CONTROLLING THE USE OF PARLIAMENTARY HISTORY

INTRODUCTION

The use of parliamentary history to assist the interpretation of statutes has now been accepted in many countries of the Commonwealth, including Singapore and Malaysia.[1] I am not sure, however, that Commonwealth lawyers yet have a full sense of the likely significance of the change.

Some statistics from the USA may help. (For obvious reasons American lawyers do not speak of parliamentary history, but of legislative history.) Although there was intermittent use of legislative history in the USA before the late 1930s extensive use of such history did not begin until that time. Its use then grew steadily. One study[2] shows that in 1938 there were 19 references to legislative history in the reports of decisions of the US Supreme Court; but by 1973 there were 416 and in 1974 there were 445. Taking averages across a broad span: across the 20 year period from 1938 to 1957 there were an average of 118 references per year; while in the next 22 years, from 1958 to 1979, the average was 232 references per year. Another study made a close analysis of the judgments in the 1981 Supreme Court Term. This showed that

1 *Tan Boon Yong* v *Comptroller of Income Tax* [1993] 2 SLR 48; *Chor Phatic Har* v *Farlim Properties Sdn Bhd* [1994] 3 MLJ 345.

2 J L Carro and A R Brann, 'The US Supreme Court and the Use of Legislative Histories: A Statistical Analysis' (1982) 22 *Jurimetrics Journal*, 294.

of the total of 141 opinions written in that term legislative history was discussed in almost half.[3] The author, Judge Patricia Wald, of the US Federal Court, commented, 'No occasion for statutory construction now exists when the [Supreme] Court will not look at the legislative history.'[4] And she went on to say, 'Not once last term was the Supreme Court sufficiently confident of the clarity of statutory language not to double check its meaning with the legislative history.'[5]

Judge Wald repeated her close study of opinions in the US Supreme Court for the 1988-89 term.[6] On the overall pattern she reported:[7]

> The Supreme Court issued 133 opinions for that term. About half of them involved issues of statutory construction, and in 53 cases - almost three fourths of those involving statutory construction and over one third of all the opinions of the Court - legislative history was relied upon in a substantive way to reach the Court's decision.

However, the detailed pattern had changed. In recent years there has been a reaction in the USA against the indiscriminate use of legislative history, led by Justice Scalia of the Supreme Court.[8] By the 1988-89 term this reaction had begun to have an effect. In at least 10 cases during the term, usually in majority opinions written by Justices Scalia or White, statutes were interpreted without recourse to parliamentary history.[9]

From the beginning of the shift to the use of parliamentary history in the Commonwealth lawyers have been concerned that the process should be carefully controlled. The shift occurred first in Australia and

---

3 Patricia M Wald, 'Some Observations on the Use of Legislative History in the 1981 Supreme Court Term' (1983) 68 *Iowa LR* 195, 196.
4 *Ibid* 195.
5 *Ibid* 197.
6 Patricia 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 Law Rev* 277.
7 *Ibid* 288. She also reported that over the past several terms, the Courts docket had been composed of at least 50% statutory construction cases: *Ibid* n 37.
8 See particularly *Immigration and Naturalisation Service v Cardoza-Fonseca* 480 US 421, 107 SCt 1207 (1987); *Blanchard v Bergeron* 489 US 87, 103 L Ed 2d 67 (1989) and *Conroy v Aniskoff* 507 US, 123 L Ed 2d 229 (1993). See also Easterbrook, Frank H, 'The Role of Original Intent in Statutory Construction' (1988) 11 *Harv J of Law and Pub Policy* 59.
9 Wald *supra* n 6 at 298.

was preceded by extensive debate.[10] In broad terms two dangers of using parliamentary material were stressed in this debate. The first was practical: it was the likely increased time (and hence cost) in (i) the preparation of cases for court, (ii) the argument of cases, and (iii) the day to day process of lawyers advising clients on the basis of statutes. The second was a matter of principle: it was the danger that the use of such material would undermine the reliability of the statute book by encouraging confusion between the meaning of a statutory text and the expectations or hopes of members of the legislature. When the change was made in Australia it was implemented by a statutory provision that attempted to strike a delicate balance between the advantages of using parliamentary history (and other similar material) as an aid to interpretation and these dangers.[11] In other jurisdictions the change has been made by the courts rather than by legislation, but the same concern to get the advantages of using parliamentary history while avoiding these dangers has been evident.

In the United Kingdom the change was made in late 1992 by *Pepper* v *Hart*.[12] Six of the seven Law Lords assembled concurred in that part of the judgment of Lord Browne-Wilkinson that dealt with the use of parliamentary history. At the tail end of this part of his judgment Lord Browne-Wilkinson summarised his position in a passage that has for the moment become the touch-stone for the use of parliamentary history in Commonwealth countries where the position is not governed by statute.[13] The passage reads:[14]

> I therefore reach the conclusion ... that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear. Further than this, I would not at present go.

---

10 See, particularly, the proceedings of the *Symposium on Statutory Interpretation Canberra* 1983 (Australia Government Printing Service, Canberra), where most earlier contributions to the debate are mentioned.

11 S 15AB of the Acts Interpretation Act 1901 (Cth) as introduced in 1984.

12 [1993] AC 593.

13 Including Malaysia: see *Chor Phaik Har* v *Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 at 360E.

14 *Supra* n 12 at 640.

Whatever quibbles one may have about the details of this test,[15] the broad concerns behind it are clear, and similar to those motivating the Australian legislation. Lord Browne-Wilkinson wants to allow the use of parliamentary history to help discern meaning, without swamping the courts with endless debate about the significance of marginally relevant material and without allowing the use of parliamentary material to undermine the reliability of the statutes. The issue, however, is whether this aspiration is likely to be achieved.

Given the American experience I do not think that Commonwealth courts will be able to avoid a continuing growth in the citation of parliamentary material. Of the practical effects of this it seems to me that the most important is the potential impact of the use of parliamentary history on the day to day practice of lawyers. If they generally need to consult Hansard before they can safely give advice on the basis of statutes the cost will be enormous. But whether this happens, and, indeed, how significant the other practical effects are, will largely depend on how successful courts are in avoiding the second danger: allowing the use of parliamentary history to subvert the statute book.

However, quite apart from limiting lawyers' costs good reasons exist why we should care about the second, principled concern. Let me sketch them.

Firstly, lawyers are not the only people who rely on statutes: accountants, administrators, architects, engineers, builders, plumbers, land developers, importers, and so forth, are all likely to do so, and should be entitled to do so. If parliamentary history subverts the meaning

15 Two brief comments: (1) Earlier remarks within the judgment make clear that the formulation in (b) is not the actual test for admissible material, but rather a description of the only material Lord Browne-Wilkinson thinks will in fact satisfy the test -see 634E. But it seems unlikely that committee reports and other of the sources mentioned in s 15AB of the Australian legislation will not from time to time throw light on the meaning of a provision. Already the material that has been used is wider than that Lord Browne-Wilkinson's specified: see T St J N Bates, 'The Contemporary Use of Legislative History in the United Kingdom' (1995) 54 CLJ 127 at 145-148; *Monkton v Lord Advocate* (1995) SLT 1201. (2) The US Supreme Court recently had to consider a case in which a literal meaning led to a result that while not strictly absurd was, in the words of the majority, 'disturbingly unlikely': see *Public Citizen v Department of Justice*, 491 US 440, 105 LEd 2d 377 (1989). What will Commonwealth courts do when faced with such a case? I suspect the boundaries of the absurd will simply be enlarged.

of statutes then there are effectively two sources of law, and to know the law on a point these persons must consult both sources, which is simply not practical.

Secondly, statutes may not always be effective in communicating rules but at least that is their aim. So as a source of law they are likely to work better than parliamentary debates, or statements by a Minister about the Governments aspirations, neither of which are designed to play the role of defining the law. Determining the grounds of our coercively enforced social expectations by interpreting statutes (according to a defined system of interpretation) is a particular method of social organisation. It may not be perfect, but it is a superior method (in terms of the predictability and precision it allows) to spelling these grounds out of diffused parliamentary debates or broad statements of government policy.

Thirdly, to treat statements of particular participants in the parliamentary process as making law is to ignore the institutional structure we have established for ensuring that putative laws receive scrutiny and debate. This point is well brought out in some comments by Judge Easterbrook made in the context of the American debate:[16]

> An opinion poll revealing the wishes of Congress would not translate to legal rules. Desires become rules only by clearing procedural hurdles, designed to encourage deliberation and expose proposals (and arguments) to public view and recorded vote. ... It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law ... .

But it is one thing to care that the use of parliamentary history not subvert the statutes and another to carry this concern into practice. My aim in this article is to help bridge this gap. The remainder of the article consists of two parts: in the first I attempt to state theoretically the legitimate use of parliamentary history; in the second I look at the performance so far of Commonwealth courts.

1 THE PROPER USE OF LEGISLATIVE INTENT

Let me explain the structure of this part. The primary, day to day, concern of statutory interpretation is to ascertain the intended meaning

16 Quoted by Patricia Wald, *supra* n 6 at 285, n 34.

of statutory provisions and apply them. But unless meaning is taken in a sense too broad to be helpful in enabling us to distinguish between the causes of different types of problems this is not the only process that can be involved. For the purpose of defining these day to day cases I take meaning in a restricted sense. It covers the sense of the general expressions used in the rule and the reference of those expressions that refer to individual things. (In rules these referring expressions may refer to the same thing for every occasion on which the rule applies - eg the Privy Seal - but more commonly on each occasion that the rule applies they refer to something that uniquely bears a particular relationship to something else that on that occasion satisfies one or more of the general expressions in the rule. An example of the latter type of case occurs when a rule refers to the common seal of a limited liability company. On each occasion that the rule applies the term refers to the common seal of the company that satisfies the rule on that occasion.) In addition, meaning includes the logical structure of a rule: that is the inter-relationship between its component parts. I should add that determining the sense of a general expression, as I intend that notion here, may involve recognising that the expression is to be understood subject to an elliptical qualification (ie a qualification thought too obvious to need stating). The first six sub-sections of this part are concerned with determining meaning in this restricted sense.

I shall argue in the next sub-section that in interpreting any use of language we have to build a theory about which meaning was intended by its author. On this view the concept of the intention of the legislature is, of course, essential to statutory interpretation. How this concept can have a meaning, and what it means, are discussed in the second sub-section. An important reservation about the role of legislative intent then follows. In statutory interpretation we seek the meaning of the author of a statutory text, but not at all costs. If this were not so it would be impossible to explain why in the common case in which the text is approved by parliament without any relevant discussion we do not subpoena the draftsperson and ask what he or she meant by it. The reason we do not is clear: this would be to interpret a provision in the light of secret information - information that is not publicly available - and it would thus undermine the public reliability of the statute book. If we want to protect the statute book we must sometimes defend the best judgment that can be made about the meaning of a statutory text in the light of a limited body of evidence even if further evidence might show this to be wrong. The significance of this is discussed in the third sub-section.

By the end of that sub-section I will have elaborated a theory of our target in the ordinary, day to day cases of statutory interpretation. But some implications of this theory will remain to be discussed. To clarify what is involved in sticking to the meaning of a statutory text I shall, in successive sub-sections, distinguish between meaning and application, between the meaning and the point or purpose of a rule, and - because it is relevant to what we mean by the point or purpose of a rule - between justification and motive.

Finally, in the last sub-section I broaden the discussion to other types of problems.

1.1 WHY DO WE NEED REFERENCE TO LEGISLATIVE INTENT?

A theme that has surfaced in the recent American debate is that all reference to legislative intent is inappropriate because statutory interpretation should be governed solely by the meaning of statutes and not by the intention of the legislature.[17] To this type of argument there is, I believe, a simple answer. All interpretation of language depends upon our being able to build successful theories about what speakers (here taken to include writers as well) intend to communicate. This is as much true of communication through statutes as of any other use of language.

There is not space here to argue this claim about language in detail.[18] I shall confine myself to making a few points to illustrate the sort of ambiguity that would exist if words had to stand strictly on their own without aid from assumptions about what speakers are likely to have meant by them.

---

17 *Eg* E Lane, 'Legislative Process and its Judicial Renderings: A Study in Contrast' (1987) 48 *U Pitt L Rev* 639 at 652-5; Frank H Easterbrook, 'The Role of Original Intent in Statutory Construction' (1988) 11 *Harv J of Law and Public Policy* 59 at 60; Laurence H Tribe, 'Judicial Interpretation of Statutes: Three Axioms' (1988) 11 *Harv J of Law and Public Policy*, 51. See also O W Holmes, 'The Theory of Legal Interpretation' (1898) 12 HLR 417 at 419; and Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 CLR 527 at 538-40. Holmes argument is the most interesting: I intend to discuss this in detail on another occasion.

