

FILLING THE GAPS

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INTRODUCTION

What a thing is termed will often dictate the attitude taken towards it. The term “gap-filling” has to many a pejorative connotation. It implies out of control judges off on frolics of their own, usurping legislative power. Lord Simons, for example, described gap-filling as “a naked usurpation of the legislative function under the thin disguise of interpretation”² and Don Dugdale as the Courts flexing their muscles.³ Tom Campbell goes even further and labels it treason:

As a matter of judicial ethics I do not argue that judicial activism is always wrong, but I do hold that, outside the confines of a fairly conservative common law methodology, it can be so wrong as to be treasonable, because it is a breach of trust and an abuse of judicial power that undermines the foundations of constitutional democracy. The fact that most activist judges are only trying to be just, may be relevant to a plea in mitigation, but not as an acceptable defence.⁴

The proposition that I put forward (with some trepidation given the remarks I have just quoted) is that judges do and should fill gaps. The questions rather are what gaps should be filled, when they should be filled and how judges should go about doing so.

¹ I am very grateful for the assistance of Thomas Geuther, my law clerk in 2002 and Karen Grau, my current clerk, in researching for this paper. Of course I take full responsibility for the final result.

² *Magor and St Mellons Rural District Council v Newport Corp* [1952] AC 189, 191. This was in response to Lord Denning’s comments, rejecting the literal interpretation of a Rent Act in that case - see *Magor and St Mellons Rural District Council v Newport Corp* [1950] 2 All ER 1226, 1236: “We do not sit here to pull the language of Parliament and Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.”

³ See D F Dugdale “Framing Statutes in an Age of Judicial Supremacy” (2000) 9 Otago L Rev 603, 608.

⁴ Tom Campbell “Judicial Activism – Justice or Treason?” (2003) 10 Otago L Rev 307, 312.

There are a number of reasons I say that judges do and should fill gaps. The first, and probably the most important, is that Parliament has told us to by mandating in s5(1) of the Interpretation Act 1999 a purposive approach to interpretation.⁵ Further it has also mandated gap-filling by requiring in s6 an ambulatory approach to statutory interpretation in that enactments are said to apply to circumstances as they arise. Parliament also requires, by s6 of the New Zealand Bill of Rights Act 1990, judges to interpret all statutes in a manner consistent with that Act, although within the limits set by s4. Aside from such specific provisions Parliament at times enacts provisions with general or vague wording with a view to Courts filling the gaps. This leads to a further reason gap-filling may be necessary and that is the nature of language, especially where that language is ambiguous.

THE NATURE OF LANGUAGE

Taking the last point first I suggest that language does not occur in a vacuum. It must be understood in context, including in its linguistic and cultural context. Language used and meaning can vary depending on the knowledge and understanding of both the speaker and listener. If I say that Nancy wants to marry a Norwegian, there are a number of different scenarios this statement may encompass. Nancy may be going to marry a particular individual who happens to be Norwegian. I may know the name of the individual but know that you do not. Therefore I use a generic description so as to convey more meaning to you than giving an unfamiliar name would convey. On the other hand perhaps I do not know who he is either but I have just heard that he is

⁵ This reference to purposive interpretation is not new. As set out in New Zealand Law Commission A *New Interpretation Act: To Avoid "Polixity and Tautology"* (NZLC R17, 1990) the Interpretation Ordinance declared and enacted in 1851 by Sir George Grey as Governor in Chief of New Zealand, with the advice and consent of the Legislative Council, said that: "the language of every Ordinance shall be construed according to its plain import, and where this is doubtful, according to the purpose thereof." (See para 9) This was replaced in the Interpretation Act 1888, s5(7) by what became, with minimal modification, s5(j) of the Acts Interpretation Act 1924 (the immediate predecessor to s5(1) of the Interpretation Act 1999). In s5(j) Parliament required that every Act and every provision thereof was to 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." However, I note that in 1963 the New Zealand Law Draftsman, Denzil Ward, complained that the courts often ignored the purposive approach required by s5(j) and instead relied on "any one or more of a set of contradictory "rules" culled from judgments of the English Courts", producing, in his opinion, "a chaotic situation" and unpredictability as to the approach likely to be taken in any given case – see D A S Ward "A Criticism of the Interpretation of Statutes in the New

Norwegian. There are further uncertainties. It could be that Nancy wants to marry someone who happens to be Norwegian but he does not want to marry her. Nancy could even have no particular individual in mind. She may want to marry anyone as long as he is Norwegian.⁶ A judge's task is to choose between such possible meanings.

Context will often dictate the choice. For example, if a statute says a company must call a meeting by a certain date there is unlikely to be any argument that the term "call a meeting" means "hold a meeting". This is because in the context of companies there are prescribed formalities for calling a meeting and it would be assumed that putting into train those formalities is what is being referred to by the phrase "call a meeting". It may be different in a situation where such formalities do not apply. It would at least be more arguable in such a context that a requirement to call a meeting before a certain date could require that the meeting actually be held by that date.

In other cases there may be genuine uncertainty, even where the context is understood. While we do not in New Zealand, as in France, have a provision that makes it an offence not to decide a case⁷, our system would break down if a judge said "Sorry I have no idea. Work it out for yourselves." A judge will therefore be required to pick which meaning to give to the provision so as to decide the case in front of him or her. That must involve gap-filling.

I suggest too that gap-filling in the widest sense takes place every time a statute is applied to particular facts. I refer here to the remarks of the Rt Hon Beverley McLachlin, the Chief Justice of Canada:

Zealand Courts" [1963] NZLJ 293, 299. See also his article "Trends in the Interpretation of Statutes" (1957) 2 VUWLR 155.

⁶ This example is given in Umberto Eco *Kant and the Platypus, Essays on Language and Cognition* (London, 1999) 312-315. He changed the example to have Nancy wanting to marry an analytical philosopher. I have changed it back to the original Norwegian, resisting the temptation for further change. Eco also makes a distinction between semantic interpretations and pragmatic interpretations and then referential and attributive uses and he fleshes out the possibilities a lot more than I have done. The example as I have set it out suffices to make the point.

⁷ Article 4 of the French Code Civil (1804) provides that: Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.

“But when new situations arise, the question becomes: does the old law extend to the new situation? Even if the court says that it does, the court has sanctioned a development in the law. In this sense, judges inevitably make law. This is nothing new. It is a venerable and necessary adjunct of a vibrant and responsive legal system.”⁸

Gap-filling in this sense is especially necessary with the modern style of drafting which aims for plain English simplicity as against the more comprehensive, precise and technical drafting of the past. I say comprehensive rather than comprehensible for good reason. The old style of drafting often served to obscure rather than elucidate meaning.

VAGUE OR GENERAL WORDING

Still taking the points in reverse order I suggest that when Parliament leaves the words of a statute vague or generally expressed judges must fill the gaps and it must be assumed that Parliament wishes them to do so.⁹ There can be a number of reasons for vague or general statutory wording. It may be that the legislators leave areas to judges where there is perceived judicial expertise, perhaps also where it is thought that a case-by-case view may be better than a conceptual one divorced from actual cases. This may explain why remedies under the Contractual Remedies Act 1979 were left to judges, and why judges were given a wide area of discretion in relation to the Illegal Contracts Act 1970, both in terms of what an illegal contract is and in terms of remedies.¹⁰

In other cases it may be that words are left vague or general so that they can more easily be adapted to particular circumstances and to changes in society. It has been

[trans] The judge who refuses to decide on the pretext of silence, obscurity, or insufficiency of law may be prosecuted for denial of justice.

⁸ Rt Hon Beverley McLachlin “The Supreme Court and the Public Interest” (2001) 64 Sask L Rev 309, 311.

⁹ See the discussion in Randal N Graham “A Unified Theory of Statutory Interpretation” (2002) 23 Statute L Rev 91.

¹⁰ See, for example, Brian Coote “The Illegal Contracts Act 1970” in New Zealand Law Commission *Contract Statutes Review* (NZLC R25, 1993) 173, 174. See also in the same report, J F Burrows “The Contractual Remedies Act 1979” 61, 84-85, which discusses the Courts’ wide discretion under the Contractual Remedies Act s9(2)(c) to direct one party to do or refrain from doing any act or thing in relation to the other. Professor Burrows notes that the courts will take time to work out the boundaries of the “any act” jurisdiction, which, if taken literally, appears limitless. However he says (at 85): “... it is probably best to leave that task to the courts. It is doubtful whether the section could be effectively

suggested that legislation relating to human rights fits into this category. Less charitably it has been suggested that Parliament enacts such legislation in vague and general terms because it would not be able to agree on details.¹¹ Vague and general wording can cover a whole political spectrum. Some would say that is precisely why it should not be left to judges to fill the gaps¹² but the fact is that Parliament has done so.

