Identification and Avoidance of Critical Ambiguity

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Declaration

I hereby declare that this thesis is entirely my own work and that it has not been submitted as an exercise for a degree at any other university.

_________________________  April 29, 2005
Michael Corr
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I would first of all like to thank my family and friends for all their continued support both financially and otherwise throughout the four years of the degree. I would also like to thank my supervisor Carl Vogel for all his support, encouragement and advice throughout the year and throughout the four years of the degree.
“Ah, ambiguity... the devil’s volleyball!”

Emo Philips

“Sometimes if you know more, things get less clear

Anonymous

“If I have seen further, it is by standing on the shoulders of giants.”

Sir Isaac Newton
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Abstract

The relationship between ambiguity and language is both intrinsic and interdependent. The fact is without one we cannot have the other. Ambiguity exists in various levels of seriousness and is one of the features of human language that makes it so unique and complex. Humour, one of the more playful and creative capabilities of language, is based on ambiguity. Politeness strategies too rely on ambiguity for effect and success. However often, ambiguity can prove to have serious consequences, and so every effort needs to be taken in order to minimise or remove it. Such cases involve legal instruments such as legislation or diplomatic treaties, wherein the use of an unsuitable word or unconcise phrase or concept can lead to a dramatic and sometimes devastating fall out. It is in situations such as these that ambiguity can be termed critical.
Chapter 1

Introduction
CHAPTER 1. INTRODUCTION

1.1 Overview

In this dissertation I will present and explore the literature pertaining to ambiguity as it exists in language. I will be paying particular attention to ambiguity as it exists in the law as this is where it most often proves to have serious consequences; where it can be critical. I will also be studying and commenting on ambiguity in diplomacy where its role can be of critical importance.

1.2 Motivation

We are surrounded by ambiguity everyday of our lives. It is something we have all learnt to accept as part of our language, and what makes it so unique. However ambiguity is still one of the biggest obstacles we need to overcome if we are ever to be successful with NLP. A goal which would give us infinite possibilities and one that I believe would revolutionize society. This is why I felt it would be both interesting and worthwhile to examine exactly how and why ambiguity occurs and how it can be avoided or at least minimised with regard to legislation etc. There is a growing movement towards plain language in the law and many people believe that this is the way forward. It is now being realised that ordinary people are at a distinct disadvantage when presented with legislation or any type of legal documentation. If it is supposed to concern them, then why is it so difficult to understand and why should they have to waste money getting a solicitor to translate it? The situation is obviously unfair and the system is outdated and unreasonable.

1.3 Aims

The aim of this project is to present in a clear, concise and coherent manner both the state of research into ambiguity as it stands and provide examples and case studies of where and how ambiguity can be critical thus contributing in some shape or form to the existing framework of theories in the area of critical ambiguity research. To this end I will be paying particular attention to ambiguity in the legal arenas.
1.4 Project Synopsis

Chapter 2

In this chapter I introduce the concept of ambiguity and talk about the different types of ambiguity which exist. I introduce the idea of critical ambiguity which occurs when ambiguity has serious consequences. I also talk about the concepts of vagueness and absurdity and how they relate to ambiguity.

Chapter 3

This chapter is concerned with ambiguity from a psycholinguistic point of view. I will talk about how ambiguity is processed and recount several experiments in the area.

Chapter 4

In this chapter I will talk about how, why and to what effect ambiguity is used in diplomacy. I present the arguments for and against its use and relate cases where it has been successful or failed.

Chapter 5

This chapter is the first of three chapters where I study and explore ambiguity and the law. This first of these chapters (Chapter 5) relates to the interpretation of statutes and the approach taken by the Irish courts. The two principle methods of interpretation i.e. purposive and literal approaches are discussed in detail and case studies are given with details of how ambiguous legislation was interpreted along with the arguments of the presiding judge.

Chapter 6

In this chapter, the problem of updating and interpreting older statute to make them relevant in today’s world is discussed and again cases where problems have occurred are discussed.
Chapter 7
Chapter 7 deals with legal drafting and details the reasons why legislation is often ambiguous. Recommendations on how to reduce this ambiguity are discussed also.

Chapter 8
This final chapter details what I feel I have achieved and gained from doing this project. I also make suggestions for further work for anyone wishing to go further in the area of critical ambiguity.
Chapter 2

Theoretical Approaches to Ambiguity
2.1 Introduction

A word, phrase, sentence, or other communication is called ambiguous if it can be reasonably interpreted in more than one way. The simplest case is a single word with more than one sense. For example, the word *bank*, can mean *financial institution, edge of a river* etc. However, often this is not a serious problem because a word that is ambiguous in isolation can often be clear when in context. If someone says for example “I visited the bank to deposit $100” he is unlikely to have meant that he went to bury the money beside a river. Problems can occur however, with words whose senses express concepts that are closely related. *Good*, for example, can mean *useful or functional*, “That’s a good dryer”, *exemplary, “She’s a good worker”*, *pleasing*, “This is good soup”, *moral “He is a good person”* etc. If we hear someone say “I have a good daughter” We can’t be absolutely clear about which sense is intended. Ambiguity should not however be confused with vagueness whereby a word or phrase has one meaning whose boundaries are not sharply defined.

In addition to words with multiple senses, ambiguity can be caused by syntax. “He ate his biscuits on the couch”, for example, could mean that he ate those biscuits which were on the couch (as opposed to those that were on the table), or it could mean that he was sitting on the couch when he ate the biscuits.

Spoken language can also contain lexical ambiguities, where there is more than one way to break up a set of sounds into words (Kooij, 1971), for example “a nice man” and “An Iceman”\(^1\). This is rarely a problem due to the use of context. However, in a book by Steve Cushing “Fatal Words” (Cushing, 1994) the author talks about incidences where ambiguity in spoken language can have devastating consequences. One such incident, arising from the ambiguous phrase *at takeoff*, resulted in the infamous Tenerife case, in which 583 people lost their lives. The two readings of this phrase, namely ‘waiting at the takeoff point’, and ‘already on the takeoff roll’, were crucially misinterpreted, such that the latter reading – the pilot’s intended meaning, was mis-construed to mean the former reading. The misunderstanding possibly resulted from a prior confusion whereby the Tower’s explanation of what was to be done after takeoff may have been construed as permission to take off.

\(^1\)For an indepth analysis and discussion on intonation and consonantal gemination see Lehiste(1960)
The ensuing communication is rife with misunderstanding as a result of the ambiguous phrase. The pilot informs the Tower that the plane is ‘now at takeoff’, which is followed by the Tower’s direction to ‘[s]tand by for takeoff’. The Tower then communicates with another plane on the runway, requesting the pilot to ‘report the runway clear’, followed by the pilot’s assurance to ‘report when we’re clear’. The first plane, on takeoff run, then collides with the second plane on ground. In brief, the interpretation of the ambiguous phrase at takeoff prevented the Tower from telling the pilot to abort his takeoff, that further clearance would be given to leave the ground.

Law makers and philosophers spend a lot of time and effort searching for and attempting to remove ambiguity in arguments, because it can lead to incorrect conclusions and can be used to deliberately conceal bad arguments. For example, if a politician says “I oppose taxes which hinder economic growth”. Some people might think he opposes taxes in general because they hinder economic growth; whereas others will think he opposes only those taxes that he believes will hinder economic growth. The politician hopes that each will interpret the statement in the way he wants, and both will think the politician is on his side.

In literature and rhetoric, on the other hand, ambiguity can be a useful tool. Songs and poetry often rely on ambiguous words for artistic effect for example.


2.2 Ambiguity, Vagueness, and Absurdity

2.2.1 Introduction to Vagueness and Ambiguity

Though seemingly synonymous in common usage, vagueness and ambiguity are entirely different but very important problems in critical thinking. The difference between ambiguity and vagueness is enumerability: an expression is ambiguous if its interpretations can be enumerated as a finite disjunction of potential meanings; an expression is vague if its meaning cannot be given as a finite disjunction of possibilities. Or, to put it in simpler terms:

- A word or phrase is said to be ambiguous if it has at least two specific meanings that make sense in context.
- A word or phrase is said to be vague if its meaning is not clear in context.

The difference between the two is quite clear: If someone doesn’t know what is meant by a phrase, then that phrase is vague to him. If someone doesn’t know which of two or more specific meanings is intended, then it is ambiguous to him. A couple of years ago there was an ad on TV about trying to quit smoking cold turkey. When presented to a class of 8 year olds in America for their opinions, one little girl asked “but who would want to smoke cold turkey in the first place”? This a perfect example of an unintentional ambiguity and the problems it can cause.

Consider this line from a help-wanted ad: “Three-year-old teacher needed for pre-school.” Some people might find this funny, because the ad seems to be seeking a teacher that is three years old. This is because the phrase is ambiguous: the ad is actually seeking a teacher for three-year-old children. The phrase is ambiguous because two specific and distinct meanings can be applied to it in the given context. English teacher needed for pre-school would normally not be considered ambiguous, though in certain contexts it could be understood to be seeking a teacher from England. But what if the ad read Vietnamese teacher needed for pre-school?


3D. Mesher, a professor of English who has been teaching critical thinking at SJSU
Vagueness, though, is a different problem. “Nurse needed for pre-school” is vague because there are many types of nurses who specialize in different areas: registered nurses, practical nurses, wet nurses, nannies etc., and so the job of a pre-school nurse would not be suitable for all of them. The problem is that the word *nurse* has many meanings, and so the ad’s usage is vague. The more details that are supplied, the less vague a phrase will be. “Registered nurse needed for pre-school” would be less vague, “Registered nurses with paediatric experience needed for pre-school” would be even less so. In fact, for almost every word or phrase, you can probably imagine some situation in which it would be vague. We can tolerate a certain level of vagueness in language, but it requires a critical thinker to minimize vagueness by ensuring the language used is appropriate for its context—that is, for its subject and its audience\(^4\).

Another example of a vague concept is the concept of a heap. Two or three grains of sand is not a heap, but a thousand is. How many grains of sand does it take to make a heap? There is no clear line. When we look at a man with thinning hair or a small pile of sand, and we do not know whether to call the man “bald”, or the sand a “heap”, we are dealing with borderline cases; it is not clear if the concept applies. We can make a general principle, which might work as a definition of the word “vague”: Vagueness describes a concept where we are not exactly clear about whether the concept applies or not. Take for example, those animals that pull the sleighs in Alaska that are the result of breeding Huskies and wolves: are they dogs? It is not clear: they are borderline cases of dogs. This means our ordinary concept of doghood is not clear enough to let us rule conclusively in this case.

Philosophically vagueness is quite important. Let’s say we wanted to define the concept of being “right” with regard to morals. We want a definition to cover actions that are clearly right and exclude actions that are clearly wrong, but what do we do with the borderline cases? And without a doubt such cases do exist. Some philosophers say we should try to come up with a

definition that is itself unclear on just those cases. Others say that we have an interest in making our definitions more precise than our ordinary language; They recommend we advance precising definitions. So, some philosophers want their definitions to be unclear in precisely those areas in which the ordinary concept to be defined is unclear, while other philosophers want their definitions to be more precise than the ordinary concepts.

Many scientific concepts are formulated vaguely out of necessity, for instance species in biology cannot be precisely defined, owing to unclear cases such as ring species. Nonetheless, the concept of species can be clearly applied in the vast majority of cases. Therefore, to say that a definition is “vague” is not necessarily a criticism. Fuzzy logic is a form of logic created to allow reasoning with vagueness.

The best-known case is herring gull versus lesser black-backed gull. In Britain these are clearly distinct species, quite different in colour. Anybody can tell them apart. But if you follow the population of herring gulls westward round the North Pole to North America, then via Alaska across Siberia and back to Europe again, you will notice a curious fact. The ‘herring gulls’ gradually become less and less like herring gulls and more and more like lesser black-backed gulls until it turns out that our European lesser black-backed gulls actually are the other end of a ring that started out as herring gulls. At every stage around the ring, the birds are sufficiently similar to their neighbours to interbreed with them. Until, that is, the ends of the continuum are reached, in Europe. At this point the herring gull and the lesser black-backed gull never interbreed, although they are linked by a continuous series of interbreeding colleagues all the way round the world. The only thing that is special about ring species like these gulls is that the intermediates are still alive. All pairs of related species are potentially ring species. The intermediates must have lived once. It is just that in most cases they are now dead. The lawyer, with his trained discontinuous mind, insists on placing individuals firmly in this species or that. He does not allow for the possibility that an individual might lie half-way between two species, or a tenth of the way from species A to species B. Self-styled ‘pro-lifers’, and others that indulge in footling debates about exactly when in its development a foetus ‘becomes human’, exhibit the same discontinuous mentality. It is no use telling these people that, depending upon the human characteristics that interest you, a foetus can be ‘half human’ or ‘a hundredth human’. ‘Human’, to the discontinuous mind, is an absolute concept. There can be no half measures: Richard Dawkins, “Gaps in the Mind,” in The Great Ape Project, ed. Cavalieri and Singer, p. 82.
2.2.2 Ambiguity and Absurdity

The term ‘ambiguity’ as it relates to the law applies to situations where the meaning of a statutory provision, in relation to the facts of a case, is unclear. Absurdity, on the other hand, is not so easily defined. To take a narrow approach to the concept of absurdity, the literal meaning of a provision is only absurd when the wording of the particular provision fails to make sense or is self-contradictory. This approach seems to suggest that the judge interpreting the legislation would make no reference to the context within which the provision operates. To give a wider meaning to ‘absurdity’ would mean that a provision would be considered absurd if it contradicted other elements of the same Act, presuming that the judge, in deciding the question, would at least bear in mind the other provisions of the Act in question.

An even wider meaning would lead to the conclusion that the literal meaning of a provision would be absurd if its effect could not have been intended by the legislature - assuming, of course, that the judge is aware of what the legislature would have intended as the meaning of the statute. Judge Bennion states that the English courts have preferred this last understanding of the term ‘absurd’. Generally, the same has been true in Ireland, but there have been some exceptions (such as Murphy v. Bord Telecom, where a result that was clearly contrary to the legislature’s intention (as gleaned from the Act) was given effect, because the Court felt that the provision was not ‘absurd’ in the narrow sense).

There is a strong argument in favour of a common sense approach to statutory interpretation, whereby a judge, in deciding a case, is expected to avoid giving a provision a meaning which clearly goes against the legislative intention behind the statute. On the other hand, there is a fine line between embracing this principle and empowering a judge to impose their own view of the most appropriate meaning, at the expense of the explicit wording of the provision. The former situation may be regarded as desirable, common-sense judicial interpretation; the latter opens the door to the risk of judicial legislation. Drawing a balance between these competing concerns is undoubtedly difficult, but it requires a choice as to which of the senses of ‘absurd’ should

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6 See chapters 6 & 7 for a full discussion of ambiguity in the law
7 Bennion, op. cit. fn. 20, at 751.
8 [1986] ILRM 483. See chapter 6 for a discussion of this case
be adopted. Most sources however agree that where there is clear evidence available of the specific effect the legislature intended a provision to have, it would be absurd if a court gave the provision a conflicting meaning.
2.3 Introduction to Types of Ambiguity

Most sources differentiate between two types of ambiguity: lexical and syntactic or structural. A third type of ambiguity, textual ambiguity, is also of relevance in diplomacy. Although people are sometimes said to be ambiguous in how they use language, ambiguity is, strictly speaking, a property of linguistic expressions.

Previously it was stated that a word, phrase, or sentence is ambiguous if it has more than one meaning. Obviously this definition does not say what meanings are or what it is for an expression to have one (or more than one). For a particular language, this information is provided by a grammar, which systematically pairs forms with their meanings and ambiguous forms with more than one meaning.

2.3.1 Lexical or Referential ambiguity

The comedian Dick Gregory tells of walking up to a lunch counter in Mississippi during the days of racial segregation. The waitress said to him, “We don’t serve colored people.” “That’s fine,” he replied, “I don’t eat colored people. I’d like a piece of chicken” (Pinker, 1994).

Lexical ambiguity is ambiguity based on a single word. In many cases, a single word in a language corresponds to more than one thought, for example, the adjective light (not dark vs. not heavy); the noun bank (financial institution vs. the edge of a river); and the verb run (to move fast vs. to direct or manage). Words may also have more than one meaning through their unrelated use in more than one category of speech, for example, can (a container of food - noun vs. to be able to - verb).

9Chapter 4 deals with this type of ambiguity, arguing for and against and giving case studies
Inattentive use of ambiguous words can lead to humorous, or even awkward situations, as shown by these newspaper headlines collected by Stephen Pinker.

- Iraqi Head Seeks Arms
- Child’s Stool Great for Use in Garden
- Stud Tires Out
- Stiff Opposition Expected to Casketless Funeral Plan
- Drunk Gets Nine Months in Violin Case

### 2.3.2 Syntactic ambiguity

In the movie Animal Crackers Groucho Marx says ”I once shot an elephant in my pyjamas. How he got into my pyjamas I’ll never know.” (Quoted by Stephen Pinker)

Sometimes an entire sentence has more than one different and incompatible interpretations, even if none of the words are ambiguous. This happens when one part of the sentence may grammatically specify in more than one direction.

Drazen Pehar provides the following example:

“I am prepared to give the sum of one million dollars to you and your husband”.

This can be understood as:

[I am prepared to give the sum of $1 million [to you] and [your husband]]

- making a total of two million dollars; or as

[I am prepared to give the sum of $1 million to [you and your husband]]

- making a total of only one million dollars.
Sytactic ambiguity can also lead to humorous sentences, as seen below in the following collected from newspapers by Stephen Pinker.

- Yoko Ono will talk about her husband John Lennon who was killed in an interview with Barbara Walters.
- Two cars were reported stolen by the Groveton police yesterday.
- The judge sentenced the killer to die in the electric chair for the second time.
- The summary of information contains totals of the number of students broken down by sex, marital status and age.
- No one was injured in the blast, which was attributed to a buildup of gas by one town official.
- One witness told the commissioners that she had seen sexual intercourse taking place between two parked cars in front of her house.