18 The reader who is doubtful about it should read Georgia Green's book, *Pragmatics and Natural Language Understanding*, (1989, Lawrence Erlbaum Associates, Hillsdale, New Jersey) in which there are, perhaps, 1000 or more examples showing how hopelessly ambiguous language would be were we not able to build theories about what speakers mean by particular words or sets of words.

Consider first polysemy - the possession by words of multiple senses. If you look at any good dictionary you will find that most common words have a number of different senses listed, sometimes two or three, but often as many as 30 or 40. The word 'ground' for example, used as a noun, has at least 12 different senses current in contemporary usage. (If you can think only of the surface of land, think of the ground that a fox goes to, or a spy goes to, the ground that a painter puts on a canvas, or the ground that is the foundation of an argument.) For the word 'draw', used as a verb, the Shorter Oxford English Dictionary shows something over 50 different senses. Some of these are obsolete, and some differences may merely reflect the different words with which draw is associated (compare to draw a bolt, with to draw a bow, and to draw a fishing net), but at least 16 different senses are listed that are in common use. Let us take an example using just six of these. Consider the sentence:

1 Is the fire drawing correctly?

If we suppress all consideration of what a speaker is likely to have meant by it (including what we know about fires) this could mean any of the following (inter alia):

1a Is the fire drawing something behind it in the correct fashion? (Remember that a horse draws a cart.)

1b Is the fire drawing funds from its bank in the approved way?

1c Is the fire drawing a picture in the required way?

1d Is the fire writing a cheque in the way it should?

1e Is the fire pulling through a current of air in the way expected?

1f Is the fire pulling in a crowd as it was expected to?

Now the fact is we know something about fires and we assume we share this knowledge with speakers and that they and we know of each others knowledge. As a consequence we know that in most circumstances a rational speaker could only hope to communicate 1e by this sentence (and then a particular fire would have to be in contemplation). But that we recognise this as the most likely meaning of the sentence depends on assumptions we make about what a speaker is likely to have meant by it, not just on the meaning of the words. For it is not

patterns made by a fire on the back of a fireplace to tell the future, in the same sort of way that British people sometimes read the patterns of tea leaves left in a teacup, someone might use this sentence and mean, 'Is the fire yet drawing a picture in the sort of way needed for a reading'? (ie 1c). And someone who thought it was the point of a particular fire, or type of fire, to draw a crowd might use the sentence meaning 1f. The beliefs needed to make any of the other meanings plausible would have to be very bizarre, but none of these meanings is strictly impossible. Thus, if fires had bank accounts and cheque books then 1b and 1d would become sensible possibilities. My point is that if we relied only on the meanings of words, polysemy would cause most sentences to be multiply ambiguous.

Not just polysemy would cause this. A second point that can be made is rather more subtle. Consider the following sentences presented by the philosopher John Searle:[19]

2 Bill cut the grass.
3 The barber cut Tom's hair.
4 Sally cut the cake.
5 I just cut my skin.
6 The tailor cut the cloth.

Searle points out that we take a different action to be involved in cutting in each case. If someone contracts to cut your lawn and they partition it with a knife, as in cutting a cake, you will probably not think they have fulfilled the contract. Yet 'cut' seems to be used literally in each of these sentences and with essentially the same sense. Searle contrasts these sentences with 7 and 8 in each of which cut is clearly used metaphorically:

7 Sam cut two classes last week.
8 The President cut the salaries of the employees.

But how do we know which action is envisaged by cutting in each of 2 to 6? It is not just that different actions are required for cutting different materials. For cutting hair is not (normally) cutting just one or two locks. And, again, it is not inevitable that these sentences carry the meaning they normally do. As Searle points out,[20] on a farm where

19 John R Searle, 'The Background of Meaning' in Searle, JR, Kiefer, F and Bierwisch, M, eds *Speech Act Theory and Pragmatics* (1980, D Reidel Publishing Co, Dordrecht) 221.
20 *Ibid* 225.

grass is cultivated for instant lawn a foreman might say to an employee, 'We have a big order coming in this afternoon, I want you to 'cut' all the grass in that next field' and mean by cut something that is quite similar to cutting a cake - or at least a flat pie. So how do we know what is meant? In broad terms the answer is obvious: because we recognise a type of action that has a point in each of these cases and from recognising the speaker's concerns see that it is *this* action the speaker intends us to understand.[21]

Not only the meaning of words would trouble us if we could not rely on assumptions about a speakers intent: the structural relationship intended between the ideas and things suggested by the words used by a speaker would often be ambiguous. Such structural ambiguity has been extensively studied in modern linguistics, which has shown how extensive it can be. To illustrate, here are two simple examples of sentences that are ambiguous in this way:

9 What disturbed John was being disregarded by everybody. (Is John being disregarded, or something that disturbs John?)[22]

10 She was cross because they fed her dog biscuits. (Did they feed her or her dog?)[23]

I should stress that these points cover only some of the ways that language would prove irresolvably ambiguous if we could not make reference to the intentions of speakers. Still, I hope enough has been said to show that we need theories about a speaker's intent to anchor the meaning of particular utterances.

Now this point not only makes clear a sense in which we *must* be concerned with legislative intent in interpreting statutes, it also clarifies the role of that notion in what I have called the ordinary, day to day cases. For if meaning determines application, as I shall argue it does, then all we need to know for the purpose of these cases is which

---

21 This type of case deserves more extended discussion. I have undertaken that in a book I am currently working on. The argument in this sub-section is a brief summary of points argued in more depth in the book.

22 From Noam Chomsky, 'The Formal Nature of Language' Appendix A in E H Lenneberg, *Biological Foundations of Language* (1967, John Wiley, New York) 405.

23 Modified from R W Langaker, *Language and Its Structure* (1968, Harcourt Brace and World, New York)110. Innumerable other examples might be given. I have discussed the influence of such structural ambiguity in statutory interpretation in Jim Evans, *Statutory Interpretation: Problems of Communication* (1988, OUP, Auckland) (hereafter 'Evans, *Statutory Interpretation*').

meaning was intended by the legislature. Any other beliefs or expectations of members of the legislature are irrelevant unless they throw light on this. But if this settles which intention of the legislature we are after in such cases, it does not clarify what counts as such an intention. So let us turn to that.

1.2 *WHAT COUNTS AS THE INTENDED MEANING OF THE LEGISLATURE?*

Sceptics about legislative intent sometimes argue that intentions belong to individuals, not groups, so that the very idea that a group such as the legislature can have an intention is absurd.[24] Yet we often do talk of the intention of groups such as partnerships, clubs, or corporations. How can this be? The answer, I think, is straightforward: we have conventions that determine what count as the intentions of such groups.[25] So it must be with the legislature. The conventions need not take the form of equating the intention of the legislature with the intention of one or more actual persons: the 'legislature' could be a hypothetical person to whom we ascribe certain sorts of knowledge. But, it seems to me that at least in modern times the common lawyer's search has been for the intention of the actual author of the text, although, as we shall see, always as judged from certain bodies of evidence.

Before we could look at parliamentary history we could build a theory about which meaning was intended by the author of the text without regard to who the author actually was. Nothing we could look at would confront us with the need to make a choice about whose understanding mattered. Now that we can look at parliamentary history we may sometimes have to make this choice, for it is possible for different participants in the legislative process to have construed a provision differently. The promoter may have understood it differently from those who drafted it, those who voted for it may have understood it differently from its promoter, or different groups who voted for it (perhaps in different Houses or at different stages) may have understood it differently from one another. Plainly we do not yet have established conventions for dealing with such cases.

---

24 *Eg* Albert Kocoureck, *An Introduction to the Science of Law*, (1930, Little Brown & Co, Boston) 201; John Willis, 'Statute Interpretation in a Nutshell' (1938) CanBR 1 at 3; D Payne, 'The Interpretation of Statutes in the Light of Their Policy' (1956) 9 *Curr Leg Prob* 96 at 97.

25 Cf Gerald C MacCallum Jnr, 'Legislative Intent' (1966) 75 Yale LJ 754 at 766-768 (especially n 32) & 776.

Nor is it clear to me that we should try to establish conventions for all such cases. Consider the following possibility. A Law Reform Committee report is laid before a parliament of one house. The report contains a draft bill that is later introduced by the Government. A provision in it is ambiguous and neither meaning is inconsistent with other parts of the Bill. The Law Reform Committee understood it one way, but the Minister's speech introducing the Bill in the second reading shows she understood it the other way. Which meaning constitutes that of the legislature? Generally, we should protect the understanding available to legislators: but whose understanding prevails here: that of a legislator who unavoidably missed the Minister's speech, but had studied the report and made sure he was there for the crucial vote, or that of a legislator who listened carefully to the Minister's speech but did not have time to study the report? Rather than adopt some more or less arbitrary convention I think we may be better to say that strictly speaking nothing counts as the intention of the legislature in this case and fall back on the meaning that someone who did not have access to either the report or Hansard would most reasonably judge to be that intended.[26] Distinctive of this hypothetical case is that two meanings have prevailed with more or less equal justification. The strategy I have suggested may be the most appropriate for any case of this type.

That we do not have, and perhaps should not try to have, conventions for every case does not imply that we have them for none. If a meaning is compatible with the text and the Bill as a whole, and was understood at all relevant stages by those who gave close consideration to the words, then the conventions of democratic process identify *this* as the meaning approved by the legislature. Sceptics about legislative intent often stress that frequently many of those who vote for a provision have not studied its meaning. This is supposed to establish that we can seldom be confident that a particular meaning has the approval

26 It might make a difference if the report was widely relied on in the legal profession as an aid to interpreting the relevant Act. But then the meaning assumed in the report would be favoured to protect public reliance on the report, not because it constituted the meaning intended by the legislature.

of the required majorities.[27] But surely the test assumed here for approval by a majority is not our common one. If people vote for a measure without knowing what it means then they take their chances. Voting procedures could not work unless such people were held to have approved what they would have discovered if they had made inquiry.

One final word on the cases for which we do not presently have conventions. When it comes to working out such conventions we will need to keep in mind that not only do we need to protect reasonable judgments about the meaning of a provision made from outside the legislature, we also need to protect such judgments within the legislative process itself.[28] Adapting to my purposes a possibility suggested by J H Baker,[29] let me pose the case of a legislator who says to herself: 'The Minister has misunderstood his own Bill. Anyone who read it with care would see that the provision he is now explaining does not mean what he thinks it means. I do not approve of the provision as the Minister understands it, but I do approve of it on the meaning that plainly appears when one reads the whole Bill. I have no opportunity to correct the Minister's error, so I shall vote for the provision relying on the meaning I have recognised.' We need to protect the possibility of justified judgment of this type because legislators need to be able to rely on a meaning that seems the only plausible meaning when a bill is studied as a whole. Of course, if they are right the same meaning will normally appear to a court that studies the eventual act as whole; but this is not inevitable - the other provisions that indicate a particular meaning may be abandoned. Nor is the only reason why we should protect such a judgment that a legislator who makes it can reasonably

27 The following express scepticism based on the supposed implausibility of a common intent among the members of a modern legislature: Ernest Brunken, 'Interpretation of the Written Law' (1915) 25 Yale LJ 129 at 130; Axel Hagerstrom, *Inquiries Into the Nature of Law and Morals* (1917) ed K Olivecrona and trans C D Broad (1953, Almqvist and Wiksell, Stockholm) 75-7; Max Radin 'Statutory Interpretation' (1930) 43 HLR 863 at 870; J A Corry, 'Administrative Law and the Interpretation of Statutes' (1936) UTLJ 286 at 290; Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston ULR 204 at 214-5; Michael S Moore, ' A Natural Law Theory of Interpretation' (1985) 58 So Cal LR 277 at 348 & 351; Ronald Dworkin, *Law's Empire* (1986, Fontana, London) at 317-27. An assumption that members of the legislature must have anticipated details of the particular case before the court (see 1.4 below) often contributes to such scepticism.

28 'Reasonable judgment' here, and hereafter, is shorthand for 'a judgment more reasonable than any alternative'. 'Reasonably appears' should be understood similarly.

29 'Statutory Interpretation and Parliamentary Intention' (1993) 52 CLJ 353 at 354.

expect the courts to make the same judgment: equally important is just protecting the ability of legislators to rely on the text put in front of them.