NEW ZEALAND BILL OF RIGHTS ACT 1990

Parliament has also mandated that judges interpret statutes in a manner that is consistent with the Bill of Rights Act if possible. This means that gap-filling is required by reference to a statute that is already expressed in general terms and requires gap-filling in its own right. I do not wish to enter the debate as to whether this should be the case. I just point out that there is a possible double helping of gap-filling created as a result. I also point out, however, that many of the common law values used to interpret legislation (for example rights of access to the courts) were designed to protect individual rights. The Bill of Rights Act was enacted to affirm such rights and thus gap-filling in this area is not necessarily new or revolutionary. As Professor Burrows puts it:

the reading-down, and straining, of language to accommodate fundamental values is a time-honoured activity. The New Zealand Court of Appeal has said that the application of section 6 of the Bill of Rights Act should not result in a “strained or unnatural meaning”. But, in the past, value-based interpretation sometimes did exactly that, privative clauses providing perhaps the best example.¹³

reworded to solve the problem completely; and the experience of the New Zealand courts in operating discretions in other areas inspires confidence.”

¹¹ Graham, above, 122-123.

¹² See for example James Allan, “Paying for the Comfort of Dogma” (2003) 25 Sydney L Rev 63.

¹³ See J F Burrows “The Changing Approach to the Interpretation of Statutes” (2002) 33 VUWLR 981, 997. See also on this topic Sir Kenneth Keith’s essay, referring to interpretation against an ideal constitution, “Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness” in Rick Bigwood (ed), *Legal Method in New Zealand* (Wellington 2001) 77, 82-83.

INTERPRETATION ACT 1999

Moving finally to the Interpretation Act, let us first set out the limits. The purposive approach mandated by the Interpretation Act is not and does not purport to be a return to the “equity of the statute” approach¹⁴ or even to the more extreme forms of the mischief rule.¹⁵ According to the Interpretation Act a judge must focus on the text in light of its purpose. I suggest therefore that this means concentrating on the purpose of the legislation itself (and in particular the purpose of that part of the statute at issue) and not the purpose or intention of the legislators, although of course often they may be the same thing.

If the search is for the purpose of the text of the legislation it is irrelevant that some members of Parliament may have voted for the measure without fully understanding it (or without even having read it). It is irrelevant that some members of Parliament may have voted for the measure as part of a trade off with regard to another measure they wished to promote. It is irrelevant that some members voted against the measure. The task is not to fathom the underlying subjective intentions of the framers of that legislation, or indeed the underlying intentions of Parliament as a whole (if there can be such a thing). It is certainly not to fathom the underlying subjective intentions of the individual members of the Parliament which passed the legislation (or the intentions of successive Parliaments or Parliamentarians who did not repeal or amend that legislation). Nor is it to ascertain what a judge may think the intention of

¹⁴ An early English example of the equity of the statute approach is *Eyston v Studd* (1574) 2 Plowd 459A, 467; 75 ER 688, 695, in which Lord Plowden said: “... sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, ... enlarges or diminishes the letter according to its discretion.”

¹⁵ The equity of the statute approach was current around the time of *Heydon's case* (1584) 3 Co Rep 7a, (1584) 76 ER 637, 638 in which the Barons of the Exchequer expounded the ‘mischief rule’. They resolved that statutory interpretation (whether the statutes are “penal or beneficial, restrictive or enlarging of the common law”) involved the consideration of four factors:

- what was the common law before the making of the Act;
- what was the mischief and defect for which the common law did not provide;
- what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and
- the true reason of the remedy;

and then “the office of all the Judges is always to made such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* [for private benefit], and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* [for the public good].”

the legislators is or (worse) should have been. It is to fathom the purpose of the text of the legislation.

This formulation does not solve all problems, not the least being the subtleties of definition some give to purpose, motive, intention and meaning (which subtleties often differ between commentators) and the differing levels of generality and abstraction that those concepts can encompass. I see the search for the purpose of the text as an objective standard. The search is a search for what a reasonably well-informed member of the targeted audience would consider the purpose of the legislation to be. As Justice Scalia says:

We look for a sort of “objectified” intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.¹⁶

Justice Frankfurter made much the same point in his famous address. He said:

Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the minds of legislators or their draftsmen, or committee members.¹⁷

The formulation can still leave a large margin for judicial flexibility (some would say unwarranted judicial creativity). The concentration on the text does, however, provide some constraint, suggesting a purpose that can be linked to the text (even if other sources are used). In addition, as pointed out by Kent Greenawalt in his

¹⁶ Justice Antonin Scalia in *A Matter of Interpretation: Federal Courts and the Law* (Princeton, 1997) 17.

¹⁷ Justice Frankfurter “Some Reflections on the Reading of Statutes” (1947) 47 Colum L Rev 527, 538-539. Justice Frankfurter would, however, (as would I) allow the use of more diverse sources than Justice Scalia in order to ascertain objective purpose. I note also the comments of Professor Jim Evans “Controlling the Use of Parliamentary History” (1998) 18 NZULR 1, 13 where he says that: “in statutory interpretation the relevant concern is to protect the public reliability of the statute book. Broadly, we endeavour to protect the most reasonable judgment about the meaning of a statutory provision that might be made by a reader familiar with the previous state of the law, and the social concerns the law addresses, who reads the provision in the context of the Act as a whole.”

comment on the Justice Frankfurter address, most judges do not set out to thwart or distort the purpose of legislation:

One can say that purpose is *something* of a constraint. Most judges are conscientious. Most judges do not deliberately seek to manipulate notions of legislative purpose to cover their reliance on personal notions of policy. And judges who try to be faithful to legislative objectives do often resort to premises other than their own preferred notions of policy. This is hardly a full guarantee against the influence of the personal, but no such guarantee is possible.¹⁸

Parliament has also ruled out an originalist¹⁹ approach to the interpretation of statutes, at least to the extent that an updating interpretation can fall within the text in the light of its purpose. Lord Wilberforce's dissenting opinion in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*²⁰ made it clear that any updating interpretation has to accord with purpose and be rooted in the words of the Act. He said:

In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case - not being one in contemplation - if the facts had been

¹⁸ "Variations on Some Themes of a 'Disporting Gazelle' and his Friend: Statutory Interpretation as seen by Jerome Frank and Felix Frankfurter" (2000) 100 Columbia L Rev, 176, 213.

¹⁹ By which I mean that a statute is given the meaning intended by its creators. A leading proponent of this approach (in constitutional interpretation at least) is Justice Antonin Scalia of the US Supreme Court – see for example *A Matter of Interpretation: Federal Courts and the Law* (Princeton, 1997) 37-41.

²⁰ [1981] AC 800, 822.

before it?’ attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

This passage was approved by four out of five of their Lordships (with the exception of Lord Millett only because he did not consider an updating approach was needed) in *R v (Quintavalle) v Secretary of State for Health*.²¹ I consider it equally applicable to New Zealand courts when applying s6 of the Interpretation Act.

The requirements for purposive and updating interpretations necessarily mean gap-filling and necessarily leave open the possibility that some judges will stray further than others from the text. As said earlier the question really is how far gap-filling should go and whether there should (or can) be rules in this regard. As Professor Mauro Cappelletti says:

The real question is not one of a sharp contrast between (uncreative) judicial ‘interpretation’ on the one hand, and judicial ‘law-making’ on the other, but rather one of *degree of creativity*, as well as one of the *modes*, the *limits*, and the *acceptability* of law-making through the courts.²²

ROLE OF THE COURTS

Before turning to the specifics I make some general remarks about the role of judges. It seems trite to say that judges are there to resolve disputes between litigants. It is now also (relatively) uncontroversial to see the common law as judge-made law with some continuing role for judges in its development, at least on a slow and incremental basis as in the past. The debate focuses around the role of judges where statute law is at issue. Even among those who say a judge’s role is to interpret statutes and not to make law in areas where Parliament has legislated there can be a wide range of approaches. As was said by Justice Frankfurter:

Admonitions... that courts should leave even desirable enlargement to Congress will not by itself furnish the meaning appropriate for the next statute under scrutiny. But as it is true of other important principles, the intensity with which it is believed may be decisive of the outcome.²³

²¹ [2003] UKHL 13; [2003] 2 WLR 692.

²² “The Law-Making Power of the Judge and its Limits: A Comparative Analysis” (1981) 8 Monash U LR 15, 16-17.

²³ See Justice Frankfurter “Some Reflections on the Reading of Statutes” (1947) 47 Colum L Rev 527, 535.

