepper v Hart* it seems that Lord Browne-Wilkinson, who delivered the leading speech, did not distinguish comity from parliamentary privilege.¹⁸

Difficulties for practitioners As Lord Mackay LC said in his dissenting speech in *Pepper v Hart* 'the only way in which it could be discovered whether help was to be given [by parliamentary materials] is by considering Hansard itself'.¹⁹ Clearly the legal adviser or advocate has a duty in every case to find out whether 'help is to be given' (that is whether help is available). To carry out effective and reliable research in Hansard on a particular point of interpretation requires time and skilled effort. In a 1968 case Lord Reid said: '*For purely practical reasons* we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard, and it would often be impracticable'²⁰

¹⁶It was so held in the Australian case of *R v Murphy* (1986) 64 ALR 498.

¹⁷1983 Hamlyn lectures. See also (1980) 405 HL Deb cols 303-4 and *R v HM Treasury, ex p Smedley* [1985] QB 657.

¹⁸[1992] 3 WLR 1032 at 1061.

¹⁹[1992] 3 WLR 1032 at 1038.

²⁰*Beswick v Beswick* [1968] AC 58 at 74 (emphasis added).

Increasing the costs of litigation Lord Simon of Glaisdale said 'in interpretation of all written material the law in this country has set great pragmatic store on limiting the material available for forensic scrutiny: society generally thereby enjoys the advantages of economy in forensic manpower and time'.²¹ In *Pepper v Hart* there was much debate on the increase of costs that would result from allowing recourse to Hansard. Lord Mackay LC said in his dissenting judgment-

'Your Lordships are well aware that the costs of litigation are a subject of general public concern and I personally would not wish to be a party to changing a well established rule which could have a substantial effect in increasing these costs against the advice of the Law Commissions and the Renton Committee unless and until a new inquiry demonstrated that that advice was no longer valid'.²²

Unreliability of Parliamentary material What is said in Parliament is manifestly unreliable as a guide to the legal meaning of an enactment. In a 1906 case Farwell LJ said of reference to parliamentary debates to interpret legislation 'they would be quite untrustworthy'.²³ In 1975 Lord Reid said of recourse to Hansard: 'At best we might get material from which a more or less dubious inference might be drawn as to what the promoters intended or would have intended if they had thought about the matter...'.²⁴ In the same case Viscount Dilhorne, who knew what he was talking about having served 20 years as an MP, said: 'In the course of the passage of a Bill through both Houses there may be many statements by Ministers, and what is said by a Minister in introducing a Bill in one House is no sure guide as to the intention of the enactment, for changes of intention may occur during its passage'.²⁵ In 1979 Lord Scarman said of Hansard 'such material is an unreliable guide to the meaning of what is enacted'.²⁶

Undermining statute book The objection that recourse to parliamentary materials for the purpose of statutory interpretation tends to undermine 'the reliability of the statute book' is made by Jim Evans.²⁷ It becomes less possible to rely on the apparent meaning of an Act if there is a suspicion that this might be displaced on reference to the enacting history.

²¹*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 645.

²²[1992] 3 WLR 1032 at 1038. The Law Commissions' report is 'The Interpretation of Statutes' (1969) LAW COM No 21, SCOT LAW COM No 11. The Renton Report is the Report on The Preparation of Legislation (1975) (Cmnd 6053).

²³*R v West Riding of Yorkshire County Council* [1906] 2 KB 676 at 716.

²⁴*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 614-615.

²⁵P 623. It smacks of breach of privilege to hold one House bound by what is said in the other.

²⁶*Davis v Johnson* [1979] AC 264 at 349-350.

²⁷*Statutory Interpretation: Problems of Communication* (1988-1989) p 288.

Contrary to principle Perhaps the most potent reason for the exclusionary rule is that reliance on the promoter's intention as ascertained through the parliamentary history is contrary to the principle upon which statutory interpretation by the court rests. This is that the legislator puts out a text on which citizens and their advisers rely and which the judiciary interpret in the light of various accepted criteria. These may in some cases bear against the actual intention of the promoters of the Bill: for example after the passage of years the enactment may require an updating construction. When asked in 1975 to look at an Irish Hansard to construe an Act passed in 1939, Lord Widgery CJ said that its value would be 'minimal when one is considering the situation in the 1970s'.²⁸