1.3 PROTECTING THE RELIABILITY OF THE STATUTE BOOK

Whenever we decide what a speaker meant we can only do so in the light of the evidence available to us. Characteristically, this includes the words used, the dialogue to which they belong, general knowledge about the world, and, perhaps, specific knowledge about the speaker. We judge, and our judgment may be reasonable, even more reasonable than any other possibility, and yet wrong. If it comes to assessing the cause of such a failure of communication, and determining the consequences of it, there may often be reason to protect the addressee(s) of an utterance against the speaker's carelessness. In such cases we protect the best judgment that could have been made by an addressee about a speaker's meaning even against what was actually meant. Of course it will matter if the speaker has misused words, but we may protect the addressee even if the meaning the speaker intended was a possible meaning of the words.

Sometimes people are tempted to elevate the most reasonable judgment about what was meant into the meaning of an utterance. I think we should resist this temptation for it is likely to cause confusion about the aim of interpretation. The whole point of communication through language is that speakers should communicate messages to addressees. Hence our aim in interpreting is to identify what the speaker meant. So long as that is something that could be meant by what was said it is rightly taken to determine the meaning of the utterance. All we need to note is that in some contexts we have an additional concern to protect what it was most reasonable to judge was meant.

That additional concern often shapes the law. For example, in the law of contract we protect what an offeree reasonably took an offeror to be offering even against what the offeror actually intended. In statutory interpretation the relevant concern is to protect the public reliability of the statute book. Broadly, we endeavour to protect the most reasonable judgment about the meaning of a statutory provision that might be made by a reader familiar with the previous state of the law and the social concerns the law addresses who reads the provision in the context of the Act as a whole. Even within traditionally acceptable aids to interpretation there are some the use of which might threaten this judgment. Careless use of law reform reports, for example, might

easily do so. Another example is the use of subsequent administrative practice within the government department from which a bill emanated, used as evidence of what that department was likely to have intended in proposing the relevant provision.[30] Access to parliamentary history creates a new threat.

Under the new regime we now have two judgments in the light of two different bodies of evidence that need to be protected, but at different stages. The wider body of evidence is that which includes the traditional sources of aid to interpretation *and* the parliamentary history. This is still not all the possible evidence: but we will not subpoena draftpersons and legislators or bring in memoranda that were not part of the public record. The evidence we can use is still publicly accessible, but it is not all easily accessible, or well organised; and if it all had to be consulted on every occasion that someone wanted to rely on a statute this would be very cumbersome. So there is good reason still to protect the most reasonable judgment that can be made in light of the more limited body of evidence I described above. As I have pointed out this is not exactly all the evidence allowed traditionally, although it is quite close to this. To handle these conflicting concerns we have opted for a complex compromise. At the end of the day we are to apply the best judgment of the authors intended meaning that can be made in the light of the wider body of evidence (ie including the parliamentary history), but subject to a caveat. The caveat is that this judgment not displace the best judgment that could be formed on the basis of a narrower body of evidence, namely the traditional sources (it ought not to be all of these, but perhaps that is the present law), unless there are reasonable grounds *from those sources* to doubt whether the judgment based on them is accurate. I read the limitations expressed by Lord Browne-Wilkinson of the purposes for which parliamentary history can be used as an attempt to state the circumstances in which there are reasonable grounds to doubt whether the best judgment based on traditional sources is accurate.

---

30 Such material can be used in the USA: see *American Jurisprudence* 2d (1974) Vol 73, notes March 1989 para 168. Its status in the Commonwealth is less clear-cut: F Bennion, *Statutory Interpretation* 2d ed (1992, Butterworths, London) states it can be used, but does not cite authority; explanatory notes issued within a department were rejected in *LCC* v *Central Land Board* [1958] 1 WLR 1296, but regulations have sometimes been used to indicate the contemporaneous understanding within the relevant government department: see *Halsbury's Laws of England* 4th ed vol 44, par 884.

Undoubtedly, this is an intricate conceptual structure. Yet handling it effectively is the price of getting what help we can from parliamentary history without harming the everyday working of statutes.

1.4 MEANING AND APPLICATION

We now embark on three short studies to consolidate the idea of applying the intended meaning of a provision.

A crude philosophical error, but one that still has significant influence in legal theory, is the belief that the meaning of a general expression is determined by the particular instances of its application that a speaker thought about at the time of using it. This belief could not possibly be true. General expressions in language are capable of marking out an open class of instances: that is, a class that can have an unlimited number of members. When we frame rules we use general expressions in this way: indeed, it is of the essence of rules that they can apply to an indefinitely large number of cases. But it is not logically possible for a speaker to think of all the instances that come within a general expression at the time of using it. So the meaning of a general expression cannot be *determined* by the instances thought about at the time of using it. At the most it might be determined by some instance[31] together with a method of using it as a sample. But when we get to that point it is easy to see that we don't need a sample, logically, a method of applying a term will do on its own. And simple reflection will show that we do not characteristically depend on recognising some sample in applying a general expression. Do we have to use a sample before we can apply terms such as apple, car tyre, run, converse, 'intention', and so forth? (Note, I do not ask, Do we have to have had some earlier experience of these things? That may, or may not be so, depending on what sort of concept we are talking about.)[32]

Fairly generally, to understand a concept is to understand what method is to be used in applying it; and quite generally, I think, to understand any concept is to understand either this or the logical connections of the concept to one or more other concepts about which

---

31 Or set of instances, but I shall stick to the simpler case - it does not affect the argument.

32 These points largely derive from Wittgenstein, *Philosophical Investigations* (1953, Blackwell, Oxford) especially up to around paragraph 217.

we do understand this. Of course, there is not a one to one relation between words and concepts, in that the same word may be used to indicate different concepts and the same concept may be indicated by different words. But words as used on particular occasions map onto concepts, and when we understand the concept or concepts a speaker intends to rely on in employing a general expression on a given occasion (and if more than one concept is relied on the intended relation between them) we understand how to go about applying that expression as the speaker intended it to be understood.

This does not mean that applying words is always simple -the application of concepts can be very difficult; but it does mean that in applying words as a speaker intended them we do not need to refer back to the speakers views about their application. Indeed that is inappropriate, for a speaker can use a term in a certain sense, then judge that as so used it has a particular application (or does not have) and be quite wrong. A thousand trivial examples could be given, but one will do. I may know what is meant by an oil painting, believe that a certain famous painting is an oil painting, and be quite wrong (perhaps it is an egg tempera). In fact, if this general truth were not true we could never be mistaken in holding that an entity has a quality, which clearly we can be.

The application of this to statutory interpretation is straightforward. To apply statutes we need first to understand the sense in which the relevant words were employed, but beliefs about their application held within the legislature are not relevant, unless by chance they throw light on the sense of the words.

Let me illustrate the dangers here from two US cases that have been involved in the recent controversy there about the use of legislative history. The first is *Conroy* v *Aniskoff*.[33] A provision of the federal Soldiers' and Sailors' Civil Relief Act 1940 stated: 'A period of military service shall not be included in computing any period ... provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment'. Across the period to which the relevant facts relate. Conroy, a career officer in the US army, was continuously in military service. In 1986 the town of Danforth in Maine, following the procedures in the relevant Maine statutes, sold a property he owned within the town to recover unpaid local real estate taxes.

33 507 US, 123 L Ed 2d 229 (1993).

Conroy claimed that the federal statute suspended the redemption period applicable to him while he was in military service. The trial court had followed a line of decisions that refused to suspend the redemption period unless the taxpayer could show that his military service resulted in hardship excusing timely legal action. These cases held it would be absurd and illogical to suspend the relevant redemption periods for career service personnel who had not been handicapped by their military service. Conroy failed in the trial court, and the lower appellate court, because he could not show that his military service caused any hardship.

The Supreme Court were unanimous that Conroy must succeed, but divided in their method of getting to that result. The majority stated, 'The statutory command is unambiguous, unequivocal, and unlimited', but still went on to consider the legislative history. Scalia J criticised the majority for going any further than the plain meaning of the language. In a marvellous display of irony he examined the legislative history and showed it was quite likely that when it passed the Bill that became this Act Congress believed that the suspension of the redemption period would be conditional on hardship as determined by a court. At one point in the legislative process representative Sparkman, who submitted the report on the Bill by the House Committee on Military Affairs to the House of Representatives, stated that while the Bill pertained to all persons in the armed forces a man serving in the armed forces for more money than he got in civil life was not entitled to any of the benefits of the provisions of this bill. Another representative then asked: 'This is to take care of the men who are handicapped because of their military service?' to which Sparkman answered affirmatively. Sparkman then went on, 'With reference to all these matters we have tried to make the law flexible by lodging discretion within the courts to do or not to do as justice and equity may require'.[34]

Sparkman was, of course, simply wrong: perhaps not about the application of the words, more likely about the details of the Bill. In any event, as Scalia J pointed out, whatever may have been believed about how the Bill would work made no difference - the words were clear. But in making this point Scalia J said, 'We are governed by laws, not by the intentions of legislators'.[35] This is correct so long as it means

34 123 L Ed 2d 229 (1993) 241.
35 *Ibid* at 238.

intentions about how the law should work that are independent of its meaning, but it is not correct if it is taken to suggest we should not be concerned with the intended meaning of statutory provisions.

The second case is *Blanchard* v *Bergeron*.[36] The relevant statute allowed a court to award 'a reasonable attorney's fee' to the successful party against the losing party in a suit. The issue was whether the fee could exceed the amount a successful party actually had to pay to his attorney under a contingent fee agreement between the two. Both the House and Senate reports on the relevant section had referred to a detailed analysis of what constituted a reasonable fee set forth in a sequence of earlier lower court cases. These references persuaded the Supreme Court that Congress intended the contingent fee arrangement as just one factor in the reasonableness calculus, and not as imposing an automatic ceiling on the award of fees. Justice Scalia objected to this use of legislative history. It seems to me he was right. Once Congress used the term reasonable fee it was for the courts to judge what was reasonable. The earlier decisions could help the Court in this judgment, but the beliefs in Congress that these decisions got it right were irrelevant. They only established beliefs about how the term reasonable fee should be applied, and both the earlier decisions and Congress could be wrong about this.[37]

I need now to say a brief word about vagueness. Legal theorists have often pointed out that general terms have some unavoidable element of vagueness, so that there will always be cases in which their application is not clear. Most of them claim that as a consequence, courts must necessarily exercise some free choice in the application of statutes.[38] Perhaps it will seem that we should at least be able to rely

---

36 489 US 87, 103 L Ed 2d 67 (1989).

37 Of course, the term 'reasonable attorney's fee' might have *meant* 'a fee that is a reasonable return for the work done', thus excluding more general issues of reasonableness, but that is not the basis of the majority's decision.

38 *Eg* Max Radin, 'Statutory Interpretation' (1930) 43 HLR 863 at 881, and 'A Short Way With Statutes' (1942) 56 HLR 388; Jerome Frank, *Law and the Modern Mind* (1930, Brentano's, New York) 189; Glanville Williams, 'Language and the Law' (1945) 61 LQR 71 etc at 302; D Payne, 'The Interpretation of Statutes in the Light of Their Policy' (1956) 9 Curr Leg Prob 96 at 98; Alf Ross, *Law and Justice* (1958, Stevens, London) 134; H L A Hart, *The Concept of Law* (1961, Clarendon Press, Oxford) Ch 7; Julius Stone, *Legal System and Lawyers Reasonings* (1964, Stevens, London) 350. For a different view see Wilfred J Waluchow, 'Hart, Legal Rules and Palm Tree Justice' (1985) 4 Law and Philosophy 41 at 47.

on the legislature's views about the application of a term when we confront genuinely marginal cases. I believe there are strategies for dealing with marginal cases in ordinary communication that these legal theorists ignore, but I shall not pursue that here.[39] For the present it is enough to say that courts must struggle with issues of vagueness as best they can on their own, drawing boundaries in places that seem to make sense given the point or purpose of the rule.[40] If they try to implement the legislature's views about how the general terms used in a statute apply in marginal cases then they will unavoidably create two sources of law. Whenever a case is marginal instead of wrestling with the issue of application lawyers will look for helpful remarks in the legislative record. If a case is judged marginal such remarks will have the capacity to over-ride the judgment that would otherwise have been made about how the term should be applied. Then no one will be able to rely on the legislation alone whenever there is a possibility a case may be considered marginal.[41]

I should point out that I am not saying legislative history can never be relevant to cases involving vagueness. On any theory about how vagueness should be dealt with the legislatures reasons for a provision will surely be relevant. So legislative history can be used to show these. What is not acceptable is that courts endeavour to apply the legislature's beliefs about whether or not a particular marginal case would come within a rule. Around this particular rock great dangers lie - we will only get through safely if we have a sure sense of how to navigate.