2.3.3 Cross-Textual

Drazen Pehar (Pehar, 2002) describes a third type of ambiguity which is based on incompatibilities between different parts of a text, or specifications in multiple directions, across a text. Pehar writes:

This kind of ambiguity is best exemplified with so-called open-ended sentences which can be found in legal texts. For example, a chapter in a peace treaty may begin with a precise enumeration of the powers that one entity, for example, a central federal authority, may exercise. But at the end of the chapter an open-ended provision is inserted, which may, for instance, state that “the central federal authority may exercise some other duties as well”\textsuperscript{11}.

\textsuperscript{11}Use of Ambiguities in Peace Agreements,” Language and Diplomacy, Malta: Diplo-Projects, 2001
CHAPTER 2. THEORETICAL APPROACHES TO AMBIGUITY

2.4 Lexical Ambiguity

Lexical ambiguity is by far the most common form of ambiguity. Everyday examples include nouns like ‘chip’, ‘pen’ and ‘suit’, verbs like ‘call’, ‘draw’ and ‘run’, and adjectives like ‘deep’, ‘dry’ and ‘hard’. There are various tests for lexical ambiguity. One test is having two unrelated antonyms, as with ‘hard’, which has both ‘soft’ and ‘easy’ as opposites. Another is the conjunction reduction test. Consider the sentence, “The tailor pressed one suit in his shop and one in the municipal court”. Evidence that the word ‘suit’ (not to mention ‘press’) is ambiguous is provided by the anomaly of the ‘crossed interpretation’ of the sentence, on which ‘suit’ is used to refer to an article of clothing and ‘one’ to a legal action.

The above examples of ambiguity are each a case of one word with more than one meaning. However, it is not always clear when we have only one word. The verb ‘desert’ and the noun ‘dessert’, which sound the same but are spelled differently, count as distinct words (they are homonyms). So do the noun ‘bear’ and the verb ‘bear’, even though they not only sound the same but are spelled the same. These examples may be clear cases of homonymy, but what about the noun ‘respect’ and the verb ‘respect’ or the preposition ‘over’ and the adjective ‘over’? Are the members of these pairs homonyms or different forms of the same word? There is no general consensus on how to draw the line between cases of one ambiguous word and cases of two homonymous words. Perhaps suggesting that the difference is ultimately arbitrary. A full review of ambiguity and homonomy can be found in (Kooij, 1971).

Sometimes one meaning of a word is derived from another. For example, the cognitive sense of ‘see’ seems derived from its visual sense. The sense of ‘weigh’ in ‘He weighed the package’ is derived from its sense in “The package weighed two pounds”. Similarly, the transitive senses of ‘burn’, ‘fly’ and ‘walk’ are derived from their intransitive senses. It can be argued that in each of these cases the derived sense does not really qualify as a second meaning of the word but is actually the result of a lexical operation on the underived sense. This argument is plausible to the extent that the phenomenon is systematic and general, rather than peculiar to particular words. Lexical semantics has the task of identifying and characterizing such systematic phenomena. It is also concerned with explaining the rich and subtle semantic behavior of common and highly flexible words like the verbs ‘do’ and ‘put’.
and the prepositions ‘at’, ‘in’ and ‘to’. Each of these words has uses which are so numerous yet so closely related that they are often described as ‘polysemous’ rather than ambiguous.

### 2.5 Structural ambiguity

Structural ambiguity occurs when a phrase or sentence has more than one underlying structure, such as the phrases “Tibetan history teacher”, “a student of high moral principles” and “short men and women”, and the sentences “The girl hit the boy with a book” and “Visiting relatives can be a nuisance”. These ambiguities are said to be structural because each phrase can be represented in two structurally different ways, e.g., “[Tibetan history] teacher” and “Tibetan [history teacher]”. Indeed, the existence of such ambiguities provides strong evidence for a level of underlying syntactic structure. Consider the structurally ambiguous sentence, “The chicken is ready to eat”, which could be used to describe either a hungry chicken or a cooked chicken. It is arguable that the operative reading depends on whether or not the implicit subject of the infinitive clause ‘to eat’ is tied anaphorically to the subject “the chicken” of the main clause.

It is not always clear when we have a case of structural ambiguity. Consider, for example, the elliptical sentence, “Perot knows a richer man than Trump”. It has two meanings, that Perot knows a man who is richer than Trump and that Perot knows man who is richer than any man Trump knows, and is therefore ambiguous. But what about the sentence “John loves his mother and so does Bill”? It can be used to say either that John loves John’s mother and Bill loves Bill’s mother or that John loves John’s mother and Bill loves John’s mother. But is it really ambiguous? It could be argued that the clause “so does Bill” is unambiguous and may be read unequivocally as saying in the context that Bill does the same thing that John does, and although there are two different possibilities for what counts as doing the same thing, these alternatives are not fixed semantically. Hence the ambiguity is merely apparent and better described as semantic underdetermination\(^\text{12}\).

\(^\text{12}\)Extra material needs to be added to yield a complete proposition. The context and purpose of the conversation makes it clear what this material is in each case.
2.6 Ambiguity contrasted

Although ambiguity is fundamentally a property of linguistic expressions, people are also said to be ambiguous on occasion in how they use language. This can occur if, even when their words are unambiguous, their words do not make what they mean uniquely determinable. Strictly speaking, however, ambiguity is a semantic phenomenon, involving linguistic meaning rather than speaker meaning. Generally when one uses ambiguous words or sentences, one does not consciously entertain their unintended meanings, although there is psycholinguistic evidence that when one hears ambiguous words one momentarily accesses and then rules out their irrelevant senses\(^\text{13}\).

When people use ambiguous language, generally its ambiguity is not intended. Occasionally, however, ambiguity is deliberate, as with an utterance of “I’d like to see more of you” when intended to be taken in more than one way in the very same context of utterance.

It might seems obvious to say that what your words convey “depends on what you mean”\(^\text{14}\), however this suggests that one can mean different things by what one says, but it says nothing about the variety of ways in which this is possible. Semantic ambiguity is one such way, but there are others: homonymy, vagueness, relativity, indexicality, nonliterality, indirection and inexplicitness. All these other phenomena illustrate something distinct from multiplicity of linguistic meaning.

The vagueness in terms like ‘bald’, ‘heavy’ and ‘old’ are obvious examples, and their vagueness is explained by the fact that they apply to items on fuzzy regions of a scale. Terms that express cluster concepts, like ‘intelligent’, ‘athletic’ and ‘just’, are vague because their instances are determined by the application of several criteria, no one of which is decisive.

Relativity is illustrated by the words ‘heavy’ and ‘old’ (these are vague as well). Heavy people are lighter than nonheavy elephants, and old cats can are younger than some young people. A different sort of relativity occurs

\(^{13}\text{see chapter 3: Psycholinguistics and Ambiguity}\)
\(^{14}\text{Lewis Carroll}\)
with sentences like “Jane is finished” and “John will be late”. Obviously one cannot simply be ‘finished’ or ‘late’ but only finished with something or late for something. This does not show that the words ‘finished’ and ‘late’ are ambiguous (if they were, they would be ambiguous in as many ways as there are things one can be finished with or things one can be late for), but only that such a sentence is semantically underdeterminate—it must be used to mean more than what the sentence means.

Indexical terms, like ‘you’, ‘here’ and ‘tomorrow’, have fixed meaning but variable reference. For example, the meaning of the word ‘tomorrow’ does not change from one day to the next, though of course its reference does. Nonliterality, indirection and inexplicitness are further ways in which what a speaker means is not uniquely determined by what his words mean. They can give rise to unclarity in communication, as might happen with utterances of ‘You’re the icing on my cake’, ‘I wish you could sing longer and louder’, and ‘Nothing is on TV tonight’. These are not cases of linguistic ambiguity but can be confused with it because speakers are often said to be ambiguous. Pragmatic force must also be taken into account in this area which relates to how we “read into” and infer different often extra meanings from an utterance. For example if someone says “Gosh it's cold in here” it is more than likely that they want the window shut or the heater turned on.

2.7 Philosophical relevance

The notion of ambiguity has philosophical applications. For example, identifying an ambiguity can aid in solving a philosophical problem. Suppose one wonders how two people can have the same idea, say of a unicorn. This can seem puzzling until one distinguishes ‘idea’ in the sense of a particular psychological occurrence, a mental representation, from ‘idea’ in the sense of an abstract, shareable concept. On the other hand, gratuitous claims of ambiguity can make for overly simple solutions. Accordingly, the question arises of how genuine ambiguities can be distinguished from spurious ones. Part of the answer consists in identifying phenomena with which ambiguity may be confused, such as vagueness, unclarity, inexplicitness and indexicality. Philosophical distinctions can be obscured by unnoticed am-
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Ambiguities. So it is important to identify terms that do double duty. For example, there is a kind of ambiguity, often described as the “act/object” or the “process/product” ambiguity, exhibited by everyday terms like ‘prediction’, ‘promise’ and ‘writing’. Confusions in philosophy of language and mind can result from overlooking this ambiguity in terms like ‘inference’, ‘statement’ and ‘thought’. Another common philosophical ambiguity is the type/token distinction. Everyday terms like ‘animal’, ‘book’ and ‘car’ apply both to types and to instances (tokens) of those types. The same is true of linguistic terms like ‘sentence’, ‘word’ and ‘letter’ and to philosophically important terms like ‘concept’, ‘event’ and ‘mental state’.

Although unnoticed ambiguities can create philosophical problems, ambiguity is philosophically important also because philosophers often make spurious claims of it. The linguist Charles Ruhl (Ruhl, 1989) for example, has argued that certain ostensible ambiguities, including act/object and type/token, are really cases of lexical underdetermination. Saul Kripke (Kripke, 1977) laments the common practice of what he calls “the lazy man’s approach in philosophy”, of appealing to ambiguity to escape from a philosophical quandary, and H. P. Grice (Grice, 1989) urges philosophers to hone the modified Occam’s Razor: “senses are not to be multiplied beyond necessity”. He illustrates its value by shaving a sense off the logical connective ‘or’, which is often thought to have both an inclusive and exclusive sense. Grice argues that, given its inclusive meaning, its exclusive use can be explained entirely on pragmatic grounds. Another example, prominent in modern philosophy of language, is the ambiguity alleged to arise from the distinction between referential and attributive uses of definite descriptions.

Less prominent but not uncommon is the suggestion that pronouns are ambiguous as between their anaphoric and their deictic use. So, for example, it is suggested that a sentence like “Oedipus loves his mother” has two ‘readings’, i.e., is ambiguous, because it can be used to mean either that Oedipus loves his own mother or that Oedipus loves the mother of some contextually specified male. However, this seems to be an insufficient basis for the claim of ambiguity. After all, being previously mentioned is just another way of being contextually specified. Accordingly, there is nothing semantically special in this example about the use of ‘his’ to refer to Oedipus. However, this apparent ambiguity concerning pronouns has been looked at in depth.
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with regard to quantification, the Context Dependent Quantifier, or CDQ, account of anaphora was suggested in (Wilson, 1984) and subsequently developed in (King, 1987), (King, 1991), (King, 1994) where it is argued that such pronouns should be considered ambiguous.

Claims of structural ambiguity can also be controversial. Of particular importance are claims of scope ambiguity, which are commonly made but rarely defended. A sentence like “Everybody loves somebody” is said to exhibit a scope ambiguity because it can be used to mean either that for each person, there is somebody that that person loves or (however unlikely) that there is somebody that everybody loves. These uses may be represented, respectively, by the logical formulas:

\[(\forall x)(\exists y)(Lxy)]
\[(\exists y)(\forall x)(Lxy)]

It is generally assumed that because different logical formulas are needed to represent the different ways in which an utterance of such a sentence can be taken, the sentence itself has two distinct logical forms. Sustaining this claim of ambiguity requires identifying a level of linguistic description at which the sentence can be assigned two distinct structures. Some grammarians have posited a level of LF, corresponding to what philosophers call logical form, at which relative scope of quantified noun phrases may be represented.

However, LF of this kind does not explain scope ambiguities that philosophers attribute to sentences containing modal operators and psychological verbs, such as “The next president might be a woman”. An utterance of such a sentence can be taken in either of two ways, but again it is arguable that the sentence is not ambiguous but merely semantically underdeterminate with respect to its two alleged “readings”.

Notwithstanding the frequency in philosophy of unwarranted and often arbitrary claims of ambiguity, it cannot be denied that some terms really are ambiguous. Philosophers sometimes lament the prevalence of ambiguity in natural languages and yearn for an ideal language in which it is absent. But ambiguity is a fact of linguistic life. Despite the potentially endless supply
of words, many words do double duty or more. And despite the unlimited number of sentences, many have several meanings, and their utterance must be disambiguated in light of the speaker’s likely intentions.
Chapter 3

Psycholinguistics and ambiguity
3.1 Overview

Ambiguity has been looked at in depth in psycholinguistics in an effort to determine how single meaning sentences are understood by studying how sentences with multiple meanings are processed. Many earlier psycholinguists investigated whether and how ambiguity affects sentence processing. Some results suggest that context determines which reading of an ambiguous sentence is to be accessed, while others claim that the more common reading is accessed first, and is discarded only after it has been determined that it is inappropriate in the context. There is a third view which puts forward that all readings are accessed first and then the correct reading is decided upon at which point the others are discarded.

This last view, while seeming to be counter-intuitive has considerable experimental evidence to support it. These have been variously labelled as: the prior choice hypothesis and the all-readings hypothesis (Hirst, 1987); the single reading, the ordered search and the all-readings hypothesis (Kess & Hoppe, 1981); and the single reading, the context-dependent, and the ordered-access models. The majority of the earlier psycholinguistic literature favours the all-readings hypothesis. Apparently, at some unconscious level of performance, all possible readings of an ambiguous sentence are processed, and one is finally selected at some point in the overall comprehension process. Ambiguous sentences are different from unambiguous sentences in this crucial feature. There has been no complete resolution of the way in which multiple readings for ambiguous utterances are reviewed and selected from in actual sentence processing. The real challenge is to find out what makes this pervasive ambiguity relatively unobtrusive, and what features in natural language processing we make use of in comprehending the meaning of such utterances.

1see Kess and Hoppe 1981a, for an account of this paradigm of research activity
3.2 Single reading or Multiple readings

A few early experimental studies argued for a single reading procedure, or at least an ordered approach to a single reading based on the probability of the most likely reading\(^2\). But generally the experimental results have pointed in the other direction. Experimental results have tended to suggest that the processing of ambiguous sentences does differ from unambiguous sentences, and the multiple readings are in fact unconsciously considered in the process of deciding upon a single interpretation.

In general, experimental findings for ambiguous sentences in isolation suggested that multiple readings are in fact computed, and the processing effects of such a requirement leaves traces when measured by various experimental tasks that presume that the processing system has limited capacities\(^3\). (Bever, Garrett, & Hurtig, 1973) provided some explanation in suggesting that both meanings are processed during an ambiguous clause, but that once the clause is completed, it is recoded with only one meaning retained.

There was even evidence that multiple readings are activated for ambiguous sentences despite the presence of context\(^4\). And such experiments continued to demonstrate that both readings are available or that some processing difference is to be found which distinguishes ambiguous sentences from unambiguous sentences. One widely cited example of such studies was a dichotic listening experiment (Lackner & Garrett, 1972). Subjects were presented with an ambiguous sentence in one ear and a disambiguating context in the other ear, and were required to attend to the ear in which the ambiguous sentences were presented. They were then to immediately paraphrase the ambiguous structure which had been presented in the attended ear. Although the disambiguating material in the unattended ear was below active comprehension recognition, the biasing contextual information it provided significantly influenced the interpretation of the ambiguous sentences being consciously attended to.


Lackner and Garrett’s experiment demonstrated that analysis of the linguistic material presented to the unattended ear did take place. The input was linked to the multiple readings for the ambiguity which were being scanned, otherwise how else could the correct meaning have been chosen. This is of course the only reasonable explanation of how the ambiguous sentences were able to be biased in the way in which they were. Both of the readings of the ambiguous sentence must have been considered during the actual processing procedure for the biasing to have effectively taken place. How else was it possible to bias the subjects in either direction, in favour of the preferred or the less likely interpretations of the ambiguous sentence?

For example, imagine that sentence (1) below was the ambiguous sentence given in the attended ear. In the unattended ear, the disambiguating sentence (2) was given.

1. The spy put out the torch as our signal to attack.
2. The spy extinguished the torch in the window.

Despite the fact that subjects could not provide any information about the unattended channel, they significantly paraphrased the attended channel, with its ambiguous sentence, in line with the disambiguating context. If, on the other hand, sentence (1) was now presented with a different sentence, like (2) below, the paraphrase was now in line with the new (2).

1. The spy put out the torch as our signal to attack.
2. The spy showed the torch in the window.

Thus, their findings seemed to conclude that all the readings of an ambiguous sentence are considered, since the biasing sentence was provided simultaneously with the ambiguous sentence. The processing of both readings had to take place in the light of the contextual information which was being presented to the unattended ear and analysed. (Foss & Jenkins, 1973) showed a processing effect for lexical ambiguity when the ambiguous word was preceded by a biasing context within the same sentence. Such results also seemed to suggest that even prior context has its effect after lexical retrieval, meaning
that even in the presence of context, all meanings of an ambiguous word are considered before the processual decision as to correct reading is rendered. Although Foss and Jenkins had expected that a biasing context would prioritize the readings of an ambiguous item, reaction times to their phoneme monitoring task were no longer in both neutral and biased contexts when the target phoneme in the monitoring task was preceded by an ambiguous word than when it was preceded by an unambiguous word.