Lord Wilberforce expressed the constitutional principle by saying it would be a 'degradation' of the interpretative process if the courts were to make themselves merely a reflecting mirror of what some other agency might say the Act meant. He added 'to take the opinion, whether of a Minister or an official or a committee, as to the intended meaning ... would be a stunting of the law and not a healthy development'.²⁹ Dawn Oliver, the new editor of *Public Law*, takes a gloomy view of how this restriction of the interpretative criteria may operate to strengthen the executive at the expense of the citizen. {*Public Law*, Spring 1993, 5 at 12-13.}

Collectively, these may be thought strong, if not conclusive, reasons in favour of the exclusionary rule. However it is necessary to note that the House of Lords in *Pepper v Hart* was following a lead set elsewhere in the Commonwealth. I have not space to go into this aspect very fully, and must content myself with the following brief remarks on the situation as I understand it to be in Australia, Canada and New Zealand.

Exclusionary rule in other Commonwealth countries

²⁸*R v Governor of Winson Green Prison, Birmingham, ex p Littlejohn* [1975] 1 WLR 893 at 900.

²⁹*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 629-630.

Australia Australia abolished the exclusionary rule in 1984 for Commonwealth Acts. This was done by a provision adding a new section 15AB to the Acts Interpretation Act 1901(Cth).³⁰ Subsection (2) of this states that the material that may be considered in the interpretation of a provision of an Act includes 'the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House'.³¹ The remarkable narrowness of this provision is alleviated by a later provision which allows reference to 'any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or in either House of the Parliament'.³² Both provisions are cut down by s 15AB(3), which enacts that in applying them regard must be had to-

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.³³

Section 15AB(1) limits the occasions when it is legitimate to refer to parliamentary materials. It can be done only-

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when-

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.'

³⁰Acts Interpretation Amendment Act 1984 (Cth) s 7. The amendment applies to past Acts also (s 2). In his book on statutory interpretation in Australia, Donald Gifford says the wisdom of this provision is 'highly controversial': *Statutory Interpretation* (1990), p 130. He suggests that the Australian judiciary 'is seriously divided internally on the subject' (p 139). The full text of s 15AB is set out in *Statute Law Review*, Winter 1992, pp 207-208.

³¹S 15AB(2)(f).

³²S 15AB(2)(h). This does not allow recourse to a report of a speech in Parliament made in relation to a later Bill intended to amend the Act in question: *Commissioner of Taxation v Bill Wissler (Agencies) Pty Ltd* (1986) 81 FLR 471.

³³This derives from clause 5(3) of the draft Processing Bill set out in my book *Statute Law* (3rd edn, 1990) at pp 343-345. For a comment by Bryson J see *Statute Law Review*, Winter 1992, pp 187-208.

Paragraph (a) of this raises the question what is to happen when the parliamentary material confirms that the meaning of the provision is *not* the ordinary meaning. Presumably it cannot then be referred to (except of course under paragraph (b)).³⁴ Paragraph (b) seems to derive from the Vienna Convention on the Law of Treaties, art 32. Although it is not so stated in *Pepper v Hart*, s 15AB(1) is obviously the source of the limiting conditions for the relaxation of the exclusionary rule imposed by the House of Lords in that case. Some of the Australian States have passed legislation corresponding to s 15AB.³⁵

Writing in 1988, Pearce and Geddes said that at that early stage in the history of s 15AB, there appeared to be little evidence to support the claims that had been made that it would greatly add to the work of litigation lawyers.³⁶ In the same year Patrick Brazil, secretary of the Commonwealth Attorney-General's Department, wrote that it was noteworthy, having regard to the many previous misgivings expressed about s 15AB, 'that these reforms have been readily accepted and used'. He added that the worst apprehensions that the ability to rely on extrinsic materials might cause substantially longer proceedings as well as significantly longer preparation of cases, leading to significantly greater costs, seemed not to have been realised.³⁷ In a 1991 paper Bryson J said that s 15AB was not intended to make any deep change and has had a 'cautious' reception. It 'seems to have been devised with a view to pleasing everybody ... but any clear underlying idea which it expresses is hard to find'. He went on: 'There is no room for the view that the minister by his statements in the Parliament establishes what the legislation means or was intended to mean or what the purpose or the policy of the legislation is ... the subject-matter under consideration remains the text as enacted.'³⁸

Canada Broadly, the exclusionary rule is retained in Canada.³⁹ The locus classicus is *Attorney General of Canada v The Reader's Digest Association (Canada) Ltd* [1961] SCR 775.⁴⁰ However it has been noted that the courts 'are increasingly ignoring or implicitly distinguishing the *Reader's Digest* decision and taking a peep at *Hansard*'.⁴¹

³⁴The point is discussed by Bryson J in *Statute Law Review*, Winter 1992, pp 187-208 at p 202. See also *ibid.*, pp 214-215.

