Law, interpretation, and dictionaries; the Legal Services Act 2007; and judges returning to legal practice

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Law, interpretation, and dictionaries

You don't need to know who Amy Winehouse is to be a good judge. But members of the judiciary worried about bad press if they don't get a reference to her, or if they have to ask "what are arctic monkeys?" can now take comfort from a new online dictionary resource. The latest Collins English Dictionary includes, in its online bibliographical section, an entry on various contemporary figures. The dictionary also includes new words like "hoodie" and "leetspeak" (jargon used by internet groups, from the word "elite").

Dictionaries are treasuries of law. They contain answers to over 100,000 legal questions. The reason is that laws are made in words, and, quite commonly, you cannot tell exactly what a law means until a court has ruled whether the words in it apply to a given situation (see *The English Legal System*, Slapper & Kelly, 8th edition, pp. 189-208). Laws contain thousands of words which, depending on how they are defined might bankrupt someone, allow someone else to win a fortune, determine a child's residence, keep someone in prison for life, save the life of an animal in zoo, permit an abortion, or put a multimillion pound bill on the desk of a local authority.

Dictionaries do not themselves automatically determine the meaning of a word but they're often used by courts as a useful and authoritative starting place. As the American judge, Justice Learned Hand, warned in 1945, we shouldn't "make a fortress out of the dictionary" (*Cabell v. Markham* 148 F.(2d) 737 at 739). Dictionaries, though, are useful guides that need to be consulted by courts to give language some consistency – we wouldn't want to live under a system where Humpty Dumpty's rules applied. In Lewis Carol's book *Through The Looking Glass*, in a dispute between Alice and Humpty Dumpty about the word "glory", Humpty says "When I use a word it means just what I choose it to mean – neither more nor less".

Hundreds of major cases have been judged with the assistance of entries in the dictionary. The human drama involved in these cases is diverse, and is reflected in the range of words for which courts have sought dictionary definitions. In recent cases, dictionaries have been used to get authoritative definitions of many words including: curtilage (a small piece of ground attached to a dwelling house), debris, fungicide, logo, trivial, well known, crane, leaflet, bootleg, caravan, to influence, sick, audit, and nerd.

In a case from 1994, a court upheld the conviction of Eric McFarlane for living off the earnings of prostitution: [1994] 2 All ER 283. He had argued that as the income in question, from his partner Miss Josephs, came to her in her work as a "clipper", there was no prostitution involved. A clipper is someone who offers sexual favours for reward but who takes the money without intending to provide the favours. She took up to £400 a night in central London doing this. After consulting precedents and dictionary definitions the court decided that the crucial feature defining prostitution was "the making of an offer of sexual services for reward". That included what a clipper did, so Mr McFarlane was guilty of living off such earnings.

Even where a dictionary is consulted but provides no answer, that in itself can help to conclude a dispute. In 2003, in a case about rap music, one artist claimed damages because he said that his song had been subject to "derogatory treatment" by another artist. (*Confetti Records, Andrew Alcee, and others, v Warner Music Ltd* [2003] EWHC 1274 (Ch)). Mr Justice Lewison had to discern the meaning of phrases like "mish mash man" and "shizzle my nizzle". Andrew Alcee, the writer of *Burnin*, a track that was a hit for Ant'ill Mob, claimed that lyrics laid over the top of the Heartless Crew's remix of the song constituted derogatory treatment of the copyright. Mr Alcee claimed that terms like "shizzle my nizzle", "mish mish man" and "string dem up" referred to drugs and violence and so "distorted and mutilated" his original tune. The judge said (referring to himself and the barristers) that the claim had led to the "faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases". He admitted that even after playing the record at half speed and referral to the Urban Dictionary on the internet he was unable to be sure of the meaning of the slang. He concluded that the latter words "for practical purposes were a foreign language". The action for damages failed.

Spelling

There are now over a million words and word variants in English. To do well in law it is not necessary to master the spelling of them all but it is desirable to avoid the problem of Winnie-the-Pooh who said his spelling was good "but it Wobbles and the letters get in the wrong places." There are many words commonly misspelt in law, and you should ensure you are confident with words such as: foresee, grievous, homicide, privilege, supersede, and likelihood.

Rarely do court cases hinge on a misspelling but one such case occurred recently at Southampton magistrates' court. Mohammed Chiang, a bogus doctor, escaped a speeding fine by claiming he was on an emergency call when caught on the speed camera. He used false letterhead paper with medical qualifications on it, and had a green flashing light and "doctor on call" notice for his car. Greed brought his downfall, though when, following his absolute discharge for the speeding offence, he then claimed £1,632.80 from the court in expenses for "locum GP cover". His letter to the magistrates court was littered with spelling mistakes, and that aroused the suspicion of the Bench. Part of the letter read: "I must assist I am reimbursed for my out of pocket expenses. I fully respect any compensation will come from the public purse but I have always sought to minimise costs and bravely chose to represent myself in court...even though I was offered emple assistance from two of my patients."

Investigations were made and his fraud was discovered. After being found not to be a doctor, he admitted perverting the course of justice, and attempting to gain property by deception, and he was jailed for a year in October, 2007.

Wobbly orthography also swung the case against Louis Voisin, see *R v Voisin* [1918] 1 K.B. 531. In 1918 he was hanged for the murder of a woman whose trussed body had been found with a note saying "Bladie Beliam". In an interrogation, Voisin had been

asked orally by the police to write "bloody Belgian" and had written "Bladie Belgiam".

The Legal Services Act 2007

The Legal Services Act, which received Royal Assent on 30th October 2007, heralds major change in law. Lawyers don't really do revolutions but the changes prescribed in this new law are certainly comprehensive and radical.

