# *Chapter 23*

# Vagueness

We have been concentrating on the imprecision of legalese but many expressions that would be considered plain English are equally vague.

For instance, how precise is *precise*? Euclidean geometry and Newton's mechanics were thought to describe the world with absolute precision until increasingly sophisticated instruments showed that they were slightly inaccurate.

In the familiar, everyday world of precise legal texts, a parcel of land *100 metres long* might measure 100.1 metres; and a parcel more precisely described as 100.0001 metres might in reality be 100.0000009 metres long.

In *OFT* v. *Foxtons* (2009), Mann J held that the terms *associated* and *connected* were too vague in their context – the letting agent's standard terms of contract – to be *plain and intelligible* to their client landlords:

> When similar words are used in statutes they are closely defined (see for example the Insolvency Act 1986) … Without some form of definition they are vague words. That is not to say that a court could not give them a meaning or apply them if it had to. The point is not that they are void for legal uncertainty. The point is that they are too vague to be classed as plain and intelligible. How far do they go? A spouse almost certainly; but a spouse's relative? How far up, down or sideways in a family chain does the expression take one? A company of which the tenant is the sole shareholder may well be connected or associated, but what about a lesser shareholding? What of a company by whom he has long been employed? On one reading of the clause the link is capable of being forged by more removed connections – it would cover the situation where X is connected with company C which is connected to tenant T.

Can a landlord object to a tenant's advertisement when the lease permits only a *small* sign showing the name and nature of the business? 'That's small,' says the tenant. 'No, it isn't,' says the landlord. Unless the sign is so disproportionate to the size of the building that the outcome could not be (much) in doubt, few landlords would consider the problem worth the expense and risk of litigation, so the clause is unenforceable. A drafter with forethought would specify the maximum size in the lease.

The *Shorter Oxford English Dictionary* has over 2,600 pages; *shorter* is not the same as *short*. Nor should *older* be the same as *old*, unless we want to surrender a useful distinction to the fashionable euphemism.

There are no categories in nature. We impose them on the world to help us make sense of it, and words help us do it. *Young* shades gradually into *old*, *blue* into *green*, *good* into *bad*, *rich* into *poor, fast* into *slow*, *often* into *rarely*, *some* into *many*, *jog* into *run, cottage* into *house*, *house* into *mansion,* and *careful* into *negligent.* This lack of clarity doesn't matter in nature, though it sometimes matters greatly in law. A careful drafter must decide the appropriate degree of precision, balancing flexibility against complexity.

But the fuzzy edge around the meaning of a word is not the only reason that absolutely precise legislation is impossible.

As words only approximate the reality they seek to describe, so also they only approximate the thoughts in people's heads, as accurately as they need to for the uses to which they are normally put. Greater accuracy would be tiresome and uneconomic. So the details of a concept can vary from one person to another, even when they use the same word and think they are talking about the same thing. Heffer (2013, p.215) compares Lord Goddard LCJ's dictum in *R* v. *Summers* (1952) …

> I have never yet heard a court give a real definition of what is a 'reasonable doubt', and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity … The jury should be told that it is … for the prosecution to prove [the defendant's] guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one

… with that of his Australian counterpart, Dixon CJ in *Dawson* v. *R* (1961):

> In my view it is a mistake to depart from the time-honoured formula. It is, I think, used by ordinary people and is understood well enough by the average man in the community. The attempts to substitute other expressions, of which there have been many examples not only here but in England, have never prospered. It is wise as well as proper to avoid such expressions.

How small a doubt can be without becoming unreasonable will vary with each juror's (or judge's) view of Blackstone's (1765) principle that

> It is better that ten guilty persons escape than that one innocent suffer.

Sir Matthew Hale, published posthumously in 1736 but writing a century before Blackstone, had put it at five guilty escapers. A politician 'tough on crime' may opt for a lower figure, as did the Roman Emperor Trajan and the Criminal Law Revision Committee (1972), neither of whom were prepared to let slip more than one wrongdoer for each innocent spared. The more liberal 12th century Talmudist Maimonides preferred a thousand mistaken acquittals to one wrongful conviction. In a detailed but witty historical review Alexander Volokh (1998) lists many other ratios that have been proposed. The modern alternatives to *reasonable doubt – satisfied so that you are sure* or just *sure* – don't help, as no juror can be absolutely sure of

anything except his or her own existence. No form of words can solve the problem because the concept behind them is incurably vague, even though it is – as one perspective of the presumption of innocence – an essential part of our liberty and of the rule of law (Wolchover & Heaton-Armstrong, August 2010).