The proper role for the courts can be discerned in my view by bearing in mind the limitations of the court process. Courts do not initiate cases.²⁴ They decide only the cases before them²⁵ and what is more they decide them based on the evidence and arguments put forward by the parties. It is still relatively rare in New Zealand to hear from those not directly affected by the particular litigation. The decisions are fact specific. While that gives a practical focus it is a very narrow one. As Sir Ivor Richardson says:

litigation under the adversary system does not readily allow for an extensive social inquiry and so there is need for great care in reaching conclusions as to social policy and the public interest on the information and arguments furnished by the parties.²⁶

In addition, by virtue of courts' decisions applying retrospectively, litigation can affect large numbers of people without them having the opportunity to be heard. Neither is the problem wholly solved by declaring decisions to apply prospectively. While this can ameliorate the position there will be those who have ordered their future affairs on the basis of the law as it was understood before the decision. It would be much harder for courts than for the Legislature to provide adequate transitional provisions to exempt such arrangements (even were it possible for the courts to operate in this manner).²⁷ This all suggests a very cautious approach for the courts.

The proper role for the courts can also be discerned from their place in the constitutional structure. There needs to be tension in any system of government to

²⁴ Lon Fuller in "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353, 385 gives an amusing illustration of this point: "A German socialist critic of 'bourgeois law' once caricatured this view by saying that courts are like defective clocks; they have to be shaken to set them going. He, of course, added the point that shaking costs money."

²⁵ See the discussion by the President of the Supreme Court of Israel, Aharon Barak in "The Supreme Court 2001 Term Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv L Rev 19, 32. He says that "Admittedly, judicial lawmaking, mostly through interpretation, is central to the role of a supreme court. But that role is incidental to deciding disputes. This is the striking difference between judge-made law and enacted law. Without a dispute there is no judicial lawmaking. By nature, then, judges create law sporadically, not systematically. The changes they make to law are partial, limited, and reactive. The issues brought before a court are, to some extent, selected randomly. Many years may pass before a problem that troubles the public enters a judicial forum. A court's control over the matters it hears is negative in nature, permitting only dismissal of what the court does not want to consider."

²⁶ Sir Ivor Richardson "Judges as Law Makers in the 1990s" (1986) 12 Monash U LR 35, 39.

ensure that each branch of the system stays within the proper bounds. However, such tension should always be at the edges only of the system. I would suggest that any tension involving the judiciary should be as far as possible tension with the Executive rather than with the Legislature,²⁸ although where the Executive controls the Legislature this distinction may be harder to draw. Any tension with the Executive should be tension that reinforces the rule of law by ensuring that the Executive remains within the law. In this way the courts are enhancing rather than detracting from the authority of Parliament.

To ensure that tension with the Legislature is kept to a minimum the judiciary must be wary of usurping the legislative role by straying from interpretation to purported judicial lawmaking (even if that is disguised as interpretation). There is the same force operating the other way, however, which is what makes the exercise so challenging. The judiciary needs to be just as wary of thwarting the democratic will by a literal or unduly narrow interpretation when this would clearly be contrary to the purpose of the legislation.²⁹ Tension can arise both from too broad an interpretation and one that is too narrow. As Justice Fisher says:

Purposive interpretation in a statutory context is now familiar enough in this country. The aim in each case is to steer a middle path between preoccupation with literal meaning to a point that frustrates obvious intention, and the use of ‘purposive interpretation’ as a rationalisation for rewriting the statute to reflect the object that the Judge thinks Parliament ought to have pursued, but in the end did not.³⁰

At this stage too I say that I see no conceptual difference between reading down a statute and what is usually termed filling the gaps. In my view both are filling the gaps and both require the limits of the role of the courts to be kept in mind. Reading down a statute can be seen as involving the addition of words by the reading in of an

²⁷ See for example the discussion by Keith Mason QC “Prospective Overruling” (1989) 63 ALJ 526.

²⁸ This is particularly the case in New Zealand where the courts do not have the ability to strike down statutes.

²⁹ An example of such a literal interpretation is *Ex parte Hill* (1827) 3 C & P 225. A statute made it an offence to ill-treat “any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle”, but the Court held that it did not cover bulls.

³⁰ Hon Justice Robert Fisher “New Zealand Legal Method: Influences and Consequences” in Rick Bigwood (ed) *Legal Method in New Zealand* (Wellington 2001) 25, 54.

exception just as an expansive interpretation can involve adding words.³¹ Admittedly it may be easier to keep the required concentration on the text when reading down a statute than it is when extending a statute. To this extent then I agree with the distinction drawn by Professor Jim Evans between outweighing exceptions and corrective extensions.³²

I would also note here that concern about tension between the branches of Government flows both ways. The Legislative Advisory Committee³³ advises legislators that, in considering whether legislation is needed, what form it should take and what its effect will be, it is necessary to consider not only the language of the proposed statute, but its place within the wider law and the principles by which it will be interpreted. Their legislative guidelines advise that the judiciary will be reluctant to interpret legislation in a manner that conflicts with certain broad principles of public policy that are the subject of presumptions of the common law. These include, for example, the principle that citizens are entitled to have access to the courts and that all are to be treated equally before the law. The guidelines go on to say: “it is the responsibility of the Executive and of Parliament to avoid imposing such pressures on the courts as to risk constitutional brinkmanship.”³⁴

It is often said that it does not greatly matter if the courts “get it wrong” as Parliament can always legislate to undo whatever the courts have done. This is an over-

³¹ J J Spigelman AC in “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 Aust Bar Rev 224, suggests that the text must always be paramount and care taken in terminology used to ensure this is the case. He says at 233: “In order to be able to characterise the process as one of construction, which remains a constitutional restriction on the role of the judiciary, it is best to avoid describing the process as one of ‘introducing words into the Act’. It remains a process of construction if what the court is doing is to interpret the words actually used by the parliament, by giving them an effect *as if* they contained additional words or *as if* some words were deleted for a specific application. That is not however to introduce words into the Act. It involves the interpretation of the words actually used.”

³² See Jim Evans “A Brief History of Equitable Interpretation in the Common Law System” in Jeffrey Goldsworthy and Tom Campbell (eds) *Legal Interpretation in Democratic States* (2002, Dartmouth Publishing, Hampshire) 67, 68-70.

³³ The Legislative Advisory Committee consists of members of the judiciary, practitioners, academics and public servants. It was established in 1986 by the then Minister of Justice the Rt Hon Geoffrey Palmer. Its terms of reference include providing advice to government departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office, reporting on the public law aspects of legislative proposals, scrutinising and making submissions on Bills that affect public law and helping to improve the quality of law-making by attempting to ensure legislative proposals give effect to Government policy and that they conform with Legislative Advisory Committee Guidelines.

simplification. Litigants are entitled to the fruits of their judgment and it is generally considered inappropriate to legislate to take these away. It is also usually considered inappropriate to take away the rights of those who may be affected by the outcome of the litigation. The Legislature by convention will usually wait for the final outcome of any litigation (including an appeal) before considering legislation which will usually be prospective only. Even if Parliament does legislate before the outcome of proceedings is known such legislation will almost always exclude current litigants from the effects of that legislation.³⁵ Forcing the Legislature to overrule decisions too often could strain the conventions in this regard. This would be dangerous, as it would create tensions at the heart of the system.

I finish this topic by quoting the Rt Hon Beverley McLachlin where she highlights the advantages legislatures have over the courts with regard to law-making. She says:

Parliament and the Legislatures have the primary responsibility to enact the laws required in the public interest. They possess advantages that the courts do not enjoy. Their members are elected for just that purpose and are reflective of and responsive to public concerns. They provide a forum for open and complete debate. Their processes permit study, research, and compromise on the best solutions for problems and the best way to resolve conflicts. They can tackle problems in a comprehensive way rather than case by case. And the results are likely to enjoy a high level of public acceptance, or legitimacy. Just as courts are better fitted than Parliament or the Legislatures to resolve disputes arising from the application of the law, so Parliament and the Legislatures are better fitted to make law than the courts.³⁶

³⁴ *Guidelines on Process and Content of Legislation* (Legislative Advisory Committee, Wellington, 2001) paras 3.11- 3.12.

³⁵ These principles are set out in the Legislative Advisory Committee *Guidelines on Process and Content of Legislation* (Legislative Advisory Committee, Wellington, 2001) para 3.3.2.