Other experiments which employed varying types of context as well as different experimental tasks, also seemed to show differences for ambiguous structures. (Holmes V, Arwas, & Garrett, 1977) showed effects for ambiguous lexical items with a biasing context. Several experiments used semantic priming as a measure of access. (Swinney, 1979) used sentences with a semantically biased context, like _John saw several spiders, roaches, and other bugs_. Subjects had to respond to target words, related to either the biased meaning (insects) or unbiased meaning (spy) of “bug”. (M.K., J.M., & M.S., 1979) investigated noun-verb categorial ambiguities in biasing syntactic contexts: for example, “rose” has the two potential meanings of “stood up” and “flower”, but is biased in “They all rose”. Both experiments report a two-stage process in which all readings of ambiguous words are initially accessed and then the false interpretations rapidly eliminated. And some studies even indicated that all meanings of a lexically ambiguous word are called up in a biased context. The multiple access theory seemed to be a fairly reliable finding for lexical items within the framework of a single sentence, and according to these studies, syntactic context does not guide the initial access.

### 3.3 Parsing Strategies

Some theoretical studies in linguistics have suggested that syntactic ambiguities might have preferred readings, and postulate first-order parsing strategies. The fundamental claim of such explanatory devices is that the parsing procedure accepts a complete but minimally complex analysis in the absence of other information. Thus, it is suggested that, in analysing an incoming

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5Tanenhaus and Donnenworth-Nolan 1984.
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sentence, phrases are attached so as to create a logical analysis as far to the right as possible or are attached so as to minimize the complexity of the analysis see (Pereira, 1985) (Kurtzman, 1985). For example compare sentences (1) and (2).

1. Rose read the note, the memo, and the letter to Mary.
2. Rose read the letter to Mary.

The principle of Local Attachment accounts for the common interpretation which attaches the phrase “to Mary” into the local noun phrase “The letter to Mary” in sentence (1). Incoming words or phrases are typically incorporated into structures which also contain the other nearby words. In contrast, the preferred interpretation for (2) is to incorporate “to Mary” into the verb phrase, as in “to read (something) to Mary”.

Another principle, Minimal Attachment, suggests that we take the incoming words or phrases to build an analysis with the smallest number of syntactic nodes. For example, take sentences like (1) and (2) below.

1. They told the girl that the boy liked the story.
   a. [[They told the girl][that the boy liked the story]].
   b. [They told the girl [that the boy liked] the story].

2. Tom said Sue left yesterday.
   a. [[Tom said][Sue left yesterday]].
   b. [Tom said[Sue left] yesterday].

Both (1a) and (1b) are plausible analyses for (1), but (1a) has fewer possible nodes than (1b), and is thus the typical parse for an ambiguous sentence like (1). In (2), is “yesterday” a sentential adverbial modifying the sentence as a whole, or does it just modify the clause “Sue left” as an adverb of time? Again the principle of minimal attachment takes the first available analysis
which will construct a syntactic analysis with the fewest permitted syntactic
nodes, and therefore (2a) and not (2b), is the likely first parse (see Frazier
and Rayner 1982).

3.4 Garden path sentences

Garden path sentences may be the best examples of how we build the most
likely syntactic tree until contrary information tells us otherwise. Obviously
the interpretation that is ultimately the most successful in specifying the
appropriate reading is the correct one\(^6\), but garden path sentences suggest
that there is an active strategy at any given point in the parsing of sentences.
For example, if you read sentence (1) below (taken from (Lashley, 1951))
to someone who has not heard it before, you will find that most people
will interpret it as (1a), until realizing that the word could not possibly be
"writing" but has to be "righting" as in (1b).

1. Rapid /raytin/ with his uninjured hand saved from loss the contents
   of the capsized canoe.
      a) Rapid writing with his uninjured hand saved from loss the contents
         of the capsized canoe.
      b) Rapid righting with his uninjured hand saved from loss the contents
         of the capsized canoe.

\(^6\) Crain and Steedmans’s (1985) principle of referential success
Such principles, however, do not always predict parsing behaviour on slightly different ambiguous sentences of the same type. For example, you may initially parse (1) as (1a) instead of (1b). But you will be less likely to initiate such an incorrect parse for potentially ambiguous sentences like (2) and (3) than you will for (1). (see Kurtzman 1985).

- 1. The horse raced past the barn fell.
   a. [The horse[raced past the barn][fell]].
   b. [The horse[raced past the barn][fell]].

- 2. A horse raced past the barn fell.

- 3. Horses raced past the barn fell.

Some studies have claimed that we employ parsing strategies even when pragmatic considerations would be expected to override the initial syntactic preference for minimal attachment (Rayner, Carlson, & Frazier, 1983). (Ferreira & Clifton, 1994) have shown results that suggest that syntactic processing is independent and that the initial syntactic analysis given to sentences is not influenced by the semantic information already processed. They used eye movements as a measurement, and examined whether semantic content or pragmatic context would influence the initial syntactic analysis of the sentence. They found that some syntactic parsing preferences do indeed appear to operate independently of such semantic or contextual factors and that Minimal Attachment influences sentence parsing in context as well in isolation.

Ferreira and Clifton conclude that there are first-order independent syntactic parsing strategies even in coherent discourse. This does not mean that semantic or pragmatic information does not play a role but rather that the input that it provides is employed at a later stage. Garden path sentences like the following thus undergo a preferential parsing strategy which constructs a structural description using the fewest syntactic nodes allowed by the grammatical rules for forming sentences in the language. For example, read the following sentences.

1. The editor played the tape.

2. Sam loaded the boxes on the cart.
The expectation, according to Ferreira and Clifton, is that the preferred analysis of the first phrase will be to mark it as an active sentence. Similarly, even the most subtle ambiguity in the second fragment will be analysed so that the prepositional phrase “on the cart” will be attached to the whole verb phrase “loaded the boxes”, instead of having it modify just the noun phrase “the boxes”. Following on from this general principle, they found that when sentences containing these fragments are embedded into longer sentences, and in turn embedded in coherent discourse, subjects still show this parsing preference at first. For example, read the following sentences and notice how your perception of the sentence changes as you are forced to re-analyse it.

1. The editor played the tape agreed the story was big.
2. Sam loaded the boxes on the cart onto the van.

(Frazier & Rayner, 1987), however found that subjects delayed the assignment of an analysis for lexically ambiguous sentences which involved syntactic category assignments, until they received disambiguating information. They examined the principle of Minimal attachment in sentences with categorially ambiguous lexical items by also using eye movements as a measure of on-line parsing. For example, a string like “The warehouse fires...” could be interpreted as Noun + Verb or Adjectival + Noun, as in (1) and (2) below.

1. The warehouse fires numerous employees each year
2. These warehouse fires harm some employees each year.

However, their results still seem to favour a delay strategy in which readers delay syntactic category assignments when there is a syntactic category ambiguity. Moreover, reading times on ambiguous words seem to be shorter in sentences with following disambiguation than in sentences with preceding disambiguation, suggesting that readers delay syntactic category judgements under such conditions of ambiguity and that readers do make immediate judgements on syntactic parsing assignments when this type of ambiguity is not present. This finding slightly modifies Frazier and Rayners (Frazier &
Rayner, 1982) previous findings that the human parser adopts the first logical syntactic analysis available, only revising this first analysis if it turns out to be ungrammatical. It also casts doubt on Rayner, Carlson and Frazier's (Rayner et al., 1983) findings that pragmatics did not override the initial syntactic preference for Minimal Attachment as a parsing principle. One explanation is that there are complimentary, but unique strategies for different kinds of ambiguities; for example, lexical ambiguities (like pipe), categorial ambiguities (like the warehouse fires...), and syntactic ambiguities (like the spy who saw the guard with the binoculars...) may not all elicit the same processing procedures. Clearly, the role of grammatical theory within models of natural language processing is being tempered by the emphasis on discovering independent strategies that explain how we deal with ambiguous structures (Pritchett, 1988).

3.5 Prosody and Punctuation

Ambiguity can also often be resolved by orthographic punctuation in written language and prosody in spoken language. Prosody refers to all aspects of the sound system above the level of segmental sounds. It consists of distinctive variations of stress, tone, and timing in spoken language. The functions of prosody are many and fascinating, see (Chasaide & Gobl, 2004). Where speech-sounds such as vowels and consonants function mainly to provide an indication of the identity of words and the regional variety of the speaker, prosody can indicate syntax, turn-taking in conversational interactions, types of utterance such as questions and statements, and people’s attitudes and feelings. The elements of prosody are derived from the acoustic characteristics of speech. They include the pitch or frequency, the length or duration, and the loudness or intensity. All these forms are present in varying quantities in every spoken utterance. The varying quantities help determine the function to which listeners orient themselves in interpreting the utterance.

The effect of prosody on parsing remains controversial and the effect of punctuation on prosody is essentially unknown. Part of the reason for the mixed prosodic effects might be attributed to varied and inconsistent usage (e.g. Allbritton et al., 1996). Similarly, the usage of punctuation, and in
particular commas, can often be highly stylistic and individualistic. Academics are divided over the primary function of punctuation: whether it is a kind of phonetic transcription of prosody, indicating where to pause when reading aloud, or whether its purpose is to guide grammatical construction in the same way as other orthography. Intuitively there appears to be some functional overlap between punctuation and prosody, although the partnership is far from perfect. Conflicts between grammar and prosody can occur, though often due to arbitrary rules. While a pause at the comma might seem natural in the following item, Chafe (1988), for example, states that a comma cannot be inserted between a subject and a predicate:

\[\text{The man over there in the corner, is obviously drunk}\]

Previous work by Hill and Murray (1997, 1998) has shown clear and reliable effects of commas on the reading of certain (but not all) garden-path sentence structures. It is not clear, however, whether this would translate into a prosodic effect when such sentences are initially read aloud, or whether the prosody produced by a naive speaker, who had become familiar with the sentence, would reflect both the structure and the presence or absence of disambiguating punctuation.

An experiment was carried out by Hill & Murray (Hill & Murray, 2000) in an effort to determine if the presence of commas influenced the prosody produced by oral readers, and if they do in fact alter their prosody to facilitate comprehension, to what extent is this driven by, and tied to, the presence of commas.

In the experiment the participants were presented with single sentences that had to be read out loud, amongst which were three classes of temporarily ambiguous garden-path sentences (prepositional phrase ambiguities, early/late closure ambiguities and reduced relatives). There were four variants of each experimental item, corresponding to the four conditions used by Hill Murray (1997): a locally ambiguous version expected to produce a garden path, its unambiguous or preferred counterpart, and variants of both that contained commas. The task itself required each presented sentence to be read aloud twice.
In the first sight reading instance, oral delivery commenced simultaneously with visual presentation in order to permit possible garden-pathing through the restriction of reading ahead. In the second instance, participants should have resolved any potential ambiguity and could therefore adopt the appropriate prosodic pattern for the entire sentence. In this way, the on- and off-line properties of both punctuation and prosody on garden path structures were determined and directly compared.

The results showed that commas do have a direct effect on oral reading. They result in the lengthening of words preceding the comma and increasing pauses in speech. This appears to be the case whether or not the speaker is aware of the disambiguating function that commas may serve, since it occurs with initial readings relatively regardless of the structure. Overall, the results showed evidence of two types of pausing: an elocutionary one, related to the presence of commas alone, but not necessarily intended to convey disambiguating information; and extra pausing and durational cues which do seem to be intended to convey disambiguating information.

Interestingly it was found that garden-path effects were less clearly shown in the case of oral reading than with silent reading or eye movement records, even under the "forced" first reading procedure. There was, however, evidence for processing effects in the initial reading of Noun Phrase attaching Prepositional Phrase sentences and the unpunctuated Early Closure items, with these effects overlaid by more general elocutionary effects of the punctuation. There were two possible explanations of why any garden-path effect might be difficult to isolate: 1) The unambiguous Late Closure and Unreduced Relative sentences contained more words than their ambiguous counterparts. 2) Increased word duration and pausing might arise in ambiguous sentences due to processing difficulties that mirror “positive” effects in punctuated and/or unambiguous cases.

Upon further examination of the results it was posited that pitch modulation over lengthened words might have arisen from surprise or uncertainty rather than an attempt to facilitate comprehension in listeners. Commas therefore appear to have a consistent effect on prosody, irrespective of structure or whether the sentence is repeated. This was not a finding in silent reading where the presence of commas was effectively “transparent” when
they agreed with the “preferred” or unambiguous parse. There was also a tendency for slightly faster reading in the region following commas; this was also found in the eye-movement and self-pace reading experiments.

### 3.6 Modularity vs. Interactionism

Ambiguity is also an excellent test case for exploring the explanatory power of the respective claims of Modularity and Interactionism. The Modularity position claims independent input systems, with these modules transmitting their processing decisions on input to a central processing system which correlates the information (Fodor, 1983). Processing at any given level is assumed to be essentially free of influence from processing decisions about the input on any other level. For example, a modular view would claim that the initial syntactic analysis of ambiguous sentences is made \textit{without} taking into account semantic or pragmatic information. In sharp contrast, the Interactionist position maintains that processing at any given level takes into account any and all information from other processing levels. Thus, an interactionist view would hold that syntactic decisions about ambiguous sentences are definitely made in the light of semantic or pragmatic information.

The evidence however, does not just point to an easy resolution and is the source of considerable experimentation. Some sense of the debate can be seen in a study by Marslen-Wilson (Marlsen-Wilson, 1989) which examines the role of lexical representations in syntactic parsing and semantic interpretation. The modular representatives argue against any initial lexical influence in syntactic processing. (Frazier, 1989) claims that only item independent information of the syntactic type guides the initial analysis of input; item-specific information of the lexical type did not alter the initially preferred parsing strategies exhibited by her subjects. In contrast, the interactionists assign a central role to lexical representations in integrating linguistic and nonlinguistic knowledge in sentence processing. (Tyler, 1989) thus presents evidence that the syntactic implications of verbs are immediately constrained by the semantic context in which they occur, and (Tanenhaus & Carlson, 1989) show that the argument structure of verbs is utilized during sentence
3.7 Ambiguity Resolution and the Influence of Discourse Context

In order to provide some idea of the role that context plays in the processing of ambiguities, it is useful to look at the processing of larger chunks of normal discourse instead of just isolated sentences.

3.7.1 Knowledge as context

However before looking at discourse it would be pertinent to mention context in its broader meaning. Whenever we look at a sentence and process it, we automatically use our world knowledge and experience as an aid to understanding it. We use this along with our knowledge of the grammar of our language to determine the most probable reading of the sentence. It is this world knowledge that accounts for the bias that certain ambiguous words and structures have. Ambiguous structures exhibit degrees of sensibleness which provide their own bias. For example, in the following 3 ambiguous sentences, you will note that (1) is most likely to have the car associated with the boy, while (2) is most likely to have the bone associated with the dog. Sentence (3) can go either way in terms of likelihood.

1. The boy chased the dog with the car.
2. The boy chased the dog with a bone.
3. The boy chased the dog with a stick.

However if you look more closely, you will note that the possibilities are many, and that the sentences admit more than one interpretation. After all, dogs in cartoons drive cars, dogs in families with children often run off with a toy car in their mouths, and one can imagine a cave-men having used a shin bone as a weapon to chase a dog off with, and so on. Nevertheless, even with this information in mind, you will probably still see the most sensible interpretation as the following: (1) a boy in a car chasing after a dog; (2) a boy chasing a dog who has a bone clenched between its teeth; and lastly (3),
either a boy with a stick doing the chasing or a dog with a stick in its mouth refusing to come back.

While there are obviously biases in the preferred reading for an ambiguity, we are still interested in whether both readings are unconsciously processed anyway. If this is so, generalized world knowledge would only enhance the attractiveness of the preferred reading, but would not exclude the other less likely reading. Some interesting evidence comes from an experiment with newspaper headlines, a written style which is syntactically minimal, and thus often syntactically ambiguous (Perfetti, Beverley, L.Bell, K.Rodgers, & FauxS, 1987). Space constraints cause headlines to be syntactically compressed, omitting definite and indefinite articles, auxilliaries and also copulas. A verbless headline violates the computational centrality of the verb, and readers may incorrectly analyze the internal sentence relationship. For example, consider the following such headlines:

1. Deer Kill 130,000
2. Purdue Game It for Winless Pitt
3. Rumours about NBA Growing Ugly

You would expect the parsing of Headline (1) to rely on the fact that every reader knows that deer are harmless and that they are the hunted ones. But even real-world knowledge apparently does not bypass syntactic processes, for the experimental results showed that parsing procedures for ambiguous headlines are the same for other instances of syntactic ambiguity. At some unconscious level of analysis, subjects did consider both potential readings before settling on the correct one. The headline Deer Kill 130,000 has no verb, and one possible analysis might have \textit{deer} as the subject of \textit{kill}; a second reading is in fact the correct analysis, with the words linked in the compound noun \textit{deer-kill}. Apparently, even though we are primed to expect more ambiguity in newspaper headlines as a discourse genre, and despite our knowing the real-world facts about deer and hunters, ambiguous headlines require more processing than unambiguous ones.
3.7.2 Discourse as context

Some previous findings in psycholinguistic investigations of ambiguous sentences in isolation do not always replicate when such sentences occur in discourse settings with pragmatically available motifs. A discourse view of context would expect that an organizational, and perhaps even processual, effect is set before the ambiguous item. Some previous studies making limited use of context in this sense have shown a bias in the selection of the appropriate reading\(^7\). (Swinney & Hakes, 1976), for example employed a phoneme monitoring task to demonstrate that prior context, in the same sentence as well as in the preceding sentence, serves to restrict access to the possible readings of ambiguous lexical items. In a phoneme monitoring task, subjects are supposed to listen for a given sound, and told to press a button as soon as they have heard it. As a way of testing for processual effects present because of ambiguity, the hypothesis is that there will be less cognitive room for the attention required.

