Jaguars and Donkeys: Distinguishing Judgment and Discretion II

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Static and mobile broad terms

Broad terms, which I began discussing towards the end of last week's article in this series of three, can be divided into two types. First there is the case where the content of the term is static or constant, in both place and time. The circumstances that fall within it are basically the same wherever they happen, and at whatever historic moment. An example is the term "accident", discussed below. Secondly there is the mobile term. What falls within that may differ according to time or place (or both). For instance one person may or may not be regarded as belonging to another person's "family" according to the place, or the period, in which they live. I now consider the two categories in turn, examining examples from decided cases. We shall see later that failure by the drafter to understand the distinction between the categories can have important consequences.

The static term "accident" has been frequently employed in legislation. One famous example was in the Workmen's Compensation Acts, which gave a workman a right to compensation for "an accident arising out of and in the course of his employment". This is a multiple broad term of epic proportions. Many thousands of judicial decisions proved necessary to process it. This operation began with the very first case to reach the House of Lords under the Workmen's Compensation Act 1909. It concerned a workman suffering from a form of heart disease induced by natural causes, an aneurism. The aneurism might have burst and killed the workman at any time - even while he was asleep in bed. In fact it did so while he was at work, engaged in manual labour of a by no means strenuous kind. Was this an "accident"? Yes, said the House of Lords in a judgment we are not surprised to find lacked unanimity. The fact was that the purpose of the Act plainly required the term "accident" to be given a wide meaning. As Kennedy LJ said in another case, when holding that it even covered the murder of a cashier by a thief-

> "An historian who described the end of Rizzio by saying that he met with a fatal accident in Holyrood Palace would fairly, I suppose, be charged with a misleading statement of fact . . But whilst the description of death by murderous violence as an 'accident' cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention, I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable . . ."[1]

This neatly illustrates the difference between the case where the drafter has selected a term which is etymologically capable of the wide meaning it should bear and the case where he has erred by making his wording narrower than the object. Other examples of static broad terms are the following, dealing first with the term "repairing" and then with the term "supply".

Rules made under the Railway Employment Prevention of Accidents Act 1900 protected workers engaged in "relaying or repairing" the permanent way. Did this include the routine

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[1] *Nisbet v Rayne and Burn* [1910] 2 KB 689.

oiling and maintenance of apparatus working the points? The House of Lords, by a majority of three to two, held that it did not.[2] The wording was narrower than the object, a frequent drafting defect. The literal meaning, applied here, defeated the claim of one who on policy grounds clearly should have been covered.

Section 1(1) of the Finance Act 1972 introduced a brand new tax in these words: "A tax, to be known as value added tax, shall be charged . . . on the supply of goods and services in the United Kingdom. . .". Griffiths J said: "There is no definition of 'supply' in the Act itself, but it is quite clear from the language of the Act that 'supply' is a word of the widest import".[3] Many more instances could be given of static broad terms, but this is not necessary. The terms are "static" in the sense that, by processing, detailed rules can be worked out which will be of universal application despite differences of time or place. I turn now to the ***mobile*** broad term.

Section 4(1) of the Obscene Publications Act 1959 provides a defence against a charge of publishing an obscene article "if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern". Lord Wilberforce said that the phrase ***other objects of general concern*** "is no doubt a mobile phrase; it may, and should, change in content as society changes".[4]

Time and place

Changes of this kind may occur in time or in place. Often they occur in both. Since an ongoing Act is always speaking it must be worded so as to accommodate them. The drafter of the Obscene Publications Act 1959 assumed that, throughout the life of the Act, science, literature, art and learning would be of general concern. It was safe therefore to specify them (and helpful to do so, since they gave shape and colour to his proposition). But other topics were to be judged not on what was of general concern in 1959 but on what was of general concern at the time of an alleged offence. If the Act lasted 50 years, and a prosecution was brought at the time of its golden jubilee, the drafter intended the case to be judged by what was of general concern in 2009 not 1959. Let us take some other examples, first of changes in time and then in place.

