Introductory Note by FB

The article below is a further addition to my writings on understanding legislation. Others are included within the Topic 'Understanding legislation'. The Topic can be found on this website at *www.francisbennion.com/topic/understandinglegislation.htm*.

Threading the Legislative Maze - I

FRANCIS BENNION∗

Nearly all the law that governs our citizens is now in statutory form. This includes not only Acts of the Westminster Parliament, and orders, regulations etc. made under them, but the growing mass of European Union directives and other E.U. legislation. That the non-specialist lawyer, never mind the uninstructed citizen, can routinely comprehend this mass of official verbiage is difficult to believe. It is said that legislation should be drafted in plain English, so that everyone can grasp its meaning; and efforts are made to this end. Plain English is all very well, indeed highly desirable, yet the truth is that, no matter how hard legislative drafters may strive to be plain, modern legislation is necessarily very difficult even for experts to comprehend. This is partly because, amongst the press of subjects which the law student feels, or is told, he or she must learn, the science of legislation takes a back seat. In other words, statute law is not fully taught.

Legislation is what the legislator says it is. The *meaning* of legislation is what the court says it is. So those whose task is to find out and apply that meaning need to know how judges are supposed to arrive at it, and what their conclusions are likely to be in the case that is currently of concern to the practitioner. A technique of what might be called law handling or law management is required, but this is often lacking.

With all that in mind, I begin this week a series of articles on the subject of legislation which are designed to be at the same time easily digestible and practically useful. The subject is a vast one, embracing virtually the entirety of law. We will take it step by step.

The legal meaning of an enactment

I start with a basic concept, the *legal* meaning of an enactment. But first I should explain what an *enactment* is, for it is a term of art we shall often use. Bentham said that a law is either a proposition or an assemblage of propositions. An enactment is a proposition, or assemblage of propositions, laid down in an Act or other legislative text. Its usual effect is that, when the facts of a case fall within an indicated area called the factual outline, specified consequences called the legal thrust ensue.

There are many types of enactment. For the purposes of this discussion I take as an example the Criminal Damage Act 1971 s 1(1). This specifies several offences. By omitting irrelevant words we can express one of these offences as follows-

> 'A person who without lawful excuse damages any property belonging to another, being reckless

---

∗ Former U.K. Parliamentary Counsel. Author of works on legislation including *Statutory Interpretation* (3rd edn 1997), *Bennion on Statute Law* (3rd edn 1990) and *Statutes* title in Halsbury's *Laws of England* (4th edn reissue, 1995).

as to whether any such property would be damaged, shall be guilty of an offence.'

This then is a typical 'enactment'. The interpreter's duty is to arrive at the legal meaning of a relevant enactment, that is the meaning it has in law. As Chief Baron Pollock said, 'it is our duty to ascertain the true legal meaning of the words used by the legislature'.[1] Many factors bear on this meaning, and it may not turn out to be the same as the grammatical or literal meaning. Finding it must be done in accordance with the rules, principles, presumptions and canons governing statutory interpretation. These are referred to as the interpretative criteria, or guides to legislative intention. I will examine them in later articles.

It is the function of the court alone authoritatively to *declare* the legal meaning of an enactment. If anyone else, such as its drafter or the politician promoting it, purports to lay down what the legal meaning is the court may react adversely, regarding this as an encroachment on its constitutional sphere. As Lord Wilberforce said-

> 'Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect on subjects by virtue of judicial decision, and it is the function of the courts to say what the application of words to particular cases or particular individuals is to be. This power, which has been devolved on the judges from the earliest times, is an essential part of the constitutional process by which subjects are brought under the rule of law - as distinct from the rule of the King or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say . . .'[2]

Ignorance is no excuse

The statute law in force at any one time consists of a very large number of enactments. Some will bear the impress of judicial decisions promulgated before that time; some will not. As with other forms of law, such as the common law, those bound by statutes are expected to know of them, or at least are not excused by lack of knowledge. As Blackstone said: 'if ignorance of what he *might* know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity'.[3] This presumed knowledge of law is required to be accurate. Blackstone said of mistakes as to the purport of a law: 'if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder'.[4]

A person is not excepted from the principle that ignorance of law affords no excuse by the fact that the operative ignorance is that of his or her professional adviser.[5] Forbes J suggested that 'having regard to the multiplicity of statutes which exist' counsel and solicitors could be excused for not recalling the existence of a relevant statute.[6] This may save a practitioner from an action for professional negligence, but it will not excuse the client.