³⁵See Interpretation Act 1987 (NSW) s 34; Interpretation Act 1984 (WA) s 19; Interpretation Ordinance 1967 (ACT) s 11B. In Victoria the relevant provision (the Interpretation of Legislation Act 1984 s 35) merely says that in the interpretation of a provision of an Act or subordinate instrument 'consideration may be given to any matter or document that is relevant including but not limited to ... reports of proceedings in any House of Parliament'. In South Australia it has been held that s 15AB should be applied by analogy to State enactments: *Commonwealth Scientific and Industrial Research Organisation v Perry (No 2)* (1988) 53 SASR 538 at 546.

³⁶D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd edn), p 49.

³⁷P Brazil, 'Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials: with a Postscript on Simpler Drafting', 62 ALJ (1988) 503 at 512.

³⁸Reprinted in *Statute Law Review*, Winter 1992, pp 202-204.

³⁹E A Driedger, *Construction of Statutes* (2nd edn, 1983) pp 156-158; Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd edn) pp 350 et seq; Edward G Hudon 55 Can Bar Rev (1977) 370 at 372.

⁴⁰See also *Gosselin v The King* (1903) 33 SCR 255 at 264.

⁴¹Graham Parker, 60 Can Bar Rev (1982) 502 at 503-504.

The classic Canadian justification of the exclusionary rule was given by J A Corry in 1954.⁴² It is chiefly based on the unreliability of parliamentary materials. The opposition is more concerned to belittle the Bill and undermine the popularity of the government than accurately expound the Bill. Even ministers are not immune from the temptation to falsify.

'From the point of view of the government, the purpose of debate on a bill is to secure consent to the precise terms of the bill and to explain its intent and meaning only in so far as that will aid in getting consent. The process of enacting new legislation is not an intellectual exercise in pursuit of truth; it is an essay in persuasion, or perhaps almost seduction! The debate on a bill is a battle of wits often carried out under extreme pressure and excitement where much more than the passage of this bill may be at stake. The ministers supporting it cannot be expected to act as if they were under oath in a court of law. It is always sensible to appeal from Philip drunk to Philip sober. But to appeal from the carefully pondered terms of the statute to the hurly-burly of parliamentary debate is more like appealing from Philip sober to Philip drunk.'⁴³

Later Corry points out that 'not least of the dangers of reference to legislative history is its tendency to draw interpreters away from hard thinking about the context and the general scheme embodied in the act in search of an easy road to learning in the legislative history'. He adds: 'The frequent reliance of the federal courts in the United States on legislative history has prompted the jibe that the court will not look at the act unless the legislative history is obscure!'⁴⁴

⁴²J A Corry, 'The Use of Legislative History in the Interpretation of Statutes' 32 *Can Bar Rev* (1954) p 624.

⁴³*Loc. cit.*, pp 632-633.

⁴⁴*Ibid.*, p 636. Corry's article contains a useful analysis of the differences, from the viewpoint of use of legislative history, between the US system of legislation and that prevailing in Canada (and also the UK). On this see also Wald, 'The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court' (1990) 39 *Amer Univ LR* 227; G B Born, 'Making Law with Hansard' (1993) 90 *Law Society's Gazette* 2.

New Zealand According to the New Zealand Law Commission, the exclusionary rule has never been clearly established in New Zealand.⁴⁵ Jim Evans presents a different emphasis in saying that in 1985, without any legislative change, the New Zealand Court of Appeal began to allow counsel to use material from parliamentary debates in arguing cases.⁴⁶ Burrows, writing earlier, says 'It is generally accepted in New Zealand that the Bill, and reports of debates in Parliament, may not be referred to for purposes of interpretation, although the New Zealand authority is surprisingly slight'.⁴⁷

To show the flavour of the way New Zealand courts apparently regard the use of Hansard I give two recent extracts. In a 1986 case Cooke J said-

'A Government statement in the House could not be allowed to alter the meaning of an Act of Parliament in plain conflict with it; but in my view it would be unduly technical to ignore such aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act.'⁴⁸

In a 1987 case the court stated-

'While we have been prepared to look at reports of Parliamentary debates in some cases, this development is certainly not intended to encourage constant references to *Hansard* and indirect arguments therefrom. Only material of obvious and direct importance is at all likely to be considered; and the court will not allow such references to be imported into and to lengthen arguments as a matter of course.'⁴⁹