Suppose it is desired to impose control over firearms, but exempt any antique weapon. The term "antique" is vague. The drafter might seek precision by referring instead to a weapon "manufactured more than 100 years before the passing of this Act". But that would be illogical. If the Act were passed in 1968 a gun made 105 years earlier would be exempt. By 1978 however, a gun made 105 years earlier would not be exempt, because it would have been made only 95 years before the passing of the Act. What is wanted is a rolling period, so that at any moment the Act will exempt guns which at that moment are 100 years old. The drafter of the Firearms Act 1968 s. 58(2) did not adopt this course. Instead, he provided a flurry of broad terms: "Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament". No definitions were provided for "antique", "curiosity" or "ornament". The question of the legal meaning of "antique" in s. 58(2) came before the Divisional Court.[5] The prosecutor appealed from magistrates' acquittal of a defendant in relation to three guns "dating from possibly 1886, and after 1905 and 1910". He told the court that prosecuting authorities needed guidance on what was "antique" for this purpose. Eveleigh LJ said it was a question of fact, but guns manufactured in the twentieth century "could not be antique" in 1980. The court directed the magistrates to convict in relation to the guns made after 1905 and

[2] *London and North Eastern Railway v Berriman* [1946] AC 278.
[3] *Customs and Excise Commissioners v Oliver* [1980] 1 All ER 353 at 354.
[4] *R v Jordan* [1976] 2 WLR 887, 893.
[5] *Bennett v Brown* (1980) *Times*, 12 April.

1910. Regarding the gun possibly made in 1886, Eveleigh LJ said that the magistrates were entitled to come to their conclusion, though he would not have done so himself. This judgment seems to put excessive weight on the arbitrary division of time into centuries.

Is "book" a mobile term? It might not seem so. Everyone knows what a book is. Or do they? Section 9 of the Bankers' Books Evidence Act 1879 defines "banker's book" as including ledgers, day books, account books, "and all other books used in the ordinary business of the bank". In 1879 it was no doubt unthinkable that banks would keep their records in anything but bound books. One cannot blame the drafter for failing to envisage the invention of microfilm. Yet in seeking to make copies of all bank records admissible in evidence he might have managed to find a phrase of more general meaning. The Divisional Court had no hesitation in coming to the drafter's rescue.[6] They treated "book" as a mobile term wide enough to embrace microfilm - and indeed "any form of permanent record kept by the bank by means made available by modern technology". It did not worry Caulfield J that a microfilm "is not normally called a book". Had he foreseen the development of computer use by banks he might have hesitated over using the word "permanent".

Social change has frequently to be accommodated by the mobile term. When "single woman" was first used in Affiliation Acts it referred solely to an unmarried woman. The growing frequency with which marriages broke up led to its ultimate extension to a married woman living apart from her husband - even where they shared the same roof.[7] It follows that a judicial decision on the meaning of a term may be disregarded if the popular meaning changes. The Rent Acts gave protection, where the tenant died, to a member of the tenant's "family". In 1950 it was held by the Court of Appeal that this did not include the tenant's common law husband.[8] In another case 25 years later the same court reversed its ruling.[9] Bridge LJ said-

> "If the language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case where the courts have constantly affirmed that the word is to be understood in its ordinary meaning."[10]

By this Bridge LJ clearly referred to the fact that a mobile term is to be applied to facts arising at a particular time in accordance with its meaning at that time.

Another legal matrimonial term of long standing is "cruelty" as a ground of divorce. Here we see the effect of a social change attributable to advancing civilisation. As the times become less rough and barbarous, and the standard of comfort advances, people will put up with less hardship. What was once part of the give-and-take of marriage becomes "cruelty". Mental torture enters the scene, alongside physical ill-treatment. There is a similar progression with broad terms like "riotous", "disorderly", "indecent" and "insulting" as descriptions of public behaviour. A dog may now be held "dangerous" within the meaning of the Dogs Act 1871 even though its behaviour is something less than savage or ferocious.[11]

Here are two examples of broad terms which are geographically mobile, that is whose content varies from place to place.