1.5 MEANING AND POINT OR PURPOSE

I speak of the point or purpose of a rule, rather than just the 'purpose', because to speak of purpose on its own suggests that the reason for a law must be that compliance with it will advance some further object. That is not so. A statute may require a certain behaviour because it

---

39 Some brief comments are made in Evans, *Statutory Interpretation supra* n 23, Ch 5.

40 For a classic legal statement of the right response of courts to the uncertain boundaries of terms see Lord Coleridge CJ in *Mayor of Southport* v *Morris* [1893] 1 QB 359.

41 Cf Lord Wilberforce in *Black-Clauson International Limited* v *Papierwerke Waldhof-Aschaffenburg* AG [1975] AC 591 at 638: ' ... it is the function of the courts to say what the application of the words used to particular cases or individuals is to be ... 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.'

is thought that behaviour is right and not because it is thought it will advance some further object. In addition, a statute may permit a certain behaviour because it is thought right that citizens should have liberty to perform it if they choose, not because the legislature wants to encourage it.[42] However, it is purpose as a further object to which the behaviour required or permitted by the rule is a means that I wish to discuss below.

In the past twenty years or so Commonwealth courts have embraced the idea of purposive interpretation with an enthusiasm that has sometimes led to a certain casualness with regard to meaning. So it may be salutary to point out that the purpose of a provision and its meaning are two different things. An understanding of the purpose of a provision is certainly an important aid to understanding its meaning, but it is not the only aid, and it is not even true that whichever possible interpretation best advances the purpose of a provision is necessarily the correct interpretation.

Consider how it is in ordinary life. I may have a certain objective, and give you an instruction as part of a strategy for securing it. Now suppose what I instruct is not a particularly effective way of securing my objective and by chance there is another meaning for my words that expresses a more effective instruction. It may be a good thing if you misunderstand my instruction, adopting the alternative meaning, but it does not follow that this is what my instruction meant or that you have complied with it. And similarly with statutes: that an interpretation would advance the evident purpose of a provision more effectively than any other makes it likely that this interpretation is correct, but it does not make it inevitable.

Nor should we think that it is the task of a court to promote the purpose of a rule irrespective of its meaning. If this were our general policy it would convert every rule into another rule of the form, 'Do whatever is necessary to promote the purpose of this appended rule (while of course taking proper account of other competing values)'. The damage this would do to legal certainty is obvious.

---

42 See Evans, *Statutory Interpretation supra* n 23, at 53-59.

1.6 JUSTIFICATION AND MOTIVE

Another argument sometimes put by sceptics of legislative intent is that members of the legislature may promote a piece of legislation, or vote for it, for all sorts of reasons - because they want to get enough votes to stay in power, or because they are told to do so by the party whips - so that it is normally not possible to know what were the motives that led to the votes for a particular bit of legislation. Even when we do know this, the argument claims, it will often not be helpful.[43] But all of this seems to me beside the point. In statutory interpretation we do not want to know the motives of legislators: we want to know what were the public interest reasons in favour of the rule, or part of a rule, we are dealing with that were thought to justify making it part of the law. Whether these concerns actually motivated legislators is irrelevant. We can see this when we think how odd it would be for a lawyer to argue that the purpose of a particular provision was really to gain extra votes in a marginal electorate and that consequently it should be interpreted so as best to achieve that purpose.

Of course, there may have been more than one justification for a law: but that should not normally concern us if these were thought of as complimentary grounds each of which ran in favour of it. However, also possible is that different, and for some relevant purpose competing, conceptions of its justification prevailed at different stages. If for any reason we have to select one or more of these against another as *the* purpose of the legislature we have a problem essentially similar to that of determining which meaning counts as that of the legislature. And again the response should be the same: determining this must depend on conventions, and that we do not have conventions for every possible case does not mean we have them for none. In a standard case when a particular justification has been presented or has been available throughout the legislative process - so that anyone who asked why do the promoters want to enact this bill (provision or amendment), having the question of justification in mind, would have been given the same answer - and this justification inter-locks in an intelligible way with the relevant detail of the statutory material in question, that will constitute the point or purpose of the legislation.

---

43 *Eg* Max Radin, 'Statutory Interpretation' (1930) 43 HLR 863 at 871; J A Corry, 'Administrative Law and the Interpretation of Statutes' (1936) UTLJ 286 at 290; and, in a slightly different context, Scalia J in *Edwards* v *Aguillard* 482 US 578, 96 L Ed 2d 510 at 553 (1987). Cf Gerald C MacCallum Jnr, 'Legislative Intent' (1966) 75 Yale LJ 754 at 756.

I make these remarks intending only to clarify what counts as the purpose of the legislature,[44] not to elevate that concept to any higher status than it warrants. In most circumstances it should be the *apparent* purpose of the statutory material as that appears from the material itself that should guide both the interpretation of meaning and the wider issues of construction we will touch on in the next sub-section.

1.7 THE USE OF LEGISLATIVE INTENT IN OTHER CASES

Let us now broaden the discussion. This sub-section will briefly review some circumstances in which statutory interpretation is concerned with something other than determining meaning in the limited sense I defined at the beginning of this section. My aim is to say a little about the proper use of parliamentary history in these cases.

1.7.1 EQUITABLE EXCEPTIONS AND EXTENSIONS

I have argued elsewhere that in exceptional cases courts should be able to make exceptions to statutory provisions to correct an obvious oversight of the legislature and that just occasionally extensions can be justified on the same ground.[45] I shall not repeat those arguments here, but confine myself to saying that any such processes we allow must be consistent with maintaining the public reliability of the statute book. The consequence is that I see little legitimate role for parliamentary history into this type of case. Indeed, if the parliamentary record were to show that the legislature did not write an exception to a statute because it expected the court to make it, that would not, in my view, justify an exception unless there was an established qualifying doctrine allowing for the exception - such as, say, the doctrine that allows waiver of procedural rules - and the legislature merely assumed this would apply.

---

44 They were stimulated by Dworkin's remarks in Law's *Empire supra* n 27 at 321-324.

45 Evans, *Statutory Interpretation*, *supra* n 23 Chs 7 and 8, and Jim Evans, 'Aristotle's Theory of Equity' in *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S Summers* ed Werner Krawietz, Nell MacCormick, Georg Henrik von Wright, (1994, Duncker & Humblot, Berlin) 225.

1.7.2 *LEGISLATIVE ERROR*

Occasionally, it appears that the drafting of a piece of legislation has been bungled so that it does not say what it was intended to say. To protect reliance on statutes we should not mend such an error unless it is starkly plain on the face of the statute. Perhaps as part of that we should insist that the rule as stated must make no sense or seem quite absurd. Just where the line should be set for absurdity can be difficult. So is there room for reference to parliamentary history to confirm a mistake has been made? So long as we maintain a clear threshold requirement I think such reference can be allowed.

An American case, *Green* v *Bock Laundry Machine Co*,[46] will illustrate the issues. The Federal Rule of Evidence 609(a) stated:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record ... but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Green had his arm torn off by car-wash machinery while on work-release from prison. In his action against the manufacturer of the machinery for negligence, an action that depended partly on his veracity, his earlier conviction for burglary was elicited on cross-examination, the trial judge having denied his pre-trial motion to exclude this evidence. The decision on the pre-trial motion had been upheld on appeal on the ground the trial judge had no discretion to undertake a weighing of the probative and prejudicial effects of the evidence as only prejudice to the defendant could be considered. (Clause (2) was not considered relevant.) This case was a further appeal to the US Supreme Court.

On its face the rule applies to both criminal and civil cases, but when applied to civil cases it has the result of treating plaintiffs and defendants differently without any apparent reason. Impeachment of the plaintiff's witnesses will always be allowed - as there will be no prejudice to the defendant - but impeachment of the defendant's witnesses will be subject to a genuine weighing. Faced with this anomaly

---

46 490 US 504 (1989), 104 L Ed 2d 557 (1989). Cf *US* v *Locke* 471 US 84, 85 L Ed 2d 64 (1985).

the Court concluded there must have been a mistake, and resorted to the Congressional record. This showed that the Conference Committee of the House and the Senate, which had settled the final wording, had overlooked civil defendants when it drafted the limitations in (1) and (2). The Court corrected the error by confining these limitations to witnesses who were defendants in criminal proceedings. (In the end that did not help Green as it meant *any* witness in a civil proceeding was impeachable without discretion.)

In the context of American law, in which the distinction the rule seemed to make between plaintiffs and defendants was highly anomalous, apparently without reason, and probably unconstitutional, that some error had been made was obvious. For the Court to then examine the legislative history to confirm that this was so, and to check what the mistake was, seems appropriate.

1.7.3 IMPLICATIONS

Sometimes issues of statutory interpretation turn on whether something that is not expressed by a statutory provision is to be taken as implied by it. By implied here I do not mean logically implied. If all citizens who earn over a certain income must file tax returns, then citizens with such an income who live in a certain area must do so. That is not expressed, but it is logically implied by what is expressed, and is not the type of implication I mean. The sources of implications drawn from statutes seem to be quite varied, but their ground is always more than just the content of the provision from which they are derived. Of course saying this is not inconsistent with allowing that some structure of premises employed logically ought always to underlie their derivation.

It is dangerous to generalise about the use of parliamentary history in cases involving implications because there is such a variety of cases.[47] I shall make a rather blunt division between three conceptually different forms and confine myself to a few remarks.

47 A general discussion of implications is in Evans, *Statutory Interpretation supra* n 23 Ch 10.

In one type of case the source of the implication is that the draftsperson appears to have taken it for granted that a certain understanding would be obvious to the interpreter.[48] I shall use one of the old cases implying a duty to exercise a power as a simple example. The case, *R* v *Barlow*,[49] concerned the Poor Relief Act 1662, which gave the overseers of a parish 'power and authority' to levy a rate to reimburse parish constables for expenses incurred in 'relieving ... and carrying rogues, vagabonds and sturdy beggars' to houses of correction and workhouses. In this case the constables had incurred expenses but the overseers refused to levy a rate pointing out that the statute merely gave them power to do so: it did not say they had to. The court held it was implied that when expenses had been properly incurred and the constables looked to the overseers for reimbursement the overseers had to levy a rate.

When an implication is of this type that it is likely the draftsperson took the relevant understanding for granted should be apparent from the statute itself. To use parliamentary history to establish an understanding that is not suggested by the statute would plainly undermine the reliability of statutes: more tricky is whether it is legitimate to use such history to confirm an implication that is suggested by the text. Use to confirm implies use to negate: but an implication that appears obvious from the text ought not to be negated by parliamentary history. The art will be to rely on parliamentary history only when the issue is genuinely open.

In a second type of case the courts seem to be effecting a repair to protect the legal state of affairs the legislature intended to implement. A simple example is *Attorney General* v *DeKeyser's Royal Hotel Ltd*,[50] in which the creation of a statutory power to take possession of property for defence purposes was taken to imply the suspension of a similar prerogative power because the statutory power, unlike the prerogative power, was coupled with a duty to pay compensation. The

48 The reasoning in these cases seems similar to the drawing of 'conversational implicatures' in ordinary discourse - see H P Grice, 'Logic and Conversation' in *Syntax and Semantics Vol 3: Speech Acts*, ed Peter Cole and Jerry L Morgan (1975, Academic Press Inc, New York) 41 - although Grice's detailed framework will not work for rules without modification.

49 (1673) Carth 293, 190 ER 773; 2 Salk 609, 91 ER 516.

50 [1920] AC 508. Cf *Laker Airways Ltd* v *Dept of Trade*, [1977] 2 All ER 182; and *R* v *Secretary of State for the Home Department, ex parte Fire Brigades Union*, [1995] 2 All ER 244.

ground of the implication was explained by Lord Dunedin as follows: 'What use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on the prerogative?' Here it seems unlikely the legislature took for granted that the interpreter would recognise the pre-existing power was to be suspended - more plausibly the pre-existing power was overlooked. But clearly the legislature did intend to enact a structure of rules that would exclusively control the war-time acquisition of property. That intent would have been frustrated by the oversight, so the 'implication' was recognised to protect it.

We might worry about the legitimacy of this type of repair but I shall leave that for another time. The relevance of parliamentary history in this type of case can only be to confirm, or show false, that the legislature had an intention the legislation itself suggests. To make a repair to effect an intention that does not appear from the statute would be to allow Hansard to be a direct source of law.

