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A Murderer, his Medicine and a Dose of Statutory Interpretation

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I have the benefit of both teaching and practising law. When not at Bond University teaching students, I work as a barrister. One thing I have noticed about students is that they struggle with statutory interpretation. This is unfortunate because, in practise, interpreting what a statute means often demands more time than looking up cases. This article considers a problem of statutory interpretation that I faced in practise. It illustrates how to approach an Act when you are trying to work out what it means.

A murderer and his medicine

The matter concerned a prisoner, serving a life sentence for murder, who had been charged with an offence alleged to have been committed while he was in jail. Prisoners in jail can still be charged with offences just like everyone else. For example, if a prisoner starts a fight or breaks prison property they can be charged with assault or wilful damage. In this case the prisoner was charged with 'Possession of a Prohibited Article' which was an indictable offence under s 93(2) of the *Corrective Services Act* 2000 (Qld) (the CSA). This Act has since been completely rewritten, but I'll tell you about that at the end.

The prisoner was in maximum security. That means he was in his cell for 22 hours a day with 2 hours in the exercise yard. He never associated with any other prisoners. When he was in the exercise yard he was alone. In his cell he had a toilet and shower in one corner, and a bed, desk and shelf in the other. There was a television built into the roof and a camera that enabled the prison authorities to see everything that went on in the cell.

The prisoner was diagnosed with a psychiatric disorder. Sometimes he would hear voices and sometimes he would see strange lights. This worried him a lot, particularly about what it might make him do. So he asked to see a psychiatrist. The psychiatrist told him to take two Zyprexa tablets everyday. Everyday the nurse would come to the door of the prisoner's cell and through the slot in the door, the nurse would pass him two tablets and a plastic cup of water. The nurse was supposed to watch the prisoner take the tablets and check his mouth afterwards to make sure he had swallowed both, but this didn't always happen.

The prisoner found that taking two tablets a day made him feel dopey. He told the nurse this and said he only wanted one tablet. The nurse said that the prisoner would have to wait until he saw the psychiatrist which was in two months time. Until then, the nurse told the prisoner that he would either have to take both the tablets or refuse to take both tablets.

Because the nurse wasn't checking whether the prisoner swallowed his medicine, he decided to only take one tablet. He would put one tablet on his shelf and the next day he would refuse his medicine and take the tablet that he had from the day before. The prisoner found one tablet was a good dosage for him because it did not make him feel dopey.

One day when the prisoner was in the exercise yard the prison guards searched his cell. They found the tablet of Zyprexa on his shelf and told the special prison police. When the prison police spoke to the prisoner he admitted to having the tablet on his shelf and told them the story I have just recounted. The special prison police charged the prisoner with 'Possession of a Prohibited Article', an offence under s 93 of the CSA which carries a maximum penalty of two years in prison.

When the prisoner contacted me I wasn't sure what to do. He had admitted to the prison police that he had the tablet. They had recorded that admission. But it seemed very unfair to make him serve an extra two years' jail just for not taking his medication properly. So I took a closer look at s 93 of the CSA.

Prohibited things

Section 93(2) of the CSA provided that 'A prisoner must not make, attempt to make, possess, conceal or knowingly consume ... a prohibited thing.' Section 93(4) provided that 'The finding of a prohibited thing in a prisoner's room ... is evidence that the thing was in the prisoner's possession when it was found.'

Consequently, under the CSA, it did not matter that the prisoner had confessed because the finding of the tablet in his cell was evidence enough that it was in his possession. The case was looking harder. But s 93 of the Act didn't say what a prohibited thing was. Section 93(1) said to look to the *Corrective Services Regulations* 2001 (Qld) (the Regulations) to find out what a prohibited thing was.

Regulation 18 gave a long list of things that were prohibited like guns, knives, explosives. Regulation 18(l) said that 'a drug or medicine' was a prohibited thing.

One of the first rules of statutory interpretation is to use the plain and ordinary meaning of the words: *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311. This is called the literal rule. Unfortunately using the plain and ordinary meaning of s 93(3) of the CSA and reg 18(l) seemed to make it clear that the prisoner was guilty in that he had a drug or medicine in his cell and a drug or medicine is a prohibited thing.

The only thing I could think of was s 93(3)(b) of the CSA which created an exemption for 'possession of a thing, if the prisoner has the person in charge's written consent to possess the thing'. I wondered whether the prescription that the doctor had made out so that the prisoner could get the Zyprexa could amount to 'the person in charge's written consent'. Unfortunately when I looked further, I found that s 5 of the CSA stated that 'a reference to the person in charge is a reference to the person in charge of a corrective services facility'.