³⁶ Rt Hon Beverley McLachlin "The Supreme Court and the Public Interest" (2001) 64 Sask Law Review 309, 316-317. Justice Dyson Heydon in "Judicial Activism and the Death of the Rule of Law", *Quadrant*, January-February 2003, 9, 17 makes the same point in a slightly more forceful manner: "Leaving aside the legitimate role of appellate courts in changing the law by a Dixonian process of development and adaptation, the conscious making of new law by radical judicial destruction of the old rests on a confusion of function. Those who staff courts do not have that function. They lack the experience to perform it; they lack the assistance required to perform it; they can only do it retrospectively; it is not easy for them to do it clearly; it is not easy for them to do it decisively; and it is not possible for them to balance the financial and other effects of the changes against other demands."

LIMITS ON GAP-FILLING

Let me now move to consider if I can formulate some rules in relation to gap-filling that keep in mind the proper role of the courts, the interpretation requirements Parliament has set out and the need to avoid tension with the Legislature. This is not an easy task. I will try, however, and reduce this to a series of propositions.

Plain Words in accordance with Purpose

Where language and purpose are both plain then it is easy. Apply the words of the statute. However, easy cases are not the ones that usually confront judges. This is often said and must seem to some as merely an excuse on the part of judges for their unwarranted meddling with the law. Excuse it may be but, where it is clear what the legislation means and also clear how it applies in a particular situation, the parties can usually work out their differences for themselves. As Lord Bingham of Cornhill has recently remarked:

Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.³⁷

Plain Words but at Odds With Purpose

The next proposition is that if the words are plain and admit of only one meaning then judges should apply the words, even if the meaning may seem at odds with the purpose of the legislation. The type of purposive approach mandated by the

³⁷ *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 para [7]; [2003] 2 WLR 692, 697. See also Frank H Easterbrook "Text, History and Structure in Statutory Interpretation" (1994) 17 Harv Jnl Law & Public Policy 61: "All judges follow a simple rule: when the statute is clear, apply it. But people rarely come to court with clear cases. Why waste time and money? People come to court when the texts are ambiguous, or conflict, or are so old that a once-clear meaning has been lost because of changes in the language or legal culture."

Interpretation Act is tied to the text and so cannot be used to change the meaning of plain words.

There are three exceptions. One, which all but the most committed literalists would agree on, is that courts can fill the gap where there is an obvious drafting error. The Parliamentary process can be cumbersome – nothing is more likely to create tension than determined literalism by the courts where a drafting error is involved. Literalism in such circumstances is also unlikely to enhance respect for the law on the part of the public. Even this exception has its difficulties. The first is in defining the limits of what constitutes a drafting error. Professor Ruth Sullivan suggests that the terminology can disguise rather than explain what is being done:

It is difficult to avoid the impression that the distinction between a correctable drafting error and an uncorrectable gap is driven in part at least by outcome. Where legislation is found to be defective and the court is willing to fix it, the defect is labelled a drafter's error, but if the court is not willing to fix it, the defect is labelled a gap.³⁸

Her cynicism may be because she provides an expansive definition of drafting error. She defines a drafting error as:

(a) use of language for which no plausible interpretation is possible because it is meaningless or contradictory or nonsensical; (b) use of language that leads to a glaring absurdity, the origin of which is evident – for example, a translation error or a mistake made in preparing an amendment or a statute revision; and (c) use of language that defeats the clear intention of the legislature as established through standard interpretive techniques.³⁹

I would limit the term drafting error to her first two categories. Her third category may come within the absurdity exception but should not come within the proper purview of the term “drafting error”. The second difficulty when dealing with an alleged drafting error is related to the first. It is not enough to be able to state with certainty that an error exists. A court must also be able with certainty to know exactly

³⁸ Ruth Sullivan *Statutory Interpretation* (Irwin Law, Ontario, 1996) 162-163.

³⁹ Sullivan, above, 164.

how Parliament would have fixed the error.⁴⁰ Error correction is therefore a very narrow exception indeed.

The next possible exception is that general words may be able to be read down where a clear assurance has been given by the sponsor of the legislation that the words were not intended to have such broad compass – a sort of statement against interest. The case of *Pepper v Hart*⁴¹ provides an example.⁴²

The third exception is where the words of a provision, literally interpreted, would be so far outside the purpose of the statute that to apply them literally would lead to an absurdity.⁴³ Even Justice Scalia has been led to insert words to avoid such an absurdity – see *Green v Bock Laundry Machine Co*⁴⁴ in which the US Supreme Court was faced with the question of whether Federal Rule of Evidence 609(a) applied to civil as well as criminal cases. The rule provided that for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime could be admitted but only if the crime was punishable by death or more than one year's imprisonment and the court determined that the probative value of admission outweighed its prejudicial effect to the defendant. Justice Scalia came to the same conclusion as the majority (who had reached their conclusion based on the legislative history). He added the word "criminal" to the rule. He held that the word defendant could not include civil defendants because it would mean that the benefit of prejudice-

⁴⁰ As said by Professor Jim Evans in *Statutory Interpretation: Problems of Communication* (OUP, 1988) 233: "The cases that remain to be mentioned are those in which a textual mistake of a more or less mechanical form has occurred. If both the nature of the mistake and the correction needed to remedy it are obvious, the courts will generally remedy this type of mistake."

⁴¹ [1993] AC 593. The case concerned the interpretation of a taxation statute. Mr Hart, a teacher at a fee-paying school was obliged to pay tax on the cash equivalent of any benefit. The benefit in his case was reduced fees for his son's education at the school if surplus places were available. The taxation of certain benefits had been explained in a parliamentary debate as being the extra cost caused by the provision of the benefit. There was no additional cost to the school in this case since the places would otherwise have been empty, but the Revenue had taxed a proportion of the total cost of providing the services. The House of Lords held that the Revenue's interpretation conflicted with the explanation given in Parliament.

⁴² Lord Steyn believes that since *Pepper v Hart* recourse to parliamentary materials by the courts has gone too far. He would in fact restrict the scope of that decision to cases in which benign assurances are made by Ministers to the House – see Johan Steyn "*Pepper v Hart*: a re-examination" (2001) 21 Oxford Jnl of Legal Studies 59, 67. See also his article "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney L Rev 5, 16.

⁴³ Sir Rupert Cross *Statutory Interpretation* (3ed, 1995) 49, states that a judge: "has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute".

⁴⁴ (1989) 490 US 504.

weighing would apply only to civil defendants and not to civil plaintiffs.⁴⁵ He considered that his interpretation did the least violence to the text.

This exception has the potential to allow a large degree of judicial creativity from differing definitions of the term absurdity, especially if absurdity as a concept is divorced from a purposive analysis. It is essential in my view that judges are very cautious before labelling something an absurdity. It may be an absurdity for the particular case before the court but not for most ordinary cases. Even if it would be an absurdity for most cases a court's "fix" may not be the best for those cases. A court, unlike a Law Commission or Parliament, only has the particular case before it in order to gauge the best solution and can only "fix" a problem through interpretation. In this context it is useful to remember the warning of Gaudron and Gummow JJ that skewing interpretation to deal with a hard case can merely be setting the ground for future hard cases. Their Honours said the problems they identified in that case with the legislation and the response by the relevant Law Commission:

... serve to emphasise the need for renovation of the New South Wales legislation, not by judicial grafting to it of tissue which it lacks, but upon detailed reconsideration by the legislature. Judicial interpretative techniques may come close to leaching the existing statutory text and structure of their content and, while answering that apparently hard case then before the court, unwittingly lay the ground for other hard cases.⁴⁶

I would suggest that the absurdity exception should be tied to a purposive analysis and that, even then, a very high level of absurdity should be present.⁴⁷ This exception too is thus very narrow. Judges need to remember that their role is not to rewrite statutes as they would have written them. As Justice Scalia writes:

⁴⁵ The plaintiff was a prisoner injured by machinery while on work-release from custody in prison. He argued that the rule should apply in civil proceedings and be extended to civil plaintiffs, an argument accepted by the minority.

⁴⁶ *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53, 60-61. Professor Jeffrey Goldsworthy makes much the same point in *The Sovereignty of Parliament* (Oxford, 1999) 267, where he says that: "the maxim 'hard cases make bad law' can be used to reinforce this argument. The meaning of the maxim is that legal rules should be framed with ordinary rather than extraordinary cases in mind, because it is better to achieve satisfactory results in the vast majority of cases that are likely to arise, even at the risk of unsatisfactory decisions in a small number of very unlikely cases (the 'hard' cases), rather than vice versa. It may not be possible to qualify a rule, so that it could achieve satisfactory results in those unlikely cases, without damaging its actual results in many other cases."

⁴⁷ I refer to Lord Scarman's words in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 239: "But mere 'manifest' absurdity is not enough; it must be an error (of commission or omission) which in its context defeats the intention of the Act."

Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.⁴⁸

Words Having More than One Meaning

Where the words admit of more than one meaning then judges should choose the meaning that best accords with the purpose of the legislation as it would be understood by the targeted audience and in some cases one that accords with the wider legal environment both in New Zealand and offshore. I comment here that there will be a natural tendency to conjure up possible meanings where purpose and plain meaning seem to be divorced and so this rule in itself allows scope for judicial creativity. I later suggest a methodology that may help to guard against that tendency. I would also suggest that a possible meaning must be a meaning that is a natural one in the particular context rather than one that is so strained that it has no relationship to ordinary meaning. Straining meaning in this sense is to move too far from the text.⁴⁹

Enactments Apply to Circumstances as they Arise

The next proposition relates to what can be termed updating interpretations, as mandated by s6 of the Interpretation Act 1999. I suggested above that any such interpretation must still be limited to updating only to the extent that the words of the statute in light of their purpose allow it. To illustrate the point I use an example given recently by Lord Bingham.⁵⁰ He said that if Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. An example of this type of analysis is the case of *Fitzpatrick v Sterling Housing Association Ltd*⁵¹ where the House of Lords by majority held that the term “family” could now include a same-sex relationship for the purpose of protected tenancies. This is because (in the context of the particular legislation) the majority decided that the term “family” could legitimately be

⁴⁸ See *A Matter of Interpretation: Federal Courts and the Law* (Princeton, 1997) 20. See also John F Manning, “The Absurdity Doctrine” (2003) 116 Harv L Rev 2387.

⁴⁹ As Justice Scalia writes: “Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.” - see *A Matter of Interpretation: Federal Courts and the Law*, above, 24. See also Kate Tokeley, “Interpretation of Legislation: Trends in Statutory Interpretation and the Judicial Process” (2002) 33 VUWLR 965, 975.

⁵⁰ In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 para [9]; [2003] 2 WLR 692, 697.

⁵¹ [2001] 1 AC 27.

interpreted as having a wider meaning than in 1920. Lord Slynn of Hadley, for example, said:

It is not an answer to the problem to assume (as I accept may be correct) that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been 'No'. That is not the right question. The first question is what were the characteristics of a family in the 1920 Act and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word 'family'. An alternative question is whether the word 'family' in the 1920 Act has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920.⁵²

Lord Bingham in *Quintavalle* went on to refer with approval to a decision where it was held that a tape recording came within the definition of "document".⁵³ The decision was made on the basis that the furnishing of information was one of the main functions of a document and thus that the tape recording was a document. I note that the latter example is moving further from the actual words of the statute as it looks rather to function than terminology.

Implications

This leads then to an area that is more controversial. This is where judges look to what I would call the spirit of the words rather than the letter. Cooke P (as he then was) used this terminology in *Northern Milk Ltd v Northland Milk Vendors Association (Inc) & Anor*⁵⁴. He said:

This is one of a growing number of recent cases partly in a category of their own. They are cases where, in the preparation of new legislation making sweeping changes in a particular field, a very real problem has certainly not been expressly provided for and possibly not even foreseen. The responsibility falling on the Courts as a result is to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act - that is to say, the spirit of the Act.

⁵² *Fitzpatrick v Sterling Housing Association Ltd*, above, 35.

⁵³ *Grant v Southwestern and County Properties Ltd* [1975] Ch 185 – see *R (Quintavalle) v Secretary of State for Health*, above, 697.

⁵⁴ [1988] 1 NZLR 530, 537 (CA).

In this case, while judges will usually say that they are still interpreting the text in the light of its purpose, the link to the text may be much more tenuous. Given the specific exhortation in the Interpretation Act to ensure that a statute is applied to circumstances as they arise this may be appropriate in some circumstances in relation to new inventions, although the limitations of the court process discussed above may suggest that in many cases such matters should be left for Parliamentary action. Where there is no question of an updating interpretation I would not rule out the use of the technique but would say that judges should use it sparingly.

Judges should always bear in mind that it is the words of the statute that are accessible to the public and that the public is entitled to rely on those words in planning their affairs. I am not sure you can necessarily take the accessibility point too far, however. A lot of our law is not statute based. Case law or even texts summarising and explaining such case law are not necessarily very accessible to the public and the same goes for statutes to a lesser extent. Older statutes are often inaccessible through the language used and, despite improvements in drafting technique, many modern ones would still be difficult for many to fathom. Also physical or electronic access to statutes is not universal although it has improved.⁵⁵

The important point is rather that judges need to be very conscious of the constitutional importance of the words of the statute. The words are the public manifestation of the will of Parliament and thus of the democratic process. For this reason the words themselves must be paramount and any implications drawn must be implications from those words.

Words of course do carry implications and to ignore those implications could do violence to the text. As Professor Pierre-André Côté says:

The presumption against adding words must be treated with caution because legal communication, like all communication, has both implicit and explicit elements. The presumption only concerns the explicit element of the legislature's message: it assumes that the judge usurps the role of Parliament if terms are added to a provision. However, if the judge makes additions in order to render the implicit explicit, he is not overreaching his authority. The relevant question is not whether the

⁵⁵ Lord Lester QC makes much the same point in "*Pepper v Hart Revisited*" (1994) 15 Statute LRev 10.

judge can add words or not, but rather if the words that he adds do anything more than express what is already implied by the statute.⁵⁶

There can, however, be a margin for different views on what is implied by a text. I would suggest that the technique should only be used in similar situations to where terms would be implied into contracts.⁵⁷

Method of Interpretation May Depend on Subject-Matter

Finally on this topic I would suggest that there may be more latitude depending on the type of statute that is being interpreted and the subject matter. As indicated above, vague or general wording in a statute both admits and requires a greater freedom for judges in their interpretative role.⁵⁸ Where statutes could affect rights guaranteed under the Bill of Rights Act a narrow or a generous interpretation may be required, depending on what is necessary to protect those rights. As Lord Steyn has recently explained:

Constitutional adjudication affecting fundamental rights contained in a bill of rights requires a broader approach than is applicable to commercial contracts and statutes.⁵⁹

In this regard there is also still some role for the old presumptions - for example that Parliament is presumed not to intend to legislate contrary to basic constitutional principles unless it does so expressly.⁶⁰ Many of these presumptions can no longer mandate the most restrictive interpretation of statutory words (for example as used to

⁵⁶ Pierre-André Côté *The Interpretation of Legislation in Canada* (2ed, 1991) 232.

⁵⁷ The Privy Council laid down a test for the implication of terms in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 as follows: ... (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it “goes without saying”; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract.

⁵⁸ Stephen J, for example, distinguishes between the judicial role where statutes set out detailed rules and those which lay down general principles: “Statute law, the direct product of the legislature, is perhaps the least appropriate field of all in which to indulge in judicial law-making. The corner of that field occupied by closely drafted statutes of high complexity should be particularly uninviting to the judicial law-maker. It provides the very antithesis of those occasional legislative measures which lay down only general principles and invite the courts to supply the details.” *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 310.

⁵⁹ Lord Steyn “The Intractable Problem of the Interpretation of Legal Texts” (2003) 25 Sydney L Rev 5, 17.

⁶⁰ Professor Burrows notes that the shift towards the purposive approach has had the consequence of weakening some of the old presumptions but those presumptions relating to fundamental values are still strong and can cut across a purposive analysis. See J F Burrows “The Changing Approach to the Interpretation of Statutes” (2002) 33 VUWLR 981, 984 and 990-991.

be required for penal⁶¹ and tax statutes⁶²) but may still point judges rather to the middle ground.

Cases where commercial certainty is important also require a very cautious approach, usually tied as much as possible to the actual words used by Parliament, although conversely commercial certainty may on occasion require an interpretation that accords with commercial practice and/or the common law (and therefore possibly may require an expansive interpretation).

SUGGESTED METHODOLOGY – A SPIRAL APPROACH

The question I have asked is not whether judges should fill gaps but where the line should be drawn – what gaps should not be filled. I am very conscious that the conclusion I have just reached of “it all depends” is unlikely to be very satisfactory to those who seek rules (and thus hopefully greater predictability of result). Neither is it very satisfactory to those who espouse a particular philosophy of interpretation, although perhaps it is more satisfactory than having me espouse a competing philosophy. Interestingly there are not many judges who, outwardly at least, espouse particular philosophies of interpretation. One could take the high ground and say that this is because those in the practical world cannot afford the luxury of philosophies as they are too busy deciding cases in a world where philosophy often goes down none too well with litigants (or indeed with their counsel).⁶³ I suspect, however, it is rather a question of keeping one’s options open.