In a third type of case the implication is justified by a general principle or conception that is applied to the statutory provision taken as a datum. The implication that founds a cause of action for damages for breach of statutory duty is of this type. If the purpose of a statutory rule was to create rights in individuals to compliance with the rule then the court itself determines that damages are appropriate for harm caused by its infringement by applying a general conception that breach of such a right ought to sound in damages. Here the statute creates a fact, the legal consequence is logically implied by the application of the general principle or conception to that fact. In such cases the fact that is the ground of the implication should appear from the statute itself. Certainly, any reference to Hansard to establish the consequence directly without reference to the statutory fact and the general principle or conception should be strictly avoided as again it would make Hansard a direct source of law.[51]

51 A particularly important 'implication' of this type is that statutory powers conferred on public bodies or officers are to be used for the purposes of the act. Indiscriminate use of statements of purposes by Ministers will certainly create dual legislation. The danger of this is much increased by the likelihood that Lord Browne-Wilkinson's comments in *Pepper* v *Hart* [1993] AC 593 at 639A will be misunderstood by those who do not check the case he relies on.

1.7.4 *DETERMINING THE LOGICAL STATUS OF A RULE*

Sometimes the issue in applying a statutory provision is not what is its meaning, but what is its logical status. The most common issue of this sort is whether a procedural rule is mandatory or directory: that is whether or not its breach automatically invalidates the purported exercise of the power to which it relates. Suppose, for example, a rule states that a criminal defendant charged with any of certain offences is to be given an election whether to be tried summarily or by jury. Is a trial that was not preceded by an effective election automatically invalid?[52]

A claim is often made that the legislature is unlikely to have turned its mind to the detailed question the court has to consider in these cases so that a search for legislative intent is unrealistic.[53] On the face of it the claim is puzzling: one would expect a person drafting a statute to intend it to have a particular role (to be a particular type of rule) just as much as to have a particular meaning. However, it is possible to draft a statutory provision intending it express a legal requirement of *some sort* while leaving it to the court to determine just how its force should be upheld. When this occurs, as it perhaps quite often does with procedural requirements, the supposed search for legislative intent is really just determining the status for the rule that best protects the values the rule was intended to protect together with other values relevant to the issue.

If a statute leaves the status of a procedural rule open normally the best help we can hope to get from parliamentary history will be evidence of the reasons for the rule. But if, occasionally, when the statute leaves the status open we do find evidence of a more particular intent some care will be needed. Firstly, we will need to be certain the evidence is really of a more specific intent and not just an assumption, perhaps erroneous, about the status courts are likely to give to the rule. Secondly, if no effort has been made to enact the preferred status it is at least arguable that there is no proper basis for preferring it. Since working out the status of such provisions is often now left to the court

52 See *eg Public Prosecutor v Kot* [1968] AC 829; *Secretary of State for Defence v Warn* [1970] AC 394. On the distinction between mandatory and directory rules see Jim Evans, 'Mandatory and Directory Rules' (1981) 1 Legal Studies 227 and *Statutory Interpretation supra* n 23, Ch 11.

53 *Eg* Theodore Sedgwick, *Statutory and Constitutional Law* (2nd ed 1874, J N Pomeroy, Baker Voohis & Co, New York) 316.

the provision will on its face appear as one the detailed status of which was to be worked out by the court rather than one that was intended to have a more specific status, so protecting what can reasonably be understood from the rule may require treating it as a rule the detailed status of which is left to the court to settle, even if a more detailed status was, as it happens, envisaged by the legislature itself.

2 THE PERFORMANCE OF THE COURTS

This part of the article consists of a series of case studies designed to show how the points made in the first part apply in practice. The cases are selected from a survey I have made of recent cases to see how well Commonwealth courts are doing in handling legislative history.

2.1 *APPROPRIATE RESORT TO PARLIAMENTARY HISTORY*

R V WARWICKSHIRE COUNTY COUNCIL, EX PARTE JOHNSON[54]

This was the first of three cases in which the House of Lords was asked to consider parliamentary history within a few weeks of *Pepper v Hart*. In my view it was the only one of the three in which it did not misuse the history.

The appellant, who managed one of a chain of stores selling electronic goods had failed to honour an offer on a notice board he placed outside the store. The relevant issue was whether he, as distinct from the Company he worked for, had committed an offence under section 20(1) of the Consumer Protection Act 1987. This read:

> ... a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available ...

The Divisional Court had held he was within the section, arguing:

> The appellants business was to manage Dixon's branch at Stratford-on-Avon. His refusal [to honour the offer] arose in the course of that business. Hence he is guilty of the offence charged. It does not matter that he had no business of his own.

54 [1993] AC 583

The House of Lords recognised the provision was ambiguous. Although the Court does not put it this way the ambiguity arises from whether the word 'business' refers to an enterprise or an activity. If it refers to an enterprise then the possessive 'of his' naturally suggests ownership or control: the defendant must give the misleading indication in the course of running a business he (or it) owns or controls. On this interpretation the appellant was not guilty as he did not own or control the business, the company did. If the word refers to an activity then the possessive 'of his' naturally suggests the activity must be undertaken by the defendant. On this interpretation the appellant was guilty as running the local branch was a business he engaged in and he gave the misleading indication in the course of engaging in it.

Lord Roskill gave the decision of the House of Lords. He concluded from conventional sources that the expression 'in the course of any business of his' meant any business of which the defendant was either the owner or in which he had a controlling interest. But recognising that the provision was ambiguous he considered the parliamentary history. This showed that at the report stage in the House of Lords, the Minister responsible for the Bill indicated that the wording was intended to restrict the application of the section to those who owned businesses. No similar discussion had occurred in the House of Commons, but perhaps it was a reasonable assumption that the same understanding prevailed, or was available to members.

CHOR PHAIK HAR V FARLIM PROPERTIES SDN BHD[55]

This is the case in which the Malaysian Supreme Court agreed to allow reference to parliamentary history. The section in dispute was section 322(1) of the National Land Code 1965, which read:

> A caveat under this section shall be known as a 'private caveat', and
>
> (a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;
>
> (b) shall have the effect specified in subsection (2) or (3), according as it is expressed to bind the land itself or merely a particular interest therein:
>
> Provided that such a caveat shall not be capable of being entered in respect of a part of the land.'

55 [1994] 3 MLJ 345.

The issue turned on the meaning of the proviso: it was whether there could be a caveat lodged against the whole of the land that protected an interest in part of it. It was accepted that two interpretations were possible: on one it would not be possible for a person having an interest in part of the land to lodge a caveat at all; on the other it would be possible, although the caveat would need to be lodged against the whole of the land but expressed to protect an interest in only part of it.

The difficulty here arises from the obscure term 'in respect of' and might have been avoided if the draftsperson had used either 'protecting an interest in', or 'against'. 'In respect of' indicates that one thing stands in a certain relation to another: the problem is that it does not make clear what relationship is intended. In the present context is a caveat barred when it *protects an interest in part of the land,* or only when it is *against* part of the land? One should observe that the first of these relationships is between the caveat and an *interest* in part of the land, while the second is directly between the caveat and a part of the land. If the first had been intended we might have expected the words 'an interest' in to be used before the words 'part of the land'. Their absence suggests that the second interpretation was more likely to have been intended.

This suggestion is confirmed when one considers the common sense of the matter. If a caveat could not be lodged to protect an interest in part of the land then a person who purchased a section in a subdivision before separate titles had been issued for each section could not lodge a caveat to protect their interest. But there seems no sensible reason why the legislature should want to allow purchasers of undivided sections to protect their interests, while denying a similar protection to the purchasers of sub-divided sections before the issue of separate titles. Furthermore, as the Court made clear, the first interpretation would deny protection to anyone who had a legal or equitable right to receive an interest in part of a registered parcel of land, notwithstanding that the interest itself might be registrable under the Act.[56] For example, an interest under an agreement to grant a right of way over part of a piece of land would not be caveatable even though the Act allowed for the registration of such an interest.

56 See 356F and following.

There was, therefore, a strong case for the second interpretation. A difficulty for the Court was that two earlier decisions of the Court contained *obiter dicta* preferring the first interpretation; but the Court was not bound by these decisions, and, rightly in my view, departed from them to adopt the second interpretation.

The point of importance for the present discussion is that there was an ambiguity in the relevant provision. That, in the Court's view, justified it in looking at material from Hansard, although in the end it derived no help from it. Had the material from Hansard supported the first interpretation I consider there would have been a difficult issue whether even then that interpretation should have prevailed. The second interpretation was fairly clearly the most likely judged from the Act itself and I find it hard to see how anything extractable from Hansard could really have justified displacing it.

2.2 *THE DANGER OF CONFUSING MEANING AND APPLICATION*

Perhaps the greatest danger of the use of parliamentary history is confusing the meaning of the legislature with its views about application. The following cases illustrate that danger.

STUBBINGS V *WEBB*[57]

This was the second case in which the House of Lords considered parliamentary history after *Pepper* v *Hart*. The case concerned the application of the Limitation Act 1980 to actions for trespass to the person. The plaintiff, who was 30 at the date of issue of her writ, alleged she had been sexually abused between the ages of 2 and 14 by her stepfather, and raped by her stepbrother when she was 12. Her claim was for damages for resulting psychological disorders and mental illness suffered in adult life. The general time limit for actions in tort was stated in section 2 of the Act. If this applied, the plaintiff's action was statute barred as it was not commenced within 6 years of her attaining her majority;[58] but the plaintiff argued she fell within section 11, which makes a substantial exception to the general limits stated in section 2 and other earlier sections of the Act. Subsection 11(1) stated:

57 [1993] AC 498
58 Limitation Act 1980 ss 2, 28(1) and 38(2).

> This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

For actions within section 11 the time limit was three years, but this ran from what was called the date of knowledge if that was later than the date on which the cause of action accrued. So far as relevant to the present case, the date of knowledge was the date on which the plaintiff had knowledge 'that the injury was attributable in whole or in part to the act or omission which [was] alleged to constitute negligence, nuisance or breach of duty'.[59] In addition, if a case came within section 11 the court had a discretionary power to allow the action to proceed even if it was outside the time limit. The plaintiff claimed she did not have knowledge of the connection between the assaults and her illness until within three years of the issue of her writ as she did not become aware of the connection until after she had consulted a psychiatrist in adult life. She also asked for the exercise of the court's discretion to allow the action to continue even if she was out of time. Whether she had a right to have these matters considered plainly depended on whether her claim for trespass to the person was within the term 'breach of duty' as used in section11(1).

Lord Griffiths, who gave the substantive judgment of the House of Lords, held it was not. He relied extensively on a report, known as the Tucker Committee report, which had preceded the Law Reform (Limitation of Actions & etc) Act 1954, the statute that first used the words that in 1980 became section 11(1). In the course of recommending a uniform time limit for all actions for personal injury the Tucker Committee had said:

> We do not think it is necessary to define "personal injuries", although this may possibly be necessary if legislative effect is given to our recommendations. We wish however, to make it clear we do not include in that category actions for trespass to the person, false imprisonment, malicious prosecution, or defamation of character, but we do include such actions as claims for negligence against doctors.

59 *Ibid* s 14(1).

Hansard disclosed that the proposer of the relevant Bill in the House of Commons stated in moving the second reading:

> In its main provisions the Bill follows precisely the recommendations of the committee which sat under the chairmanship of Tucker LJ. There is only one comparatively minor point upon which the provisions vary from the recommendations of the Tucker Committee. [The minor point was that a fixed period of three years had been substituted for a two year period with a discretion to extend this to six years].

Furthermore, in the House of Lords, Lord Tucker, the author of the report, had spoken on the Bill and had only mentioned the one change from his report, the one mentioned by the promoter.

Lord Griffiths considered that these extracts showed clearly it was the express intention of parliament to implement the Tucker Committees report with the one change mentioned. However, the extracts show, at most, that Parliament believed that the Bill in some way excluded from the new uniform limitation for claims for personal injury the various types of claims the Tucker Committee thought should be excluded. They do not show any meaning of section 11(1) that can achieve this. Nor does Lord Griffiths give us much help with this. His most extensive comments on the meaning of the section come near the end of the judgment and are as follows:

> Even without reference to Hansard I should not myself have construed 'breach of duty' as including a deliberate assault. The phrase lying in juxtaposition with 'negligence' and 'nuisance' carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person. If I invite a lady to my house one would naturally think of a duty to take care that the house is safe but would one really be thinking of a duty not to rape her? But, however this may be, the terms in which this Bill was introduced to my mind make it clear beyond peradventure that the intention was to give effect to the Tucker recommendation that the limitation period in respect of trespass to the person was not to be reduced to three years but should remain at six years. The language of s 2(1) of the 1954 Act is in my view apt to give effect to that intention, and cases of deliberate assault such as we are concerned with in this case are not actions for breach of duty within the meaning of s 2(1) of the Act of 1954.