Chapter 4

Ambiguity in Diplomacy
4.1 Diplomatic Ambiguity

The phrase “diplomatic ambiguity” is used to describe a special type of language used by diplomats. Professor Norman Scott, director of Diplomatic Training Programmes at the Graduate Institute of International Studies, Geneva, writes:

In common parlance the skill of finding formulations which avoid giving offence and are at the same time acceptable to all sides is treated with justifiable respect and often referred to as a ‘diplomatic’ form of expression. This usage probably reflects an accurate perception of language and diplomacy down the years.

The use of ambiguous formulations in diplomacy allows for a degree of consensus when parties to a negotiation cannot come to an agreement. Drazen Pehar explains:

If two parties have strong and contradictory interests, and if it seems that neither side is ready to concede a part of its maximum demand, and/or if the negotiations are running short of time and the parties can not discuss such concessions in more detail, then the issue of conflicting interests can be resolved by, so to speak, simulating a compromise in a very rudimentary form. The mediators may come up with a formula which is open to at least two different interpretations; which can carry at least two meanings, A and B, one to gratify the interests of party A and another to gratify the interests of party B. Ambiguities make sure that, on the one hand, the parties retain their own individual perceptions as to “how things should proceed” and that, on the other,

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2. Drazen Pehar is an independent researcher and an associate of International Forum-Bosnia, Bosnia-Herzegovina. He served as chief of staff to the president of the Federation of Bosnia and Herzegovina in 1996, and took part in the final series of 1996 negotiations on the establishment of the Federation institutions. Pehar acquired a Masters of Diplomacy from the Mediterranean Academy of Diplomatic Studies in Malta in 1997 with summa cum laude. His theoretical interest is primarily in creative uses of language (metaphors, ambiguities, politeness figures, historical analogies) focusing on international politics, diplomacy, and conflict research.
one common language is adopted, which both parties may later equally use³.

Norman Scott in his paper on ambiguity in conference diplomacy, points out that while a party may push for precise language to “serve the purposes of his own side in stipulating claims or limits to commitments” it may seek ambiguity “to allay anxieties on either side or to secure a margin for subsequent interpretation.” Thus we see our first example of when ambiguity can indeed be critical.

4.2 Is ambiguity an effective diplomatic tool?

Arguments can be found both for and against the use of ambiguity in diplomacy. Opponents point out that an ambiguous formulation in a treaty or agreement does not actually resolve a problem but simply puts it off until a later time, or allows the parties to the agreement a means of avoiding their obligations. Proponents in response contend that in a conflict, any tactic that brings an end to actual physical violence is useful and valuable.

Scott reminds us that in conference diplomacy ambiguity is usually used by parties seeking to avoid obligations, and that

in the drafting of legal documents such as contracts strenuous efforts are usually made to eschew ambiguity because their survival in the document improves the chances of one or other of the parties raising a successful challenge in court and thereby escaping fulfillment of ambiguous provisions. It is easier to hold a party to an agreement to a specific commitment than to a vague or ambiguous one.

According to Pehar, opponents of the use of ambiguities in peace agreements consider ambiguities a deceptive device which brings only temporary

³Use of Ambiguities in Peace Agreements,” Language and Diplomacy, Malta: Diplo-Foundation, 2001
satisfaction. This is because both parties have the right to interpret ambiguities in their own way and sooner or later it is a right they will start to exploit. This is why ambiguous agreements can quickly lead to arguments, which turn into disagreements, because due to ambiguities, conflicts in interpretation will inevitably arise. Because of this implementation of an ambiguous agreement is very likely to fail. Furthermore, Pehar states:

Just as, prior to an outbreak of war, the crucial terms of political vocabulary become ambiguous and generate misunderstandings and disagreements that then lead to war, an ambiguous peace agreement will itself generate new misunderstandings and add more heat to the parties’ already hostile feelings.

However, Pehar draws our attention to several factors in favour of the use of ambiguities, despite the fact that ambiguous agreements do pose a risk. Firstly he says that if an ambiguity makes it easier for negotiating parties to accept an agreement and in doing so put an end to a war, or to a situation of instability or hostility, this should be taken as an argument supporting the use of ambiguities. Even if an ambiguous provision may later generate a conflict in opinion, the fact that the relationship of physical hostility gave way to the relationship of merely verbal conflict must be taken as a sign of progress.

Secondly, ambiguity offers great potential for cooperative conflict resolution. It generates further conflict only when parties insist on their own, unilateral interpretation of an ambiguous provision and do not recognise ambiguity as ambiguity. If they recognise an ambiguous provision for what it actually is, a sentence or a text open to several incompatible interpretations, the argument over interpretations would in all likelihood give way to the relationship of a joint cooperative effort in the search for a third impartial reading of the provision.

Third, they make the conflict of interpretation predictable. In other words, even if the two parties in negotiation are going to continue fighting politically after they sign the treaty, this process of political fight will be more channelled, more orderly and predictable if one knows in advance which provisions of the jointly adopted text will give rise to a conflict in opinion or
interpretation."

Pehar concludes that ambiguous peace agreements should be "tolerated in an ambiguous fashion, used as a last resort and employed to the best of their capacity, with all the caution they deserve. Pehar points out, as a final point in favour of the use of ambiguities in peace agreements, that societies whose members display an ability to tolerate an ambiguous state of affairs fare both economically and psychologically much better than societies whose members are lacking in such ability. Individuals tolerating ambiguity also tend to tolerate risks, to cope more easily with emotional or intellectual friction and conflict, and to refrain from jumping to premature conclusions when evidence is inconclusive. Those tolerant of ambiguity do not believe in a black and white image of human affairs, but find shades of grey more attractive and enjoyable. Therefore he claims, if tolerance of ambiguity represents a value worth striving for, then why would one oppose the use of ambiguous wording in peace agreements?

4.3 Ambiguity in Diplomacy: Examples

1994 Cairo Conference on Population, clause on abortion:

Louise Lassonde (Lassonde, 1996) provides the following example of how ambiguity was used in abortion talks to render contradictory formulations acceptable to both sides of the controversial debate. The resultant wording was as follows:

"In those circumstances where abortion is not against the law, such abortion should be safe".

In other words, safety (and therefore the possibility of an abortion) is not relevant where a government regards abortion as unthinkable. Safety is recommended, however, where abortion is not unthinkable. Therefore, since all positions on abortion are given equal weight, the wording agreed upon satisfies both those who wish abortion to be safe and those who do not want to acknowledge their legitimacy except in specific circumstances spelt out in their domestic legislation. Although these wordings are sometimes awkward
or strange for those not participating in the negotiations, they are of vital importance. This is because they express a concept which is particularly effective since it is deliberately charged with a multiplicity of meanings, and so makes it possible to break a deadlock in negotiations.

Rambouillet Agreement

Rambouillet mediators started with the premise that interests of Serb and Kosovar-Albanian delegations to the Rambouillet negotiations contradicted one another. The Serb delegation, for instance, wanted to maintain the status of Kosovo as a province with very little, or no, competence in foreign relations, among other things. The Kosovar-Albanian delegation had different interests; to turn Kosovo into at least a fully-fledged republic on equal footing with the other two republics of the Federal Republic of Yugoslavia: Serbia and Montenegro. This status, of course, entails the capacity to run certain aspects of foreign relations independently from the central federal authority. Secondly, the Serb delegation wanted the Rambouillet draft agreement, such as it was presented in Rambouillet, to remain binding in the foreseeable future. The Kosovar delegation had an opposing interest which was not envisaged by the Rambouillet draft: to turn Kosovo one day into a fully independent entity. They therefore wanted to see a revision of the agreement as soon as possible as well as to organise a referendum to check the will of the people of Kosovo regarding the status of Kosovo within the Federal Republic of Yugoslavia.

Mediators to the Rambouillet process decided to use an ambiguous wording to bridge the gap between the both parties interests. The constitution, as the key part of the Rambouillet Draft agreement, stipulated that

Kosovo shall have authority to conduct foreign relations within its areas of responsibility equivalent to the power provided to Republics under Article 7 of the Constitution of the Federal Republic of Yugoslavia.

So, the mediators made use of a referentially ambiguous adjective "equivalent", which is not the same as equal, but could be. As to the interim
character of the agreement, the mediators used both referential and cross-
textual ambiguities to meet the demands of both delegations. First, the
draft agreement itself was called "Interim-agreement", to the liking of the
Albanian delegation. However, Chapter 8, Article I, 1-3\(^4\), stipulated that
amendments to this agreement should be adopted by agreement of all par-
ties. That meant that without Serb consent the interim agreement could not
be changed; and that thereby it would turn into a permanent arrangement.
However, in Article I, 3, mediators emphasised that "three years after the en-
try into force of this Agreement, an international meeting shall be convened
to determine a mechanism for a final settlement for Kosovo" which seemed
to tilt the balance of the wording again in favor of the Albanian demands.\(^5\).

United States Involvement in Israel/Palestine conflict

Many observers note that the United States advocacy of constructive
ambiguity has had disastrous consequences for the Israel/Palestine peace
process. Both parties to the conflict have mistakenly assumed at different
times that either the Israelis had accepted to end the occupation or that
the Palestinians had agreed to forego some of their fundamental rights as
a result of vaguely worded agreements. Whereas such ambiguity made it
possible for both sides to sign agreements that they could interpret in di-
ametrically opposed manners to their domestic constituencies, the facts on
the ground of implementing opposing interpretations have led to very little
implementation at all. This lack of implementation, combined with the ever-
increasing number of Palestinian-Israeli agreements brokered by the United
States, has caused Palestinians to become increasingly wary of US involve-
ment in a process that has brought some normalcy to Israel but none to
Palestinians. The resulting lack of faith in the peace process and the conse-
quent distrust of US promotion of process over substance has made securing
a just peace all that more difficult.

Croesus at Delphi \(^6\) - Referential Ambiguity

Croesus, an ancient king of Lydia, asked the oracle at Delphi to foresee the
outcome of his attempt to conquer the Persian Empire. The oracle, as clever

\(^4\)The entire agreement can be found at http://jurist.law.pitt.edu/ramb.htm

\(^5\)In the end Serb delegation did not accept the Rambouillet draft agreement, whereas
the Albanian delegation accepted it in such an ambiguous fashion that its acceptance was
just a bit better than the Serb refusal.

\(^6\)The History of Herodotus (Chicago/London/Toronto: Encyclopaedia Britannica Inc.,
1952), 11.
as always, issued the following prophesy: "If you attack the Persians, you will destroy a mighty empire." In this sentence, the expression "mighty empire" was used in an ambiguous way. The way Croesus understood the expression was not even close to the way the oracle of Delphi intended it. What the oracle meant by "mighty empire" was the empire of Lydia whose king was Croesus himself, not the empire of Persia, as Croesus understood. So, Croesus, acting on his mistaken understanding of the expression "a mighty empire", did destroy a mighty empire, but it was his own. It is also believed that Croesus understood the term "destroy" from the prophetic message too narrowly, because the oracle intended it to mean both "destroy" and "self-destroy".

**Delphi Oracle - Syntactic Ambiguity**

A famous Latin translation of one of the prophecies of the oracle at Delphi reads "Ibis, redibis numquam peribis in bello." Two different translations and interpretations may be provided for this sentence.

1. "You’ll leave, and you shall never return as you will perish in the war."
2. "You’ll leave and return, and you shall not perish in the war."

*Numquam* here specifies in too many directions; prima facie it can specify both *redibis* and *peribis*, but it cannot specify both simultaneously. However, nothing in the sentence indicates to which verbal phrase the "numquam" qualifier should be allocated.

**Athenian Constitution**

In the sixth century B.C. the Greek poet and statesman Solon wrote a constitution for Athens that was considered a revolutionary turn in organisation of both Athenian social and political life. As Aristotle explains in his book "Athenian Constitution", Solon provided a framework for the resolution of the inter-group conflicts inherent in sixth century Athenian society, leaving an important part of his constitution deliberately ambiguous; open to free interpretation. As Aristotle says, some have interpreted Solon’s strange decision to do this as implying that Solon primarily wanted to extend the powers of Athenian courts and by implication to strengthen the political position of
the "demos"; of the common people of the middle strata of Athenian society. In other words, Solon had opened the possibility for the "demos" to play a larger role at the Athenian courts than they played before. Unfortunately, today it is very difficult to reconstruct the precise differences in interpretation of the ambiguous parts of the constitution by the different strata of Athenian society of that time. Nonetheless, it is clear that there was a conflict of interests and that Solon intended to strike a balance between those interests by including provisions in his constitution that were open to several equally valid interpretations.footnote{7}
Chapter 5

Statuatory Interpretation
5.1 What is meant by a purposive approach?

"purpose, object or intention"

The Law Reform Commission\(^1\) note as a preliminary observation in their 2000 report on statutory interpretation, that three different words might possibly be used to describe the concept of “a purposive approach” namely, purpose, object or intention. A priori there is seemingly very little difference between these words, especially bearing in mind the broad context in which they are used with regard to the law, and the fact that the three words are often used interchangeably\(^2\). However, in an effort to avoid using multiple seemingly synonymous terms, (the practice of which is rife in legal language and often is the cause of ambiguity) the word *purpose* is chosen. The main reason for preferring this term is that ‘intention’ is often used in the phrase ‘intention of the legislature’ and for the purposes of this discussion it is necessary to distinguish between ‘purpose’, as a broad concept, and ‘intention’, as something peculiarly linked with extrinsic aids, eg Oireachtas debates.

5.1.1 Relationship between the literal and purposive approaches to interpretation

It is important to state, at the outset, that the literal rule is, and must remain, the general governing principle in the area of statutory interpretation, as understandably, anything else would lead to chaos. Moreover, in most cases a literal construction will lead to the same result as a purposive construction. However, the central question in this chapter is whether a court, in the minority of cases in which the literal meaning of a provision is not consistent with the purpose of the relevant Act, should look beyond the literal meaning, in order to give expression to the intended effect of the statute. In other words, is a court entitled to strain the meaning of the words in pursuit of the purpose? Broadly speaking, a literal meaning and a purposive meaning

\(^1\)The Law Reform Commission is an independent body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

\(^2\)For example, Bennion uses the phrase “purpose or object”, clearly implying that he considers the two terms as being interchangeable; Bennion, *Statutory Interpretation*, (3rd ed., Butterworths, 1997) 732.
may conflict with each other in two different ways. The first occurs where a literal construction of a statutory provision is ambiguous; the second occurs where such a construction is absurd.

5.2 Irish law on giving effect to the purpose of legislation

In this section the current approach of the Irish courts with regards to purposive interpretation will be examined, before looking into where the balance between literal and purposive interpretation may be drawn in the future.

*Rahill v. Brady*

A good example of how the common law limited the extent to which a court could look beyond the literal meaning of a provision is provided by the Supreme Court case of Rahill v. Brady. The case concerned an objection made by two publicans to the granting of a licence to sell intoxicating liquor to the proprietor of a cattle mart. The licence - an ‘occasional licence’ - was granted on the basis that cattle marts, held twice weekly throughout the year, were ‘special events’ for the purposes of section 11(1) of the Intoxicating Liquor Act, 1962. The phrase ‘special events’ had not been defined in the Act. On the ordinary literal interpretation of the word ‘special’, it would have seemed that the mart, which occurred twice weekly throughout the year, could not reasonably be regarded as ‘special’ and thus as eligible for an occasional licence. Against this view, it was argued in Court that the legislative history of the Intoxicating Liquor Acts showed that the legislature had specifically intended the exemption of marts from the ordinary licensing

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3The distinction between ambiguity and absurdity was discussed in chapter 2 section 2.2

4[1971] IR 69. In a sense, this was a case about extrinsic aids (the legislative history of an Act).

5A question also arose as to whether the use of the word ‘occasional’ required that the events concerned be infrequent; the term ‘occasional’ was not defined in the Act. However, the court found that a literal interpretation of that term did not entail infrequency, but merely referred to the occurrence of the event.
laws. The judgment of Budd J on this point in the Supreme Court directly addressed the question of how far a court is entitled to go in seeking the purpose of a provision:

While the literal construction generally has prima facie preference, there is also the further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intentions of the legislature were; but the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature\(^6\).

Thus, as was seen earlier in (chapters 1 and 2) the court felt that when interpreting a provision it is necessary to factor in our common sense view of the case and our world knowledge in order to avoid drawing absurd conclusions from an act\(^7\). This judgment clearly adopted the position that the literal meaning may be departed from if, and only if, there is evidence within the Act as a whole that such a literal meaning goes against the purpose of the Act. In this case, the evidence which was set forth failed to establish clearly that a literal meaning would conflict with the intention of the legislature and the Supreme Court (O Dlaigh CJ, Budd J, and Fitzgerald J) unanimously allowed the publicans’ appeal against the granting of the licence.

**Nestor v. Murphy**

The Rahill case provides a relatively conservative version of the purpose rule. However, there have also been many more occasions where an even more purposive approach was adopted. This can be seen for example, in the case of Nestor v. Murphy\(^8\). The provision in question here was section 3(1) of the Family Home Protection Act, 1976, which states:

where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home

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\(^6\)Op. cit. fn.24, per Budd J, at 86.
\(^7\)see Ambiguity and Absurdity 2.2.2
\(^8\)[1979] IR 326.
to any person except the other spouse, then ... the purported conveyance shall be void

In this case the two defendants were a married couple who were refusing to complete a contract on the grounds that the wife had not consented in writing to the sale before the contract was signed. It was significant that the spouses were joint tenants of the house. Henchy J, giving judgment for the Supreme Court, upheld the decision of the High Court ordering the sale of the house. In his decision he conceded that:

[a] surface or literal appraisal of s. 3. sub-s. 1, might be thought to give support to the defendants’ objection to the contract ... [However] the flaw in this interpretation of s.3, sub-s. 1, is that it assumes that it was intended to apply when both spouses are parties to the 'conveyance’. That, however, is not so. The basic purpose of the sub-section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction ... The sub-section cannot have been intended by Parliament to apply when both spouses join in the 'conveyance’. In such event no protection is needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home ... When both spouses join in the 'conveyance’, the evil at which the sub-section is directed does not exist. To construe the sub-section in the way proposed on behalf of the defendants would lead to a pointless absurdity. 