So we have the position that ignorance or mistake regarding it is not accepted as an excuse for failing to comply with an enactment. That translates as ignorance or mistake as to the legal meaning, which as I have said may differ from the literal meaning. Obeying this rule is a tall order. So let us look more closely at what, at any given moment, the legal meaning of an enactment really is.

The legislator's intention

---

[1] *A-G v Sillem* (1864) 2 H & C 431 at 513.
[2] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591.
[3] Kerr Bl (4th edn, 1876) i 28. Emphasis in original.
[4] Kerr Bl (4th edn, 1876) iv 21.
[5] *Turner & Goudy v McConnell* [1985] 1 WLR 898 at 901.
[6] *Murphy v Duke* [1985] QB 905 at 918-9; overruled in part *Cooper v Coles* [1986] 3 WLR 888.

Put shortly, the legal meaning is the one that corresponds to the legislator's intention in framing the enactment. Lord Radcliffe said that 'the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention'.[7] This rule has been criticised as artificial. It sits uncomfortably with modern developments such as the requirement under the European Communities Act 1972 ss 2 and 3 to construe United Kingdom enactments so as to fit Community law where possible and the forthcoming requirement, under clause 3 of the Human Rights Bill now before Parliament, to do the same in relation to the European Convention on Human Rights. Yet the original legislator's intention is still the touchstone, and must remain so.

So what do you do when you need to find out the legal meaning of an enactment? First, read it through. Second, find out what if anything the courts have said about it. Thirdly, consider its legislative history and overall context. All this enables you to give what is necessary, namely an *informed* construction. If on an informed construction you feel real doubt as to the legal meaning then you have a problem and must go through the process of applying what I refer to above as the interpretative criteria. Before deciding whether this is necessary you need to bear in mind that 'no form of words has ever yet been framed . . . with regard to which some ingenious counsel could not suggest a difficulty'.[8] The law recognises a doubt over the legal meaning of an enactment as 'real' only where it is substantial, and not merely conjectural or fanciful. Even then, there is still the problem of differential readings. This is the name given to the phenomenon where different minds arrive at different assessments of the legal meaning. It is notorious that two or more judicial minds may, and frequently do, conscientiously arrive at differential readings. As Alexander Pope wrote in the days when watches were unreliable: 'Tis with our judgments as our watches, none Go just alike, yet each believes his own'.[9]

In a general survey like this we must contemplate the great mass of subsisting enactments, each with its legal meaning. Does this meaning remain constant? If it really corresponds to the intention of the legislator, and we assume that a later legislator does not amend it, one may expect it to do so. The original legislator has enacted it and passed on. How can its meaning thereafter change? One can imagine a notional, ideal 'legal meaning' held aloft and immune to developments, but that is not the position in real life. In real life the kind of circumstances to which the enactment applies will change over time. Sooner or later the enactment may come before the courts, and they will pronounce what its legal meaning is. Until that starts to happen, there is nothing but the notional, ideal 'legal meaning' together with a collection of non-authoritative, non-judicial conjectures (usually by professional lawyers) as to what that is. More accurately, the conjectures relate to what, when the enactment does come before a court, the judge is most likely to make of it. Putting the matter at its most succinct, and allowing for the possibility of judicial disagreements, the legal meaning is what it is most likely the House of Lords would say it is.

Further elaborations

There are further elaborations. Suppose the enactment comes into force in year *E*, and the profession agrees that its legal meaning is W. Then in year *E plus five* the enactment comes before its first court, court A, which holds that the legal meaning is not W at all but X. In year *E plus ten* the enactment comes before court B, which does not follow the ruling of Court A but decides that the legal meaning is Y. What then is the legal meaning? If court B is superior to court A, its decision blots out meaning X and substitutes meaning Y. But suppose the two courts are of equal jurisdiction? What then is the legal meaning of the enactment?

