

Lecture 1

Statutory Interpretation

In the famous words of Professor Guido Calabresi, we are ‘in the age of statutes’;¹ and it is indisputable that statutes are swallowing up our common law. Yet oddly, although they have been touched on, statutes have never been the focus of a Hamlyn Lecture Series. Perhaps this reflects their status in UK legal academia where the study of statutes as a coherent whole is sadly neglected, especially by those specialising in private law like me. While particular statutes or statutory provisions within a particular area of substantive law (e.g. contract law or tort law or employment law or company law) are studied, albeit generally without much enthusiasm compared to the common law, statute law as a coherent whole tends to be treated only at a basic introductory level in, for example, first year English Legal System or Legal Skills courses.² Even where statute law as a whole is taken more seriously, this is often either at

¹ Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) at 181.

² *Teaching Legislation in UK Law Schools : Summary of Survey Results* (2011) (carried out for the Statute Law Society by Professor Stefan Voganauer and accessible at www.statutelawsociety.co.uk/library for 2012) showed that in only 19% of UK law schools (who responded to the survey, there being a response rate of 47.04%) was there a dedicated course or teaching unit on legislation; and 56% of such courses were for first years.

THINKING ABOUT STATUTES

a theoretical level in jurisprudence courses or as a relatively small part of the constitutional law syllabus. As Lord Steyn has said, '[T]he academic profession and universities have not entirely caught up with the reality that statute law is the dominant source of law of our time.'³ And in the words of Professor Neil Duxbury, 'Generally speaking, statute law has been regarded as a dusty and uninviting academic topic – in so far as it has been considered an academic topic at all.'⁴

In these three lectures, I want to rise to the challenge of thinking seriously, and at a practical level, about statutes by examining three central aspects, which, for shorthand, I label interpretation, interaction and improvement. So, in this first lecture, I am looking at statutory interpretation.

I should stress at the outset that my focus in these lectures is on statutes – on primary legislation, that is Acts of Parliament⁵ – and not on secondary or delegated legislation contained in, for example, statutory instruments. Although

³ Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review*, 5.

⁴ Neil Duxbury, *Elements of Legislation* (Cambridge, 2013) at 64.

⁵ I confine myself to what are termed 'public general Acts'. There is a small but declining number of Acts each year that are termed 'local Acts'. Albeit that we might still say they are passed in the public interest, such local Acts are confined in scope to a limited area or a limited class of people (i.e. they may be local or personal). As regards statutory interpretation, it would appear that local Acts are interpreted in the same way as public general Acts, although there has been an occasional reference to a rule of *contra proferentem* operating against the promoters of a local Act. See generally Daniel Greenberg, *Craies on Legislation* (11th edn, Sweet & Maxwell, 2017) paras. 1.4.1–1.4.11; 29.1.12. I am also dealing with Acts of Parliament only and not with legislation of the Northern Irish Assembly, the National Assembly for Wales or the Scottish Parliament.

INTERPRETATION

almost all of what I shall say is equally applicable to secondary legislation, I put to one side any distinct issues that may arise in relation to secondary legislation. So, for example, although a topic of great importance that has been brought into sharp focus by Brexit, I shall not be dealing with the divide between primary and secondary legislation and the use of so-called Henry VIII clauses.⁶

I have divided this first lecture into four parts. First, I want to give an overview of the modern approach in English law to statutory interpretation. Secondly, I want to consider the extent to which, if at all, statutory interpretation is best seen as effecting the intention of Parliament. Thirdly, I want to focus on the idea that a statute is ‘always speaking’. Fourthly, I want to compare and contrast statutory interpretation with some other forms of legal interpretation.

1 What Is the Present English Law on Statutory Interpretation?

Before answering this, it should be stressed just how important, in the practice of law, statutory interpretation has become. As Justice Kirby, formerly of the High Court of Australia, has said, ‘[T]he construction of statutes is now, probably, the single most important aspect of legal and judicial work ... This is what I, and every other judge in the countries of the world that observe the rule of law, spend most

⁶ In general terms, these clauses give Ministers the power in secondary legislation to amend primary legislation. See Lecture 3, note 8.