There is a third problem. A rule should be worded in sufficiently general terms to apply, in the way the legislators want, in all the circumstances that might arise. But those circumstances are infinitely variable and often unpredictable, so judges will always be needed to fine-tune the boundaries in borderline cases, and also in 'hard' cases – those where the strict application of a clear rule would produce an unwanted result.

Let's consider H.L.A. Hart's much discussed (1958) example of what he calls the *open texture* of language:

> No vehicles are allowed in the park.

It would be an ingenious litigator who challenged the meaning of *No*, *are*, *allowed*, or *the*. But is a helicopter hovering over the grass a vehicle? Probably yes (although in *McBoyle* v. *United States* (1931) the Supreme Court held that for the purposes of the relevant legislation an aeroplane wasn't a vehicle). And is it in the park? At the time of Hart's article, the *Shorter Oxford English Dictionary* defined *vehicle* (in more or less the sense intended here) as:

> A means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, sledge, etc. … A receptacle in which anything is placed in order to be moved.

But its other definitions of *vehicle* included

> A means or medium by which ideas or impressions are communicated or made known

and

> A material means, channel, or instrument by which a substance or some property of matter (as sound or heat) is conveyed or transmitted from one point to another.

So does the bye-law ban children's pedal cars, wheelchairs, baby carriages, skateboards, skis, shopping trolleys, books, and any wires and conduits needed for the park's facilities? A purpose clause would help answer the more difficult questions, and drafters and legislators will want to provide some exceptions, and exceptions to exceptions, to give effect fairly and reasonably to the spirit of the law. Do they want to stop children playing, or to create a safe area in which they *can* play? Do they want to stop tired shoppers from taking a short cut? Easily foreseeable exceptions include emergency vehicles and park maintenance vehicles. Against that it is easy

to imagine circumstances in which such vehicles *should* be excluded from the park, for instance if they are not on official business.

Bayless Manning, a former dean of Stanford Law School, took the counter-intuitive view (1982) that blocking the loopholes in legislation was pointless, as it inevitably created just as many new loopholes. Taking as his example the US Treasury's proposed 110 single-spaced pages of s.385 regulations (devoted to distinguishing for tax purposes between *equity* investments and *debt* investments), he

> predict[ed] that the regulations will not reduce the aggregate of ambiguity that attends the problem of distinguishing between debt and equity. New ambiguities will substitute for old; the seeds of new litigation will be sown; and new pressures for still further elaboration will ensue. These things will happen, not because the regulations are poorly drafted (though the … proposed regulations are), but because that is the nature of the process.
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> Consider the United States Constitution. The Constitution is open-ended, generalised and telescopic in character. What has it spawned? Pervasive ambiguity and unending litigation.
>
> Consider the extreme counter-model of law, the Internal Revenue Code and its festooned vines of regulations. The Code and regulations are particularised, elaborated and microscopic in character. What have they spawned? Pervasive ambiguity and unending litigation.

Andrew Stumpff (2012) helpfully illustrates what Manning called 'The Law of Conservation of Ambiguity' (though *vagueness* might have been a better term than *ambiguity*) with the analogy of fractals – shapes that are identical regardless of scale. Increase the scale of the map to clarify the boundary between *lawful* and *unlawful* and see on which side a case falls, and the new line will be just as vague, though the details will be different. A large-scale coastline viewed from the clifftop is as jagged as the longer stretch of that coast visible from space.

This depressing doctrine seems to us as under-argued and implausible as other forms of fatalism. We accept that one can never rule out the possibility of uncertain cases, for the reasons already given. But nothing Manning says disproves the intuitive view that blocking loopholes will *reduce* the number of uncertainties, continuously approaching precision even if it never arrives there. It should reduce to an even greater extent the economic viability – and so the likelihood – of tax avoidance and of litigation in general, as the uncertainties become more fanciful and less worth the risk or costs of the argument. A sensible drafter will recognise that you cannot legislate for everything and must agree with the client a sensible cut-off point. For instance, in drafting a will with a gift to A it is sensible to ask who is to take it if A predeceases the testator. It might be worth including a second reserve in case both A and the first reserve have died. But you have to draw the line somewhere, and the sensible place to do so depends on a balance involving the amount at stake, the cost and convenience of adding further precautions, and the likelihood of mass extinction.