Henchy J went on to outline the practical consequences of such a literal interpretation and described them as being ”outside the spirit and purpose of the Act”, stating that in such circumstances a ”schematic or teleological” approach was required. The limit which he set on the extent to which a purposive approach should be pursued was as follows:

s.3, sub-s. 1, must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to the legislative scheme as expressed in the

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Act of 1976 as a whole. Therefore the words of s.3, sub-s. 1, must be given no wider meaning than is necessary [in order] to effectuate the right of avoidance ... It is only by thus confining the reach of the sub-section that its operation can be kept within what must have been the legislative intent\(^{10}\).

\textit{Mulcahy v. Minister for the Marine}

In the case of Mulcahy v. Minister for the Marine\(^{11}\), Keane J was similarly faced with what he described as a choice between a literal and a more purposive construction of a provision in an Act governing the granting of certain licences. The case centred on the granting, by the Minister for the Marine, of various licences for the operation of a salmon farm. The applicant claimed that the granting of the licences in question was unlawful.

The power to grant the licences was governed by a number of separate pieces of legislation, but mainly by section 15 of the Fisheries (Consolidation) Act, 1959. Read literally, the relevant section allowed the Minister a wide discretion to authorise aquaculture projects. Counsel for the Minister encouraged the court to take a purely literal view of the relevant section and thus reading the provision in isolation from other pieces of legislation. However, Mulcahy argued that the legislation had to be interpreted in the light of other related statutes, particularly the Fisheries Act, 1980, which was plainly designed to regulate fish-farming. It was submitted that the earlier 1959 Act had been enacted at a time when fish-farming was not a widespread phenomenon and although it might appear on the face of the Act that the Minister was thereby empowered to grant such licences, this consequence would not have been intended by the legislature at the time of enactment.

Keane J rejected the Minister’s arguments in favour of a literal reading, stating that:

\begin{quote}
While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal
\end{quote}

\footnote{\(^{10}\)Op. cit. fn. 27, at 329-30.}

\footnote{\(^{11}\)High Court, 4 November 1994.}
construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole.

Again, although this case may be viewed as involving the issue of whether a court may consider related statutes, the judge put it under the head of the purposive rule and offered a clear statement of this latter principle. The rule decided upon was that a court may depart from a literal reading of an enactment where there is an alternative meaning available to the court which plainly reflects more accurately the purpose of the Act.

*DPP (Ivers) v. Murphy*

A more recent decision on this point was delivered in the case of DPP (Ivers) v. Murphy\(^\text{12}\). Here, the relevant provision before the court was section 6(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, which provides:

Where a person who has been arrested otherwise than under a warrant, first appears before the District Court charged with an offence, a certificate purporting to be signed by a member [of An Garda Siochána] and stating that that member did, at a specified time and place, any one or more of the following namely:

(a) arrested that person for a specified offence,
(b) charged that person with a specified offence, or
(c) cautioned that person upon his or her being arrested for, or charged with, a specified offence, shall be admissible as evidence of the matters stated in the certificate

The facts here were that no member of An Garda Siochána had appeared before the court to give evidence as to whether the accused had been arrested otherwise than under a warrant. The prosecutor argued that the purpose behind introducing the provision was precisely that a Garda would not have to appear in court. Yet, on a literal reading of the provision, a Garda’s evidence was necessary in order to enable the remainder of the provision to operate in

\(^{12}\)[1999] 1 ILRM 46.
Deciding in favour of the accused, McCracken J in the High Court stated:

I would accept that the legislature probably did not intend that evidence of the nature of the arrest would have to be given, but I cannot construe a statute, which is quite clear in its wording, in accordance with what I might perceive as the intention of the legislature. I must give the words their normal meaning.

This decision was unanimously reversed by the Supreme Court. In her judgment, Denham J referred to the literal, golden and mischief rules as the three related rules of interpretation. She categorised the approach taken by McCracken J as one based on the literal rule, which she considered was not in line with contemporary judicial practice, whereby a purposive approach was preferred. In explaining why she preferred this latter approach, she referred to a passage from the groundbreaking English case of Pepper v. Hart quoting Lord Griffiths:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt a literal meaning of the language. The courts now adopt a purposive approach, which seeks to give effect to the true purpose of legislation.

Denham J went on to state that the literal rule should not apply if it produces an absurd result that thwarts the intention of the legislature. What is especially worthy of note in this case is the fact that a purposive construction was adopted, even in a criminal case where this was to the detriment of the defendant.

Murphy v. Bord Telecom - the problem of overly-literal constructions

Despite the more purposive approach advocated in Nestor v. Murphy, there

\begin{footnotes}
\item[14][1993] 1 All ER 42. See Chapter 5 on extrinsic aids to construction.
\item[15]Ibid. per Lord Griffiths, at 50.
\end{footnotes}
have still been cases where a literal meaning, which is obviously inconsistent with the purpose of an Act, has prevailed. The best example of this type of case is Murphy v. Bord Telecom. This case centred on the meaning given to the phrase ‘like work’, which was the basis for the Anti-Discrimination (Pay) Act, 1974. The circumstances in which two persons were considered, for the purposes of the Act, to be involved in ‘like work’ were defined in section 3 (c) as including:

[a situation] where the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical or mental effort, responsibility or working conditions

The difficulty confronting the claimants was that the work being performed by particular female employees was in fact of superior value to that of their male colleagues. In other words, they could find no male colleague who was being paid more for ‘like work’, but several who were being paid more for lesser work. The applicants argued that the relevant provision should be understood to include the words ‘at least’, which, they argued, was surely the effect that the draftsman had intended the provision to have. Applying a literal interpretation, the High Court held that work of equal value did not include work of superior value. The judgment of Keane J stated that no ambiguity or absurdity was evident on the face of the provision and, accordingly, there was no reason not to apply the literal meaning of the wording of the sub-section.

As a result of this literal approach taken by Keane J, the claimants could not bring themselves within the scope of the legislation, even though it is extremely unlikely that the drafter intended a person in the position of Ms. Murphy and her colleagues to be excluded from the benefit of the Act. In fact, it was argued on behalf of the applicants that it could not have been intended that the provision should have the narrow meaning which the Court later gave to it, as the Act had been introduced in order to give effect to Article 119 of the EC treaty and Article 1 of EEC Council Directive 75/117. Reference was also made to the long title, which clearly stated that all discrimination in pay on the basis of sex was to be outlawed. The case of Murphy v. Bord

Telecom was subsequently referred to the European Court of Justice, where the decision of the High Court was held to be incorrect.

5.2.1 Other jurisdictions

*English case-law*

A recent House of Lords decision in this area is Inco Europe Ltd v. First Choice\(^{17}\). The main issue in this case was whether the Court of Appeal had jurisdiction to hear an appeal of a decision made at arbitration. The relevant provision was section 18(1) of the Supreme Court Act, 1981, as amended by section 107 and Schedule 3 of the Arbitration Act, 1996. The provision as amended stated, plainly enough, that “no appeal shall lie to the Court of Appeal”. Thus, a literal reading would obviously dictate that no appeal would lie. However, the House of Lords and the Court of Appeal each unanimously ruled that there was an entitlement to appeal.

This conclusion was mainly drawn from the history of legislation in this field and the fact that there was no evidence of any intention to change the status quo in this regard. Lord Nicholls, in his judgment, directly addressed this point. Responding to the charge that the preferred interpretation was overly creative, he stated:

> I freely acknowledge that this interpretation of s.18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross’s admirable opuscule, Statutory Interpretation, 3rd ed (1995) pp 93-105. He comments, at p 103:

> In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as

\(^{17}\)[2000] 1 WLR 586 (also reported in The Times, 10th March 2000).
Lord Nicholls went on to describe what he considered to be the proper limits of this aspect of the judicial role,

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ... In the present case these three conditions are fulfilled.

*European Union Law*

As mentioned earlier, the strict literal approach still holds a somewhat shielded position due to its common law origins. However, a major factor in the move towards a more purposive approach has been the increasingly important interface between domestic and European Union law. This was acknowledged by Barr J in HMIL (Formerly Hibernia Meats Ltd.) v. Minister for Agriculture\(^1\), a case concerning the administration of EU Beef Intervention schemes and associated European legislation. In that case, Barr J

\(^1\)High Court, 8 February 1996.
CHAPTER 5. STATUTATORY INTERPRETATION

outlined the general approach which is considered appropriate in interpreting EU law;

It is a primary rule of European law that a court should adopt a teleological or schematic approach to the interpretation and construction of EU legislation

Barr J went on to explain what he saw as the relevance of this approach to a common law jurisdiction by quoting from a decision of Lord Denning:

They adopt a method which they call in English strange words - at any rate they were strange to me - the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?19

It is notable that the case in which Barr J was giving judgment concerned the interpretation of domestic regulations which, admittedly, implemented EEC regulations of 1988. However, he went on to state that "the teleological approach was adopted ... in Nestor v. Murphy ... and more recently ... in Lawlor v. Minister for Agriculture"20. The point is that while Lawlor involved EU law, Nestor was about the Family Home Protection Act, 1976, and Barr J made no distinction between Nestor and the other cases.

19Buchanan and Co v. Babco Ltd [1977] QB 208, per Denning LJ, at 213. It is worth noting that this decision was later overturned by a less enthusiastic House of Lords decision, reported at [1978] AC 141.
20Nestor v. Murphy [1979] IR 326 (see Paras.2.11-13 above); Lawlor v. Minister for Agriculture [1990] 1 IR 356.
This grouping together of European and domestic cases as part of the same general movement towards a teleological approach is strong evidence of the increasing influence of EU law on the Irish legal system.

Conclusions

In several of the Irish cases cited above the approach to interpretation is already along the lines of the moderate purposive approach recommended by the Law Reform Commission. However, there are a number of important cases where this has not been true, and a heavy reliance on the literal rule is still evident in cases such as Murphy v. Bord Telecom. The decision of Keane J in that case was effectively reversed by the European Court of Justice, and it is interesting to note his comments when the case came back before him in the High Court\(^2\). In this later judgment, Keane J accepted that the primacy of EU law meant that where a teleological (purposive) interpretation would give effect to the EC treaty and other sources of EU law, that should supersede a literal interpretation. He also accepted that he had been wrong in stating that there was not an alternative teleological approach available to him.

In favour of giving the purposive approach precedence, the commission suggested that if a judge knows, or can reasonably be expected to know, what the Oireachtas intended the effect of an Act to be, then he or she must give effect to that intention. It is also a fundamental aspect of the Rule of Law that the law should be certain and accessible, and in our system, generally this means that the sole source of law should be *within the four corners of the Act*. An examination of the case-law in this area shows that there remains a degree of uncertainty as to what is the proper relationship between the literal and purposive rules of interpretation. Judges have differed in their views as to how far one can go, in pursuit of purpose, beyond the literal meaning of a provision.

Thus, even accepting that a consistent approach is desirable, there remains the question of what that consistent approach should be: the LRC has stated that it prefers the moderately purposive approach already adopted in

several judgments, particularly the cases of Nestor v. Murphy and Mulcahy v. Minister for the Marine, discussed above.

5.3 The case for moderately purposive approach to interpretation

The next question is the level of detail that should be included in such a standard approach, so as to render it of maximum utility in assisting judges to take a consistent approach to cases.

Existing provisions in other jurisdictions

There are a number of examples available of how other jurisdictions have formulated such legislative provisions in their respective Interpretation Acts. The two most notable of these are s.15 of the Australian Acts Interpretation Act and the formulation recommended in the draft Interpretation Act of the New Zealand Law Commission. The Australian 1901 Act section 15 AA (as amended), reads as follows:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

However, having considered the matter further, it was found that there was a flaw in this provision, in so far as it states that

construction that would promote the purpose ... underlying the Act ... shall be preferred to a construction that would not ...

It was viewed that this reasoning was elliptical, and failed to address the question of the relative positions of the purposive trend, established by the provision, and the literal rule. The literal rule is not mentioned, yet it can hardly have been intended that it should not be used at all. Instead it is just assumed to apply but to what extent is unclear. This could be due to some diplomatic or tactical reason which is unknown. However, it can
be said that in the Irish context, especially when one of the purposes of a proposed provision is to encourage consistency, it is important to be as clear as possible. This is particularly so in an area of law which, because of the breadth of its scope, inevitably contains many inherent difficulties. Thus, the Australian provision was rejected as a model for a new Irish Interpretation Act.

Another possible model considered was the formulation found in section 5(j) of the New Zealand Acts Interpretation Act, 1924:

> Every Act, and every provision or enactment thereof, shall be deemed remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit.\(^{22}\)

This provision seemed to hinge on the phrase 'fair, large and liberal' - language which, to 21st Century ears, was considered rather characteristic of the 18th Century in its literary and inspirational style. This formula was rejected because it seemed imprecise. Again, it leaves the position of the literal rule uncertain, although it does appear to downplay it; something which the reform commission did not want to do. It was also found that, as a matter of drafting practice, phrases such as “fair and liberal construction” and “true intent, meaning and spirit” were “unnecessarily repetitious and unwieldy.”\(^{23}\)

### 5.3.1 Recommended draft provision

In the light of the above observations, the Commission recommended a provision which retained the literal rule as the primary rule of statutory interpretation. The other significant feature of their proposed formulation is that it would specify exceptions to this primary approach, not only in cases of ambiguity and absurdity, but also where a literal interpretation would defeat the intention of the Oireachtas. The draft provision which they proposed also indicated that such an exception should only apply where the intention of the Oireachtas is plain.

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\(^{22}\)The Canadian Interpretation Act (as consolidated) is almost identical.

\(^{23}\)see chapter 7 for proposed guidelines on clearer legal drafting
The model recommended owes a good deal to the judgment of Keane J (as he then was) in the case of Mulcahy v. Minister for the Marine, already discussed. Keane J set out the circumstances in which a court may depart from the literal meaning of a provision as follows:

While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole.

Based in part on this passage, the recommended draft was as follows:

In construing a provision of an Act
(a) which is ambiguous or obscure; or
(b) a literal interpretation of which would be absurd or would fail to reflect the plain intention of the Oireachtas, a court may depart from the literal interpretation and prefer an interpretation based on the plain intention of the Oireachtas; provided that this can be gathered from the Act as a whole.

5.3.2 Other issues

Penal and taxation statutes - the principle of doubtful penalisation

Another policy issue was whether the recommended moderately purposive approach should apply to penal and taxation statutes. At the Colloquia, the view was expressed that these categories of cases could not justifiably be exempted from the proposed approach as it was felt that such an exemption would mean that a criminal defendant or taxpayer would always benefit from whichever construction, either literal or purposive, was most favourable to his or her position.
The approach taken to criminal cases in this regard was discussed comprehensively in the case of Mullins v. District Judge William Harnett\(^ {24} \). In that case, the applicant had been charged with assault contrary to common law and the Offences Against the Person Act, 1861, as amended. The common law offence of assault was abolished in August 1997, between the time when the alleged offence occurred and the time when the prosecution of the applicant came up for hearing. The applicant claimed that as the offence no longer existed and as there had been no stipulation in the Act regarding crimes committed before the date of abolition of the offence, the prosecution could not continue.

The Attorney General argued that despite the *apparent lacuna* in the law, the offences were covered by section 21(1) of the Interpretation Act, 1937. This section states that when an Act is repealed, such repeal should not affect any penalty incurred in respect of an offence committed before the repeal. The issue was then raised as to whether there was a common law rule that a strict construction of a penal statute should be applied. O’Higgins J quoted from Bennion;

> The true principle has never been that ‘a penal statute must be construed strictly’ (though it is often stated in such terms). The correct formulation is that a penal statute must be construed with due regard to the principle against doubtful penalisation, along with all other relevant criteria\(^ {25} \).

O’Higgins J went on to refer to the following passage from Maxwell, concerning this canon of construction:

> The effect of the rule ... might be summed up by saying that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. If there is no ambiguity, and the act or omission in question falls

\(^{24}\)[1998] 2 ILRM 304.

clearly within the mischief of the statute, the construction of a penal statute differs little, if at all, from that of any other.\textsuperscript{26}

Having applied the canons of interpretation to the Mullins case, O’Higgins J concluded that there was no ambiguity in the relevant section that might justify the matter being resolved in a manner favourable to the applicant.

It may be noted that the decision in DPP (Ivers) v. Murphy, discussed earlier, casts further doubt on whether or not the Irish courts will be willing to allow a defendant in a criminal case to benefit from a literal construction of a statutory provision, where the effect of such a construction would be to frustrate the intention of the legislature.

With regard to taxation cases, in the Supreme Court decision in O’Connell (Inspector of Taxes) v. Fyffes Bananas\textsuperscript{27}, Keane CJ ruled that the defendant could not claim the benefit of manufacturing tax relief for the artificial ripening of bananas. On the face of it, section 39(2) of the Finance Act, 1980 seemed to cover any company that provided a service of subjecting another company’s goods to any process of manufacturing – an apparently broad category. However, the Inspector of Taxes argued that the Government had introduced a separate section, section 41 of the Finance Act, 1990, specifically to exclude such activities as the artificial ripening of bananas from manufacturing tax relief.