THINKING ABOUT STATUTES

of our time doing.’⁷ Yet in line with the general neglect of statutes in our law school curricula, statutory interpretation is rarely given the attention it merits. As Lord Justice Sales said in his address to the Society of Legal Scholars in Oxford in 2016, ‘Most of the law which the courts are called on to apply is statutory. Yet statutory interpretation languishes as a subject of study. For the most part, law students are expected to pick it up by a sort of process of osmosis.’⁸ It follows that, if I were to ask this audience tonight, ‘What are the leading cases on statutory interpretation?’, I suspect that, with the exception of *Pepper v. Hart*,⁹ I would be met either with a blank or with a myriad of different cases dealing with different specific statutes. I would also hazard a guess that it would not be long before someone referred to the literal rule, the mischief rule and the golden rule. These rules have often been trotted out in basic textbook treatments – I remember that I first came across them when reading Glanville Williams’ introductory book *Learning the Law*¹⁰ before I came to university – but they cast very little light on the modern approach. Indeed, we may ask: where did that analysis or categorisation of the rules on statutory interpretation come from? We do not find them neatly set out and labelled in that way in any case. The answer is that they come from a relatively little known article – this must be the most referred to and yet least properly cited

⁷ The Hon Michael Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2002) 24 *Statute Law Review* 95, 96–97.

⁸ Lord Justice Sales, ‘Modern Statutory Interpretation’ (2017) 38 *Statute Law Review* 125, 125.

⁹ [1993] AC 593. ¹⁰ (ed. A.T.H. Smith, 16th edn, Sweet & Maxwell, 2016).

INTERPRETATION

article of all time – entitled ‘Statutory Interpretation in a Nutshell’ appearing in the 1938 *Canadian Bar Review* and written by a Canadian academic Professor John Willis.¹¹

Certainly, it is not easy to pin down the present approach of the courts. Although said in 1956, the words of Lord Evershed MR remain accurate today: ‘[S]ome judicial utterance can be cited in support of almost any proposition relevant to the problems of statutory interpretation.’¹²

However, it is tolerably clear today that our judges have moved from an old literal to a modern contextual and purposive approach. We no longer give words their literal or dictionary meaning in so far as the context and purpose of the statute indicate that that is not the best interpretation of what Parliament has enacted.¹³ In *IRC v. McGuckian*¹⁴ in 1997 Lord

¹¹ (1938) 16 *Canadian Bar Review*, 1. As explained by Willis, the ‘literal rule’ is that the words should be given their ordinary or plain meaning; the ‘golden rule’ is that the plain meaning of the words may be departed from to avoid absurdity (see *Grey v. Pearson* (1857) 6 HLC 61 at 106); and the ‘mischief rule’ is that the words should be interpreted to remedy the problem addressed by the statute (see *Heydon’s Case* (1584) 3 Co Rep 7a; 76 ER 637).

¹² ‘The Impact of Statute on the Law of England’, Maccabean Lecture in Jurisprudence (1956) XLII *Proceedings of the British Academy* 247 at 258.

¹³ In Australia, a purposive approach is laid down in statutes. So, e.g., s. 15AA of the (Commonwealth) Acts Interpretation Act 1901 (as amended) reads: ‘In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act . . . is to be preferred to each other interpretation.’

