Lost in legislation: the legacy of Pepper and Hart

Ambiguous statutes; seventeenth-century Bills of Rights; eighteenth-century judges; counterintuitive rules; overseas backup to overturn them; and troublesome research: the stuff of legal nightmares or par for the course in 1992's law courts? Through interviews with two of the key players, we investigate the background to one of Britain's most celebrated landmark cases and seek to establish whether things could be on the up in 2009.

By Alistair King of Justis Publishing

From humble acorns do mighty oaks grow.

And from humble tax cases can mighty changes in constitutional law grow.

Yet my analogy is a little slapdash: the tax case in question set a significant precedent in its own right: though initially low-key, humble it was not; and, unlike acorns blooming into oak trees, there was nothing predictable in its growth: the constitutional questions it threw up resulted in the overturning of a 200-year-old judge-made convention on citing parliamentary debates in court.

Few cases have had an impact as great as Pepper v Hart, [1993] AC 593.

But isn't this a given? The case that set three separate but interwoven precedents – on tax, on statutory construction and on parliamentary privilege – has been flagged up for study in law schools pretty much since the final House of Lords rulings. And they were reported 16 years ago. So why bring things up now?

Two key reasons spring to mind.

The first – and I hold my hands up that 2009 is no more relevant a year to investigate the topic than any other – is the history and background of the case. We can all read the law report. But, outside the realm of those involved, what's actually known about how and why things played out in the way they did? Alongside journalistic instinct, awareness of some of the luminaries involved in the story suggested to me that such an investigation would make enlightening reading if they could be tracked down.

The second reason is perhaps timelier. Informed in a large part by an examination of the first, it's the issue of research. Though it had been around for a while, the World Wide Web was still something of a geek's preserve in 1992; certainly it wasn't seen by many in the legal profession as a serious means of acquiring usable information. Other electronic media – CD-ROMs and the like – were used but only for very specific tasks, not as the default starting point of one's enquiries, which the internet has since become. On the back of the re-launch of a website that provides a route into the sort of information the appellant's counsel used in their successful litigation, how might the unearthing of such material have been different had today's technology been available in 1992? And could the availability of this technology – Justis Parliament and related services – have made it more likely to seek such courtroom backup in the first place?

In 1992 Jeremy Woolf was a young barrister of six years' call at Pump Court Tax Chambers in central London. A junior on the case since its first hearing, he – as his set's name might suggest to astute readers – was focused on the tax issue and was one of the counsel who represented the appellant, Mr Hart, a teacher at a fee-paying school, and eight colleagues.

The taxpayers' case didn't initially focus on the constitutional aspects of the case. But Woolf's and others' research on a particular tax statute impacted on it. And I suspected he would provide useful inside observations on the issue at large.

Still at these chambers, Woolf has seen his case portfolio swell in the years since Pepper and Hart. And, like so many of his peers, his office is piled with paper tower heirlooms to his career, many of them as tall as him. But he retrieves the relevant bound law reports – which he now uses in conjunction with their electronic equivalents on the full-text, online Justis legal library – in record speed and immediately deals with my questions.

I ask him to fill me in on the tax issue at stake.

It hinged on the "benefit in kind to schoolmasters [of independent schools at which they taught] receiving education for their children," he tells me. "The question was whether the tax on the benefit should be based on the average or marginal cost of educating a child at that school." In other words, should the total cost of running the school be divided by the number of pupils, attributed to the schoolmaster's child, and taxed accordingly? Or, as Woolf's side argued – ultimately successfully – should one accept that the school would run at that total cost regardless of the inclusion of the schoolmaster's child? By accounting only for marginal costs like food, this would lead to a significant reduction in his client's tax burden.

The good news was that Section 63 of the (now re-codified) Finance Act of 1976 dealt with this specific point; the bad news was that it was arguably ambiguous. "What's the cost of the benefit?" is how Woolf sums up the ambiguity, a simple question to which the statute alone provided an inconclusive answer.

Any resolution would have far-reaching implications not just for the private education sector but for all manner of employees of organizations that could offer similar benefits, such as airline staff, rail workers and the like.