So I spoke to the prisoner about what I had found out. In my experience prisoners often have good ideas about their legal problems, probably because they have a lot of time to think about them. The prisoner gave me further instructions that he had been given Aqueous cream to use in the shower. I thought, surely Aqueous cream was a medicine? I went back to s 93 and read it and reread it. Then I realised that the plain and ordinary meaning of the words in s 93(2) – that a prisoner must not possess, conceal or knowingly consume a prohibited thing (drug or medicine) – meant that every prisoner who ever took any medication in jail was guilty of this offence!

Submitting to medical treatment

I looked at other sections of the CSA to see what I could find. Section 15 said that 'A prisoner must submit to a medical examination or treatment by a doctor if the doctor considers the prisoner requires medical attention.'

'Treatment' was not defined in the Act, so I consulted a dictionary. Its ordinary and settled meaning, according to the Macquarie Dictionary, was 'management in the application of medicine or surgery'. Insofar as 'medical treatment' of a prisoner was concerned, s 15 of the Act and reg 18 were inconsistent. The effect was that a prisoner would be committing an offence by submitting to treatment by a medical officer whenever that treatment involved consuming medicine.

I looked further and found that the Queensland Parliament had provided for punishing prisoners for failure to take medicine as directed by a doctor under s 15 of the CSA. Parliament had decided that such a failure would amount to a breach of discipline. A breach of discipline is not an offence and does not go on the prisoner's criminal record. It does go on their prison record and the prisoner is punished for such a breach, but not with extra jail time. Section 86(1) of the CSA dealt with breaches of discipline, but what amounted to a breach of discipline was in the Regulations.

All the acts that constituted a breach of s 86(1) of the CSA were set out in reg 15(1). Thus, under reg 15(1)(m)(i), 'a prisoner commits a breach of discipline if the prisoner ... without the approval of a corrective services officer, doctor or nurse ... possesses or takes medication.' The words of reg 15(1)(m)(i) were very clear and exactly matched the facts of the case of my prisoner. Parliament had enacted that failure to take medication was a breach of discipline and not an offence!

It was clear that a plain and ordinary reading of the words in s 93 of the CSA would produce the absurd result that all prisoners were guilty of possessing a prohibited article even if they were submitting to medical treatment under s 15 as they were obliged to do. So what was the Parliament getting at when it defined a prohibited thing as a drug or medicine?

Noscitur a sociis

The rule of statutory interpretation known as *'noscitur a sociis'* means that 'a word is known by the company it keeps'. Looking at the other words listed as prohibited articles in reg 18 gave me an idea of what 'drug or medicine' might mean. The other things listed as prohibited articles included explosives, flammable substances, keys, anything capable of cutting metal bars, knives, saws, a passport, disguises, communication devices, syringes and alcohol. These other items related to escape or substances to intoxicate. So using the rule of *noscitur a sociis,* 'drug or medicine' in s 18 must arguably be referring to drugs that create an intoxicating effect. This was a good start. But I needed more to strengthen my argument.

Extrinsic material

In *Commissioner for Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719, Justice Kirby (then President of the New South Wales Court of Appeal) said that 'we should presume that Parliament intended its legislation to operate rationally, efficiently and justly together'. Clearly the CSA was not operating in anything like a rational, efficient and just manner, so I had to find an interpretation of it that did operate in that way.

When you are having trouble interpreting an Act, it is useful to remember that the Parliament of every State and the Commonwealth has an Act to help you interpret other Acts. In Queensland it is called the *Acts Interpretation Act* 1954 (Qld) (the AIA). Section 14A of the AIA provides that an interpretation which best achieves the purpose of an Act should be adopted. Section 14B(1) of the AIA provides that extrinsic material may be used to help interpret a section of an Act. Section 14B(3)(e) defines 'extrinsic material' as including explanatory memoranda. Explanatory memoranda are documents that accompany Bills to explain to the politicians who are going to vote on the Bill what it is designed to do.

There is also a common law rule of statutory construction which provides that ambiguous words or phrases in a statute should be read in light of the 'mischief' or 'defect' in the existing law which the statute was intended to remedy: *Heydon's case* (1584) 76 ER 637.

The explanatory memorandum to the *Corrective Services Bill* stated that the purpose of s 93 was 'to discourage the import and possession of potentially dangerous items and drugs, and to ensure the protection and safety of the community, staff, and other prisoners.'

It was clear from the explanatory memoranda that the 'mischief' Parliament was trying to remedy, or the purpose it was trying to achieve, was discouraging the importation of dangerous drugs like cocaine and heroin into the jails. It was not to punish prisoners for taking medication given to them as part of their medical treatment.

Other jurisdictions

The people who draft legislation often look at the wording other States or other countries have used in their statutes covering a similar topic. So I also looked to other States to see how they dealt with drugs in prison to see if medicine was something that the other States banned as well. I found that both Victoria and Western Australia had provisions that drew a clear distinction between medications that prisoners are authorised to take and those they are not.