It is thus with great hesitation that I put forward not a philosophy but a methodology, which I suggest as a discipline that guards against the natural tendency to start at the

⁶¹ See *Karpavicius v R* [2002] UKPC 14 para [15]; [2003] 1 WLR 169, 175 in which the Privy Council, interpreting the Misuse of Drugs Act 1975, said: “in a more literalist age it may have been that the words of [the section] are capable of bearing either a wide or narrow meaning and that the fact that a criminal statute is involved requires the narrower interpretation to be adopted. Nowadays an approach concentrating on the purpose of the statutory provision is generally to be preferred...This is reinforced by section 5(1) of the Interpretation Act 1999...”

⁶² Section AA 3(1) of the Income Tax Act 1994 sets out as a “principle of interpretation” that “the meaning of a provision in this Act is found by reading the words in context and, particularly, in light of the purpose provisions, the core provisions and the way in which the Act is organised.”

⁶³ James M Landis in “A Note on Statutory Interpretation” (1930) 43 Harv L Rev 886 expressed some sympathy for judges regaled by different theories. “A passing acquaintance with the literature of

destination and work back. Starting with the result as a judge thinks it ought to be has a tendency to encourage distortion of a statute's words to achieve that result and thus to unwarranted judicial law-making. The reason I hesitate in setting out a methodology that would in my view help to curb those tendencies is that it leaves me open for past or future judgments to be seized upon where the methodology has not been (at least on the face of the judgment) followed. I must reserve the right to be inconsistent, although I will probably argue it is only apparent inconsistency. I also reserve the right to change my mind, although again I will no doubt argue I am merely showing flexibility.

So now to my methodology. A friend of mine when discussing a problem used to use the analogy of an onion. He would start at the skin and laboriously peel layer upon layer away to reach the core of the problem, by the end of the process usually to the intense annoyance of his audience who used to wish he had just taken a knife to the thing and be done with it. My suggested methodology starts at the core and works outwards. If this methodology must be elevated to a philosophy I would call it the spiral approach to statutory interpretation.⁶⁴ This is because a spiral starts at the centre and moves out, but you are able to stop at any time. I would suggest too that a spiral is a reasonably strict shape that should conjure up images of boundaries of the judicial role, encouraging thinking inside the circle rather than outside the square.

Having a set methodology gives at least some predictability through the assurance that a logical progression will be followed rather than having what can appear to be a random choice of starting point. The spiral still gives judicial choice (I would rather term it flexibility to meet the requirements of the individual case) but at least through a set methodology.

The Text

The first and most important step I suggest is to look at the text of the particular provision. This ensures that the analysis starts with the words Parliament enacted. As

statutory interpretation evokes sympathy with the eminent judge who remarked that books on spiritualism and statutory interpretation were two types of ebullitions that he had learned not to read."

⁶⁴ My clerk, Karen Grau, suggests a subheading "Statutory Interpretation without Tears: Peeling the Onion from the Inside Out."

indicated above, the words actually enacted have constitutional significance. This is why the analysis not only starts with the text of the provision but can stop there too if the words of the provision are clear.

Professor Ruth Sullivan does warn that a judge's perception of meaning may differ from the ordinary meaning to as perceived by the targeted audience. This is a timely reminder that judges must always keep the targeted audience in mind. Professor Sullivan even suggests that courts should receive expert opinion evidence and perhaps direct testimony to establish ordinary meaning:

[T]aking judicial notice of the ordinary meaning of legislative language is inconsistent with the meta-legal message of plain language drafting. It amounts to privileging the linguistic intuitions of judges, which are unavoidably based on their own knowledge, values and assumptions, over the intuitions of everyone else. But if statutes are supposed to communicate the law to those who are affected by it, interpreters should be interested in more than themselves. If statutes are supposed to speak directly to the audience to which they are addressed, without mediation by experts, interpreters need to focus on the linguistic competence of that audience and the context it brings to the text. In short, to bring interpretation in line with the meta-legal message of plain language drafting, interpreters need to shift their attention from judge-based ordinary meaning to audience-based ordinary meaning, and from reliance on judicial notice to reliance on empirical and expert evidence.⁶⁵

It must be said too that in most cases that come before the courts the parties have different perceptions of what meaning even apparently clear words convey. Sometimes such perceptions of meaning bear little relationship to those of any average English speaker but in most cases the competing perceptions are possible meanings of the words. As this is the case it would be unusual (and I would suggest often dangerous) to stop without at least considering the words of the provision in the context of the rest of the Act. As Sir Ivor Richardson has said:

The twin pillars on which our approach to statutes rests are the scheme of the legislation and the purpose of the legislation. Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole Act including the long title, analysing its structure and examining the relationship between the various provisions, and recognising any discernible themes and patterns and underlying policy considerations. It presupposes that in that way the study of the statute or of a group of sections may assist in the interpretation of a particular

⁶⁵ Ruth Sullivan "Some Implications of Plain Language Drafting" (2001) 22 Statute L Rev 175, 194.

provision in its statutory context. It may provide a detailed guide to the intentions of the framers of the legislation and in so doing may cast light on the meaning of the provision in question. Certainly that seems to me a preferable means of ascertaining the purpose or purposes of a provision rather than attempting to elicit it simply from consideration of the language of the section in isolation.⁶⁶

Context of the Act

Looking at the provision in the context of the statute as a whole is the next step and is still at this stage within the constitutional bounds of the words actually enacted. I suggest this step can be seen as a spiral within a spiral, starting with the words in the context of the section in which they appear and working outwards to the rest of the Act. Lately there has been a tendency for statutes to contain purpose provisions either for the Act as a whole or for particular parts of the Act.⁶⁷ Of course due attention must be paid to such provisions. They certainly make the task of discerning purpose easier, as the purpose is contained within the legislation itself, but they do not necessarily help in deciding how far one can stray from the literal words of a particular provision and or indeed do not necessarily help discern the purpose of a particular provision.⁶⁸ I would, therefore, still suggest beginning with the words of the provision in their immediate context and gradually fanning out, rather than starting with purpose provisions and working back. This is again to avoid starting at the destination as this can lead to unwarranted leaps of logic.

Legislative History

If the meaning of the provision is still uncertain after this exercise then a move to the third stage of legislative history is justified. I should modify that statement (mainly because I know I break that rule). It may be justifiable to move on to examine legislative history, even where the words of the statute provide the answer – the idea of this is to confirm that what you thought clear was also clear to those enacting it. It is a comfort blanket if you like but can also be helpful to litigants to explain why they

⁶⁶ Sir Ivor Richardson “Appellate Court Responsibilities and Tax Avoidance” (1985) 2 Australian Tax Forum 3, 8.

⁶⁷ For example s2 Te Ture Whenua Maori Act 1993 which informs the courts that it is “the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act” and s5 Resource Management Act 1991 which states the purpose of the Act is “to promote the sustainable management of natural and physical resources”.

lost or at least to spread the blame – it is not just a judge being obscure but Parliament as well. It can also give valuable insight into the wider context or at least the wider context at the time the legislation was passed and therefore the “mischief” the statute was aimed at. It can too help identify who was the targeted audience.

Legislative history can, however, be of real assistance where meaning is not clear and in particular where there is more than one possible meaning. The use of extrinsic material in such circumstance can reduce uncertainty as it provides a source outside of the judge’s own preferences. Even where doubt as to meaning subsists it is important to keep in mind the reason for examining legislative history – as discussed above it is a search for the purpose of the legislation in order to understand the text in the light of its objective purpose. The concentration on the text remains.⁶⁹

The search for purpose often starts with a search for the reasons legislation was considered necessary. Using sources outside the text itself to ascertain such reasons may be necessary even in cases where the Legislature has, as is the modern trend, set out the intended purpose in the legislation, as purpose provisions in themselves can often only be understood in context. I must say that there seems little point to me in restricting the material judges can look at to ascertain purpose, except perhaps to require all sources to be publicly available. It may be my training as an historian but I cannot understand an approach that artificially denies access to sources,⁷⁰ for example denying access to Parliamentary debates. Why allow access to Law Commission Reports but not to Minister’s speeches on the introduction of legislation, or Select Committee reports, which may elucidate the reasons for departure from some of the

⁶⁸ Some purpose provisions are of very limited assistance even in ascertaining the purpose of the whole Act. For example sAA 1 of the Income Tax Act 1994 sets out that one of the Act’s main purposes is to impose tax on income.