The Act follows the publication of the draft Legal Services Bill in May 2006 and the White Paper, 'The Future of Legal Services - Putting Consumers First' in October 2005. In July 2003, Sir David Clementi was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales. In 2004, the Clementi Review's report was published. The Government broadly accepted the main recommendations of the review. These were:

- A Legal Services Board - a new legal services regulator to provide consistent oversight regulation of 'front line' regulators like those for solicitors (the Solicitors' Regulation Authority) and those for barristers (the Bar Standards Board).
- Statutory objectives for the Legal Services Board, including promotion of the public and consumer interest.
- Front line regulators to be required to make governance arrangements to separate their regulatory and representative functions.
- The Office for Legal Complaints a single independent body to handle consumer complaints in respect of all members of front line regulators, subject to oversight by the Legal Services Board.
- The facilitation of Alternative Business Structures that could see different types of lawyers and non-lawyers working together on an equal footing as well as providing for the possibility of external investment in the delivery of legal and other services.

The Legal Services Act was built on those recommendations. These provisions will engineer major changes in many aspects of legal services – a £20 billion sector in the UK. It will also bring legal services in line with other professional services in the 21st century. The Act is designed to enable greater consumer choice and flexibility in legal services by removing restrictions on business structures, allowing lawyers and non-lawyers to set up businesses together for the first time, and enabling services to develop in what the Ministry of Justice described as "new, consumer-friendly ways".

The new measures in the Act include:

- A single and fully independent **Office for Legal Complaints** (OLC) to remove complaints handling from the legal professions and restore consumer confidence. This will establish a new ombudsman scheme as a single point of entry for all consumer legal complaints. The Office though is unlikely to be empowered to handle complaints until autumn 2010.
- **Alternative Business Structures** (ABS) that will enable consumers to obtain services from one business entity that brings together lawyers and non-lawyers, increasing competitiveness and improving services. The Act will also allow legal services firms to have up to 25 per cent non-lawyer partners, and will allow different kinds of lawyers to form firms together. Alison Crawley, who monitored the Legal Services Bill for the Solicitors Regulation Authority, has said (Who will police the lawyers? Frances Gibb, *The Times*, 8th November, 2007) that this will not happen before spring 2009. That will enable firms to plan for whom among their employees they want to elevate to partner status. As for the full-blown "alternative business structures", allowing lawyers to form partnerships with outside professionals or invite outside investment, that, Alison Crawley predicts, is unlikely to be until 2012. Meanwhile, the Bar is still consulting on whether to allow its members to become partners in law firms — and remain as practising barristers.
- A new **Legal Services Board** (LSB) to act as a single, independent and publicly accountable regulator with the power to enforce high standards in the legal sector, replacing a variety of regulators with overlapping powers. The supervision will extend to anyone providing legal services including claims handlers, notaries, licensed conveyancers, and will-writers The chair of the Board will be a lay person.
- A clear set of **regulatory objectives** for the regulation of legal services which all parts of the system will need to work together to deliver, including promoting and maintaining adherence to professional principles.

These reforms come after long and careful research and consultation, with input from a large cross-section of people, including the Office of Fair Trading, consumer organisations, the legal professions, and consumers themselves.

Judges returning to legal practice

There is a convention that once appointed to the Bench, judges will not return to legal practice. The convention is based on the need to keep the judiciary as an institution sealed off and enduringly independent from the world of interests, conflicts, and disputes. It is also arises from the idea that it would give to the judge returning to practice an unfair advantage over other members of the Bar (see *Judges on Trial*, Shimon Shetreet, North-Holland, 1976, p. 374).

It is widely accepted that a society of mixed cultures, races, and economic classes benefits from a judiciary that is socially diverse. One recently explored idea for widening social access to the judiciary is that of changing the rules of convention so as to allow judges to return to practice after some years serving on the Bench. Practice for can be much more lucrative than serving as a judge and so, it was thought, allowing a return to practice might remove what was guessed to be an obstacle to ascending the Bench in some quarters of practice, especially people from economically modest backgrounds. Currently, the judiciary is not reflective of the society it serves. For example, according to the latest *Judicial Annual Diversity Statistics* (2007), only 18 per cent of the judiciary is female, (whereas over 50 per cent of the general population is female), and only 3.5 per cent of the judiciary is of ethnic minority origin (whereas 7.9 per cent of the general population is of ethnic minority origin).

The government, however, has, having reviewed the evidence, just rejected the return to practice option. The convention that former judges cannot return to practice as barristers or solicitors will remain, following a government consultation (*Return to practice by former salaried judges* CP 1506).

The Lord Chancellor and Secretary of State for Justice, Jack Straw, considered the arguments both for and against return to legal practice. In response to the consultation he said he was not persuaded that lifting the conventional prohibition would increase diversity of the judiciary. Jack Straw said (5th November, 2007):

> "The Government consulted widely, considering the arguments both for and against allowing former salaried judges to return to practice. I do not believe there is sufficient evidence that this would achieve a more diverse judiciary and that therefore the arguments against this change outweigh those for. This proposal will not therefore be implemented."

Twenty five responses to the consultation were received by the Ministry of Justice. These included five from judicial groups, like the Council of Circuit Judges, and 13 from legal groups. Some groups, such as the Association of Women Solicitors, favoured the proposal to allow former judges to return to practice. The preponderant thought, though, was against the change, and this consultation exercise is a good example of policy being evidence-based: in the end there was no clear and persuasive evidence that by allowing judges to return to practice there would be a more diversified judiciary. Those who advocated the change did not adduce sufficient evidence to prove it.