In its 1990 proposals for a new Interpretation Act the New Zealand Law Commission did not recommend including provisions comparable to the Australian s 15AB. They said-

'... the signal that parliamentary material can be used has already been clearly given by the courts themselves, and it has been extensively discussed. The uncertainty which was a significant factor seven years ago in the Australian decisions to enact the liberating legislation has now been dispelled - to the extent that it existed here ... the legislative answers do not appear to provide any significant assistance to the courts. Rather, the courts themselves have

⁴⁵Law Commission Report No 17 (1990) p 50. To confirm this statement they cite *Re AB* (1905) 25 NZLR 299; *Monk v Mowlem* [1933] NZLR 1255 at 1256-1257; *Police v Thomas* [1977] 1 NZLR 109 at 119; *Levave v Immigration Department* [1979] 2 NZLR 74 at 79.

⁴⁶Jim Evans, *Statutory Interpretation: Problems of Communication* (1988-1989) p 280. Evans cites as the cases in which this new trend developed: *Proprietors of Atihau-Wanganui v Malpas* [1985] 2 NZLR 468 at 478; *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5086; *Howley v Lawrence Publishing Co Ltd* CA 77/84 1 May 1986; *Maori Council v Attorney General* (1987) 6 NZAR 364.

⁴⁷J F Burrows in *New Zealand Commentary on Halsbury's Laws of England* tit. Statutes C901. Burrows cites as authority for this proposition *Hamilton Gas Co v Mayor of Hamilton* (1908) 27 NZLR 1020 at 1030-1031; *Otago Land Board v Higgins* (1884) NZLR 3 CA at 80.

⁴⁸*Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5086 at 5093.

⁴⁹*Attorney General v Whangarei City Council* [1987] BCL paragraph 1587.

been developing and will no doubt continue to develop rules and practices about relevance and significance ...⁵⁰

This shows sensitivity to the fact that since the middle ages common law jurisdictions have regarded the interpretative function as belonging to the courts rather than the legislature. On the other hand an Interpretation Act, in order to achieve maximum utility, really ought to codify all clearly worked out judicial rules regarding the construction of enactments. That is surely the whole object and purpose of codification, though we have not been very good at realising it in practical terms.

Facts and law in Pepper v Hart

I turn now to the facts and law in *Pepper v Hart* itself. The taxpayers were nine masters and the bursar of Malvern College, a public school for boys. Under a concessionary scheme their twelve sons were educated at the school on payment of an amount, namely one-fifth of the ordinary fees, which in each case more than covered the extra actual cost to the school of the son's presence (the 'marginal cost'). As the school was not full, the scheme did not deprive it of any full fees from ordinary pupils.

⁵⁰*Loc. cit.* pp 50-51.

The case concerned rival interpretations of income tax enactments contained in the Finance Act 1976 ss 61(1) and 63(1) and (2).⁵¹ These provisions subjected such staff benefits to income tax. Tax was levied on the notional value of the benefit, after the amount paid by the staff member had been taken into account. The provisions lay down a precise three-stage definition of the notional benefit, intended by the drafter to be precisely applied stage by stage. In relation to each taxpayer, tax is levied on the *cash equivalent* of the benefit. This is defined as the *cost* less anything paid by the taxpayer. The cost is defined as the *expense* incurred by the employer, including 'a proper proportion' of expenses partly related to other matters, such as the education of the other boys at the school. Since most of the expenditure was of this type, the broad term 'a proper proportion' was crucial.

As we have seen, 'a proper proportion' is one of those phrases by which the drafter signals that he is leaving the matter to the judgment of the administering agency (in this case the Board of Inland Revenue) without giving it any further guidance. It will then be for the agency to consider whether it needs to formulate guidelines indicating how judgment is to be exercised by its staff so as to ensure consistency. If the matter comes before a court or tribunal on appeal or review it will be for it to determine whether to approve such guidelines or lay down guidelines of its own. Use of such a phrase as 'a proper proportion' in the *Pepper v Hart* enactment also indicated, contrary to the view taken by all the judges in that case, that the drafter did not intend one simple uniform test to be applied invariably. If that were so, he would have specified the test in the legislation.