¹⁴ [1997] 1 WLR 991 at 999. For other tax cases in which it was similarly stressed that the modern purposive interpretation applies even to tax statutes (contrary to a view that such statutes should continue to be interpreted applying the old literal approach) see: *Barclays Mercantile*

THINKING ABOUT STATUTES

Steyn said: ‘During the last 30 years, there has been a shift away from the literalist approach to purposive methods of construction . . . the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it.’ In Lord Bingham’s words in *R v. Secretary of State for Health, ex p Quintavalle*, ‘The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.’¹⁵ In the same case, Lord Steyn again emphasised that a purposive, rather than a literal, approach was now to be taken. ‘The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of the European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas . . . [N]owadays the shift towards purposive interpretation is not in doubt.’¹⁶ Lord Nicholls in *R v. Sec of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd*¹⁷ emphasised the importance of context saying, ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.’ And in the precisely accurate and succinct words of the late and sadly missed Toulson LJ, as he

Business Finance Ltd v. Mawson [2004] UKHL 51, [2005] 1 AC 684; *UBS AG v. HMRC* [2016] UKSC 13, [2016] 1 WLR 1005; *RFC 2012 Plc v. Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767.

¹⁵ [2003] UKHL 13, [2003] 2 AC 687, at [8]. ¹⁶ *Ibid.* at [21].

¹⁷ [2001] 2 AC 349, 397.

INTERPRETATION

then was, in *An Informer v. A Chief Constable*, ‘Construction of a phrase in a statute does not simply involve transposing a dictionary definition of each word. The phrase has to be construed according to its context and the underlying purpose of the provision.’¹⁸

Three specific points on the modern approach are noteworthy. First, the modern approach has subsumed many of the old so-called ‘canons’ of interpretation, such as the rule *eiusdem generis*¹⁹ or the rule *expressio unius*²⁰ or, to

¹⁸ [2012] EWCA Civ 197, [2013] QB 579 at [67]. See also for mention of both context and purpose Lord Nicholls in *MD Foods (formerly Associated Dairies) Ltd v. Baines* [1997] AC 524, 532: ‘In the process of statutory interpretation there always comes a stage, before reaching a final decision, when one should stand back and view a suggested interpretation in the wider context of the scheme and purpose of the Act.’ For the emphasis on purpose, see, e.g., Lords Griffiths and Browne-Wilkinson in *Pepper v. Hart* [1993] AC 593, 617, 633–634; and *Harrods Ltd v. Remick* [1998] 1 All ER 52, 58, where Scott LJ said, ‘[W]e should, in my judgment, give a construction to the statutory language that is not only consistent with the actual words used but also would achieve the statutory purpose of providing a remedy to victims of discrimination who would otherwise be without one.’ In the same context of discrimination law, see *MHC Consulting Services Ltd v. Tansell* [2000] ICR 789, 798 (per Mummery LJ). For a compelling application of what he termed ‘purposive considerations’ so as to give a meaning to words that were linguistically possible even though not the most natural interpretation, see Henderson J in *Investment Trust Companies v. HMRC* [2012] EWHC 458 (Ch) at [104]–[105] (decision on this upheld by the Supreme Court, also adopting a purposive construction [2017] UKSC 29, [2017] 2 WLR 1200, esp. at [80]).

¹⁹ The meaning of this is that general words, following specific words, should be confined to things ‘of the same kind’.

²⁰ The meaning of this is that where ‘one thing is expressly mentioned’, this is to the exclusion of others.

THINKING ABOUT STATUTES

choose one not expressed in Latin, the rule that the scope of a criminal statute should be narrowly construed. While no doubt these canons or rules will continue to reflect what will usually be the best interpretation, they have lost primacy with the demise of literalism and have tended to be swallowed up by the modern contextual and purposive approach.²¹ Secondly, much of the legislative history is now admissible (e.g. Law Commission Reports and White Papers and Explanatory Notes) and this includes, exceptionally and subject to constraints, Parliamentary debates from Hansard following the landmark case of *Pepper v. Hart*. Thirdly, in *Inco Europe Ltd v. First Choice Distribution*,²² the House of Lords accepted that, very exceptionally, provided it is clear there has been a drafting mistake and it is clear what the statute was meant to say, the courts can amend the words of a statute. This has been labelled ‘rectifying construction’ or even just ‘rectification’.