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[6] *Barker v Wilson* [1980] 1 WLR 884.
[7] *Watson v Tuckwell* (1947) 63 TLR 634.
[8] *Gammans v Elkins* [1950] 2 KB 328.
[9] *Dyson Holdings Ltd v Fox* [1976] QB 503.
[10] P. 513.
[11] *Keddle v Payn* [1964] 1 WLR 262).

Section 59 of the Highways Act 1980 gives a highway authority power to recover compensation from an operator responsible for damage caused by "excessive" weight passing along the highway, or other "extraordinary" traffic thereon. Both these broad terms are modified by reference to the average maintenance expenses of highways in the neighbourhood of the one in question. Here the geographical variability of the term is expressed in the statute.

In the other example the variability is not expressed, but has been held by the courts to be implied. Section 74(4) of the Licensing Act 1964 (reproducing earlier legislation) empowers justices to extend permitted licensing hours for the sale and consumption of alcoholic liquor on a "special occasion". No definition of this term is provided. In a case decided under earlier legislation, Lord Coleridge CJ said "the question what is a special occasion must necessarily be a question of fact in each locality". He added: "[e]ach locality may very well have its own meaning to those words, and it is for the justices in each district to say whether a certain time and place come within the description".[12] Thus the Saturday before a bank holiday may be a "special occasion" in a seaside holiday resort but not in an industrial town.[13]

Not only should the interpreter be alert to the distinction between the static and mobile broad term, but the drafter needs to be aware of it too. It is really a distinction between static and mobile concepts. If the concept for which the drafter needs a term is static, then he should select a static term, and vice versa. If he fails in this he may create unnecessary difficulties of interpretation. The commonest error, and the most troublesome, is where the drafter with insufficient imagination thinks his concept is fixed when it is in fact mobile. The Canadian Criminal Code made it an offence to trade or traffic in "any bottle or syphon" which had upon it the trade mark of another person, or fill it with any beverage for sale, without his consent.[14] It is obviously possible for beverages to be sold in other forms of container, such as cartons. By looking only at the conditions prevailing at the time he was writing, and failing to exercise his imagination, the drafter made his text unnecessarily and unjustifiably narrow. He could easily have written "container" instead of "bottle or syphon". We saw earlier how a similar difficulty arose in connection with bankers' books. The reverse error, of using a mobile term for a static concept, creates unnecessary vagueness. It would not have been sensible to say "container" instead of "bottle" in a provision intended to guard against danger from broken glass.

As we have seen, the wider the penumbra of doubt attached to a broad term the greater the range of judgment effectively delegated to the interpreter. There is an important class of cases where, because the limiting framework is virtually non-existent, this form of delegation occurs practically across the whole field. In effect the legislator abdicates completely. For his judgment is substituted that of the interpreter, guided only by vague concepts such as what is "reasonable" or "just" or "fit and proper". There are many examples of this form of delegation. Here is one, drawn from the Consumer Credit Act 1974. In this instance the interpreter is an official, the Director General of Fair Trading. Section 25(1) states that a licence to carry on a credit or hire business shall be granted on the application of any person if he satisfies the Director General that he is "a fit person to engage in activities covered by the licence". If this stood alone, as it well might have done, it would empower the Director General to set his own standards of fitness. Parliament thought it right to lay down guidelines however, and the section goes on to instruct the Director General to have regard to specified factors - such as whether the applicant has a record of dishonesty or violence.

For obvious reasons, Parliament has been more ready to entrust unfettered discretion to judges than officials. In the early days of divorce law for example, the court was empowered

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[12] *Devine v Keeling* (1886) 50 JP 551, 552.
[13] *R v Corwen Justices* [1980] 1 WLR 1045.
[14] Cited Driedger, *The Construction of Statutes* (Butterworths, Toronto 1974), p. 86).

in relation to the children of dissolved marriages to "make such provision as it may deem just and proper" with respect to their custody, maintenance and education.[15] The modern tendency is for judges to receive (and indeed expect) more detailed guidance from the legislator. When the grounds for divorce were recast in 1969-70 elaborate criteria were laid down for maintenance, including the absurd requirement to put the parties as nearly as possible in the position they would have been in if the marriage had not broken down.[16] This could not last, and was soon abandoned - but not before it had inflicted great harm on divorcing husbands.

