LEGAL TERMINOLOGY

By The Honourable Sir Wilfred K. Fullagar*

'When we are certain of sorrow in store,
Why do we always arrange for more?' – KIPLING.

About thirty-five years ago, in a well-known passage in his *Introduction to the Philosophy of Law,* Roscoe Pound wrote: 'For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding a friction in human enjoyment of the goods of existence – in short, a continually more efficacious social engineering'. It is not my purpose to discuss generally the many interesting implications of this view of legal history, or the conceptions involved in it of 'what law is' and 'what law is for'. It is in the concluding words of the passage quoted that at the moment I find food for thought. They involve more than a striking metaphor. They suggest a real analogy between the fabric of the law and the fabrics of great buildings and great bridges, and, by consequence, between the work of the lawyer – and I am not thinking exclusively of the courts – and the work of the civil engineer. It would be absurd to press the analogy too far, but it has importance in that it calls attention not merely to the highly technical character of the work in which each of the two professions is – like all professions – engaged, but also to the essentially constructive nature of the functions of each.

Every profession – and especially a profession which aims at achieving something constructive – must work on technical lines and develop a technique of its own. In particular it must develop a technical terminology of its own, in which particular words and expressions have a definite meaning which is accepted by those who practise it. Because of the necessity for generalization and communication within its own field, it could not function usefully without adopting definitions and categories and thinking in terms of its definitions and categories. And these must be a matter of general agreement within the profession if they are to serve their essential purposes. If a physician thought that the term 'vermiform appendix' meant one thing, and a surgeon thought that it meant something else, the patient would be facing a risk which he ought not to be called upon to face. If an engineer specified a particular kind of material for the construction of a bridge, and the technical words he

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used were *ancipitis usus* in the engineering world, and the contractor thought that he meant something different from what he did mean, the result would be, at best, delay and waste, and, at worst, tragic disaster. It is safe to say that this kind of thing happens, but seldom in the engineering world. Surely it is hardly less important in the legal world that technical terms should be used in a definite and universally accepted sense. Yet we fall again and again into the temptation to use those terms loosely and inaccurately. Sometimes we simply mistake the meaning of a term. Sometimes, instead of accepting an established meaning, we either make terms mean whatever we choose that they shall mean *ad hoc,* or use them unconsciously in different senses almost in the same breath. One root of our trouble is that there are many terms which we use constantly, but on the meaning of which we cannot agree. We should not be slaves of words, but we should not assume a mastery of words in the sense in which Humpty Dumpty claimed to be a master of words. The tendency is an extremely dangerous one, and, if it were given full rein, its effect upon the law could be, in the words of Chesterton, 'to drag it down, and double it up, and damn its soul alive.'

Probably the most frequently used word in our legal vocabulary today is the word 'negligence'. It is a solemn thought that we do not really know what it means. Some would define it (to put it very shortly) as a failure to exercise reasonable care in what one is doing. Others would define it as a breach of a duty to exercise reasonable care in what one is doing. Salmond wrote: 'There is no negligence unless there is in the particular case a legal duty to take care.'[1] For this proposition he cited a passage from *Thomas v. Quartermaine,*[2] in which Bowen L.J. said that the first thing the plaintiff had to prove was 'that the defendant had been guilty of some negligence, that is to say, of some breach of duty towards the plaintiff himself.' This passage on its face supports Salmond's proposition. The other authority which he cites is directly against it. It is a passage from the opinion of Lord Kinnear in *Butler v. Fife Coal Co.*[3] where his Lordship said: 'Negligence is not a ground of liability unless the person whose conduct is impeached is under a duty of taking care'. The term is here used as involving no duty element, and Lord Kinnear makes it very clear that, in his view, the question of duty is a question of law, while the question of negligence is a question of fact. In editions of Salmond since *Donoghue v. Stevenson*[4] the reference to *Butler's* case[5] has been deleted.