In understanding the move that the courts have made, it may be helpful to look at a couple of cases that epitomise the old literal approach. In doing so, I am conscious that there have been traces of a contextual and purposive

²¹ *Karpavicius v. The Queen* [2002] UKPC 59, [2003] 1 WLR 169, at [15] (per Lord Steyn). See also *R (on the application of Black) v. Secretary of State for Justice* [2017] UKSC 81, [2018] AC 215. In this latter case, it was decided that the ‘no smoking in public places’ legislation does not apply to (state) prisons. But in relation to the long-standing presumption (or rebuttable rule) that the Crown is not bound by a statute, Lady Hale (giving the sole judgment) at [37] said, ‘The question is whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown to be bound.’

²² [2000] 1 WLR 586.

INTERPRETATION

approach throughout, going back to identifying the relevant ‘mischief’ being cured in *Heydon’s Case* in 1584,²³ so that some would argue that the modern move is not as clear-cut as I have indicated²⁴ and that the literal approach I am about to illustrate was not adopted by all judges. Nevertheless, the two cases I am about to discuss, both from the 1960s, were decided as they were and would, in my view, clearly be decided differently today.

In *Fisher v. Bell*²⁵ the defendant was charged with the offence of ‘offering for sale’ a flick knife contrary to section 1(1) of the Restriction of Offensive Weapons Act 1959. He had displayed a flick knife in his shop window with a ticket behind it saying ‘Ejector knife – 4s’. He was held to be not guilty because according to the Divisional Court, applying the words literally in the light of the principles of contract law, the display was not an offer to sell but rather a mere invitation to treat. The offer was made by the customer to buy the knife and there was therefore no offer to sell by the shopkeeper. Although this interpretation was in conflict with the purpose of the Act – as Lord Parker CJ said ‘it sounds absurd that knives of this sort cannot be manufactured, sold, hired, or given, but apparently can be displayed in shop windows’²⁶ – that was a matter for the Legislature, not the courts, to sort out.

²³ (1584) 3 Co Rep 7a; 76 ER 637.

²⁴ See, e.g., Daniel Greenberg, ‘All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting’ (2005) 7 *European Journal of Law Reform* 31; Daniel Greenberg, *Craies on Legislation* (11th edn, Sweet & Maxwell, 2017) ch. 18.

²⁵ [1961] 1 QB 394. ²⁶ Ibid. at 399–400.

THINKING ABOUT STATUTES

In *Bourne v. Norwich Crematorium Ltd*²⁷ the claimant ran a crematorium and sought a statutory tax allowance for expenses in improving the furnace chamber and chimney of the crematorium. The allowance was applicable if the business could be said to be concerned with the ‘subjection of goods or materials to any process’. The court held that those words did not cover the business of a crematorium because ‘it is a distortion of the English language to describe the living or the dead as goods or materials’.²⁸ I would suggest that applying a modern purposive approach, a different result would now be reached. However, to avoid misunderstanding, it is crucial to clarify that the modern purposive approach does not mean that the words used in the statute can be ignored. On the contrary, the words used are of central importance so that the courts cannot depart from a plausible meaning of those words. There is a difference between, on the one hand, the literal meaning of words irrespective of context and purpose and, on the other hand, the best plausible meaning of the words in the light of their context and purpose. The courts have moved to adopting the latter approach. In the *Bourne* case, a literal meaning of the ‘subjection of goods or materials to any process’ did not embrace the business of a crematorium. But those words could plausibly embrace the business of a crematorium and that that was the best

²⁷ [1967] 1 WLR 691.

²⁸ Ibid. at 695 (per Stamp J). For criticism of Stamp J for taking a literal approach, see *The Interpretation of Statutes*, Law Commission Report No 21 (1969) para. 8. But while I agree that Stamp J is best understood as taking a literal approach, it is noteworthy that he did expressly recognise that context is important.