Section 44(1)(e) of the Victorian *Corrective Services Regulations* 1998 provides: 'A prisoner must not ... have in his or her possession an article or substance not issued or authorised by an officer, prescribed by a medical officer, medical practitioner or dentist, or permitted under the Act or these Regulations.'

In Western Australia, s 70 of the *Prisons Act* 1981 states that 'a prisoner commits an aggravated prison offence if he ... uses, or is in possession of, drugs not lawfully issued to him.'

Reading provisions together

I thought I had a good argument and was keen for the trial. It was a summary trial – that is, in front of a Magistrate rather than a jury. The police prosecutor called his witnesses – the nurse, the prison guard who found the tablet, and the prison police officer who interviewed the prisoner. Under cross-examination the nurse conceded that she didn't watch the prisoner take the medicine as she was supposed to, and the prison guard agreed that the prisoner had Aqueous cream in his cell but had not been charged for that. When I addressed the Magistrate, her Honour realised that my argument would take some thought. So the Magistrate reserved her decision until another day. But when the Magistrate gave her decision, she found the prisoner guilty.

In trying to provide the Magistrate with several examples of how the application of s 93 of the CSA was absurd, I had raised s 15 of the Act as well. As set out above, s 15 compels a prisoner to submit to medical treatment. I raised this in an effort to demonstrate that s 93 was never intended to cover prescription medication because when medication was pushed through the slot in a prisoner's cell, they would not have a choice; they would be compelled to take it. Otherwise, if medicine was a prohibited thing, they would be committing an offence if it was in their cell!

The Magistrate found that:

> 'The possession of the drug Zyprexa by the defendant in his cell was not part of any medical treatment mandated by s 15(1) of the Act ... The existence somewhere of a written prescription for the issue of Zyprexa was not a written consent for the purpose of s 93(3) of the Act.'

The Magistrate held that '[s]ection 93 is clearly to be read subject to s 15.' She concluded, 'In my view s 15 authorises the consumption or possession of a drug as part of medical treatment.'

So the Magistrate decided that s 93 was read subject to s 15. This is not stated anywhere in the CSA. There is a general presumption that sections of an Act are read with reference to each other, but this presumption does not stretch so far as to read sections as subject to one another where that reading is against the clear words of the section. If s 93 was to be read in conjunction with s 15 to that extent, then the CSA would have to specifically say so. And it did not.

In due course, I found myself in the District Court of Queensland arguing the construction of s 93 of the CSA. Not only did I have to convince the Court that my construction of the section was right, but that the Magistrate's construction was wrong and that the prosecution's construction was also wrong!

Written consent

Although it was not a strong argument, I had raised at trial the alternative argument that the prescription was 'written consent' as referred to in the exclusion given in s 93(3) of the CSA. In hindsight I would not make that submission again because it distracted the Magistrate and was picked up by the prosecution on appeal. I had raised it because under s 15 of the CSA a prisoner has no choice and no opportunity to resist when they have medicine placed in front of them by a doctor or a nurse. At trial the nurse had admitted in cross-examination that she had not watched the prisoner take the tablet as she was supposed to. Did the fact that she failed in her duty to watch the prisoner take it mean that she was guilty of aiding the commission of an offence?

It had to be that the prescription was 'written consent' because the prisoner had to take the medicine and had no power to apply for the written consent of the person in charge. The law of Queensland could not be that a man, shut in a cell for 22 hours out of 24, with no contact to the outside world and with no power to resist medicine being given to him can then be charged for having it!

The Magistrate dealt with that proposition by saying that 'in the absence of a treatment regime an offence arises'. The Magistrate decided that the prisoner was entitled to possess the medicine, but only for the purposes of taking it. However that does not follow from the plain and ordinary meaning of the words in s 93. You either have written consent to possess it or you do not. There is no provision to possess a prohibited thing for a particular purpose. Further, the Magistrate's reasons did not cover consuming the medicine, but only covered the possession of it.

On appeal, the prosecution came up with a neat response. They argued that if the prescription was 'written consent' as referred to in s 93(3)(b), it was only consent to possess the medicine for the time specified on the board in the control room which told the nurses what time to administer a prisoner's medicine.

How absurd! How was my prisoner to know whether the nurse was giving him his medicine at the right time or not? More importantly, s 93 of the CSA made no mention of time.

The Prosecution submitted:

> 'By keeping the olanizipine [Zyprexa] pill it is clear that ... [the prisoner] was doing so against the instructions of the nurse and therefore without the authority, written or otherwise of the person in charge.'

This was a reference to s 93(3)(b), which created an exemption for 'possession of a thing, if the prisoner has the person in charge's written consent to possess the thing'.