Keane CJ acknowledged that special rules of construction were applicable in cases involving taxation, but his understanding of those rules was quite novel. He stated that in order to establish that a party fell within a certain taxation category, the language of the relevant taxation statute had to be clear and unambiguous. However, he also held that the same principle applied in respect of categories of exemption from taxation. In other words, parties claiming specific exemption from a particular taxation measure similarly had to demonstrate that the relevant statutory provision was unambiguous, and that they clearly fell within the group of persons entitled to the exemption.\textsuperscript{28}

\textsuperscript{26}Ibid. citing Maxwell (12th ed.), at 246.
\textsuperscript{27}Irish Times, 11 September 2000. It is arguable that this case was a special one which should not be taken to reflect a change in the general approach.
\textsuperscript{28}For a comprehensive discussion of the approach taken by the Supreme Court to statutory interpretation in taxation cases, see Kelly, ”The Construction of Statutes” (1997) 9 Irish Tax Review 327.
The principle of doubtful penalisation can be viewed as part of the broader legal concept of natural justice. The extent to which the principle is accorded weight in a particular case generally depends very much on the particular facts. However, it would appear from the recent case-law in this area that the Irish courts are taking a more restrictive view of this principle.
Chapter 6

The Principle of Updated Construction
6.1 Modern Technology And The Interpretation Of Older Statutes

6.1.1 Problem Stated

The conflict between literal and purposive approaches to statutory interpretation can be seen when the courts attempt to interpret older statutes in a modern context. Problems occur most when the words of a particular statute are from previous centuries. Many cases have come before the Irish courts in the 90's highlighting this quandary. Often a court is faced with statutes which were enacted in a different social and technological context where the meanings of specific elements of the statute at the time of enactment can differ greatly from a literal common sense interpretation of those elements today. Hence, the purpose of the provision at the time of enactment may be obscured from the contemporary interpreter, at least in terms of how it was intended to apply in new circumstances, and particularly in the light of modern technological developments which were unforeseeable at the time of enactment.

6.1.2 The case for applying an updated construction to older statutes

If the interpretation of older statutes is to be realistic and meaningful, it is necessary that a court undertaking this exercise should interpret statutes according to their contemporary meaning at the time of interpretation. The basic interpretative rule governing this area is the presumption that legislation is always speaking from the present; that each enactment is to be viewed as a living part of the current legal system and not limited by circumstances which were current at the time of its enactment¹. This rule is derived from the general principle underlying the literal approach to interpretation; namely that, in the interests of the Rule of Law, the courts will wish to honour the understanding of the contemporary man or woman as to what constitutes the law on a particular point. In accordance with this policy, a judge will tend to interpret the wording of a statute literally, by reference to the meaning of the wording as read in the light of the social

conditions and technological advancement which prevail today. The effect of such an approach is to require an up-dated construction of the wording of an older piece of legislation.

The construction of older statutes, then, may need to accommodate a more complex type of conflict between the intention of the legislature and the literal meaning of the words of a provision, than that discussed in Chapter 5. In the case of older statutes, this further conflict may be caused, not by failures in drafting, but simply by altered understandings with the passage of time. Generally, an updated construction of the words of a statute will allow the original intention of the statute to be fulfilled. However, in practice, as can be seen by the case-law here and elsewhere, this may not always be true, and the application of an updated construction in interpretation can then become quite problematic.

**Cases where the meaning of a statute has changed over time**

In some cases, the meanings of words contained in a statute at the time of its enactment may differ from the usual construction of such words today. Alternatively, words, phrases or concepts which were not used at the time the legislation was drafted, may now normally be used in referring to the subject matter of the earlier statute. In such situations - most commonly in areas where there has been substantial technological change - the effect of giving the words of a statute their modern meaning might be to frustrate the purpose of the Act. Therefore, the view has emerged that it is open to a judge, in certain circumstances, to take a more purposive or dynamic approach, in order that the original intention of the legislature be upheld. This may be done by ascertaining the intention behind the provisions of the Act in the context of the circumstances prevalent at the time of enactment, and going on to apply this general objective of the legislation in the changed context of contemporary technology and modern social values.

There are, broadly speaking, three types of situation where the interpretation of older statutes involves this potential conflict between the literal and purposive approaches:

1. Cases where the word/phrase in question is ‘mobile’ in nature, i.e where
the word, phrase or concept has, by its very nature, a meaning that has changed over time.

Words and phrases are ‘mobile’ to a variable extent, so that a spectrum of ‘mobility’ exists; from words and phrases, the meaning of which has changed little over time, to those of which our understanding has altered greatly. At one end of the spectrum, however, among those words or phrases which may be considered highly mobile, two main types of words/phrases may be identified. The first is where the word or phrase involves abstract concepts or refers to standards or values of society. Such words or phrases are ‘mobile’ in the fullest sense and judges will naturally take a dynamic interpretative approach to these, eg. “standards of decency”, “reasonable behaviour”, etc. The second type of highly mobile phrase is where the original legislation speaks of a broad category or generic term which, over time, extends to include other items which did not exist at the time of enactment. Modern technological innovations are one important example of where this situation may arise: eg phrases like "means of communication" or "written word", may now need to take account of developments like the fax, e-mail, etc.

Generally, neither of these types of wording cause many difficulties of interpretation. As the intention of the legislature at the time of enactment was clearly that the statute be interpreted in its context at the time of interpretation, there are no competing constructions. The two applicable rules of interpretation, i.e the presumption that points towards an updated construction and the general rule in favour of the purpose of the legislature at the time of enactment, both lead to the same result.

2. There are cases where the words referred to in the original legislation had a specific meaning, but now there are words, in addition to those which were used at the time of enactment, which have an equivalent meaning.

Most of the case-law on this issue of updated construction of statutes falls into this second category, where the wording of the statute be-
trays the limitations of the language which was commonplace at the
time of its enactment. An example of this type of situation is where
older statutes refer to technological devices and some new technology
is developed between the date of the legislation and the date of its in-
terpretation. This new technology may serve broadly the same purpose
as that which was referred to in the original statute, so it may be con-
sidered that the new words or phrases used in referring to the modern
technology have an equivalent meaning to the older phraseology. In
such cases a judge may choose to inquire as to whether the modern
development in question should be viewed as being included within the
concepts contained in the statute. There are a variety of tests which
a judge could apply in assessing whether a modern word/phrase has a
meaning which is equivalent to an older one. This problem of vague
concepts and defining borders was discussed earlier with reference to
"ring species” and the difficulty of categorisation

3. There are also instances where an expression had a definite meaning at
the time of enactment of the relevant legislation, but has a different,
although equally specific, meaning at the time of the Act’s interpreta-
tion. Such cases may turn on what, if any, evidence can be admitted
as to the alleged earlier meaning of the expression.

This type of case is rare, but there have been situations in which it has
been plausibly argued that the ordinary usage of a word can change
significantly over time, so as to make a contemporary literal interpre-
tation of the word conflict with the original intention of the legislature.
One case where this type of argument was raised was Inspector of Taxes
v. Kiernan, discussed further in the next section, where the Inspector
of Taxes attempted to raise an argument that the word “cattle” in a
taxation statute should be given its nineteenth century meaning, so as
to include pigs. In England, the so-called 'box principle' may be ap-
plicated to such cases.\(^3\) Under this principle, when such a difficulty arises
it is open to a court to replace the original wording of a statute with a
modern term that has the equivalent meaning to the original intention.

\(^3\)As stated in The Longford (1889) 14 PD 34. See Bennion, Statutory Interpretation -
6.2 Case-law

Keane v. An Bord Pleanla

Keane v. An Bord Pleanla is an example of a recent Supreme Court decision on the issue of updated construction of the wording of statutes. The case concerned an appeal by the plaintiff from a decision of the board to grant planning permission for the erection of a mast as part of a new type of radar system on the coast of County Clare. The case turned on whether the Commissioners of Irish Lights were empowered to erect the mast under sections 634 and 638 of the Merchant Shipping Act, 1894, which gave them power to erect “lighthouses, buoys or beacons”. The test used by the Court was to distinguish between: (a) instances where “terminology used in legislation was wide enough to capture a subsequent invention”, and (b) instances in which the inclusion of the subsequent invention, in the view of the court, would amount to “altering the meaning of words”.

The first question was whether or not ‘beacon’ fitted into category (a) referred to above, as a generic term referring to a broad category of navigational aids. On the facts of the case, Judge Murphy held in the High Court that the word ‘beacon’ could not be construed in such a way as to include a modern radar system, placing particular emphasis on the fact that the proposed system utilised electromagnetic waves which were unknown in 1894. He distinguished this case from earlier ones like McCarthy v. O’Flynn and Derby & Co. v. Weldon (No.9) where ‘document’ was taken to include X-ray photographs and computer databases, relying on the Latin etymology of the word ’document’. He would not accept that the word ’beacon’ should be interpreted in such a broad manner.

In the Supreme Court, in a three: two majority decision, Hamilton CJ held that ’beacon’, in the ordinary sense in which the word is used today, would include a radar system, but the meaning of ’beacon’ in the Act should be assessed by reference to the intention of the legislators who created the 1894 Act. In other words, he seemed to make a distinction between a ’legal’ literal meaning, decided by reference to normal language usage at the time of enactment, and an ’ordinary’ literal meaning, as defined by current linguistic norms. He declared himself in favour of a literal interpretation, but referred
to the true original intention of the legislature. Blayney J and Barrington J concurred, although they took slightly different approaches.

O’Flaherty J, however, in his dissenting judgment, addressed the issue of whether, even if ‘beacon’ in its current, ordinary sense does not include radar, the wording should be reconstrued so as to include it. He stated:

[W]e do no injustice to anyone if we allow [the Act] to operate in the light of new discoveries in science or elsewhere which can be taken to be within the ambit of what the particular Act seeks to achieve.

He quoted a passage from Maxwell where the latter stated that the language of a statute was generally extended

“to new things which were not known and could not have been contemplated when the Act was passed, when the Act deals with a genus and the thing which afterwards comes into existence was a species of it.

O’Flaherty J went on to state that it would be asking too much of the legislature to be on the alert to amend old legislation to take account of every new development. The guiding principle here, in his view, was that statutes should be put to work, not let work to rule.

Denham J referred to the Oxford English Dictionary definition of ‘beacon’ as including “a radio transmitter whose signal helps fix the position of a ship or aircraft”. She also noted that the definition of “buoys and beacons” in the Act stated that “all other marks of the sea” were included. While she emphasised that dictionary definitions were distinct from legal meanings, the test she applied was whether there was any pressing reason why the ordinary meaning should not apply. It is noteworthy, however, that her understanding of the ‘ordinary meaning’ in this case differed from that of Murphy J. Denham J also made reference to the above mentioned cases of McCarthy v. O’Flynn and Derby & Co. v. Weldon (No.9), but she invoked them to lend support to the wider meaning which she favoured, as in her view, the word ‘beacon’ was sufficiently generic.

\(^4\)Denham J’s dissent
Universal Studios v. Mulligan

In the subsequent case of Universal Studios v. Mulligan, Laffoy J held that ‘videotape’ came within the meaning of the words ’cinematograph film’ for the purposes of the Copyright Act, 1963. Although Laffoy J referred approvingly to the test used by Murphy J in Keane, her investigation into the meaning of the relevant word was more in line with the approach which had been taken by Denham J. Laffoy J inquired into the issue of what constituted the essence of a cinematograph, concluding that it was material on which visual images are recorded, which can then be displayed, directly or indirectly, as moving pictures. The defence had contended that the essence of a cinematograph was that the images were themselves visible on the tape.\(^5\)

Mandarin Records v MCPS (Ireland) Ltd

In the case of Mandarin Records v. MCPS (Ireland) Ltd\(^6\) counsel for the plaintiff submitted that a ”power CD”, producing both visual images and audio material, did not come within the definition of a ‘record’ for the purposes of Section 13 of the Copyright Act, 1963. The word ‘record’ had been defined in Section 2 of that Act, and the definition centred on the concept of a device ”in which sounds are embodied”. Barr J stated that he considered it desirable that, where possible, advances in technology should be accommodated by a court engaging in statutory interpretation, but only...

\[\text{where that can be done without straining the words used beyond their ordinary statutory meaning and having paid due regard to the structure and intent of the statute.}\]

Barr J again alluded to Keane as the relevant authority. He adopted the reasoning of Murphy J, and concluded from its application that...

\(^5\)Ibid., at 446. It is to be noted that, in this case, counsel cited cases from Malaysia, New South Wales and England dealing with the relationship between videotape and pre-videotape copyright legislation.

[A] broad interpretation in this case does not distort the statutory definition of ‘record’ nor do violence to the wording thereof".7

*Inspector of Taxes v. Kiernan*

Finally, an example of the type of case where a word has a precise meaning, but one which has altered significantly over time, is *Inspector of Taxes v. Kiernan*. This concerned the assessment of the respondent’s income for tax purposes under s. 78 of the Income Tax Act, 1967, which applies to an occupier of land who is a “dealer in cattle”. On this issue the 1967 Act replicated substantially a provision of the Income Tax Act, 1918, which, it appeared, in turn reproduced a rule in a mid-nineteenth century statute. The relevant Acts failed to provide a definition of the word “cattle”. The respondent was engaged in the keeping of pigs, which he bought, fattened and sold. The Inspector of Taxes had assessed the respondent and had decided, on the basis of old case-law, that “cattle” included pigs, and consequently that the respondent was a “dealer in cattle”. The respondent challenged this assessment in the Circuit Court.

On a case stated to the High Court, and on appeal in the Supreme Court, it was held, in the respondent’s favour, that the word “cattle” did not include pigs. Henchy J, in the Supreme Court, addressed the Inspector of Taxes’ arguments that “cattle” had been defined to include pigs for the purposes of other earlier Acts, and reasoned as follows;

> There is no doubt that, at certain stages of English usage and in certain statutory contexts, the word “cattle” is wide enough in its express or implied significance to include pigs. That fact,

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7 Ibid. at 160. An example of how a similar scenario was dealt with by the courts in New Zealand is provided by IBM Corp. v. Computer Imports Ltd. [1989] 2 NZLR 395. In that case an original written programme of silicon chip, known as its source code, was held to be equivalent to a "literary work" for the purposes of the Copyright Act, 1962. It was also held that the series of electrical pulses which make the source code electronically readable, known as the object code, would qualify under the Act as being equivalent to a "translation". However, there remain other cases where a very static approach has been taken by the New Zealand courts
however, does not lead us to a solution of the essential question before us. When the legislature used the word “cattle” in the Act of 1918 and again in the Act of 1967, without in either case giving it a definition, was it intended that the word should comprehend pigs? That the word has, or has been held to have, that breadth of meaning in other statutes is not to the point.

He accepted that where it was contended that a meaning had changed, a judge might have to investigate the meaning of a word at the time of enactment. In this case, McWilliam J in the High Court had looked to a nineteenth century edition of the Oxford English Dictionary, which clearly restricted the meaning of the word “cattle” to bovine animals. Therefore, on the facts of the case, the plaintiff failed to establish that the broader connotation had been prevalent either in 1918 or in the mid-nineteenth century\(^8\).

### 6.2.1 Comment

Even a cursory examination of these few recent cases in the High Court and Supreme Court reveals that there are clearly many different approaches to, and techniques of, interpretation in this type of case. It is true that the general trend seems to be to have regard to the general objective of the legislature at the time the statute was enacted and to read this purpose in a modern context. This is in line with the general purposive approach which the Law Reform Commission have recommended, but there are, nonetheless, certain practical difficulties with the present law that must be highlighted. If we take the example of Keane, what we see is that different judges had different views as to what the key questions were and gave different answers to these key questions. Furthermore, even where they agreed on these points, they prescribed different consequences and results to follow from the answers, and different weightings to be given to the different issues. The following are specific criticisms of the current situation in this regard:

\(^8\)Henchy J held that the case of Phillips (Inspector of Taxes) v. Bourne [1948] KB 533, where “cattle” in the 1918 Act was held to include pigs, had been wrongly decided on the facts.
The first point is the absence of a clear test as to when a judge should depart from the literal approach. In Keane, the rule seems to be that the Court should inquire as to the purpose of the legislature only where “the terminology of the legislation was wide enough to capture a subsequent invention” and should desist from “doing violence to the words of the statute”. This would seem to suggest that it is only when a word is generic in nature that it can be construed to include technology not contemplated at the time of enactment. In Keane itself, as we have seen, Murphy J, Barrington J and Blayney J were guided by the ordinary meaning of the words, and defined the ordinary meaning quite narrowly. Hamilton CJ referred to the meaning of words at the time of enactment, but also reached quite a narrow definition. O’Flaherty J, on the other hand, had no difficulty in giving the legislation a wider meaning on the facts of the case.

The second question is how a court decides what constitutes a ‘generic’ term. Again, in Keane, Denham J preferred a broad interpretation of ‘beacon’, which she saw as a general term, while O’Flaherty J chose a more narrowly-defined meaning; yet both reached the same result. Hamilton CJ did not directly address the issue of whether the term should properly be viewed as a broad or narrow one, emphasising instead the intention of the legislature. It is of interest to note that in the later cases of Mandarin Records and Universal Studios, where Keane was cited with approval, the High Court gave seemingly more precise words (‘record’ and ’cinematograph’) much more strained meanings.

Finally, even if a court decides that it is entitled to go beyond the literal meaning of a provision (either because it is a generic term or because of the purpose of the legislature), it is unclear which test should be applied in order to decide if a new development in technology is covered by a provision. One way of resolving this problem was suggested in the Mandarin Records case, where it was held that a judge should interpret a contentious word, relating to modern technology, by reference to the “essence” of that word. However, such an approach does not necessarily remove the difficulty, since there will often be different views as to what is that essence. The “essence” could be determined by reference to either the function or the physical characteristics of the device in question. In Mandarin Records, the Court opted not to engage in a detailed examination of the nature of the product in question,
similar to that which had been undertaken in Universal Studios.