As the type of duty we may think of in a given situation is no guide to the type of duties we have, I take it the suggestion in the third sentence is that it is natural to speak of a duty to take care but not of a duty not to assault or rape someone. I simply cannot agree. Since Bentham and Austin, and certainly since Hohfeld, it has been common

to use the term duty as the general term for a legal obligation. Nor is that usage confined to legal theory. In 1945 the Court of Appeal in *Billings* v *Reed*[60] had to construe a war-time statute that used the phrase 'negligence, nuisance or breach of duty' in limiting the recovery of damages for 'war injuries' as defined by the Act. It held that trespass to the person was within the term 'breach of duty', Lord Greene stating that it is 'certainly a breach of duty as used in a wide sense'.[61] And in *Letang* v *Cooper*[62] in 1964 each of the three judges in the Court of Appeal had held that breach of duty in the predecessor to section 11 included an action for trespass to the person. Typical of their approach is the following from Dankwerts LJ:[63] 'In my view, trespass to the person involves a breach of duty, as in the case of any other tort.'

In the passage quoted above, Lord Griffiths seems to suggest that breach of duty should be understood to mean breach of a duty to take care not to cause personal injury. But this limitation of the language leads to enormous textual difficulties:

(1) As the damages claimed for breach of this more specific duty must necessarily include a claim for damages for personal injury there is then a redundancy in the wording. If this limitation of breach of duty had been intended the appropriate logical construction would have been 'any action for damages for breach of duty (whether ... etc) or any claim for negligence or nuisance where the damages claimed include a claim for personal injury'.

(2) This limitation very considerably reduces the application of the section to actions for breach of statutory duty. It will only apply when the statute imposes a duty of care. Cases in which failure to fence machinery or post warning notices, or keep explosives securely, or whatever, result in personal injury (whether or not from want of care) will be outside the section.

60 [1945] 1 KB 11.
61 *Ibid* at 18.
62 [1965] 1 QB 232.
63 *Ibid* at 242.

(3) Likewise breach of a contractual duty that is not on its terms a duty to take care but results in personal injury will be outside the section. Thus, breach of a duty to maintain or supply a hire bus or car in roadworthy condition, or to maintain a building or grounds, or to supply any product in a specific condition, that result in personal injury will fall outside the section.

(4) It is not easy to think of cases in which a duty of care would exist independently of a contract or statutory provision that would not be within negligence. Duties of care arising by virtue of a role or office such as parent, school teacher, health worker, and so on, are presumably within the term 'negligence'. The only case I can think of that might have been in contemplation is a duty of care under the law of trespass to the person itself: but if the words at the tail end of the brackets were included to catch this then it is extraordinary the draftsperson did not include words to make explicit that intentional trespass to the person was not included.

There is also a serious difficulty in reconciling this interpretation with other sections of the 1980 Act. Section 12(2) of that Act stipulates the same time limits for claims under the Fatal Accidents Act 1976 as those set out in section 11 - except that the relevant date of knowledge is that of the person or persons for whose benefit the action is brought. (The Fatal Accidents Act permits claims by executors on behalf of dependents when 'death is caused by *any* wrongful act, neglect or default [my emphasis]',)[64] Section 12(2) speaks of actions generally and does not use the 'negligence', 'nuisance' or 'breach of duty' formula. In both section 11 and section 12(2) the term 'date of knowledge' awaits later definition. This comes in section 14, but in setting out the definition section 14 refers to knowledge 'that the injury was attributable in whole or in part to the act or omission which is alleged to constitute *negligence, nuisance or breach of duty* [my emphasis]'. Now if 'negligence', 'nuisance' or 'breach of duty' is taken as covering all causes of action for personal injury there is no problem, since claims under the Fatal Accidents Act will necessarily involve knowledge by the relevant dependents of some act or omission affecting the deceased which is alleged to constitute negligence, nuisance or breach of duty. But if the formula is limited in the way Lord Griffiths suggests then for claims

64 S 1.

under the Fatal Accidents Act that are not claims for 'negligence, nuisance or breach of duty' the definition of 'date of knowledge' provided by the 1980 Act will make no sense.[65]

Nevertheless, there is something puzzling about the wording of section 11(1) (and the earlier section 2(1) of the 1954 Act). Earlier in his judgment, Lord Griffiths noted that if the draftsperson had intended to include within the subsection all actions in which the plaintiff claimed for personal injuries it would have been easy enough to say just that (ie to refer to such actions under that description).[66] This is not a very strong point. Of a similar point put in *Letang* v *Cooper* Diplock LJ commented, 'economy of language is not invariably the badge of parliamentary draftsmanship.' As he went on to remark, negligence and nuisance are the commonest causes of action which give rise to claims for damages in respect of personal injury. So it is not unlikely that the draftsperson would specify these and then use a general, catch-all expression to pick up any other cases.

Still, while this point does not seem strong enough to prevail against the objections set out above, it, and the statements in Hansard, are enough to leave a puzzle. Just what did happen in 1954? Did the draftsperson intend to implement the suggestion of the Tucker Committee, but use words that were inept for this purpose? Or was there a change of mind between the date of the report and the introduction of the legislation? If the latter, then the promoter of the Bill was either ignorant of the change, overlooked it, or thought it did not falsify his claim: 'In its main provisions the Bill follows precisely the recommendations of the Committee'.

Of these two possibilities I believe the second is more plausible. To see this we need to go back to *Billings* v *Reed*[67] in 1945. To the argument put in that case that breach of duty in the phrase 'negligence, nuisance or breach of duty' did not include trespass to the person Lord Greene had responded:[68]

---

65 I owe this point to W V H Rogers, 'Limitation and Intentional Torts', (1993) 143 New LJ 258 at 259-60.
66 [1993] AC 498 at 507.
67 [1945] 1 KB 11.
68 *Ibid* at 19.

> I am unable to accept that proposition. It would appear to limit the words "breach of duty" to cases of breach of duty to take care, which is the same thing as negligence. It seems to me that in this context the phrase "breach of duty" is comprehensive enough to cover the case of trespass to the person which is certainly a breach of duty as used in a wide sense. If that view be not right, it would be easy to get round this sub-section, because the plaintiff would only have to frame his action on the ground of trespass to the person, saying no word about negligence, and he could avoid the effect of the sub-section altogether.

This passage brings out that in 1945 it was still assumed that an action for trespass to the person could be based on negligence. That is not surprising because it is historically accurate. For a substantial period before 1833, actions for personal injury resulting from negligence (so far as allowed) were divided between trespass and actions on the case. If the injury resulted from the direct application of force by the defendant the action had to be in trespass; if the defendant merely set up a situation as a consequence of which the plaintiff suffered loss the appropriate action was an action on the case. All that had happened historically is that in 1833, in *Williams* v *Holland*,[69] it was held that a plaintiff could bring an action on the case even if the injury was direct. Thereafter, by suing in case a plaintiff could avoid the subtleties of the old law and as a consequence trespass to the person fell into disuse as a means of claiming damages for negligence; but it did not disappear.[70] In 1964, in *Letang* v *Cooper*, Lord Denning was to assert that the growth of modern negligence had removed the possibility of pursuing an action for trespass to the person for negligently caused harm: but in 1954 that still lay in the future.[71] It seems likely that the section considered in

---

69 (1833) 10 Bing 112.

70 See M J Prichard, 'Trespass, Case and the Rule in *Williams* v *Holland*' (1964) CLJ 234.

71 In *Stubbings* v *Reed* Lord Griffiths accepted that *Letang* v *Cooper* was right in deciding that negligent driving fell within s 2(1) of the 1954 Act, but he did not indicate which justification for that result he adopted. The judges in *Letang* v *Cooper* gave different reasons for holding that quite apart from the meaning of 'breach of duty' the action in that case - an action for negligent driving framed alternatively in trespass - was caught by s 2(1). Lord Denning's view that the growth of modern negligence has removed the action for trespass to the person for negligence was approved by Dankwerts LJ; but Diplock LJ took a different view. His argument is not altogether clear, but he seems *(inter alia)* to have accepted the argument of Adam J *in Kruber* v *Grzesiak*, [1963] 2 VR 621, that the words 'action for damages for negligence' in s2(1) (and sections derived from it) were intended to cover all actions based on negligence whether in case or trespass.

Billings v *Reed* was the pattern for section 2(1) of the 1954 Act and, if so, the draftsperson had probably read that case. But whether this is so or not, any competent draftsperson trying to give statutory effect to the suggestions of the Tucker Committee was likely to recognise that if claims for trespass to the person were excluded from claims for personal injury it would be easy to avoid the limitation on actions for negligence by framing the action in trespass. The thought that was then likely to occur was, 'Why not let the limit apply to any type of action but only when it includes a claim for personal injuries'?

However, even if I am wrong, and the draftsperson did intend to exclude the types of action mentioned by the Tucker Committee, there is no plausible meaning that will achieve that. In the discussion above we considered only the limitation suggested by Lord Griffiths. Others might be suggested: but there are none that I can discern that are not subject to at least some of the objections set out above. Indeed, we can go a little further. There is not for this section any commonly understood background, or any preceding text, that would make it natural to understand the words 'breach of duty' as subject to any elliptical qualification. This brings me to the crux of my criticism of Lord Griffith's judgment. In the end this is not that he got the meaning wrong (although I think he did), it is that he focused on the wrong intent. Once he had concluded that parliament intended to exclude the cases mentioned by the Tucker Committee (an issue of application) he really ceased to be interested in the meaning of the section. That is why there is no attempt to frame with care just what qualification of 'breach of duty' he thinks is implicit in the text - and then because that is not done the obvious objections to the limitation he loosely indicates are simply not confronted.

JAX TYRES PTY LTD V *FEDERAL COMMISSIONER OF TAXATION*[72]

A similar mistake was made in this Australian case. The issue was whether the re-treading of tyres was the 'manufacture' of goods within a definition in sales tax legislation which defined manufacture to include:

(a) production;
(b) the combination of parts or ingredients whereby an article or substance is formed which is commercially distinct from those parts or ingredients, ...

72 (1984) 55 ALR 723.

Beaumont J held that re-treading tyres was not within manufacture in the ordinary sense of that term as it did not change the thing worked on into a different type of thing. I have no complaint against this ruling. But the more difficult question was whether re-treading was within (b) of the extended definition of manufacture set out above. The learned judge did not spend much time on this question as he thought it was resolved by a passage in Hansard. The relevant Bill had amended a principal Act that merely defined manufacture as including production. The amendment followed a decision of the High Court of Australia in which the assembly of motor cycles from full sets of parts, each set being imported into Australia in a separate box, was held not to be manufacture. In introducing the amendment the Prime Minister had said:

> In consequence of a decision of the High Court, some doubt exists as to whether a person who imports or purchases fabricated parts and combines them into a distinct commercial article can be treated as a manufacturer. It is essential that the law should be clarified for the purpose of ensuring ... that the person who both fabricates and combines the parts of any commercial article should not be at a disadvantage in competition with persons who produce a similar article by a combination of purchased or imported parts.

From this Beaumont J concluded:

> The plaintiff submits, I think correctly, that this explanation of the mischief at which the amendment was aimed supports a construction of the amendment which limits its operation to the type of case described by the Prime Minister. That class of case would not pick up a process such as retreading a worn tyre.

Beaumont J does not explain what is the construction of the amendment that the passage supports. The statement by the Prime Minister perhaps indicates the Prime Minister thought the only change being made by the amendment was to make clear that activities lying within the ordinary meaning of manufacture that use purchased or imported parts are within the Act. But that view, if it was held, is a view about the application of (b) rather than its meaning. The problem is that (b) uses the expression 'commercially distinct', and a process such as re-treading may change a thing into something that is commercially distinct (here a more or less worthless tyre into a valuable one) without changing it into a different type of article. Is there any other meaning of 'commercially distinct' available? I think not: in context the language seems unambiguous. But if there is another meaning the learned judge does not suggest it. Nor does he indicate how a re-treaded tyre could

be anything other than commercially distinct from the worn tyre it once was. The question of meaning is effectively treated as settled by a ministerial belief about application.