It may be said that the distinction is of little practical importance, and up to a point this may be true. In the traffic accident cases, which

[1] *Salmond on Torts,* (3rd ed., 1912), 24.
[2] (1887) 18 Q.B.D. 685, 694.
[3] [1912] A.C. 149, 159.
[4] [1932] A.C. 562.
[5] *Supra,* n. 3.

today make up so large a proportion of the work of the courts, juries are generally told that every user of a motor car on a highway owes a duty of care to every other user of the highway, and 'negligence' is defined for them in the terms used by Alderson B. in *Blyth's* case,[6] terms which treat the word as involving in itself no duty element. If they happen to be told also that negligence is a breach of duty – which will be true in the particular case on any view – no harm is done. But the fact remains that there is a real difference between the two meanings of a technical term in constant use, and that the word is used sometimes in the one sense and sometimes in the other. This is capable of giving rise to confusion of thought, and anything that is capable of that is a bad thing. The possible importance of the difference between the two meanings is well illustrated by such cases as *Bell v. Holmes.*[7] I am not really concerned at the moment with the question of which meaning is preferable, though I would observe that (as has often been pointed out) the definition of Alderson B. makes the expression 'contributory negligence' rational and understandable. Clearly we may have cases of 'contributory' negligence where a man owes no duty. However, if we pursue this line of reasoning, we may find that the conclusion of thought goes even deeper than we had realized, and that not only is there doubt as to whether the concept of negligence involves the element of duty, but there is equal doubt as to the meaning of the word 'duty', which is one of our fundamental terms. For we may be told that a man may owe a duty to himself. Where are we going? Is the behest of Polonius – 'To thine own self be true' – to be enshrined as a legal maxim in future editions of Broom?

Apart from cases where it may be of great direct importance, I strongly suspect this *anceps usus* of the term 'negligence' of having a capacity for a more subtle and sinister effect. If, in the propounding of a question for ourselves, we use a technical term loosely – that is to say, without a clear conception of its meaning – we are apt to have our attention distracted from the true nature of the ultimate question. We must run a real risk of going wrong by running two questions into one. As Slesser L.J. said in *Sharp v. Avery,*[8] 'there is a tendency to dismiss the problem . . . by merely investigating whether a particular person is careless, and from that it is fatally easy, by transposing the word "careless" into "negligent", to dismiss from one's mind the essential problem – namely, whether or not there was in the particular case a failure of "duty".' There seems to me to be wisdom in that warning. I would only observe that what is in danger of being overlooked in this way is probably not so often the question of the existence of the duty as the actual content of the duty – the *standard*

[6] (1856) 11 Ex. 781, 784. [7] [1956] 1 W.L.R. 1359. [8] [1938] 4 All E.R. 85, 88.

of care as expounded by Alderson B. I would think that there is general agreement that in certain fairly recent decisions (I am not, of course, speaking of jury cases) liability has been held to exist where a defendant or a servant of a defendant could not reasonably he held to have fallen short of that standard. If we consciously treat as separate and distinct questions the question whether a duty of care exists and the question whether there has been an observance of the required standard of care such cases are less likely to occur.

Another term of dubious import, which has had a certain vogue for a considerable time, is the term 'statutory negligence'. The harm done by it is of a somewhat different kind, but is serious. Its vice is not so much in its ambiguity (though it *is* ambiguous) as in its positively misleading nature.

Modern human life is, to an extraordinary degree, dependent on occupations of a more or less hazardous character. Materials have to be won from deep in the earth, and almost everything is made for us by machines, which 'can neither love nor pity nor forgive', but have to be tended and worked by men and women. Partly because of the doctrine of common employment (now abolished) and partly because of the common law standard of care – fair and reasonable enough, no doubt, in everyday human relationships – workers injured in mines and factories, and the dependents of workers who lost their lives at work, seemed to English-speaking legislatures to require more protection than the common law gave. The legislation which followed assumed two main forms. We have had, in the first place, provisions for 'workers' compensation', and we have had, in the second place, provisions, growing ever more elaborate, requiring the taking of specific steps, and the observance of specific precautions, in and about the installation and guarding of machines, and the working of machines, in mines and factories. Today the employer in most industries is subject, under statute or regulation or both, to the most detailed requirements of this kind.