Suppose further that in year *E plus fifteen* the enactment comes before court C, a court higher than A and B, and court C decides on meaning Z. One can say that thereafter meaning Z prevails, but what was the

[7] *A-G for Canada v Hallett & Carey Ltd* [1952] AC 427 at 449.
[8] *Pratt v South Eastern Rly* [1897] 1 QB 718, *per* Lord Cave LC at 721.
[9] Essays on Criticism (1709) i. 9.

legal meaning (i) between years *E* and *E plus five*, (ii) between years *E plus five* and *E plus ten*, and (iii) between years *E plus ten* and *E plus fifteen*? These are not academic questions. In year *E plus two* a client may have quite properly been advised that the legal meaning was W, and acted accordingly. In year *E plus seven* a client may have been quite properly advised that the legal meaning was X, and acted accordingly. In year *E plus twelve* a client may have been quite properly advised that the legal meaning was Y, and acted accordingly. How do these clients stand after court C has pronounced its decision? Surprisingly, the law is in disarray over these questions and no short answer is possible. I will endeavour to provide an answer in a later article. Meanwhile I will just point out here that in the absence of an answer specifically given by legislation, the courts have to deal with such questions, as the course of litigation requires of them, by reference to fundamental principles dictated by legal policy, such as the need for courts to do justice. This is the common law in action, as Lord Wilberforce put it.[10]

Factual outline and legal thrust

I said above that the usual legal effect of an enactment is that, when the facts of a case fall within an indicated area called the factual outline, specified consequences called the legal thrust ensue. In other words an enactment lays down a legal rule in terms which show that the rule is triggered by the existence of certain facts. The enactment indicates these facts in outline form, omitting immaterial features. This is referred to as the *statutory factual outline*. I gave above the example of the offence of reckless criminal damage, as laid down in the following words by the Criminal Damage Act 1971 s 1(1)-

> 'A person who without lawful excuse damages any property belonging to another, being reckless as to whether any such property would be damaged, shall be guilty of an offence.'

Here the statutory factual outline can be set out as follows.

1. The subject is any person with criminal capacity, the last three words being implied.

2. The *actus reus* (required guilty act) is without lawful excuse damaging any property belonging to another.

3. The *mens rea* (required guilty mind) is being reckless as to whether any such property would be damaged.

It is the function of a court deciding on the legal meaning of an enactment accurately to identify this area of factual relevance. Often a court will hold that the literal meaning of the outline stated in the enactment needs to be narrowed or widened in order to give effect to the legislator's true intention. The literal outline as so modified is referred to as the *judicial factual outline*. The basis of the doctrine of precedent is that like cases must be decided alike. The ratio decidendi of a case involves postulating (whether expressly or by implication) the factual outline held to be laid down by the enactment, so far as relevant. If the facts of a later case fit within this judicial factual outline but demand amendment of the legal thrust of the rule, the outline is too broadly stated. If on the other hand the facts of a later case do not fit into the outline, but do elicit the same legal thrust, the outline as stated by the court is too narrow.

The legal thrust of an enactment is the legal effect arising where the material facts of the instant case fall within the statutory or judicial factual outline. In criminal law the legal thrust of an enactment is often expressed, as in the above example, by saying that where the factual outline is satisfied the person in question is 'guilty of an offence'. The legal consequences of this by way of trial procedure, punishment and so forth may be spelt out by the legislator at the same time or left to the general law.

Summary

[10]Express Newspapers Ltd v McShane [1980] AC 672 at 684.

- Successful handling or management of legislation by the practitioner requires mastery of certain essential concepts, some of which are as follows.

- The basic unit of legislation is the enactment, consisting of one or more propositions.

- An enactment must be given an informed construction, that is one which takes account of its context, its legislative history, and any court rulings on it.

- Where they differ, what matters is the legal rather than the literal meaning of an enactment.

- The legal meaning is the one that is taken to correspond to the original legislator's intention.

- It is the exclusive function of the courts authoritatively to declare the legal meaning; and in practical terms, the legal meaning is the one most likely to be adopted by the House of Lords if the point comes before it.

- To be acted on, a doubt as to the legal meaning must be real, that is substantial and not merely conjectural or fanciful.

- The phenomenon of differential readings may lead to different judicial minds reaching different conclusions on the legal meaning.

- The law is in disarray over the position of a person who has acted on a court decision as to legal meaning where a later court overrules the decision; but the problem must be decided by reference to common law principles of legal policy.

- Ignorance or mistake as to the legal meaning, whether by the subject or a legal adviser, is not accepted as an excuse for non-compliance.

- The usual effect of an enactment is that, when the facts of a case fall within an indicated area called the factual outline, specified consequences called the legal thrust ensue.

- The statutory factual outline may be modified by the court of construction if that is necessary to implement the legislator's intention.