2.3 *THE DANGER OF CONFUSING MEANING AND PURPOSE*

MCKAY V NORTHERN IRELAND PUBLIC SERVICE ALLIANCE[73]

This unreported decision from Northern Island is worth discussing because it illustrates several points including the need to distinguish between meaning and purpose.

The Fair Employment (Northern Ireland) Act 1976 made it unlawful for an employer to discriminate against a person seeking employment in Northern Ireland. Section 16(1) contained a definition of discrimination part of which was as follows:

> In this Act discrimination means -
>
> (a) discrimination on the ground of religious belief or political opinion; ... and 'discriminate' shall be construed accordingly.
>
> [The Act contained no definition of 'political opinion'].

McKay had complained to the Fair Employment Tribunal set up by the Act that the defendant had discriminated against him on the ground of political opinion in his application for employment as an assistant trade union secretary. He indicated at the hearing that he did not complain that he was discriminated against on religious grounds, rather that he was discriminated against because he belonged to the 'Broad Left' of the NIPSA (Northern Ireland Public Service Association), which was opposed to what the left regarded as the right wing approach and tendencies of the leadership of the NIPSA.

The Fair Employment Tribunal had declined jurisdiction on the ground that the words 'political opinion' should not be taken to include all political opinions but only political opinions displaying some connection or correlation between religion and politics in Northern Ireland. Its grounds were:

---

73 (1994) Lexis

1 The words political opinion are obscure as there are many cases in which it is unclear whether an opinion is political or not. For example, is the view that all school students should sit a common public exam political or not?

2 Therefore, applying Lord Brown-Wilkinson's test in *Pepper* v *Hart*, it was entitled to look at parliamentary history.

3 The relevant history (both pre-parliamentary and parliamentary) revealed the following:

(a) The legislation originated from the report of a working committee set up by the Minister of Northern Ireland to consider what steps should be taken to counter religious discrimination in the private sector of employment in Northern Ireland, which stated:

> 5. The meaning of the term 'religious discrimination' is widely understood in Northern Ireland, but it may be useful at the outset to describe the working definition of this term which we have adopted for the purposes of our enquiry. This is that a person practises such discrimination when he treats someone less favourably on account of his religious affiliation than he treats, or would treat, another person.
>
> 6. We also agreed that the term 'religious discrimination' should be taken to include discrimination on political grounds. We did so because we recognise the close connection between politics and religion in Northern Ireland. It is important to ensure that any measures adopted to deal with religious discrimination do not leave loopholes for its practice in another guise.

(b) In the Standing Committee of the House the Minister responsible for the Bill stated:

> Our reason for including these words [ie political opinion] is this. Because of the correlation between religion and politics in Northern Ireland, we envisage that employers could, in effect, avoid the responsibility by discriminating on a political base while at the same time suggesting or implying that they were discriminating on a religious base. One must catch the two. Otherwise one could be played off against the other.

4 This evidence justified the conclusion that the legislation should not be interpreted to render unlawful all less favourable treatment of a person on the ground of a political opinion. Only if such a political opinion displayed some connection or correlation between religion and politics in Northern Ireland was it unlawful.

The present case was an appeal by case stated against the Tribunal's decision. I shall discuss it initially on the assumption that the evidence cited by the Tribunal was the only relevant evidence, although the judgment shows this was not so.

As Hutton LCJ held, the term 'political opinion' is not obscure. In fact, it is vague, in that quite a number of cases are likely to occur in which it is difficult to decide whether it should apply or not. But as I argued in the second part of this article that does not justify the use of Hansard: courts must struggle for themselves to decide the application of general terms in marginal cases, otherwise we unavoidably have two sources of law for these cases. Hutton LCJ did not use the term vague, but he correctly diagnosed the character of the difficulty that the tribunals argument pointed to and recognised that courts just have to struggle on their own with such difficulties.

Once we recognise the term 'political opinion' is vague, not obscure, another point is obvious. The present case was not a marginal case: nobody could seriously argue that McKay's left-wing views were not a 'political opinion'. So unless there was some ground for reading 'political opinion' as meaning 'political opinion about a matter relating to religion', or something similar, McKay's case was squarely within the terms of the Act. But there was no ground for reading the term in this way: nothing in the context or the earlier provisions of the Act could suggest such an ellipsis to an ordinary reader.

Effectively, what occurred in this case was that the Tribunal tried to implement its sense of the legislature's purpose for including the words political opinion in the section without regard to their meaning. It believed the purpose was to prevent discrimination on political grounds that was, or was likely to be, a disguised form of religious discrimination. So it restricted the application of the words to that. But as is apparent in this case pursuing the legislature's purpose at the expense of its meaning misconstrues the structure of the legislature's concerns. Preventing disguised religious discrimination was no doubt the further purpose to be achieved by the rule, but it seems quite clear the means adopted to pursue this purpose was to prohibit *all* discrimination on political grounds. The overkill might have been viewed either as a tolerable price of pursuing the desired objective in the only feasible way, or as a desirable side-effect - not something that would have been pursued for its own sake, but welcome nevertheless. Either way once the framers of the rule had adopted this means and the resulting rule was approved by the legislature prohibiting all discrimination based on political opinion was also a purpose of the legislature. To restrict the

words to that which fell within the further purpose was therefore to ignore the legislature's deliberately chosen means to achieve that purpose.

This view of the purpose is, I think, reasonably obvious from the language itself, but we can in this case be quite sure, because the judge gives us a wider survey of the parliamentary history than the Tribunal. That shows that questioned on the specific point the Minister responsible for the Bill twice made clear that the definition was intended to cover political discrimination in its own right.

2.4 THE NEED TO PROTECT APPARENT MEANING

CHIEF ADJUDICATION OFFICER V *FOSTER*[74]

This is the third of the House of Lords decisions that considered parliamentary history shortly after *Pepper* v *Hart*. Parliamentary history was used only to confirm a meaning already arrived at from conventional sources; so, if, as I shall argue, an error occurred, the use of that history can not be said to have caused it. Nevertheless, the issues in the case are worth discussing because they illustrate nicely the conflict that can exist between protecting the reliability of statutes and taking account of parliamentary history.

The issue was whether an empowering sub-section in the Social Security Act 1986 authorised a regulation made under it. To simplify the subsequent discussion let me state at this point the structure of the issues as I see them. The empowering sub-section taken on it own was, as the Court held, ambiguous; however when it was read in conjunction with the immediately preceding sub-section only one of the two possible meanings allowed both sub-sections to have an intelligible role. On that meaning the regulation was ultra vires. The Court chose the other meaning. By chance, this meaning was supported by the parliamentary history in that parliament assumed that the power would be capable of being used to make a regulation such as that actually made.

The two sub-sections, which were within that part of the Act creating an income support scheme, made provision for a 'severely disabled premium' that was to be added in certain circumstances to the 'appli-

74 [1993] AC 754.

cable amount', as it was called, of income support that would otherwise have been payable. Here are the relevant sub-sections - 22(3) and 22(4) - in the context of the surrounding text:

> 20(3) A person in Great Britain is entitled to income support if - (a) he is of or over the age of 18 ...
>
> 21(1) ... where a person is entitled to income support - (a) if he has no income, the amount shall be the applicable amount; and (b) if he has income the amount shall be the difference between his income and the applicable amount ...
>
> 22(1) The applicable amount shall be such amount or the aggregate of such amounts as may be prescribed.
>
> (2) The power to prescribe applicable amounts conferred by sub-section (1) above includes power to prescribe nil as an applicable amount.
>
> (3) In relation to income support ... the applicable amount for a severely disabled person shall include an amount in respect of his being a severely disabled person.
>
> (4) Regulations may specify circumstances in which persons are to be treated as being or as not being severely disabled ...'

The regulation in dispute stated three conditions for being a severely disabled person for the purpose of entitlement to the premium: among these only one related to the degree of the persons disablement; the other two were extraneous to that. One required that the claimant have no-one living with him capable of looking after him and the other that no one received an invalid care allowance in respect of him. The issue was whether section 22(4) gave power to impose these extraneous conditions.

Taken on its own section 22(4) is ambiguous. It might be intended to give what I shall call a 'defining power': namely a power to substitute for the very vague term 'severely disabled' a more precise test that settled in a reasonable way at least some of the issues that would need to be decided in applying that term or provided a mechanism for settling them (such as a ruling by an approved doctor applying specified criteria). Alternatively, it might be intended to confer what I shall call a 'deeming power': a power to determine who should be within the term severely disabled for purposes of the Act regardless of whether they would be within the normal meaning of that term. The second of these meanings is more literal, for on its face the sub-section does not impose any limits on the type of specifying that can be done. A regulation stipulating that anyone living in Kent, or anyone owning a Ford Capri,

should be treated as severely disabled would be within this meaning: although no doubt such specifications would run afoul of the general administrative law understanding that powers must be exercised consistently with the purposes of the parent act. But both meanings are clearly possible, as Lord Bridge, whose judgment was approved by the other judges, recognised.[75]

When section 22(3) is taken into account, however, I believe only the first interpretation survives as an acceptable candidate. Counsel for the social welfare claimant pointed out to the Court that unlike the power given by section 22(1), which because of section 22(2) can be used to specify nil as an applicable amount, section 22(3) requires that the Secretary of State include in the applicable amount for a severely disabled person some amount in respect of his being such a person. He argued that if section 22(4) could be used to impose other conditions than those related to the claimants degree of disability then not all those within section 22(3) would get a premium as that subsection requires. The Court avoided this argument by accepting the Government's contention that: subsection (4), is in effect a deeming provision whereby the Secretary of State, in defining the category of persons who are to be treated as severely disabled for the purposes of subsection (3), may do so by reference to circumstances which either relate to their degree of physical or mental disability or affect the extent of their need for income support arising from that disability.[76]

However, the argument of counsel for the claimant can not be disposed of this easily. It is true, of course, that legal terms are often used as technical terms, serving to link a number of definitions to a number of consequences that apply to all the things so defined.[77] The difficulty is that it is impossible to give such a meaning to the term 'severely disabled' in section 22(3) in a way that enables the two subsections to make good sense. Let us proceed methodically. 'Severely disabled person' is used twice in section 22(3). On each occasion it must have either (i) its ordinary meaning, or (ii) a technical meaning paraphrasable as 'a person within that term as it is to be defined by regulations'. (To distinguish the two I shall hereafter put the technical meaning in inverted commas.) Since there are two meanings and two occasions of use we have four possibilities. Let us consider each the combinations here relate the different meanings to the occurrences of the term:

---

75 *Ibid* at 772C.

76 At 778EF.

77 See Alf Ross, 'Tutu' (1956) 70 HLR 812. I have carefully considered the role of rules defining such terms in Jim Evans, 'The Concept of a Legal Power' (1984) 11 NZULR 149 at 159-162.

1 (i) and (i): On this interpretation section 22(4) can not confer a deeming power as then not all those who are severely disabled need receive a premium in respect of being severely disabled.

2 (i) and (ii): If the power given by section 22(4) is a deeming power not all severely disabled persons need be 'severely disabled persons'. But then section 22(4) would allow section 22(3) to be over-ridden. So on this interpretation also section 22(4) can not be a deeming power.

3 (ii) and (i): If the power given by section 22(4) is a deeming power 'severely disabled persons' need not receive the premium just because they are severely disabled. If some restraint is imposed on the deeming power it may be necessary that they are severely disabled *inter alia*: but then why stipulate they are to receive the premium in respect of being a severely disabled person when in fact they may receive it in respect of being that and more? Why not just say: 'A premium to be known as a severely disabled premium shall be paid to such persons as shall hereafter be specified by regulations'?

4 (ii) and (ii): On this interpretation section 22(3) seems to be without a point. Why say that persons within a technical term shall receive a premium on account of being within that technical term? Why not just say, as above, that regulations may define who is within the term and that those within it shall receive a premium?

An additional argument against 3 and 4 becomes apparent when we ask: what is to be the position if no regulation is made? Then it will not occur that all 'severely disabled persons' receive a premium. That problem would be avoided if there was a duty to make a relevant regulation, but if it was assumed there was to be such a duty one would expect section 22(4) to have said 'Regulations *shall* specify circumstances ...'; but it does not, it merely says Regulations *may* specify circumstances.

