



## Pepper v Hart

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Following the decision in *Pepper v Hart* in 1993, if primary legislation is ambiguous or obscure the courts may in certain circumstances take account of statements made in Parliament by Ministers or other promoters of a Bill in construing that legislation. Until that decision, using Hansard in that way would have been regarded as a breach of Parliamentary privilege.

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## A. The *Bill of Rights*

Article 9 of the *Bill of Rights 1689* provides:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Article 9 gives the members of each House the right to say what they will (freedom of speech) and discuss what they will (freedom of debate). It is therefore generally regarded as “a cornerstone of parliamentary democracy”.<sup>1</sup> However, there is uncertainty as to what is covered by Article 9 and what, in a modern democracy, ought to be covered. Until 1993, the protection given by Article 9 was held to prevent the courts from using statements made in Parliament concerning the purpose of Bills as a guide to the interpretation of ambiguous statutory provisions.<sup>2</sup>

## B. The Joint Committee on Parliamentary Privilege’s commentary on *Pepper v Hart*

The report of the Joint Committee on Parliamentary Privilege describes the case of *Pepper v Hart* which led to the lifting of this restriction:

The case concerned the proper meaning of a taxation provision. Mr Hart was a schoolmaster at a fee-paying school which operated a concessionary fee scheme enabling members of staff to have their sons educated at the school at reduced fees if surplus places were available. Tax was payable by Mr Hart on ‘the cash equivalent of the benefit’, but the statutory definition of that expression was ambiguous. During the committee stage of the Finance Bill in the House of Commons the financial secretary to the Treasury indicated that the basis of taxation for certain benefits in kind would remain the cost to the employer of providing the service. When pressed he interpreted this as being, in effect, the extra cost caused by the provision of the benefit in question. In Mr Hart's case the actual additional cost to the employer was negligible, because boys educated through the scheme were filling places which otherwise would have been empty. However, relying on the wording in the Act, the Inland Revenue had taxed a proportion of the total cost of providing the services.

The House of Lords in its judicial capacity decided that clear statements made in Parliament concerning the purpose of legislation in course of enactment may be used by the court as a guide to the interpretation of ambiguous statutory provisions. The Lords held such use of statements did not infringe article 9 because it did not amount to questioning a proceeding in Parliament. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what was said and done there. Lord Browne-Wilkinson said:

‘I trust when the House of Commons comes to consider the decision in this case, it will be appreciated that there is no desire to impeach its privileges in any way. Your Lordships are motivated by a desire to carry out the intentions of Parliament in enacting legislation and have no intention or

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<sup>1</sup> HC 214-I of 1998-99, para 36

<sup>2</sup> *Pepper (Inspector of Taxes) v Hart* [1993] AC 593

desire to question the processes by which such legislation was enacted or of criticising anything said by anyone in Parliament in the course of enacting it. The purpose is to give effect to, not thwart, the intentions of Parliament.’

A similar principle had already been adopted in Australia and New Zealand before the English decision in *Pepper v Hart*. It had also been adopted earlier in England, in *Pickstone v Freemans*, in the context of subordinate legislation, but in that case the admissibility of the parliamentary material seems not to have been questioned.<sup>3</sup>

The Joint Committee did not object to the development introduced by *Pepper v Hart*:

Parliament must be vigilant in protecting its freedom of speech. Any departure by the courts from hitherto accepted practice must be scrutinised thoroughly to see whether, *as a matter of principle and practice*, it is justifiable. Applying that test the Joint Committee is of the view that the development outlined above in *Pepper v Hart* is unobjectionable. This use of parliamentary proceedings is benign. The Joint Committee **recommends** that Parliament should not disturb the decision in *Pepper v Hart*. However, it is important that this specific court decision should not lead to any general weakening of the prohibition contained in article 9.<sup>4</sup>

The rule remains that Hansard is inadmissible as statutory interpretation except within the conditions laid out in Lord Browne-Wilkinson’s ruling.