In the circumstances of *Pepper v Hart* it could be thought 'proper' to treat the benefit as attracting the same proportion of the expenses as fell to be allocated to the share of the school amenities enjoyed by ordinary pupils (the 'average cost'). Or it could be thought 'proper' to allow staff some advantage by charging them only the marginal cost. A refinement would be to treat it as 'proper' to apply the average cost but reduce this by appropriate amounts in certain cases. This could reflect the fact that staff receiving a benefit may not be in as good a position vis-a-vis the employer as an independent member of the public. Staff may be expected to help out, or accept a lower standard of service. Where the employer was operating at a loss, so that the price charged to the public was less than the aliquot share of expenses, this approach would again allow a suitable reduction. It would ensure that the object of the legislation was realised by taxing employees on a fair and reasonable quantification of the benefit they actually received.

⁵¹ See now the Income and Corporation Taxes Act 1988 ss 154(1) and 156(1) and (2).

None of the judges in the case (including the Law Lords, except perhaps Lord Mackay) appreciated the elasticity of the word 'proper' or the fact that it required the interpreter to arrive at whatever apportionment was fair on facts within a particular category. In allowing the initial appeal against assessment the Special Commissioner applied the marginal cost basis.⁵² In reversing the Special Commissioner Vinelott J said, without discussing the point, that the proper proportion was the average cost, which he described as 'a rateable proportion of the facilities afforded to them all'.⁵³ The Court of Appeal agreed that in all cases a rateable proportion of costs was the 'proper' proportion.⁵⁴ Slade LJ was troubled by the fact that where a facility was provided at a loss (as in the case of a municipal swimming bath) the rateable proportion of costs attributable to staff enjoying the facility without charge might work out at considerably more than a member of the public would pay.⁵⁵ The point that the term 'proper' would enable, even require, an adjustment to be made in such cases was not taken.

Lord Browne-Wilkinson traced the history of the provisions back to the Finance Act 1948 s 39(1) and (6), where the wording was virtually identical. From the commencement of the 1948 Act until that of the Finance (No 2) Act 1975 s 36(1), which made similar provision, the Inland Revenue charged tax on the basis not of the average cost or the true 'proper' cost but the marginal cost.⁵⁶ In the debate on the Bill for the 1976 Act the Minister said that its effect would be to tax such benefits in the same way as under the existing law. By this he appeared to mean the marginal cost basis, though his statements quoted by Lord Browne-Wilkinson (at pp 1047-1052) are far from clear, and do not use this expression. What the Minister said apparently amounted to this. The Revenue would go on interpreting the phrase 'a proper proportion', which in reality called for the exercise of judgment in different categories of circumstances, in one uniform way, namely by applying the marginal cost basis.

Like the other Law Lords, Lord Browne-Wilkinson did not see the phrase 'a proper proportion' as calling for the exercise of judgment, but as having a fixed 'meaning'. He concluded that the arguments for this 'meaning' to be the marginal or the average basis were 'nicely balanced', and that there was therefore 'an ambiguity or obscurity'.⁵⁷ He resolved this by applying what the Minister had said, as reported in Hansard.

I submit that the Minister had not in reality made a clear statement about the 'meaning' of the provision. He had said how the Revenue would exercise its power of judgment as to what was 'a proper proportion'. If the matter is seen in this way it is apparent how improper the finding of the House of Lords was. I submit that it was not for the court meekly to accept and apply this statement by the Minister. It was for the court itself, using its own judgment, to arrive at the proper proportion of expenses on the facts of the Malvern College scheme.

Conclusions

What conclusions can we draw from all this? I offer the following.

⁵²[1990] STC 12.

⁵³[1990] 1 WLR 204 at 209.

⁵⁴[1991] Ch 203.

⁵⁵*Loc. cit.*, pp 216-217.

⁵⁶P 1047.

⁵⁷P 1062.

Legislative drafters should carry on as before, undeterred by the possibility that some uncomprehending Minister may put an unfortunate gloss on their work.

Courts and practitioners should be better educated in the techniques and practices of legislative drafting. Then they would better understand the nature of the task they have to carry out when enactments fall to be construed.

Courts should use Hansard sparingly. Most, if not all, of the nine reasons I have given against using it are valid. Moreover, as T St J N Bates has pointed out in detail, admission of Hansard reports raises more problems than it is likely to solve.⁵⁸

Civil servants in departments promoting legislation should resist the temptation to 'plant' in their Ministers' briefs statements about what they want the Act to mean. These are likely to rebound on them. Whether they do or not, the practice will feed what I believe to be an unhealthy and undesirable constitutional development, though doubtless well-intentioned.

Let us keep Hansard where it belongs.

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⁵⁸T St J N Bates, 'Parliamentary Material and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*', *Statute Law Review*, Spring 1993, pp 46-54.