Sometimes, as we have seen, guides to the interpretation of the broad term are stated expressly in the legislative text. Even where this is not done, the meaning is not left completely at large. Under the noscitur a sociis principle, terms are recognised to gain colour from their context. The context may not furnish much assistance however. The Housing Act 1980 laid down the repairing covenants that are to apply where the secure tenant of a flat exercises his statutory right to acquire a long lease.[17] It enabled the landlord to charge the tenant a "reasonable" proportion of the cost of non-structural repairs. Often when the broad term "reasonable" is used, as with the concept of a "reasonable" rent, the factors by reference to which it is to be applied are obvious. Here they are not. The Act imposed on the landlord the duty to repair whether or not it was "reasonable" that he should be saddled with this. It then enabled him to transfer to the tenant such part of the duty as might be "reasonable". If, from an objective viewpoint it was wholly unreasonable in a particular case to saddle the landlord with the cost of any repairs, how could it be "reasonable" to transfer only a part of the cost to the tenant - and how could one judge which part? The courts are forced to grope for a meaning in such cases.

The area of judgment

Although where judgment is required there is notionally one right answer, in practice there is what in ***R v Criminal Cases Review Commission, ex p Pearson***[18] Lord Bingham of Cornhill CJ called "the area of judgment". In that case the Criminal Cases Review Commission might properly have found either that there was or that there was not a "real possibility" within the meaning of the Criminal Appeal Act 1995 s. 13(1)(a) that the conviction would not be upheld. This "area of judgment" may overlap two alternative categories, e.g. two broad terms. In another case the Court of Appeal held that there was such an overlap between the broad terms "special educational provision" and "non-educational provision" in the Education Act 1996 s. 319.[19] Sedley LJ referred[20] to "the limits of possible meaning" of the term "special educational provision". These led, he said,[21] to a "potentially large area of judgment" resulting in the fact that it would be acceptable to reach a judgment that given treatment fell within the range of special educational provision or fell within the range of non-educational provision.

The width of this "area of judgment" depends on the degree of precision with which the standard to be used for forming the judgment is defined. ". . . the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court [of review] is entitled to substitute its own opinion for that of the person to whom the decision

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[15] Matrimonial Causes Act 1859, s 35.
[16] Matrimonial Proceedings and Property Act 1970, s 5(1) and (2)), succeeded by the Matrimonial Causes Act 1973, s 25(1).
[17] See Sch 2, paras 13 to 17.
[18] [1999] 3 All ER 498 at 523.
[19] ***Bromley London Borough Council v Special Educational Needs Tribunal*** [1999] 3 All ER 587.
[20] At 591.
[21] At 596.

has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14".[22]

As I have said, notionally there is only one correct answer arising from judgment-forming, as opposed to the exercise of discretion, where there may be several. When the question arose whether a certain act was an abuse of process Lord Diplock, stressing that the question was one of judgment, said "I disavow the word discretion".[23] In pronouncing on the meaning of "substantial" in the Fair Trading Act 1973 s. 64(3) (which allows a merger reference to be made where services are supplied "in a substantial part of the United Kingdom"), Lord Mustill said: "Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment . . ."[24] Where the exercise of judgment is required, the term "evaluate" may be used. In the case of a statutory application to an authority, e.g. under the Housing Act 1985 s. 62(1), it may be necessary for the authority to judge whether the applicant has the necessary mental capacity to be a householder. Lord Griffiths said that Parliament "must have intended the local housing authority to evaluate the capacity of the applicant".[25]

2000.023 164 JP 336.

[22] *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 WLR 23, *per* Lord Mustill at 32; cited by Auld LJ in *R v Ministry of Defence, ex p Walker* [1999] 3 All ER 935 at 942.
[23] *Hunter v Chief Constable of West Midlands* [1982] AC 529 at 536.
[24] *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 32.
[25] *R v Oldham Metropolitan Borough Council, ex p Garlick* [1993] AC 509 at 520.