### C. Concerns about the ruling

Three main concerns were raised about the implications of *Pepper v Hart*. Lord Mackay, who gave dissenting opinion in the ruling, felt that lawyers would feel obliged to consult Hansard as a matter of course, thus leading to longer and more costly cases. The development of Hansard as an online resource in the years since 1993 has made this concern less valid on practical grounds, as the cost and time taken to search Hansard volumes has decreased dramatically.

The reliability of statements made in the House was also held to be a potential cause of concern. Sir Rupert Cross, in *Statutory Interpretation*, quotes Reed Dickerson, the American authority on statutory interpretation, speaking here about Congress, to illustrate that point:

Not only are they laden with sales talk, but their frequent references to what a provision means is an unconscious effort to finesse [is delicately manipulate] the courts in performing their constitutional function of having the last word of what the statute means.<sup>5</sup>

In 1994, during a debate on the Education Bill, a Minister was expressly invited to give an interpretation “under the ruling in *Pepper V Hart*”.<sup>6</sup> This has not been common practice.

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<sup>3</sup> Ibid, paras 43-44

<sup>4</sup> Ibid, para 45

<sup>5</sup> Sir Rupert Cross, *Statutory Interpretation*, 3rd edition, Butterworths, 1995 p159, citing “Statutory Interpretation in America: Dipping into Legislative History”, [1984] Stat LR 76 at 82

<sup>6</sup> 557 HL Official Report (5th series) col 83

The final reservation that Lord Mackay stated was possible over-reliance on Hansard in statutory interpretation cases. Although *Pepper v Hart* has been referred to more often than the conditions for admission would support, recent House of Lords judgments (in particular *R v Secretary of State for the Environment, Transport and the Regions ex p. Spath Holme Ltd*)<sup>7</sup>, have insisted that these conditions for admissibility be strictly complied with, in order to reduce the amount of Parliamentary material relied on.<sup>8</sup>

#### **D. Recent rulings and comment related to *Pepper v Hart***

In 2003, the House of Lords, in the judgment on *Wilson and others v Secretary of State for Trade and Industry*, restated the scope of *Pepper v Hart*, accepting that its purpose was to require the executive to honour any legitimate expectations created, but stated:

The court is called upon to evaluate the proportionality of the legislation, not the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights.<sup>9</sup>

The introduction in recent years of Explanatory Notes to Bills, which are written and revised as legislation passes through the House, has negated some of the need to examine individual statements. In his ruling on *R (Westminster City Council) v National Asylum Support Service*, Lord Steyn made it clear that he considered Explanatory Notes admissible, even when the statute was unambiguous:

... Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible as aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible. ...

If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.<sup>10</sup>

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<sup>7</sup> [2001] 2 AC 349 at 391–392, 398–399, 407–408 and 413

<sup>8</sup> March 2004, JR

<sup>9</sup> *Wilson and others v Secretary of State for Trade and Industry* [2003] UKHL 40 at 67.

<sup>10</sup> [2002] UKHL 38 [2002] 1 WLR 2956

Lord Steyn's final comment reflected his earlier thoughts on attempting to determine "the intention of Parliament", which he outlined in a lecture that was reprinted in the Oxford Journal of Legal Studies:

It would have been a fiction for the House to say that as a matter of historical fact the explanation of the Financial Secretary reflected the intention of Parliament. Such a fact cannot in the nature of things be deduced from Hansard. Arguably the House may have had in mind in *Pepper v Hart* that an intention derivable from the Financial Secretary's statement ought to be imputed to Parliament. If that were the case, the reasoning would rest on a complete fiction. My view is that the only relevant intention of Parliament can be the intention of the composite and artificial body to enact the statute as printed. If there is substance in this part of the analysis, it tends to undermine the very core of the reasoning in *Pepper v Hart*.<sup>11</sup>

## E. Further reading

Further reading on this issue is contained in:

- *Erskine May*, 23rd ed (2004), pp 106-108;
- Francis Bennion, *Statutory Interpretation*, 4th ed 2002
- Geoffrey Marshall 'Hansard and the interpretation of statutes' in D Oliver and G Drewry (eds), *The Law and Parliament*, 1998.

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<sup>11</sup> Johan Steyn, "Pepper v Hart; A Re-examination", *Oxford Journal of Legal Studies*, Vol 21, No 1, 2001, p66