### 6.2.2 Other jurisdictions

#### New Zealand

The New Zealand Law Commission, in their 1990 Report on a new Interpretation Act for New Zealand, examined the issue of updated construction under the heading, “Should provision be made to the effect that legislation is ‘always speaking’?” The starting point for the New Zealand Commission was an analysis of the existing statutory provision, providing that legislation is ‘always speaking’, contained in s.5(d) of their Interpretation Act, 1924:

> The law shall be considered as always speaking, and whenever any matter ... is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning”

The New Zealand Commission found the same problem of inconsistency in their case-law that the Irish Commission had found. Interestingly, the New Zealand Commission assessed the impact of the purposive provision just quoted and found that it had a limited effect in practice. Indeed, in their earlier Preliminary Paper of 1988, they had suggested a number of reasons why the existing statutory provision might be removed, seeing it as not serving any useful function. However, the Commission also outlined some arguments as to why it might be desirable to retain a statutory provision in principle;

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9New Zealand Law Commission, A New Interpretation Act - To Avoid "Prolixity and Tautology" (Report No. 17, 1990), 34.
10The Canadian provision is almost exactly the same, the main difference being that the Canadian Act refers to giving effect to the ‘enactment’, while the New Zealand provision speaks of giving effect to ‘the Act and every part thereof’. This would not appear to make any significant difference to the impact of the provision. Another difference is that “true spirit, intent and meaning”, replaces “spirit, true intent, and meaning”
namely that a clear legislative statement of the principle of dynamic interpretation improves the accessibility and transparency of the law, and helps to prevent statutory proliferation. Any definite move towards a more static approach to interpretation would lead to an increasing need for amendments updating the statute book.

In the light of these arguments, the conclusion of the Irish Law Commission was to recommend that the legislative provision in the 1924 Act be removed and replaced by a more direct statement, which would give more practical direction to judges:

An enactment applies to circumstances as they arise so far as its text, purpose and context permit

*International law*

There have also been initiatives in international trade law to develop concepts which focus to a greater extent on the essence and function of new technology. In particular, recent developments in information technology, and the increasing importance of electronic commerce, have led UNCITRAL, the United Nations Commission on International Trade Law, to establish a set of legal principles, known as the Model Law\(^\text{12}\). The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules which detail how a number of legal obstacles to the development of electronic commerce may be removed. There are two concepts used in the Model Law which are of special interest in the present context.

The first is the concept of “functional equivalence”. A key issue for those involved in electronic commerce is the legal status of forms of communication that have replaced paper, given that paper transactions have been the medium of economic interaction for centuries. ‘Functional equivalence’ sets a general presumption of equivalence between paper and electronic modes of

\(^{12}\text{The Model Law on Electronic Commerce. For a discussion of the background to this development see, “Establishing a Legal Framework for Electronic Commerce; The Work of UNCITRAL”, a paper delivered by Gerold Herrmann at the International Conference on Electronic Commerce and Intellectual Property in Geneva, 14-16 Sept 1999.}
communication. Thus, the Model Law centres on a list of basic functions relevant to commercial relations, which were traditionally fulfilled by, for example, writing, signature or an original paper document. In developing the Model Law, the basic characteristics and functions of legal situations which commonly arose in the world of paper documents were examined, in order to determine how those situations could be transposed, reproduced or imitated in a paper-free environment.

Another principle of the Model Law is that the rules prescribed in it are designed as ‘neutral’ rules, in that they do not distinguish between different types of technology - different ‘media’ - and can therefore be applied to various methods of communication and storage of information. In relation to drafting, one of the consequences of this policy of ‘media neutrality’ is the adoption of new terminology, in an effort to avoid any reference to a particular, technical means of transmission or storage of information. Although both these initiatives are concerned with the drafting of new legislation, the concepts outlined share an obvious resonance with the reasoning used, for example, by Barr J in Mandarin Records.

6.2.3 Conclusions

(i) The present law is unsatisfactory

If one accepts that the inconsistencies detected in the cases referred to in the above discussion are undesirable, then a number of possible remedies are open to the Irish legislature. The main criticism is that several common law rules and doctrines may be considered applicable to such cases, and they do not point to a consistent approach. What is argued here is that clarity and predictability in the law are to be desired in the interests of transparency and for the avoidance of unnecessary litigation, and such clarity and predictability could be achieved by statute.

(ii) Any new approach must centre around the function of the new technology

Having examined the different outcomes of various cases, it would appear that technological evidence, as to the extent to which a new device is comparable,
or equivalent, to a device or product referred to in original legislation\textsuperscript{13}, will be crucial in determining the outcomes of cases of this type in the future\textsuperscript{14}. The courts should, however, be given direction as to how to deal with such evidence. The Law reform Commission viewed that assessment of the essence of modern technology by reference to its function is the method most in line with the purposive approach. In this regard, the approaches taken by Laffoy J in Universal Studios v. Mulligan and by Barr J in Mandarin Records were considered to be the most appropriate.

(iii) Judicial discretion is unlikely to provide a consistent rule

It might be argued that it is impracticable to legislate comprehensively for cases which will always turn on the subjective understanding of the meaning of a word by a judge in a particular case. Accordingly, it might be considered preferable not to prescribe any legislative guidelines to interpretation, but instead to leave the matter to the courts, and promoting more dynamic interpretation by informal means, such as a practice directive to judges on how to deal with cases involving modern technology. Such an approach would, however, inevitably cause a significant degree of uncertainty as to which of several possible approaches might be preferred by a judge in a particular case.

(iv) A programme of statutory amendments is impractical

It might also be contended that the only appropriate means of dealing with these problems is by way of a widespread programme of legislative amendments to the general provisions and the schedules of existing legislation.

\textsuperscript{13}For example, in a letter to the New Law Journal in 1997, (1997) 147 NLJ 716, Bennion explained why he believed that courts would hold that “Dolly”, a cloned sheep, would fall within the Animals Act 1971. In doing so he listed seven approaches which he felt might be taken in such a case: the legal meaning of a word, the grammatical meaning, the presumption against absurdity, the common-sense construction rule, the mischief rule, the purpose rule, and the presumption in favour of an updated construction of a word.

\textsuperscript{14}To take the facts of the Mandarin Record case, Scales points out that some power CDs might be more analogous to records than others. There might be competing arguments for categorising such CDs as computer software applications or as databases. She believes that it is "stretching the imagination to suggest that the legislature might have intended the Section to capture a future product incorporating a mixture of different media". Scales, The Power CD, the Cat and the Controller, (December 1998) 1 Irish Business Law, 309, 311.
Such an approach would be in line with the more conservative view that the courts should never ‘do violence’ to the wording of statutes. However, the viability of such a comprehensive programme of reform is questionable, and considerations relating to resources and practicability therefore make this an undesirable proposal. Of course, there is also a fundamental flaw in such an approach, since the enactment of appropriate amendments to all our legislation, in order to perfect the statute books ‘once and for all’, would prove impossible. Continuing progress means that legislation is constantly becoming out-of-date, and the project could never be completed.

(v) The general purposive approach will not be effective in regard to older statutes

The point can be made that a purposive approach necessarily centres on the intention of the legislature, or the purpose of an enactment. In order for this intention to be clear and meaningful, there must be evidence capable of being adduced as to the relevant intention or purpose. In practice, evidence of the legislature’s intention may very often be unavailable, or may be oblique and unhelpful, and this is particularly so in relation to older legislation. In such cases, for example those involving technology that did not exist at the time of enactment, to speak of the ‘intention’ of the legislature that such objects be covered by the legislation is to indulge in a fiction. It may legitimately be argued that a parliament cannot truly be said to have ‘intended’ an effect (in the ordinary sense of ‘intention’) which it could not possibly have contemplated.

In fact, many cases involving a conflict between literal and purposive constructions of statutory language fall into this category (older statutes and modern technology).

6.2.4 Recommendations

In the final analysis, the Commission is of the view that the principle of dynamic interpretation of legislation, whereby an updated construction is applied to old statutory provisions, should be adopted, and this should take the form of a statutory provision in a new Interpretation Act. As well as the benefits discussed above, this approach has the merit of being consistent with the reasoning, in Chapter 5, which recommended a general provision setting out a purposive approach to interpretation.
One reason why it is submitted that such a statement of principle should be included in a specific provision in an Interpretation Bill is that the guidance provided by case-law in this area has proved to be inadequate. It is to be noted, however, that in the Keane case, Hamilton CJ endorsed Bennion’s view that

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any changes which have occurred, since the Act’s passing in law, social conditions, technology, the meaning of words, and other matters.\(^{15}\)

However, he went on to approve the limitation which Bennion had himself placed on the extent to which a court could accommodate changes which had occurred;

\[\text{If, however, the changed technology produces something which is altogether beyond the scope of the original enactment, the Court will not treat it as covered.}\]

The problems which have arisen in this and subsequent cases are largely due to the imprecision involved in reconciling these divergent ideas ie in interpreting in a way that makes allowances for changes which occur over time, while acknowledging that some changes lie beyond the scope of an original enactment. Thus, unfortunately, the observations made by Hamilton CJ have not fully succeeded in achieving the desirable level of clarity or consistency of approach in the law.

6.2.5 Recommended draft

The Law Reform Commission decided in the end to recommend a statutory provision which would authorise a court to make allowances for any changes which have occurred since the Act was passed, without going so far as to encroach on the province of the legislature.

\(^{15}\)Keane v. An Bord Pleanla [1997] 1 IR 184, 215, quoting Bennion, Statutory Interpretation, 618.
In choosing the formulation, the Commission kept in mind the cases where this issue had arisen and they also considered the New Zealand model. However, because they considered that the New Zealand provision was flawed, they recommend a new formulation, which draws on the remarks of Hamilton CJ in Keane. In spite of the observations made above regarding the outstanding difficulties which have not been obliterated by case-law in this area, they regard Bennion’s analysis, given judicial approval by Hamilton CJ in Keane, as a good, simple summary of desirable law and borrowed from it the formulation:

the interpreter is to make allowances for any changes which have occurred, since the Act’s passing in law, social conditions, technology, the meaning of words, and other matters.

As regards the second element of the provision, which indicates the limit that marks off the forbidden territory of judicial legislation, there are two candidates for a recommended form of words. Bennion’s version is:

[I]f, however, the changed technology produces something which is altogether beyond the scope of the original enactment, the Court will not treat it as covered,

The second possibility was the proposal of the New Zealand Law Reform Commission:

"An enactment applies to circumstances as they arise so far as its text, purpose and context permit"

This second alternative was preferred because it made it clear that in setting the limits of ‘updated construction’ approach, a court should take into account the ‘text, purpose and context’ of the measure. In other words, it emphasises that the problem is, at base, a particular question about context. The Irish courts have always been prepared to approach the question of interpretation from the perspective of the context within which a provision operates. Accordingly, in taking into account the factors identified in the New Zealand proposal, a court would be doing no more than applying this traditional approach to the problem under consideration here, ie the application of statutory provisions in altered circumstances, with the passage of time.
As a result, the following draft was recommended for the Interpretation Act:

In construing a provision of an Act, a court may make allowances for any changes, in law, social conditions, technology, the meaning of words used in the Act and other relevant matters, which have occurred since the date of the passing of the Act, so far as its text, purpose and context permit.
Chapter 7

Legislative Drafting
7.1 Overview

The movement towards plain language in legislative drafting reflects a broader movement towards more comprehensible language in contracts, forms and other legal documents. The Plain English Campaign\(^1\) has been in existence for 25 years and there has already been much reform in these areas. The campaigns aim is to promote the use of a construction in forms and other documents that is “as simple as possible but no simpler”. The campaign refers to the use of “ordinary language, reinforced ... with graphics and other drafting tools, and with constant emphasis on purpose” (\(?\)).

One can discern a more general trend in this direction in the wider legal and commercial worlds. Indeed, this issue is now considered so significant that an insurance company recently thought it worthwhile to highlight the fact that their policies were drafted in plain English, in an effective radio advertisement which included the punch-line (referring to the drafting of their policies); “no guff; no guitar solo”\(^2\)

In spite of these general trends, it must be admitted that the language and style of statute law has remained largely unchanged. However, many jurisdictions have embarked on reform projects to improve the quality of their legislation and these will be referred to briefly below.

The topic of drafting reform can be divided into four broad areas. The first three of these are concerned with the ‘readability’ of statutes i.e. they are directed to ways in which the quality and clarity of statute law can be improved and ambiguity thus avoided. The fourth area investigates the question of whether it is possible to make a clear authoritative statement of the purpose of an Act, either within the Act itself, or in material published with it.

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\(^1\)Plain English Campaign is an independent pressure group fighting for public information to be written in plain English. They have more than 8000 registered supporters in 80 countries and have published many guides and books covering the law, advertising and all areas of public information.

\(^2\)quotes taken from (Language on Trial, 1996).
The four areas that will be examined in this Chapter are:

1. **Language**
2. **Structure and Content of Statutes**
3. **Amendment and Consolidation**
4. **Legislative Statements of Purpose**

### 7.2 Language

**7.2.1 Familiar vocabulary should be used in legislative drafting**

The use of Latin and French terminology or other archaic language obscures the meaning of the law. Latin and French are now rarely used in ordinary conversation in Ireland, but words such as ‘herein’, ‘heretofore’, ‘aforesaid’ and ‘aforementioned’ are frequently used in legislation. Because their use is now largely confined to legal contexts, they are not always readily comprehensible to most members of the public. Similarly, the persistent use of the word ‘shall’, when the modern meaning of the word ‘must’ would be more appropriate, can obscure the meaning of even simple legislative provisions. Peter Rodney, legislative draftsman for Gibraltar, recommends the Data Protection Act, 1998, in the United Kingdom, as an example of how ‘must’ is now being used in place of ‘shall’ to improve the clarity of statute law. The ongoing use of archaic words also extends to the use of certain specialised formulae, such as “An Act may be cited as..”, which might usefully be replaced by a more modern phrase such as “An Act is called...”.

Similarly, there has been a tendency to use excessively formalised words in legislation, long after those words were replaced in common usage by simpler expressions. For example, the legislature continues to use the word ‘facsimile’, in spite of the fact that the public, almost universally, prefers the term ‘fax’. Another example of this legislative characteristic is provided by

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3For example, see the Criminal Evidence Act, 1992, s.30(2).
the Electronic Commerce Act, 2000, which uses the obscure term ‘electronic communication’, in place of the common term ‘e-mail’.

7.2.2 Shorter sentences should be used in legislative drafting

In general, it is recommended that sentences should not exceed 20-25 words in length, as over-lengthy sentences obscure the central message of a sentence. One of the main reasons for the prevalence of long sentences in legislation is the convention that a section within an Act should consist of one sentence only. It would appear that most draftsmen still follow this convention, even though there would appear to be no pressing reason for its strict observance. Very often, too, draftsmen include words that appear superfluous. This is probably a symptom of an excess of the traditional care taken to ensure that there is no omission in a section. The common practice of using two or three words, with a similar meaning, in succession, when one noun would suffice is equally unnecessary.

For instance, section 27(2) of the Local Government (Planning and Development) Act, 1976, (as substituted by section 19(4)(g) of the Local Government (Planning and Development) Act, 1992), states:

... the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not that person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be...

Typical examples of unnecessary use of synonyms and words with similar meanings are:

- last will and testament,
- give, and bequeath,
- null and void,
- rest, residue and remainder,

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4Electronic Commerce Act, 2000, s.12.
• act and deed.

The Law Reform Commission of Victoria addressed this issue in its Discussion Paper, Legislation, Legal Rights and Plain English\(^5\). It concluded that the use of surplus words, particularly synonyms, often caused confusion by suggesting a distinction between those words when in fact none existed or was intended. As a consequence, unnecessary repetition of words is no longer seen in Victorian legislation.

7.2.3 Complex and obscure sentence structures

A major problem with present drafting practice is the use of sentence constructions that are unusual and not readily understandable. There have been several studies and recommendations made on this point over the years, generally to the effect that sentences should be direct and as close to common English usage as possible\(^6\). The excessive use of conditional clauses and the passive voice, the preference for negative over positive expressions and the separation of subject and verb, are the most pronounced examples of this.

The customary separation of subject and verb within a sentence often means that a reader will have to read through a series of clauses before gaining an understanding of the principal significance of a sentence. A simple example of this problem is provided by section 294 H (2) of the Social Welfare (Consolidation) Act 1981, as inserted by section 27 of the Social Welfare Act, 1993. The section, as drafted, reads as follows:

An employer or any servant or agent who aids, abets, counsels or procures an employee in the employment of that employer to commit any offence under subsection (1) shall be guilty of an offence.

When one brings the subject and verb of the sentence together, however, it is more easily understood;

\(^{5}\)Law Reform Commission of Victoria, Discussion Paper No. 1, Para.24.

\(^{6}\)Examples of such studies include Eagleson, Writing in Plain English, (Commonwealth of Australia, 1990) and Redish, ”The Plain English Movement”, in Greenbaum, The English Language Today (Pergamon Press, 1985).
An employer or any servant or agent of an employer shall be guilty of an offence if he aids, abets, counsels or procures an employee in the employment of that employer to commit any offence under subsection (1).

A second point is that there should, generally, be greater use of the active instead of the passive voice. There are occasions when it is more appropriate to use the passive voice to emphasise an act rather than its agent. However, on the whole, present drafting style makes far too much use of the passive voice, often obscuring the central message of a section.

Thirdly, there is an unfortunate tendency in drafting to make a statement in the negative sense rather than in the direct positive sense. Again, there may be times when this is appropriate, but generally a positive statement is clearer and more to the point.

Cohesion among sections

The practice of constantly referring back to other sections and sub-sections of an Act, in order to explain the context of a provision, is often unnecessary. Where the sections or sub-sections involved are contained in the same document, this constant cross-referencing often merely confuses and obscures the meaning of the provision.

The creation of unnecessary concepts

Similarly, constant use of concepts, such as “the relevant period” and “the appropriate date”, in an Act forces the reader to look elsewhere for information which could just as easily be given directly in place of those phrases. This use of unnecessary concepts also tends to obscure the significance of a particular provision.

Other Jurisdictions

The United Kingdom Tax Law Rewrite Project\textsuperscript{7}, which commenced in 1996, will re-write almost the entirety of direct tax legislation in plainer language.