⁶⁹ As Justice Michael Kirby says in “Towards a Grand Theory of Interpretation: The Case of Statutes and Contract” (Clarity and Statute Law Society Joint Conference, Cambridge University, 13 July 2002): “That text is examined to ascertain the meaning to be attributed to the words used. The purpose is not to ascertain the meaning that, with hindsight, those who wrote the words truly meant to say or wish they had said.”

⁷⁰ As Justice Frankfurter said: “If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment.” – see “Some Reflections on the Reading of Statutes” (1947) 47 Colum L Rev 527, 541. I note too that Francis Bennion in *Statutory Interpretation* (3ed, Butterworths, 1997) 458 makes much the same point. He considers that reference to legislative history is an important component in informed interpretation, the principle being that in general the interpreter can never be too well-

Law Commission proposals? Lord Browne-Wilkinson made a similar point in *Pepper v Hart*:

The Attorney-General raised a further constitutional point, namely, that for the court to use Parliamentary material in construing legislation would be to confuse the respective roles of Parliament as the maker of law and the courts as the interpreter. I am not impressed by this argument. The law, as I have said, is to be found in the words in which Parliament has enacted. It is for the courts to interpret those words so as to give effect to that purpose. The question is whether, in addition to other aids to the construction of statutory words, the courts should have regard to a further source. Recourse is already had to white papers and official reports not because they determine the meaning of the statutory words but because they assist the court to make its own determination. I can see no constitutional impropriety in this.⁷¹

Obviously all sources have to be interpreted and their significance assessed. Their place in the constitutional structure has to be recognised – at the most basic therefore it has to be recognised that what is said in Parliamentary debates is not legislation. It must be clearly understood too that it is the purpose of the legislation that is being searched for and not the underlying subjective intentions of legislators and particularly not those deliberately expressed in order to skew interpretation.⁷² I must say in New Zealand, however, most Ministers' speeches on the introduction of legislation and most Select Committee reports are largely technical.⁷³ Rhetoric has traditionally been reserved for others whose grasp of the details may be less than perfect. Professor John Burrows puts all this in context as follows:

informed. For example he regards Committee Reports as among the most useful sources of enacting history (at 471).

⁷¹ [1993] AC 593, 639-640.

⁷² As Lord Lester QC said in "*Pepper v Hart Revisited*" (1994) 15 Statute L Rev 10, 21: "If, for example, a Minister chooses to put an administratively convenient gloss upon statutory language in the course of the parliamentary debates, without proposing any amendment to the statutory language itself, the courts can and no doubt will continue to insist upon applying the well-known constitutional principles of judicial interpretation protecting basic human rights and freedoms."

⁷³ I note too that many of the issues in the United Kingdom and United States do not apply in New Zealand. We have a unicameral system and, unlike the United States no Presidential role in legislation. However the slower passage of legislation under the Mixed Member Proportional electoral system (MMP) introduced in 1993, with more compromise and amendment along the way, may make legislative history a less reliable interpretive guide. See the discussion on the effects of MMP on the preparation of legislation in J F Burrows *Statute Law in New Zealand* (3ed, LexisNexis, Wellington, 2003) 60-64. It is certainly true that MMP may reduce the reliance one can place on the Minister's speech in introducing the legislation as to the purpose of the text. In an MMP environment the reason for any amendments during the progression through the House may, however, be better documented than in the past as politicians may be more inclined to explain those reasons and thus why they supported the amendments.

But it is important not to misconstrue what is going on here. The statements found in these documents are not the word of Parliament. Parliament's authority attaches only to the words of the legislation that it passes. It is therefore not really true to say, as sometimes is said, that one is using these Parliamentary documents as direct evidence of the intention of Parliament. But it is clearly relevant and helpful to know what the proponents of a Bill or clause, normally but not always the government, and those responsible for drafting it, intended to achieve by it. The intentions and purposes of those most directly responsible for the legislation cannot be dismissed as having no value. There is no reason why the courts should not use their statements as a tiebreaker in a case of real ambiguity, or to add persuasive force to an interpretation to which the court is tending for a variety of reasons. (Indeed quite often decisions on statutory interpretation are arrived at by a number of separate arguments using language, scheme, purpose, history and perhaps statements in Hansard).⁷⁴

The Wider Context

The final stage I suggest is to look at the matter in the light of the wider context both in New Zealand and offshore. This would mean having regard to the New Zealand statute book as a whole and in particular statutes dealing with similar subject matter both here and offshore, as well of course as having regard to the common law and any relevant international law and treaties. The old presumptions may also still be relevant at this stage as discussed above. This has been called the contextual approach to interpretation. Professor Manning describes it as requiring a judge to:

...construe common law terms in light of their common law connotations; apply settled common law practices where pertinent to the subject matter of the statute; read technical language in light of its technical import; accept that words have colloquial meanings informed by common sense; interpret statutes in light of their relationship to other statutes; draw inferences from statutory structure; and apply settled background canons of construction, including the rule of lenity.⁷⁵

In many cases this final stage would only be reached as a double check or if meaning still remains obscure after the earlier steps have been completed. This is particularly true where it consists of the formal analysis of other sources in order to interpret the

⁷⁴ John Burrows "Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981, 987.

⁷⁵ John F Manning "Deriving Rules of Statutory Interpretation from the Constitution" (2001) 101 Colum L Rev 1648, 1656-1657. Such an approach is also consistent with what Francis Bennion calls the "informed interpretation rule", one aspect of which is that the interpreter: "should treat the express words of the enactment as illumined by consideration of its context or setting" – see Francis Bennion *Statutory Interpretation* (3ed, Butterworths, 1997) 449-453. The limits of context, as well as the evidence that may be needed in this respect, are discussed by Professor John Burrows in "The Changing Approach to the Interpretation of Statutes" above, 985-986.

provision at issue through reasoning by analogy.⁷⁶ General background and context (at least that of the targeted audience) will, however, necessarily be part of any analysis of plain meaning and statutory context in the first two stages.⁷⁷

The final stage must, however, always be reached in two (and possibly three) cases. The first is where rights protected by the Bill of Rights Act may be involved. Where this is the case the question must always be asked whether an interpretation that can accord with that Act is possible. The second is where it appears there is a difference in contextual background between the targeted audience and the legislators, perhaps because of the need for an updating interpretation. The third (and more controversial) is where international treaties may be applicable.

Courts' use of international treaties for interpretation purposes has been the subject of criticism. For example Treasa Dunworth objects to the Courts' consideration of international instruments not yet formally incorporated into law by Parliament on the basis that such an approach to interpretation usurps the powers of Parliament, even with the more recent practice of putting some international treaties before Parliament for consideration.⁷⁸ Melissa Poole appears less opposed to their use.⁷⁹

I do not consider that the manner in which the courts currently use international treaties causes any challenge to Parliamentary sovereignty. Their use in my view is no less democratic than the presumption that the interpretation of legislation should accord with certain values of the legal system which have long been protected by the common law, such as rights of access to the courts and the rules of natural justice. In addition, the use of the international context is not new. For example in 1876 Sir Robert Phillimore said:

⁷⁶ See *Assistant Registrar of Companies v Moses and Stevens* CA 322/02, CA 323/02, 9 April 2003, as an example of the approach of starting with the specific (that is the provision in question) and moving to the general (the immediate context followed by the context of the Act as a whole and then the wider statutory context).

⁷⁷ Professor Ruth Sullivan suggests that the move to plain English drafting may require a return to a greater concentration on the text itself to discern purpose as divorced from purpose discerned from the wider context. At the least judges should be more conscious of the different levels of competence and different contexts readers bring to a text and the effect that should have on interpretation if a statute is aimed at a wide range of readers – see Ruth Sullivan “Some Implications of Plain Language Drafting” (2001) 22 Statute L Rev 175, 179.

⁷⁸ “Public International Law” [2000] NZ Law Rev 217, 221.

...it is an established principle as to the construction of a statute that it should be construed, if the words will permit, so as to be in accordance with the principles of international law.⁸⁰

It is clear that any use of treaties can only be to presume Parliament would not legislate in a manner inconsistent with such international obligations – but this is presumptive only and clearly rebuttable. In *R v D*⁸¹ a systemic challenge was made to the sentence of preventive detention on the grounds that it was incompatible with New Zealand's obligations under the International Covenant on Civil and Political Rights (ICCPR). The Court of Appeal reiterated the proposition that statutes should be interpreted in a manner consistent with international obligations, but only if the words of the statute allowed it. In this case they did not and the Court could not override the criteria Parliament had laid down for the imposition of preventive detention.⁸²

Lord Steyn has recently made a distinction between unincorporated treaties in the human rights area and other treaties. He suggests that the Courts should more readily apply human rights treaties. According to Lord Steyn:

The rationale of the principle is that the executive must not be allowed to bypass Parliament and oppress citizens by entering into treaties not incorporated into domestic statute law. Human rights treaties ratified by the executive are untouched by this rationale. It is arguable that where the reason for the rule stops the reach of the rule may end.⁸³

While this clearly goes further than I think the courts should go in New Zealand I note that many of the cases where this question arises relate to the actions of the Executive. There appears to me to be nothing inherently undemocratic in holding the Executive

⁷⁹ “International Instruments in Administrative Decisions: Mainstreaming International Law” (1999) 30 VUWLR 91, 107.