We see three flaws in Manning's reasoning:

- Taking Manning backwards in time, removing the accumulated complexities of the tax code and back through the various drafts of the Constitution, we arrive not at the same amount of ambiguity and legislation as when we began the journey but at a blank sheet of paper, with no power to tax and nothing to litigate. Or is he saying that the doubts only arise when the first word is written, whatever that is, and then can never be reduced or increased?
- The Constitution and the regulations have different functions: respectively to enable and to do. The relevant clause of the Constitution (the opening paragraph of Article 1, §8) reads:

  > The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

  and §385, the section under which the regulations were made, reads:

  > The Secretary is authorised to prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated for purposes of this title as stock or indebtedness (or as in part stock and in part indebtedness).

  No one would suggest that these clauses specify the taxpayers' liability with as much precision as the Code – or at all.
- Manning offers no systematic comparison between the litigation generated by the Constitution and that generated at different stages of legislative development; nor between that generated by laws drafted with different degrees of skill.

If, on the other hand, Manning was writing a polemic and didn't mean to be taken literally, he had a point. Over-legislation is counter-productive.

Some vagueness is desirable, being often essential for flexibility: how could we legislate without *reasonable*? (Note the vague words *some* and *often* here; it would be neither possible nor desirable to be precise.) Necessary vagueness also makes use of words like *immediately*, *sufficient*, *believe*, and of course *necessary*, *vague*, and *precise*.

But we must contrast this useful vagueness with the lazy vagueness that reveals woolly thinking, although there is of course – as with so many things – no clear boundary between them.

**MA:** In seminars I used to ask students how they would interpret a rule entitling patients to see their medical records unless it was *likely* that the disclosure would compromise a confidential source. If no possibility of compromise was described as a 0 per cent chance, and certain compromise was described as a 100 per cent chance, what figure would they give as the threshold of 'likely'? They were asked

> to think about it for a moment but to keep their answer to themselves until everyone had decided. Then each answered in turn. Although many students suggested 51 per cent, the responses were surprisingly diverse, sometimes ranging in a well-attended seminar from one per cent to 99 per cent. The lower figures seemed to me more thoughtful.

So lawyers must live with vagueness, but they should be aware of and minimise the risks.

## And/or

We single out this expression for discussion because of its exceptional contrast between vagueness and apparent simplicity and because of its malign grip on the legal mind. Everyone thinks they know what it means: *either A or B or both.* If that were always so, *and/or* might be an (inelegant) shorthand. But it is not always so.

Its meaning must depend on the meaning of the '/' alone. That too is vague but seems to be the same as the meaning of the whole 'and/or' expression, creating an infinite regress: *and and/or or*. Only lawyers could have added a third level with longer words:

> Further and/or in the alternative …

Too often the expression is a lazy alternative for the drafter who has not considered which option is appropriate: (*A and B*) or (*A or B or both*) or (*A or B but not both*). Is a bequest to *A and/or B* to be shared between them (as in *In re Lewis* (1942))? If so, in what proportions, and what is the function of */or*? Or is it a gift to one or the other? If so, who chooses, and what is the function of *and/*? The confusion is compounded in *A or B and/or C*.

In *Situ Ventures* (2013) para.26, where a drafter meant *or* but wrote *and/or*, Lord Justice Mummery said:

> That this document is not the product of skilful drafting is also evidenced by the presence of the expression 'and/or.' Its use in this clause is unnecessary and confusing. … I would add that the use of the expression 'and/or' in any legal document is in any case open to numerous more fundamental objections of inaccuracy, obscurity, uncertainty or even as being just plain meaningless, as explained by Sir Robert Megarry in his erudite philological discussion of 'and/or' in 'Andorandororand' from *Law at the Centre* (1999) at pp.71 to 78.

For a history of the extensive case law, see Mellinkoff (1963, especially pp.147–152). Since then, one 'respected law firm' has been reported (Henderson, 1989, p.185) as being so concerned about the expression's vagueness that it insisted on putting this definition in a partnership agreement:

> '*and/or*' means that the thereto precedent and subsequent words grammatically associated therewith are connected thereby in the conjunctive sense (whether cumulative as to the whole thereof, or in any combination of more than one thereof) and also, as an equal alternative, in the disjunctive sense, and (except where specially restricted to the conjunctive sense, for example by use of the phrase and (but not or)) ordinarily means that the conjunctive sense should be applied thereto unless by reason of the context, subject matter and circumstances then concerned substitution of the disjunctive sense would reasonably be necessary to give meaning to the words used therewith, and or (except where specially restricted to the disjunctive sense, for example by use of the phrase or (but not and)) means the converse (both ordinarily and substitutionally) of the foregoing meaning and implication of and.

So now you know.