In sum, 3 and 4 are not possible meanings and 1 and 2 both require that section 22(4) confer a defining power only. I think the natural understanding of section 22(3) in its context is 1. Perhaps it will be pointed out that even if section 22(4) gives a defining power only, section 22(3) may not be given effect if a reasonable, and therefore sustainable, definition nevertheless excludes some persons within the

ordinary meaning of severely disabled.[78] But the possibility of such departure from an original concept is necessarily incident to giving a defining power, so it is not difficult to understand section 22(4) as modifying section 22(3) to that extent, or even to read section 22(3) as subject to an implicit qualification of the form, 'Except insofar as is unavoidably incident to respecting the power granted by the next subsection ....' Simple contemplation will show that any similar qualification would make a nonsense of section 22(3) if a deeming power were in contemplation.

The puzzle that now has to be faced is that the parliamentary history makes clear that both Houses expected the power granted to be used to make a regulation of exactly the sort that was eventually made. That does not show that those members of parliament who attended to the debate understood section 22(4) as conferring a deeming power. All the evidence suggests they did not consider the meaning of the two subsections closely. But the history remains good evidence that those who drafted the sub-sections thought that a regulation of the sort made would both satisfy the obligation stated in section 22(3) and be within the power conferred by section 22(4).

What went wrong in the drafting process is not clear. The process started when an amendment in favour of a premium for the severely disabled who lived independently was approved in the House of Lords against Government opposition and against assurances that the Government shared the concern for these people of those supporting the amendment. The Government introduced subsections 22(3) and (4) in the House of Commons to replace the amendment approved in the Lords and they were subsequently accepted in both Houses. The best view I can come up with of what occurred is as follows. The Government considered sections 22(3) and (4) were unnecessary since the relevant premium could be provided anyway under other parts of the Bill.[79] But since it intended to enact a regulation of the sort that eventuated it inserted section 22(3) as a sort of promissory note that this would be done. At this point one of two things happened: either the term 'severely disabled person' was used as shorthand for the sort of severely

78 I don't imagine there is always a plain fact of the matter here as to who is severely disabled - the position can be taken relative to the point of view of the person making the appraisal. But, abstractly, and without making any appraisal, we can surely recognise the possibility discussed in the text.

79 See the remark of the Minister in the House of Commons cited in the judgment at 770H.

disabled person that had been discussed during the earlier debate, namely one living independently, and section 22(4) was framed to allow that class to be defined; or this term was used broadly but it was assumed the scope of the relevant entitlement could be reduced by using the power inserted in section 22(4). In the latter event those responsible failed to realise that the duty they had framed would not be satisfied if the regulations limited the entitlement to the severely disabled who were living independently. Either way, one of the two sub-sections meant something other than it would reasonably be taken to mean by a person who had not read Hansard.

I said earlier that resort to parliamentary history did not lead the Court astray in this case, so the points I want to make need to be stated hypothetically. They are: (i) if the Court had arrived at the view it reached by consulting Hansard it, nevertheless, should not have given it effect; and (ii) if the Court had reasoned correctly from the text, it should not then have been swayed from its conclusion by anything contained in Hansard. Protecting the reliability of the statute book allowed only one result in this case.[80]

One final comment. The Browne-Wilkinson test stated in *Pepper v Hart* says resort can be made to parliamentary history when a provision is ambiguous. If a robust view is taken about when ambiguity exists that may be satisfactory. However, it is possible that a provision may be ambiguous in that one can see that theoretically it could have two meanings, but one meaning may seem very unlikely when the rest of the Act is considered. If we are to protect the reliability of statutes the likely meaning will need to be protected in such cases even if, through some quirk, the unlikely meaning turns out to have been what Parliament intended.

---

80 Space precludes detailed discussion of the two additional arguments Lord Bridge put, but here are some brief comments. (1) The argument from s 20(12): (i) none of these provisions is accompanied by a similar subsection to 22(3); (ii) all the powers in s 20(12) need to be considered, then they broadly divide into defining powers and deeming powers; (iii) (a) is the only case that provides significant support for the argument, but that 'persons living in Great Britain' may be defined to include some persons physically outside Great Britain - *eg* those in embassies and in the armed forces - is traditionally understood. (2) On the argument from the 1975 Act: a similar system might readily have been introduced under the power in s 22(4) understood as a defining power.

2.5 EXTRANEOUS CONSIDERATIONS AFFECTING INTERPRETATION

RE BOLTON, EX PARTE BEANE[81]

Unlike the cases discussed so far this case involved a refusal to take account of parliamentary history. The interest of the case lies in the considerations extraneous to meaning that influenced the process of interpretation and led the Court to decline to employ parliamentary history.

Douglas Beane, an American citizen, allegedly deserted from the US forces in Vietnam in 1970, while in a military hospital. He travelled to Australia, where he remained, obtaining permanent resident status. In 1982 the Commanding Officer of US forces in Australia sought the Commonwealth's assistance in apprehending Beane, who was subsequently arrested and delivered into the custody of the Australian Naval Forces. Beane then sought habeas corpus to secure his release and prohibition to prevent his delivery to the American service authorities.

If authority for the arrest existed it lay in Section 19(1) of the Defence (Visiting Forces) Act 1963 (Cth), which provided:

> Where the designated authority of a country in relation to which this section applies, by writing under his hand, requests an authorised officer for assistance in the apprehension of a member of the forces of that country who is a deserter or an absentee without leave from those forces, the authorised officer may, in his discretion, issue a warrant in accordance with the prescribed form authorising ... any member of the Defence Force to arrest that deserter or absentee.

The USA was a country to which the section applied and in all other respects the procedure had been complied with. *Prima facie* the events that had occurred were within section 19(1), but the High Court limited the sub-section by effectively adding to the words 'a member of the armed forces of that country' the qualification 'who is part of a visiting force of that country in Australia', thus excluding Beane. The argument that led to this limitation turned on another section, section 8, which was the only section of the Act that expressly gave a foreign country jurisdiction in Australia over a deserter or absentee. This gave jurisdiction over only:

---

81 (1987) 162 CLR 514

> (a) members of any visiting force of that country; and
>
> (b) all other persons who, being neither Australian citizens nor persons ordinarily resident in Australia, are for the time being subject to the service law of that country otherwise than as members of that country's forces.

Deserters from the forces of a foreign country are not persons 'subject to the service law of that country *otherwise* than as members of that country's forces [my emphasis]'. Thus, the only jurisdiction over deserters given by section 8 was over members of a visiting force. (Additionally, of course, Beane was outside (b) as he was ordinarily resident in Australia.) So the argument was that arrest of a deserter in Beane's position was pointless in that nothing further could lawfully be done with him after his arrest. The US authorities had no jurisdiction under Australian law to hold such a person or remove him from the country; and his desertion from the US forces was clearly not an offence against Australian law. The argument went on that to avoid the silly situation in which such a person could be arrested but not held section 19(1) must be limited to members of the force of a relevant country that were part of a visiting force of that country.

If this had been all there was to it the argument for limiting section 19(1) would have been very strong even though there is nothing in the immediate context of section 19(1) itself to suggest the qualification imposed, and textual evidence suggested that Part III of the Act, which contained section 19, was intended to deal with different matters to those in Part II, which contained section 8. However, there was more to it. A power in a foreign country to remove a deserter or absentee from the jurisdiction to be dealt with elsewhere might easily have been implied as ancillary to the scheme in sections 20 and 21 of the Act. Section 20 allowed the arresting authority (an Australian authority remember) to detain the person arrested for 'such time as is reasonably necessary to enable that person to be dealt with in accordance with the next succeeding section' and section 21(1) then stated:

> Subject to this section, a person held in custody under the last preceding section shall be delivered into the custody of such service authority of the country to which he belongs and at such place in Australia as are specified in the warrant or otherwise directed by the authorised officer.

The phrase 'Subject to this section' was there because the rest of the section set out an appeal procedure that might be used by the arrested person to try to avoid being handed over. So there was power to hand an arrested person over if an appeal was not pursued or failed. What was missing was any express grant of authority to the foreign power to hold a person when handed over and remove him from the jurisdiction. But this might reasonably have been taken as implied from the clear purpose of permitting the person to be handed over.

That such an implication was justified was supported by comparing the 1963 Act with its predecessor. This allowed a deserter who was not a member of a visiting force to be handed over to the service authority of the country to which he belonged 'on the coast or frontier of the Commonwealth [ie the Commonwealth of Australia'].[82] The intent behind section 21(1) of the 1963 Act seems to have been to allow the deserter to be handed over within Australia as well as on the frontier. But, of course, no express authority was given to hold a person when handed over and remove him from the jurisdiction.

In the earlier English case, *R* v *Thames Metropolitan Stipendiary Magistrate, ex parte Brindle*,[83] which dealt with essentially similar legislation, having a similar history, the Court of Appeal had no difficulty in implying such an authority. Each of the judges allowed it: the following from Lord Denning being representative of the view taken:[84]

> Lord Gifford [counsel for the arrested person] then took a technical point. He said that section 13 only warrants the "handing over" to the United States authorities: it does not warrant his subsequent detention by them. I cannot accept this contention. His detention is clearly to be implied. What is the point of handing him over except so that he may be returned to the unit from which he deserted or to such unit as the United States authorities think proper?

In the present case a literal interpretation of section 19(1) was also supported by parliamentary history, which showed clearly that the section was intended to apply to deserters or absentees whether or not they were members of a visiting force. And, clearly, if section 19(1) was not to be qualified an implication had to be drawn from section 21(1) to avoid an absurdity.

---

82 The Defence (Visiting Forces) Act 1939 (Cth) s 8(2).
83 [1975] 1 WLR 1400.
84 *Ibid* at 1409.

Despite these points the High Court refused to derive an implication from section 21(1). The stumbling block was that to do so would be to allow the liberty of a subject to be interfered with by an implication rather than by an express provision. As it was put in the joint judgment of Justices Mason, Wilson and Dawson: ' ... we would not be justified in reading an implication carrying such serious consequences for the liberty of the individual into Section 21 of the Act.' Throughout the various judgments great stress is placed on this point.[85] The Court does not quite say so, but in effect it imposes a restraint on law-making that any interference with the liberty of the subject must be made expressly, not by implication. When it comes to the parliamentary history the judges merely state that as the construction they have arrived at is the unavoidable construction yielded by the Act itself there is no place for resort to parliamentary material.[86] But the construction they arrive at is unavoidable only because they refuse to draw the relevant implication from section 21(1). To claim that whether such an implication was intended was not at least an open question is simply not true.

Should we applaud the Court's stance or not? The difficulty is that implications of the type at issue in this case are commonly drawn in construing statutes,[87] and a good deal of chaos would result if they were universally rejected. If we have a rule that they are to be rejected for certain subject-matters this is bound to cut across the normal concern of interpretation to give effect to the intended meaning of statutory provisions. If such a rule is to exist in my view it ought to be part of a constitutional structure and not a canon of interpretation.

A defect of the Court's decision is that although the true ground of the decision is made reasonably clear, the logic of the reasoning is never quite explicit. Substantively, the judgments apply a constitutional constraint, but they have the form of a conventional search for meaning. Considerations extraneous to the search for meaning are influential, but their role is not fully acknowledged. Even before we had access to parliamentary history that type of process occurred, of course; but access to this history opens up a new danger. This is that courts will hold that a text is unambiguous as it stands when they want to avoid the meaning suggested by the history, but acknowledge an ambiguity when they favour that meaning. I think we ought not to welcome such a random process of interpretation.

---

85 *Supra* n 81, see 518, 523, 527, 532, 547.

86 See *eg* Deane J at 532, Gaudron J at 547.

87 *Supra* 2.7.3. The disputed implication seems to me of the first type discussed there.

2.6 CONCLUSION

Discussing the advantages and disadvantages of using parliamentary history, I wrote in 1988:[88]

> The principal disadvantage ... is the danger ... of undermining the reliability of the statute book. This is only a danger, it is not an inevitability. Time will tell whether courts are able to use parliamentary history without this result.

As a matter of logic that still seems to me right. But I wonder if I did not under-estimate the danger. The issue now seems to me whether it is realistic to expect lawyers to use Hansard without causing damage to the reliability of statutes. In a sense to say 'No' is a counsel of despair - if the task is intellectually possible why should we not be able to carry it out? But certainly the task is not easy - as I have tried to show in the first part of this article carrying it out requires a good deal of knowledge and care.

How have Commonwealth courts done so far? The cases discussed here were not selected on the basis of any science - I simply looked for cases that involved interesting points. Nevertheless, I think they display sufficient errors to justify considerable disquiet.

Jim Evans*

*Professor of Law
Auckland University

88 Evans, Statutory Interpretation, *supra* n 23 at 288.