When an injured worker claims damages for breach of one of these statutory commands, the first question which arises is whether the Act or Regulation intends that he shall have a right of action for breach – in other words, whether the duty which the statute unquestionably imposes is a duty owed to the plaintiff worker. This is the question which arose in cases of which *Groves v. Wimborne*[9] and *Gorris v. Scott*[10] are familiar examples. It depends entirely on the interpretation of the statute. If this question be answered in the affirmative, then one would think that the only remaining questions would be whether there had been a breach of the statutory duty and whether that breach had caused damage to the plaintiff. It is really

[9] [1898] 2 Q.B. 402.

[10] (1874) L.R. 9 Ex. 125.

a mistake to describe as actions of tort actions in which the cause of action asserted is a breach of a statutory duty as such. If, however, no more were involved than the subsuming of such cases in a text-book or a digest under a generic heading of 'Tort', possibly no great harm would be done. (The Australian Digest, by the way, deals with them under the heading of 'Statutes' and they have always been similarly treated in Salmond). But the moment we begin to think of such actions as actions for negligence, we simply set a trap for ourselves. Such actions have nothing to do with negligence.

A possible source of confusion between actions for negligence and actions for breach of a statutory duty lies in the fact that it has been held that a breach of a statutory duty may afford *prima facie* evidence of negligence: for example, *Henwood v. Municipal Tramways Trust (S.A.)*,[11] where the negligence in question was 'contributory' negligence. Such a breach never affords conclusive evidence of negligence, but it may afford *prima facie* evidence of negligence whether or not the statute imposing the duty gives, on its true interpretation, a right of action for breach of the duty as such. The basis of this view is presumably that *prima facie* the 'reasonable man' obeys rules and regulations which are obviously designed for his own safety or the safety of his 'neighbours'. But the fact that a breach of a specific statutory duty may afford evidence to support a cause of action for negligence should not be allowed to disguise the truth that negligence, as a cause of action, is one thing, and a breach of the specific statutory duty, as a cause of action, is another thing. It is not merely another thing: it is a radically different thing – different in its nature, and depending on different considerations altogether. Where the cause of action asserted is negligence, the ultimate question is whether the defendant has conformed to a certain standard – a somewhat vague standard, perhaps, but one which is quite susceptible of sensible and just application. What is involved is the giving or denying of a particular character to an act or an omission. No such characterization in this sense is involved when the cause of action asserted is breach of a statutory duty. No question of conforming to a standard arises: the question is simply whether the defendant has obeyed or disobeyed a specific statutory command. Such expressions as 'statutory negligence' involve a loose and false use of the technical term 'negligence', and they mislead us into thinking that 'contributory negligence', which is a relevant matter in an action for negligence, must be a relevant matter also in an action for breach of a specific statutory duty. Yet it is as certain as anything can be that the legislature imposed the specific duty just because it did not think that the liability of an employer for negligence afforded sufficient

[11] (1938) 60 C.L.R. 438.

protection to the worker, and just because it wanted to protect the worker from the possible consequences of his own negligence. In imposing the new duty, it left the existing liability for negligence completely untouched: it was giving a new and different right in addition to the existing right, and claims are often made in the alternative at common law and under a statute. If legislation took the form of saying that a particular act or omission should be deemed to be negligent, there might be some excuse for such an expression as 'statutory negligence'. But legislation of the kind in question has not generally taken that form – for reasons which seem plain enough.

There are many other technical terms, which we fall into the habit of using without attaching to them a clear and precise meaning. I hardly dare mention the subject of 'invitees' and 'licensees', but I am oppressed by the fact that the Forensic Fable about Mr Pottle, the Nasty Accident and the Sagacious Cook, however much we may laugh over it, has a sad ring of truth about it. Estoppel is a very important term of the law, which may almost be said to have lived its life under constant threat of corruption. In a fairly recent head-note we read that the plaintiff was estopped from bringing his action. A man cannot be estopped from bringing an action any more than he can be estopped from eating his breakfast. We have known it to be said that in a particular case it did not matter whether the facts gave rise to a contract or an estoppel, for in either case the party affected must fail. Contract and estoppel are such radically different things that the very fact that it is different to say which of them came into existence is apt to raise a strong suspicion that neither of them came into existence, and that the case needs further analysis. The term 'misdemeanour' is a technical term, but, when it is used in a statute, grave doubt may arise as to its meaning. Does it mean any offence other than a felony or any indictable offence other than a felony?