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and in more accessible format, without changing or making less certain its effects. In this re-writing, the major technique used is the arrangement of the material around a more logical structure. Similar rules are grouped together and greater use is made of signposts to guide the reader to other relevant provisions. Other techniques which make the legislation more accessible include method statements, examples and formulae. In addition, the drafting style is characterised by the following: shorter sentences; use of the active rather than the passive voice; and the replacement of archaic expressions. Care is taken however to avoid 're-writing' words or expressions on which legal usage has stamped a well understood meaning. The British Parliament has adopted a new streamlined procedure which will allow it to scrutinise the re-written legislation properly, without opening up a debate on a full range of fiscal policy matters. Likewise, a ‘Corporations Law Simplification Programme’ was established in the New South Wales Attorney General’s Department as far back as 1993.

7.2.4 Comment and Analysis

Most of the recommendations made by the various Law Reform Commissions and the Plain English Campaign in relation to plain language are non-controversial. Generally, they are designed to make legislation easier to read, both for lawyers and lay persons; many of them amount to little more than common sense. An updating of the language and structure of statutes would reflect the evolution of the English language and of the needs of today’s consumers of legislative instruments.

Sometimes brevity does not imply clarity; slightly more obscure words may sometimes be appropriate. In essence, plain language is just one of the factors to be considered in the drafting process, and its relative weight will vary according to the circumstances. Plain language should never be utilised at the expense of legal certainty, particularly where certain words and grammatical constructions, though not in common usage, have acquired a fixed and clear legal meaning. However, in cases such as the examples given above, it is difficult to see how anyone could be misled by modern language which merely clarifies the meaning of a provision for a reader. It is noteworthy in this regard that, by and large, the judgments of our courts are written in comprehensible and precise, but also readable, English.

Concern has sometimes been expressed about the resources which would
be required to implement a programme of plain language reform. However, according to the “Plain English Campaign” any short-term costs would be outweighed by the long-term benefits of removing much of the ambiguity and uncertainty which currently affects statutory interpretation. It is also worthy to point out that plain language reform is a project which will probably have to be undertaken at some stage in the near future, bearing in mind the continuing increase in the amount of new legislation coming before the Oireachtas and of course European legislation.

7.3 Structure and Content of Statutes

The layout and structure of statutes are also important. Issues which arise under these topics include general points such as the organisation and numbering of statutes and improved typography. For example, the highlighting in bold of terms which have been defined earlier in an Act directs a reader to the statutory definitions provided.

Use of examples

There should be increased use of examples in statutes, given that research in the general area of communication has shown that examples increase the ability of a reader to understand complex concepts. However there has been some concern expressed that examples should not form part of a substantive Act, as they may constitute restatements of the enacting provisions of the Act.

The use of examples violates the precept - once thought to be fundamental to drafting style - that a statute should contain no repetition. It has been argued that an example within an Act could possibly conflict in some way with the literal meaning of the provision itself, and that if the example had also been given authoritative status, confusion would result. Although a Colloquia held by the Commission disclosed that judges no longer regard the rule against repetition as inviolable.

Use of maps, diagrams, mathematical formulae, etc.

The use of maps, diagrams and mathematical formulae should be used if they can help to clarify the context or effects of a statute. In particular,
simple mathematical formulae can be used in legislation in place of complex jargon which may require many words and a tortuous series of clauses and sub-clauses to convey the same meaning in English. For instance, the United Kingdom Tax Rewrite Project Tax law demonstrates the possible use of mathematical formulae, charts and diagrams in the context of plain language reform. The project is widely regarded as a great success.

### 7.4 Amendment and Consolidation

As has been already stated, Updating and consolidation of the statute book are important issues in maintaining the accessibility of the law. These twin issues are primarily matters for the Office of the Attorney General and the Parliamentary Counsel who have already initiated a number of projects designed to address these. These projects include:

- A Statute Law Revision Unit was established in the Office of the Attorney General in February 1998 to draw up and co-ordinate a programme of revision and consolidation.

- In August 2000, the Law Reform Commission submitted to the Attorney General a Law Reform (Miscellaneous Provisions) Bill, setting out a series of proposed statutory amendments on a range of topics. The purpose of the Bill is to effect minor, but valuable, reforms in a variety of legal areas; reforms that would not in themselves justify the introduction of individual Bills.

- The Revenue Commissioners have published two major consolidating statutes in recent years; the Taxes (Consolidation) Act, 1997 and the Stamp Duties (Consolidation) Act, 2000. The Department of Social, Community and Family Affairs has also published Consolidation Acts at intervals of ten years in the area of social welfare law.

### 7.5 Legislative Statements of Purpose

One strategy that would help in avoiding the need to look outside an Act for evidence of legislative intention, would be the inclusion of a statement of purpose in the statute itself. There are several ways in which a draftsman
can present such a definitive statement of the object or purpose of an Act, namely through a preamble, a purpose clause or a recital. Essentially there are no significant differences among these options. An alternative approach would be to include a statement of purpose with explanatory material that would be published with the statute. Generally, such explanatory material is presented in the form of explanatory memoranda (but it may also, for example, take the form of explanatory notes, as occurs in England).

7.5.1 Statements of legislative purpose in an Act

Preamble and Recital

The ‘preamble’ is an optional part of an Act, which, if present, is placed after the long title and states the reason for the enactment of the statute. It serves as a form of introduction to an Act, indicating the purpose of the substantive provisions which follow. A ‘recital’ has the same function as a preamble, but its scope is confined to a single section of an Act. In other words it is a comment upon, or introduction to, a particular section, setting out the purpose of the section. One might think that a useful source of explanatory material could be provided by the inclusion of such features within an Act. However, actual practice in Ireland has tended not to make much use of either preambles or recitals.

Purpose Clauses

Neither has it been the practice in Ireland to include purpose clauses in the drafting of statutes. The only recent example of such a clause cited by the Reform Commission, was in the Taxes (Consolidation) Act, 1997, where section 806(3) states:

This section shall apply for the purpose of preventing the avoidance by individuals ordinarily resident in the State of liability to income tax by means of transfers of assets by virtue or

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8The long title of an Act may also disclose the purpose of the Act
9The long title and preamble have, on occasion, been referred to interchangeably in the Irish Courts. In the case of Croke v. Smith, Supreme Court, July 31 1996, Hamilton CJ uses the term ‘preamble’ to refer to the long title of the Mental Health Act, 1945.
in consequence of which either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the State\textsuperscript{10}.

On further investigation, however, it was discovered that this section of the Act is based on a section contained in a corresponding English statute. The reasoning behind the inclusion of sub-section (3) in the Irish Act was that it would be inappropriate to import the whole section from the English Act without including all its constituent parts - including the purpose clause. It would appear, then, that the section cannot be taken as evidence of any new policy in Ireland to make use of such clauses. It may be of interest to note that in Bermuda, all Acts have an 'objects' section setting out the purposes of the act in question\textsuperscript{11}.

Comment

It is significant that the use of purpose clauses is standard practice in European Union legislation, an increasingly important source of Irish law. It is, of course, possible to envisage cases where a legislative statement of purpose could resolve a point of uncertainty in statutory interpretation, in much the same way as an intrinsic aid. For example, the case of Murphy v. Bord Telecom would almost certainly have been decided differently if there had been a clause in the Equal Pay Act setting out the objects of the Act. The controversies about the origin and status of the material would most probably never have arisen.

However, some people are still sceptical about whether the use of purpose clauses would have such a clarifying effect. Admittedly, it is difficult to see

\textsuperscript{10}An earlier, analogous provision - section 57 of the Finance Act, 1974, contained the following, more complex formulation: "For the purpose of preventing the avoiding by individuals ordinarily resident in the State of liability to tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the State, it is hereby enacted as follows..."

\textsuperscript{11}Rodney, Legislative Counsel for Gibraltar, in a Paper delivered to "Emerging Trends in Legislative Drafting", a Conference hosted by the Attorney General, Dublin Castle, 6-7 October 2000.
how a single purpose clause could resolve all, or even most, of the potential ambiguities in a statute. And there may be other problems associated with the use of purpose clauses. There has been some suggestions that a purpose clause could become the focus of debate in the Oireachtas, diverting attention from the substantive provisions of a Bill. There is certainly a perception that such clauses might be open to abuse by members of the Oireachtas, who might propose purpose clauses designed to give legislation the appearance of being something other than it is. Such clauses might not accurately reflect the content of the substantive provisions of a Bill and there may be a danger of conflict between the actual provisions contained in a Bill and its politically-motivated purpose clause.

7.6 Explanatory Memoranda

Explanatory memoranda are published with Bills, for the purpose of providing guidance to members of the Oireachtas when Bills come before the Dáil and Seanad. The use of explanatory memoranda has become more common in recent years. However, some judges have remarked that explanatory memoranda were of more assistance to interpretation in previous times, when they were published more selectively with some Bills. A factor to be noted is the variation in quality and content of memoranda; this may result from the fact that memoranda are drafted in the various Departments of State, rather than by the Office of the Parliamentary Counsel to the Government. Very often, these Departments may have little or no in-house legal expertise.

7.6.1 Explanatory Notes in England

In England, explanatory and (usually brief) financial memoranda have been replaced by fuller “explanatory notes” since the beginning of the 1998-1999 parliamentary session. These notes are the result of a recommendation of the House of Commons Select Committee on Modernisation, and are

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12 Similar concerns have been expressed in relation to statements made during Oireachtas debates and consequential dangers in their use as extrinsic aids.
published with all Bills. They are prepared when a Bill is first introduced to Parliament and are later revised, both when the Bill moves to the House of Lords and when it receives Royal Assent. These updated versions reflect any amendments that may have been made since the earlier version. Another innovative development is that these notes are made available in both printed form and on the internet. However, the notes are prepared in the relevant Departments and do not receive the draftsman’s approval. Also, and most importantly, they do not form part of the Bill itself.

7.6.2 Comment

Explanatory memoranda have the status of extrinsic aids, given that they do not constitute part of the Act itself. Nonetheless, it has been suggested that the involvement of draftsmen or Parliamentary Counsel in the preparation of explanatory memoranda or notes, or at least some standardisation of these materials, would improve their usefulness. Many judges expressed concern that both the length and the quality of explanatory memoranda are quite variable. Against this, the point has been made, in the English context, that there is a greater degree of flexibility associated with the drafting of explanatory notes within government departments. The draftsman’s customary methods are informed by the goals of consistency, certainty and precision. If explanatory materials had to be drafted or approved by draftsmen, it is likely that they might be in a more rigidly standardised form.

At one of the Commissions Colloquia it was a major concern, particularly of the parliamentarians present, that explanatory memoranda could often become misleading in a situation where a Bill had been heavily amended in the Oireachtas. However the point was made by the Commission that they felt there was no reason why a later, definitive, version of the memorandum should not be published when a Bill actually becomes law. And they pointed out that updated versions of explanatory memoranda have been published with important Acts in the past.
Chapter 8

Summary Of Recommendations
Moderately Purposive Approach to Statutory Interpretation

- The Commission recommends that a standard approach to statutory interpretation should be set out in legislation.
- The Commission recommends that the literal rule should remain the primary rule of statutory interpretation.
- However, the Commission recommends that a court should be enabled to depart from the literal interpretation and prefer an interpretation based on the plain intention of the Oireachtas, where a provision of an Act is ambiguous or obscure; or when a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas. The plain intention of the Oireachtas in such cases should be gleaned from a reading of the Act as a whole.
- The Commission is of the view that a provision enacted in accordance with the above recommendations need not contain any express exception for penal or tax statutes.

Updated Construction of Older Statutes in the light of Recent Developments

- The Commission recommends a provision which would authorise a court to make allowances for changes which have occurred in law, social conditions, technology, the meaning of words used in an Act and other relevant matters, which have occurred since an Act was passed; yet without going so far as to encroach upon the province of the legislature.

Intrinsic Aids to Construction

- The Commission is of the opinion that the courts should have a discretion to take into account all potentially helpful material in interpreting a statutory provision, save where there is a good reason to the contrary. As a consequence, judges should enjoy a discretion to have regard to material that is published alongside the substantive sections.
of a statute, allocating whatever weight is apt, to these various sources of enlightenment.

- To achieve this, the Commission recommends that s.11(g) of the Interpretation Act, 1937 should be repealed, and that a provision should be enacted which would positively authorise a court to have regard to intrinsic aids.

**Extrinsic Aids to Construction**

- The Commission is of the view that a court should be free to make reference to extrinsic aids in interpreting a statutory provision, where the provision is ambiguous or obscure, or where a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas.

- The Commission considers that while it is appropriate that a large measure of judicial discretion should be retained in this area, a legislative framework should nonetheless be put in place, rather than leaving the matter entirely to the courts.

- The Commission recommends that the use of extrinsic aids for these purposes should be restricted in two ways: first, by an exhaustive list of the permissible categories of extrinsic aids to which a court may refer; and secondly, by the stipulation of certain contra-indications which a court must consider before using extrinsic aids to construction.

- The Commission recommends that the official record of debates in the Dáil or Seanad should be included among the extrinsic aids to which a court may refer.

**8.0.3 Legislative Drafting**

- The Commission recommends that a comprehensive programme of reform of Irish law, with a view to replacing existing statutory provisions with alternatives expressed in plain language, be undertaken. In this
regard we support the initiatives currently being undertaken by the Office of the Parliamentary Counsel to the Government and the Statute Law Revision Unit.

• The following policies or devices should be adopted where possible and appropriate:
  – familiar and contemporary vocabulary in legislative drafting;
  – shorter and less complex sentences;
  – the active, rather than the passive, voice;
  – positive statements, rather than negative ones;
  – the avoidance of multiple cross-references between sections and subsections of the same Act;
  – the replacement of concepts, such as ‘the relevant period’, or ‘the appropriate date’, with more specific information where this would be clearer;
  – increased use of examples, maps, diagrams and mathematical formulae; and
  – the highlighting in bold font of terms defined earlier in an enactment.

• However, the Commission wishes to emphasise that while the use of plain language is desirable, this end should not be achieved at the expense of legal certainty, especially where certain words and grammatical constructions, though not in common usage, have acquired a fixed and clear legal meaning.

• The Commission recommends that ‘purpose clauses’ should be included where appropriate, and supports the view that this ought to be done, in particular, where an Act gives effect to European legislation which itself has such a ‘purpose clause’.

• The Commission recommends that explanatory memoranda should accompany legislation where appropriate; such explanatory memoranda should reflect any amendments made at the various stages of a Bill’s passage through the Houses of the Oireachtas, and should, when published, be made available on the internet.
Chapter 9

Conclusion
9.1 Overview

In this chapter I will briefly summarize the project, outline the achievements I feel I have gained as a result of this project, and will conclude by suggesting possible directions for future work.

9.2 Summary

This project explores, analyses and highlights the linguistic phenomenon of ambiguity and in particular when it can be critical. In chapter 2 I talked about and explained ambiguity from a theoretical point of view. There is a wealth of literature on this subject and I feel that I have brought together and presented a concise and representative picture of what ambiguity is and the many different aspects to it.

Chapter 3 continued in this vein but concentrated on ambiguity from a psycholinguistic viewpoint. I looked out how we process ambiguity, what makes words and phrases ambiguous, and then aspects of ambiguity resolution.

In Chapter 4 the concept of Critical Ambiguity was presented. We saw (in Chapter 1 and 2) how and where ambiguity can exist without causing too much trouble as humans have adapted to it and use world knowledge and context to disambiguate, however this chapter introduces the idea that ambiguity can indeed make a difference and have serious consequences. I talked about how ambiguity is used in diplomacy and to what effect. I gave case study examples and also represented the arguments for and against its use.

In Chapter 5 I continued on with the concept of critical ambiguity also staying in the legal arena but moving towards home and the Irish Legal system. I talked about statutory interpretation, explaining the purposive and literal rules and gave examples of cases where the outcome hinged on ambiguous terms, how the cases were argued and the judges findings.

In Chapter 6 I continued on with the theme of ambiguity in the Irish Legal System and talked more about problems of interpretation with respect to older statutes applying and being relevant to modern times. This Chapter highlighted the fact that language is an ever changing entity and that it is necessary for the legal systems to take this into account when both drafting and interpreting legislation.
Finally, in chapter 7 I present and discuss the current obstacles and failures in the law which continue to allow ambiguity to prevail.

9.3 Achievements and knowledge gained

Although I found it difficult to be present at court cases where an ambiguous provision has been debated due to time-tabling constraints, I feel that I have given quite a representative set of case examples of how different judges interpret and argue different ambiguous wordings. By doing this project I have gained a new interest in law and the whole legal arena and have come to see how it really does all hinge on language to a great extent. This project necessitated a crash course in law which I feel will stand to me in years to come. My skills in research and project preparation and construction have multiplied ten fold, and this in an important skill which I am also grateful for having improved. The aim of this thesis, as outlined in section 1.3 of the Introduction was to contribute in some shape or form to the existing framework of theories in the area of critical ambiguity research and I have achieved this to the best of my abilities.

9.4 Suggestions for further work

As the study and research into the area of critical ambiguity is relatively young, there is an enormous opportunity for anybody wishing to continue on with further study in this area. Both this project, and its predecessor (Coen, 2002), looked in detail into the arena of jurisprudence where ambiguity thrives and often results in dramatic consequences. However, critical ambiguity is rife in all walks of life, including diplomacy, as talked about in chapter 4. However, as was discussed in that chapter ambiguity can often be critically important\(^1\) when faced with a dilemma and this whole concept of “Critically Important Ambiguity” would be a very interesting area of research which would cover things like such as politeness strategies and a more indepth analysis of it’s diplomatic usage.

\(^1\)In the positive sense!
9.5 Conclusion

I found doing this project thoroughly stimulating and insightful on many levels. Not only have I come to realise the sheer depth and pervasiveness to which ambiguity extends to varying degrees in language but also I have come to see how important, useful, and sometimes essential, ambiguity can be, and how accepting ambiguity can indeed allow one to be a more critical thinker and open minded individual thus helping one to better deal with situations and people in this increasingly grey world that we inhabit.
Bibliography