For this submission to have been correct, the Court would have had to interpret s 93(3)(b) as follows: the reference to 'written consent' would have to be read to include 'written or oral consent'; the phrase 'person in charge' would have to be read to include 'doctors and nurses'; and 'possession of a thing' and 'possess the thing' would have to be read as 'possession or consumption' and 'possess and consume' the thing.

Where phrases are specifically defined in an Act it is inappropriate to go beyond the meaning laid down: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. And as I mentioned above, words in statutes are to be given their natural and ordinary meaning: *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311. Thus expanding the definitions of such phrases as 'written authority' and 'possession' was inappropriate.

Finally, there was nothing in the definition under reg 18(1) that differentiates between authorised and unauthorised drugs or medicine. There was no provision in reg 18(1) or s 93 for the prohibition of articles for one purpose but not another.

Other medicine

Another point that, in hindsight, was distracting to raise at trial was the evidence of the other medicine like the Aqueous cream that the prisoner had without being charged. I raised

it as a further example of how the application of s 93 to ordinary medicines leads to absurd results because this prisoner had other medicine in his possession for which he was never charged, and there was evidence from the nurse that other prisoners were given medicines like Ventolin and Panadol and also were not charged.

The Magistrate took the view that I had raised these matters because I wanted to point out the inconsistencies of prison policy. That was not the case. I raised it as a means of demonstrating the absurdity of applying s 93 to ordinary medication. It would be absurd, for example, for the prisoner to be charged with possession of Panadol just as it would be absurd to require every prisoner who had a headache to get the written permission of the general manager before they took a Panadol tablet.

The prosecution again took a very strict approach to this issue on appeal. They argued that because the prison guard at trial had said that 'as far as he knew' the written consent of the general manager was not needed for Ventolin or Panadol, then the possibility was not excluded that prisoners did in fact need 'written consent' for these things. The flipside of that argument was that it also didn't exclude the far more likely and logical possibility that written consent wasn't required for these medicines. And if not required for these medicines, why was it required for the medicine my prisoner had?

Breach of discipline

I also raised the point that Parliament had already determined how to punish a prisoner's failure to take medicine as directed. The words of reg 15(1)(m)(i) were very clear. In circumstances where Parliament had clearly covered this scenario and the operation of s 93 was not clear, I asked the Court to infer that Parliament had never intended for s 93 of the CSA to cover a failure to take medicine.

On appeal, the prosecution argued that 'the fact that an act or omission of a prisoner amounts to a breach of discipline does not preclude that conduct from also constituting an offence.' Very true, but in the case of *Beckwith v The Queen* (1976) 135 CLR 569, the High Court said:

> 'In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the ... [accused] by refusing to extend the category of criminal offences.'

Clearly this was a case of ambiguity or doubt as to the meaning of a section, so I asked the Court to resolve that doubt in favour of the prisoner by not extending the operation of s 93 to cover a failure to take medicine.

Conclusion

After a long day in Court and the provision of a further set of written submissions, the Court finally accepted the defence submissions and the prisoner was found not guilty.

In 2005, the Queensland Parliament decided to rewrite the *Corrective Services Act* 2000. I was extremely interested in the approach Parliament might take because this case and others had demonstrated difficulties with how the CSA – particularly s 93 – worked. Last year, the *Corrective Services Act* 2006 (Qld) was passed. Section 93 became s 123. That section now reads:

> '(1) A regulation may prescribe a thing to be a prohibited thing.
> (2) A prisoner in a corrective services facility must not deal, or attempt to deal with -
> (a) a prohibited thing; or
> (b) something intended to be used by a prisoner to make a prohibited thing. Maximum penalty 2 years imprisonment.
> (3) However, subsection (2) does not apply to -
> (a) making or attempting to make a thing if the prisoner has the chief executive's written approval to make it; or
> (b) possession of a thing if the prisoner has the chief executive's written approval to possess it.
> (4) The finding of a prohibited thing in a prisoner's room that is not shared with another prisoner, or on the person of a prisoner, in a corrective services facility is evidence the thing was in the prisoner's possession when it was found.
> (5) In this section – *deals with* a thing means make, possess, conceal or knowingly consume the thing.'

Regulation 20 of the *Corrective Services Regulations* 2006 (Qld) deems what is a prohibited thing. Regulation 20(l) says 'a drug or medicine' is a prohibited thing.

So the provisions are numbered differently and the wording has been slightly altered. But the question remains whether these amendments have changed the problems with the interpretation of s 93 of the previous Act? Decide for yourself, but I can't help thinking of the old saying, 'The more things change, the more they stay the same.'

You be the judge:

How would the circumstances described in this article be dealt with today, under the provisions of Queensland's new Corrective Services Act? In your view, have past difficulties and uncertainties with the legislation been resolved?