It is an ironical fact that there is much uncertainty about the meaning of the word 'uncertainty'. Yet, if we think it possible to say that a provision in a will or in a contract or in a by-law is 'void for uncertainty', we are using what surely ought to be regarded as a technical term to be used with some precise significance. In order to establish uncertainty, is it necessary that it should be impossible to give to the provision attacked any rational meaning? Is it necessary merely that it should be very difficult to apply it at all to any conceivable state of circumstances? Or is it enough that it might be found difficult to apply it to some conceivable state of circumstances? Is any distinction, in the case of a will or a contract, to be drawn between a case where a final discretion is left to a trustee, or other third party, and a case where a final decision must be a matter for the courts?

One very conspicuous example of the loose use of terminology must be briefly mentioned. It relates to the conclusive effect of judgments entered and issues curially determined. Various terms have been used more or less indiscriminately in this connexion – *res judicata,* estoppel *per rem judicatam,* estoppel by record, estoppel by matter of record. I would not be thought to criticize either the decision or the reasoning in *Marginson v. Blackburn Borough Council*[12] but the undiscriminating use of terms is well illustrated by the following passage: 'We are dealing here not so much with what has been called estoppel by record, but with the broader rule of evidence which prohibits the reassertion of a cause of action which has been litigated to a finish – estoppel by *res judicata.* In such a case the question arises, what was the question of law or fact which was decided?'[13] The important point is that there are two distinct rules, which, for present purposes may be stated very briefly thus – (1) when judgment has been entered in a proceeding, no other proceeding can afterwards be maintained in respect of the same cause of action: (2) 'A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies'[14] The second rule, which is much more commonly invoked than the first, has sometimes been called the rule in *Outram v. Morewood.*[15] It was never in doubt in *Marginson's* case[16] that it was the second rule (which is not concerned with causes of action) that was in question, but the passage quoted suffers from the lack of an accepted terminology and mixes up the two rules. No harm was done in *Marginson's* case,[17] but the confusion did lead to harm in *Johnston v. Cartledge & Matthews.*[18] In Australia the term 'issue estoppel' has, I think, come to be generally used to describe the effect of the second rule: see *Hoysted v. Commissioner of Taxation*[19] and *Blair v. Curran.*[20] It is an accurate and useful term, and it is to be hoped that we shall be able to continue to use it with a definite meaning and with only one meaning, but history does not dispose one to be optimistic about it.

Perhaps the most abused words of all are the words 'agent' and 'agency'. 'Agency' is a technical term useful to describe a particular legal relationship. It is also, unfortunately a word used popularly in a much wider sense – indeed with a variety of meanings. We find a situation to which the word may be legitimately applied in some popular sense but not in its technical sense. We proceed to use it in

[12] [1939] 2 K.B. 426. [13] [1939] 2 K.B. 426, 437.
[14] *Blair v. Curran* (1939) 62 C.L.R. 464, 531, *per* Dixon J.
[15] (1803) 3 East 346. [16] [1939] 2 K.B. 426. [17] *Ibid.*
[18] (1939) 3 All E.R. 654.
[19] (1921) 29 C.L.R. 537, 561 *per* Higgins J.
[20] (1939) 62 C.L.R. 464, 531-532 *per* Dixon J.

the popular sense. That in itself may be harmless. But we are all too apt then to fall into error by drawing a deduction which is sound only if the relationship in question is correctly described as that of agency in the technical sense. If the major premiss of the reasoning were made articulate and set out in full, the fallacy would be manifest.

I do not know what can be done by way of achieving a better terminology and a more accurate use of technical terms. But at least we could cultivate a greater respect for the tools with which we have to do our engineering. That persistent purveyor of half-truths, Bernard Shaw, has said that 'every profession is a conspiracy against the laity.' The laity cannot expect perfection from any institution or from any profession. But it has a right to expect from its doctors and its engineers and its lawyers that they shall not 'miscall technicalities', and that they shall be sure of what they mean when they speak their own chosen language. It cannot expect that they shall have a faultless vocabulary and never make a mistake in using it. But is it entitled to expect that they shall have a vocabulary adequate for their professional needs, and that they shall conform to the common law standard of reasonable care in the use of it.