

## **Interpreting taxing statutes # 38 – Identification of mischief and advancing of remedy**

**Where the legal meaning of a particular enactment is in question, it is important to identify the precise mischief that the enactment was intended to remedy. The mischief for which an Act was passed may be ascertained from the text of the Act or from any external aid to construction. Having identified the mischief, an interpreter should make such construction as suppresses the mischief and advances the remedy.<sup>1</sup>**

### **SYNOPSIS**

Identifying the mischief

Ascertaining mischief through external aid

Identification of remedy

Advancing of remedy

### **Identifying the mischief**

Some Acts deal with a single mischief. Other cover many different areas – an extreme example of which is the annual Finance Act which usually contains an array of unconnected provisions. Since, the enactment is the unity of inquiry in statutory interpretation, what matters in a particular case is not so much the mischief as it may have been generally regarded (or at which the Act as a whole may have been concerned), but the mischief with which the enactment is concerned. The interpreter needs to make sure that the correct target is identified. Initially, an interpreter should focus on the defect at which the enactment was aimed (so far as this may be relevant to the factual situation in the instant case). What matter is not so much the defect as it

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<sup>1</sup> Bennion 2020 s 12.7, 12.8 and 12.9

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was in fact, or as it was originally identified – rather, it is necessary to concentrate on the **defect for which in the end the legislature legislated.**<sup>2</sup>

Where a remedy is devised to deal with a particular mischief, it may have a complex operation. Within that operation there may be room for ‘mischiefs’ concerned only with the smooth working of the remedy. In appropriate cases, the enactment is to be construed with this in mind. For example, the remedy decided upon to deal with a mischief on the ground, or social mischief, may be the creation of a new social security benefit. It may be thought that problems will arise if people make fraudulent claims for the benefit, so the Act may create an offence of making a fraudulent claim for the benefit. The mischief which the offence is intended to remedy is a future one: the possibility of fraudulent claims being made for the new benefit if the making of such claims is not deterred.<sup>3</sup>

There is no necessary correlation between a particular defect and a remedial Act. Society suffers from an excess of defects: legislature suffers from an insufficiency of debating time. Although there must be a mischief for every enactment, there is not an enactment for every mischief. There are some examples in schematic form.<sup>4</sup>

**Example 1:** A mischief is identified, which we may call M1. A Bill is introduced to remedy M1. It is pointed out in debate that there is also a comparable mischief M2 as well. The Bill is amended to deal with M2 as well. The fact that M1 alone was identified as the original mischief (perhaps in the report of a

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<sup>2</sup> Bennion 2020 p 450

<sup>3</sup> Bennion 2020 p 450

<sup>4</sup> Bennion 2020 p 450

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committee of inquiry) should not lead the interpreter to suppose that the Act as it finally emerged was not intended by the legislature to cover M2 as well.

**Example 2:** A mischief with five facets is identified. We may call it A+B+C+D+E. A Bill is introduced to deal with it, but runs into strong opposition. To secure its passage, the government decided to drop the enactments tackling B and D. The fact that B and D in fact formed part of the problem on the ground should not lead the interpreter to conclude that the Act was intended to cover them.

**Example 3:** A mischief Y is identified. A Bill is introduced to deal with it, but the nature of Y changes radically during the period while the Bill is passing through the legislature. Suitable amendments are made to the Bill. In the end the mischief to which the final Act is directed (Z), though bearing points of resemblance to Y, is broadly different from it. The Act must be construed accordingly.

As is indicated in the above examples, the legislature may find itself unable to tackle a pressing social problem in one operation, and may tackle it in stages instead. It is important therefore not to confuse the mischief on the ground, or social mischief, with the legislative intention in relation to it.<sup>5</sup>

While the general area of the mischief may be easily inferred, it may be difficult to identify the precise scope or ambit of the mischief that the legislature intended to remedy. <sup>6</sup>

### Ascertaining mischief through external aid

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<sup>5</sup> Bennion 2020 p 451

<sup>6</sup> Bennion 2020 p 451

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The mischief may be ascertained not only from the text and context but also from materials external to the statute. Said as follows:

“It has long been established that the courts may look outside a statute in order to identify the “mischief” Parliament was seeking to remedy. Lord Simon of Glaisdale noted it is “rare indeed” that a statute can be properly interpreted without knowing the legislative object.<sup>7</sup> Reports of the Law Commission or advisory committees, and the government white papers, are everyday example of background material which may assist in understanding the purpose and the scope of legislation.”<sup>8</sup>

Other external aids that may indicate the mischief include a treaty to which an Act was intended to give effect.<sup>9</sup>

In some cases, particularly with older Acts, it may not be possible for the court to find out what the mischief was. Since the court cannot take into account what it does not know, it must then do the best it can with the Act as it stands. For lack of further information, courts sometime equate the mischief with the very act forbidden by the statute, or an approximation to it. <sup>10</sup>

### Identification of remedy

It is presumed that the legislature intended by the enactment to suppress the mischief. Once the interpreter has correctly marked out the area of the mischief intended to be dealt by the enactment, the interpreter can go on to identify the corresponding remedy. This presumption as to the legislature’s intention may help in construing an enactment whose wording is doubtful. The

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<sup>7</sup> Black–Clawson International Ltd v Papierwerke Waldhof–Aschaffenburg AG [1975] AC 591

<sup>8</sup> Wilson v First Country Trust Ltd (No 2) [2003] UKHL 40 cited in Bennion 2020 p 453

<sup>9</sup> Bennion 2020 p 453

<sup>10</sup> Bennion 2020 p 453

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importance of mischief goes further than this, however. An interpreter cannot be sure whether there is real doubt or not unless the mischief is considered. In the consideration of opposing constructions of an enactment in relation to a particular factual situation, bringing the mischief into account may help to decide whether the enactment is intended to be given a wider or narrower construction.<sup>^11</sup>

### Advancing of remedy

Where an Act deals with one mischief, virtually the entire Act constitutes the ‘remedy’. Where it deals with a number of mischiefs, the relevant provisions of the Act constitute the remedy for each particular mischief.<sup>^12</sup>

Where a difficulty in the working of Act impairs the effectiveness of the intended remedy, it may be necessary for the court of construction to apply techniques designed to rectify the difficulty. That is no doubt what the Barons of the Exchequer had in mind when they said in Haydon’s case the court must advance the remedy and “add force and life” to it. <sup>^13</sup>

A court may consider that, in providing a remedy for a mischief, the legislature intended the remedy to apply to the whole of the mischief rather than a part only. <sup>^14</sup>

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<sup>11</sup> Bennion 2020 p 454

<sup>12</sup> Bennion 2020 p 456

<sup>13</sup> Bennion 2020 p 456

<sup>14</sup> Bennion 2020 p 456