"At the first hearing [in the Lords], we didn't get a very receptive audience," Woolf chuckles. "But Lord Griffiths went away and looked at the Hansard debates, which were referred to in the decision in the High Court." At the time, recourse to such material wasn't allowed, as laid down by an eighteenth-century judge who argued that it would violate Article 9 of the 1689 Bill of Rights. But, adds Woolf, "having looked at the debates, Lord Griffiths managed to persuade other members of the House of Lords that they should have further argument on the issue." This led to the second hearing and two questions: should one be able to look at parliamentary debates? And if so, what would be the outcome of this case?

So was it good luck that you dealt with a forward-thinking law lord who happened to suggest looking at Hansard?

It was a little more complicated that this, explains Woolf. "The issue came to light because we referred the first instance judge, Vinetlott J, to a tax guide that referred to an Inland Revenue press release that suggested such benefits should be taxed on a marginal cost basis." He continues: "The Revenue claimed to have no knowledge of the press release. Further researches suggested that the comment may have been based on comments by the Chief Secretary to the Treasury during the committee debates." It was this clue that made Griffiths look at the debates, which resulted in the further hearing.

Woolf's other abiding memory is the time-consuming process of traipsing to and from the Guildhall Library to request hard copies of the debate transcripts. "You had to go and ask the librarians to bring the material up to you," he says. "So obviously it was quite a slow process" to find the text of Standing Committee debates.

And all this assumes that you know exactly what you're looking for in the first place; speculative searches would rely on the glacial sifting of index cards.

Nevertheless, documentary evidence was found. And for the second House of Lords hearing, for which Woolf remained the junior, "they wanted to get someone who was more of a constitutional lawyer involved, so they brought in Anthony [now Lord] Lester QC," as the silk.

I'll introduce Lord Lester in a moment.

But first it would be remiss to not touch on some of the research methods available for similar tasks today.

And so, briefly, to Justis Parliament.

Formerly known as Parlianet when its 3 million-record-strong set of data was kept separate from the rest of Justis, it has a loyal base of subscribers. "Being able to find what's in the House of Commons, the Lords and some of the UK's devolved assemblies is amazingly useful, as is finding older documents and odd material that it would be difficult to locate elsewhere," says Joy Caisley, the Law and Official Publications Librarian at the University of Southampton, who adds that she "often refer[s] third-year dissertation students to it and they find it incredibly helpful."

But since its incorporation into Justis this month and its eventual indexing by Justis's sister service, the provider-neutral JustCite citator, will its practitioner uptake rise?

With numerous improvements to its intuitive search and results handling, all summarized at www.justis.com/justisparliament, it could become the first port of call for all parliamentary research.

Among other things, Justis Parliament is the most user-friendly route into the otherwise nearly-impossible-to-search full text of Hansard. With access to title and full-text searches of parliamentary questions, Bills going through parliament, Select Committees and debates from the Houses of Commons and Lords, and from the Welsh and Northern Ireland Assemblies, its users rely on the time-saving device.

It also indexes Standing Committee debates; crucial for the type of research Woolf was involved in back in 1992. Though it doesn't yet provide a search of or link into their full texts, this facility is a "superb starting point for tracking down relevant ammunition," according to Masoud Gerami, managing director of Justis Publishing, who hints at plans afoot to enhance this side of the service.

Gerami acknowledges that currently the database goes back only as far as 1979; not ideal for Pepper and Hart, which relied on debates from 1976. But he explains that, should earlier data on the full service become available – as it might well do – the process of adding it to Justis Parliament would be straightforward.

Can Woolf see the benefits of such a service in his general practice?

His cautious response is that the further back it goes the more valuable it would be because the service could be "providing something that's not easily accessible elsewhere." He adds that potential developments on Standing Committee reports "would clearly be quite valuable because it would save having to go to the Guildhall Library or the library in Westminster, the only two places in London

that have them for the older years."

But I promised to introduce you to Lord Lester, a silk at London's Blackstone Chambers, which also subscribes to Justis and JustCite.