⁸⁰ *R v Keyn* (1876) 2 Ex D 63, 85.

⁸¹ [2003] 1 NZLR 41, 45.

⁸² *R v D*, above, 46-47. The Court also noted Parliament had retained preventive detention in the new Sentencing Act 2002 and that the consistency of the sentence with the ICCPR had been considered during the Select Committee process, with the Committee being satisfied that the provisions complied with the ICCPR.

⁸³ See Lord Steyn “Democracy Through Law” (Occasional Paper No. 12, NZ Centre for Public Law, VUW, September 2002) 8.

to treaties it has entered into if the legislation involved allows it. This is especially so in the case of treaties which concern human rights.⁸⁴

To recap then, this final stage requires the words to be looked at in their wider context. The stage is not always reached but, even where it has to be, I would suggest that ideally (and if possible) analysis of the wider context should be left to this final stage, again to curb the tendency to interpret backwards from the perceived desired result.

THE *NORTHLAND MILK* CASE

Before I conclude I would like to discuss just briefly the case of *Northland Milk*⁸⁵ as that is where I should have started. *Northland Milk* inspired those who set the topic for this paper or should I rather say disapproval of *Northland Milk* inspired them. In that case Cooke P, as he then was, said that courts can fill gaps in an Act but only in order to make the Act work as Parliament must have intended. If those remarks are taken out of context, as they so often are by hopeful counsel, the unease felt is understandable. Citation of *Northland Milk* is usually the herald of an argument along the lines of the old adage “when in doubt and all other sources fail look at the words of the statute”. It is therefore often a signal that the words of the statute are (inconveniently for the party citing *Northland Milk*) all too clear.

Briefly the case involved the interpretation of the Milk Act 1988. That Act, according to its long title, was to “provide for the continued home delivery of milk; and to reduce in other respects the regulation of the [milk industry]”. It replaced the Milk Act 1967 which extensively regulated the industry. The 1988 Act provided for the setting up of the New Zealand Milk Authority, which would grant licences to milk processors to process milk for sale in specified home delivery areas. Such processors were required to provide a home delivery service in accordance with standards set by the Authority for the home delivery of milk. Former milk delivery vendors who lost their businesses due to the 1988 Act were entitled to compensation. *Northland Milk*

⁸⁴ See, however, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502, 526-527, 531, 539.

⁸⁵ *Northern Milk Ltd v Northland Milk Vendors Association (Inc) & Anor* [1988] 1 NZLR 530 (CA).

Ltd, the milk processor for the Whangarei area, resolved to reduce the number of days on which home deliveries were provided and also to reduce the number of vendors whom it engaged.

At the time of the decision no members had been appointed to the Milk Authority and there were therefore no standards applicable to home delivery. The Court held that Parliament must have intended that, after the 1988 Act came into force, the frequency of home deliveries would continue as specified in the approvals applying immediately before, that is under the 1967 Act, but subject to the setting of minimum standards determined by the Milk Authority in due course.

I do not wish to comment on whether I consider the decision to be correct or not. I do, however, venture to suggest that the remarks in *Northland Milk* are in fact of relatively narrow application if taken in context. For a start any gap-filling ability is explicitly tied to Parliamentary intent and is not a frolic of the Courts' own. The remarks were also preceded by an exhortation to courts not to usurp the policy-making function, which rightly belongs to Parliament. Cooke P said:

[T]he Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended.⁸⁶

The particular gap filled in that case was filled only after an analysis of the words of the statute and the scheme of the statute, as well as the purpose as set out in the long title, concluded that no other interpretation could accord with the purpose of the legislation. Cooke P said:

The Act is by its long title to provide for the *continued home delivery* of milk, which is emphasised by being stated as the first objective; and, not for complete deregulation, but to reduce in other respects the regulation of the milk industry. It is clear from the long title and numerous specific provisions of the Act that continued home delivery is regarded as a vital feature of the legislative pattern. Further, the basic scheme is that home delivery is to be governed by minimum standards determined by the new Authority. It is most unlikely that the legislature intended that for any of the time while the Act is in force processors will be left to fix their own standards. And all processors are statutory licensees and have a limited

⁸⁶ *Northern Milk Ltd v Northland Milk Vendors Association (Inc) & Anor*, above, 537.

statutory monopoly in their respective districts. When the Act came into force they did not begin trading under common law freedoms; they have had statutory rights and protection from the outset. As to the milk vendors, up to the commencement of the Act they have had to operate on conditions as to frequency of deliveries and other matters laid down by the Milk Board and have enjoyed subsidies and built up goodwills under that system. It is also most unlikely that the conditions under which they were operating were meant to cease the moment the Act took effect.⁸⁷

The decision can also be explained not as restricting the common law freedom of Northland Milk Ltd to trade but as an example of the common law presumption that the milk vendors should not be deprived of their property rights except in accordance with the process set up by Parliament, being as a result of the establishment of standards by the Milk Authority.

When I say the decision is of narrow compass this is in a temporal sense as well as a substantive sense. The case was dealing with a very short period as the Milk Authority was to be appointed within two weeks. This can of course cut both ways. One could argue that it is unnecessary to fill a gap for such a short period. On the other hand an argument that it was vital for Northland Milk to have common law freedom to trade for that short period also has an air of unreality, especially when it is remembered that it was enjoying statutory protection itself.

It may even be that there should be more latitude in “filling gaps” where transitional provisions are at issue because of the limited effect on the law in general and the difficulties in foreseeing all eventualities involved in the transitional period. It is likely that Parliament would wish the courts to find a solution rather than requiring further legislation for what will usually be only a short period.⁸⁸

I am not alone in thinking that *Northland Milk* is not a revolutionary case. It has been mentioned by commentators merely as an example of purposive interpretation.⁸⁹ It

⁸⁷ *Northern Milk Ltd v Northland Milk Vendors Association (Inc) & Anor*, above, 541-542.

⁸⁸ For a further example of the interpretation of transitional provisions *Australasian Correctional Management Ltd v Corrections Association of New Zealand Inc & Anor* [2002] 3 NZLR 250. See also *Federated Farmers of New Zealand (Inc) & Ors v New Zealand Post Ltd & Anor* [1992] 3 NZBORR 339.

⁸⁹ In “An Update on Statutory Interpretation” [1989] NZLJ 94, 94-95 Professor Burrows mentioned *Northland Milk* in a footnote (see fn 2). He saw the gap-filling approach as part of the shift from literal interpretation, which often frustrated Parliament’s intention, to the purposive approach, which looks beyond the words of a statute to an underlying theme or purpose. Professor Burrows’ *Statute Law in*

may go further than some would wish in interpreting the spirit rather than the letter of the legislation but it certainly does not go very far down that path and cannot be taken as authority for a return to the equity of the statute approach.

CONCLUSION

This paper has been all about lines and boundaries. The thesis is that gap-filling is alive and well and mandated by Parliament. Judges must, however, be very conscious of their role and the limits and limitations of that role. They must not step over the line between interpretation and legislation but at the same time they must interpret in accordance with the methodology required by Parliament (in particular through the Interpretation Act 1999). They must also try to keep tension between the courts and the Legislature to a minimum. These different forces may at times pull in different directions and individual judges will certainly have varying perceptions of what is required by them. I have suggested a number of propositions combined with a methodology. This is my attempt at setting boundaries through what I would call disciplined flexibility. Selfishly I can only hope I have sufficiently kept my options open.

New Zealand (3ed, LexisNexis, Wellington, 2003) 141-143 takes much the same view, noting that the gap-filling approach is dangerous if taken too far but stating that it has been used to provide “sensible” responses to drafting errors. The *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (Legislative Advisory Committee, Wellington, 2001) para 3.1.2, in the context of the consideration of whether legislation complies with fundamental common law principles, states simply that an example of the courts’ approach when construing legislation is that the courts will, where necessary, fill a gap to express the presumed intention of Parliament. *Northland Milk* is cited in support of this proposition, along with *Goldsboro v Walker* [1993] 1 NZLR 397, 404 and *Inco Europe v First Choice Distribution* [2001] 1 WLR 586 (HL).