Lester is a prolific lawyer. Called to the Bar in 1963, he has been a silk for 34 of those 46 years in practice. Alongside the countless cases in public and human rights law he has fought, he was the then Home Secretary Roy Jenkins's Special Adviser on human rights; he's served on a number of parliamentary committees; and he's been awarded numerous honorary doctorates. Quite an embarrassment of riches. But Pepper and Hart holds its own against this backdrop. The case was "of exceptional difficulty and public importance," says Lester, who adds: "It required a great deal of research into comparative law and parliamentary practice."

By the time Lester got onboard, establishing that the essence of the relevant statute was somewhat different from its wording had, to an extent, become secondary; the primary issue, for which he, as a constitutional lawyer, had been brought in to debate was whether recourse to transcripts from debates, in order to iron out ambiguity, was constitutional.

In contention was the so-called "Exclusionary Rule". As stated in the official law report, "Mr Lester did not urge us to abandon the exclusionary rule completely." This was a crucial counterpoint to the detractors' belief that it could open the floodgates, meaning lawyers could potentially waste the courts' time by resorting to legislative history at every opportunity.

So, when the judges finally found in favour of Lester's client, they laid down stringent guidelines for determining whether a statute was ambiguous. Whether these explicitly addressed others critics' concerns, alluded to by Woolf, that ministers could potentially make self-serving comments, knowing that they'd be on-the-record, is moot. But the 30,000-word judgment was fairly watertight.

So how did Lester win them over?

Clearly the full answer is longer than I have space for. But what is also clear is that foreign precedent played an important role in the debate.

"We relied on many things from America, India, Ireland, New Zealand and Australia," says Lester.

Back in the day, these former British colonies – and Ireland, which was of course once a constituent part of the UK – adhered to the 1689 Bill of Rights. But one by one they each abolished the rule that Lester sought to help abolish here.

The persuasiveness of the arguments used in their courts was, in part, behind the decision made in our court.

After all, as Lester points out, one of the purposes of Hansard was to help with the very thing that lawyers were, until Pepper and Hart, banned from doing. Its case report notes this absurdity, as highlighted in the Law Commission of New Zealand Report from 1990, which was cited: "It is irrational for the courts to maintain an absolute rule depriving themselves of access to potential [sic] relevant evidence or information for this purpose."

It must have been quite a task to find all this collateral.

But Lester is a comparative law researcher of old. He read "textbooks, articles, debates and other source material," and he tapped into "personal contacts".

Though he had access to the technology of the day – "certainly I used a fax machine, as this was before email, to send a fax to Kenneth Keith [a renowned judge] in New Zealand," he says – but it's clear that to the likes of Lord Lester, research is rarely much of a stumbling block.

To those of us less able, innovative research tools can be a boon. As-enacted legislation, a feature on Justis, is one such tool that would help on the tax side of similar cases; on the constitutional side, JustCite would have provided a quick and easy means of tracking down some of the aforementioned foreign precedents – its indexing, deep-linking to full-text case reports and citatory information currently includes the UK, Ireland, Australia, Canada and Singapore.

The JustCite record for Pepper and Hart shows the cases cited and how they were treated in court, along with similar information on the subsequent cases in which Pepper and Hart has since been cited – in tax and constitutional cases. Its sample record can be seen for free at www.justcite.com/phsample.

But what of the legacy of Pepper and Hart? Has it really had that great an effect on the type of support material sought by legal practitioners?

Though he retired eighteen months ago, Dr Chris Pond spent 32 years in the House of Commons Library, the body which feeds much of the data that makes its way on to Justis Parliament.

Pond, who for many years has "appreciated the efficacy of Justis Parliament and JustCite," estimates that immediately after the ruling, requests for Standing Committee transcripts quadrupled.

Though this is good evidence, it's far from conclusive.

But it's my hunch that with easier access to such material, isolated or included alongside cases and legislation, lawyers will gradually see parliamentary data as little acorns bursting with legal potential.

And so I close with a metaphor as eloquent and uncontrived as that with which I started.