

30 Years of *Pepper v Hart*: an empirical review

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ABSTRACT

Over 30 years have passed since the House of Lords handed down its seminal decision in *Pepper v Hart*. That decision made it possible, under tightly construed circumstances, for judges to consider Hansard materials when approaching the construction of a statutory provision. Perhaps surprisingly, there has been as of yet no empirical study into the workings of this important judicial tool. This article seeks to redress this deficiency. Using a bespoke dataset compiling information from 427 judgments, this article answers a number of important questions relating to the use of *Pepper v Hart*, and uncovers relevant trends and tendencies in the case law. It explains how often *Pepper v Hart* is invoked and how stringent the criteria have been applied in practice, whether the invocation of *Pepper v Hart* has changed over time, and which courts are most likely to make use of this power. Some reflections on the overall legacy of *Pepper v Hart* are offered to conclude.

1. INTRODUCTION

The House of Lords' decision in *Pepper v Hart*¹ was handed down on 26 November 1992. That landmark case established that when construing a statutory provision, judges may have recourse to *some* Hansard materials under narrow circumstances. Six of the seven judges deciding the case² voted to reverse the decision in *Davis v Johnson*,³ which was authority for the contrary position. Much has been said about the decision, but until now, there has been no empirical study into the use of *Pepper v Hart* over time. It has therefore been difficult to make an empirically informed assessment of the use (or possible abuse) of the *Pepper v Hart* jurisdiction in practice. This article seeks to change that.

The actual judgment in *Pepper v Hart* concerned the interpretation of the phrase 'expense incurred or in connection with its provision' found in section 63(2) of the Finance Act 1976. By way of background, Hart (and others) were teachers at an institution, where they took part

¹ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

² Lord Mackay of Clashfern dissented.

³ [1979] AC 264.

in a scheme allowing their children to be educated at that same institution for a fraction of the normal fee. The Inland Revenue sought to apply tax to this scheme (Pepper being the Inspector of Taxes). Both the High Court and Court of Appeal ruled in favour of Pepper: the scheme was subject to taxation because it constituted an ‘expense incurred or in connection with’ the provision of in-house benefits. The House of Lords was asked whether the lower courts were right.

Before the Lords, Hart sought to rely on statements made in Hansard which purported to show that Parliament’s clear intention, when passing the bill which would eventually become the Finance Act 1976, and in particular those provisions which would materialize in section 63(2) of the Act, was that he should *not* be taxed at the higher rate. A majority of judges found that these statements *could be* admissible (and also that they *were* admissible on the facts of the case). In the course of his judgment, Lord Browne-Wilkinson set out three important conditions, all of which must be met if Hansard material is to be considered.⁴

The first, condition (a), is that the legislation must be ambiguous or obscure, or its natural reading would lead to an absurdity. The second, condition (b), is that the material which is permitted excludes any statement which is not made by a ‘Minister or other promoter of the Bill’, although ‘other Parliamentary material as is necessary to understand such statement and their effect’ may also be considered. The third, condition (c), is that the material relied upon must itself be clear and provide a sufficient answer to the question of how to interpret the legislation.⁵

If, and only if, all three conditions are satisfied, judges can consider the relevant Parliamentary material as an aid to interpretation. All three conditions were satisfied in Hart’s case, and, having assessed the content of the Parliamentary statements, the House of Lords ruled in his favour. The conditions were ‘said to have been strictly circumscribed’⁶ and it was intended that they should be ‘strictly adhered to.’⁷ Lord Bridge therefore envisaged that instances where such materials would actually be used would be ‘rare,’⁸ a sentiment which has been echoed in later cases.⁹ Despite this, judges and commentators have differed as to whether resort to Hansard has truly been limited to exceptional cases.¹⁰

So much for what this article seeks to do. Here, then, is what the reader will *not* find in this article: any re-treading of the familiar debates as to the propriety of the *Pepper v Hart*, whether it is doctrinally appropriate to look to Hansard, or whether the rule in *Pepper v Hart* should be abolished. Readers interested in these issues can find accounts far more sophisticated than I could offer in the existing literature: contributions by Lord Steyn,¹¹ David Manknell,¹² Stefan Vogenauer,¹³ Aileen Kavanagh,¹⁴ Philip Sales (now Lord Sales),¹⁵ and Elizabeth Laing (now Elisabeth Laing LJ)¹⁶ are particularly interesting in this regard. Some of the findings I present in this article may have repercussions for *these* arguments, but I am interested, in this article, in

⁴ *Pepper* (n 1) at 640 (per Lord Browne-Wilkinson).

⁵ This condition is ‘stringent’—*R (Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11; [2022] WLR 2389 at [14].

⁶ *R (Sindair Collis Limited) v The Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394 at [29].

⁷ *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme* [2001] 2 AC 349 at 413 (Lord Hutton). See also *Spath Home* at 393 (‘stringent’) and 309 (‘strictly insisted upon’). See further *Good Law Project Limited v National Health Service Commissioning Board* [2023] EWHC 43 (Admin); [2023] PTSR 608 at [128] (judges have ‘insisted upon strict observance of these conditions’).

⁸ *Pepper* (n 1) at 617 (Lord Bridge).

⁹ *Spath Holme* (n 7) at 399 (Lord Nicholls); *AE Beckett & Sons (Lyndons) Ltd v Midlands Electricity Plc* [2001] 1 WLR 281 at [39]. There has been particular caution expressed about the invocation of *Pepper v Hart* in criminal cases: *Massey v Boulden* [2002] EWCA Civ 1634; [2003] 2 All ER 87 at [18]–[20]; *Thet v Director of Public Prosecutions* [2006] EWHC 2701 (Admin); [2007] 2 All ER 425 at [15]; *R v B and L* [2018] EWCA Crim 1439; [2019] 1 WLR 3177 at [26].

¹⁰ See, eg, Johan Steyn, ‘Pepper v Hart: A Re-examination’ (2001) 21 OJLS 59 and Stefan Vogenauer, ‘A Retreat from Pepper v Hart? A Reply to Lord Steyn’ (2005) 25 OJLS 629.

¹¹ Steyn, *ibid*.

¹² David Manknell, ‘Time to Revisit Pepper v Hart?’ (2003) 9 JR 30.

¹³ Vogenauer (n 10).

¹⁴ Aileen Kavanagh, ‘Pepper v Hart and Matters of Constitutional Principle’ (2005) 121 LQR 98.

¹⁵ Philip Sales, ‘Pepper v Hart: A Footnote to Professor Vogenauer’s Reply to Lord Steyn’ (2006) 26 OJLS 585.

¹⁶ Elisabeth Laing, ‘Pepper v Hart: Where Are We, How Did We Get Here, and Where Are We Going?’ (2006) 11 JR 44.

simply presenting the data, rather than discussing their potential implications for these related, but distinct, legal debates.

2. THE DATA

Now, more than 30 years have passed since *Pepper v Hart* was decided, it is high time to consider how the *Pepper v Hart* jurisdiction has been used in practice. Whilst some critics have voiced concerns which do not hinge on such matters, for example that the very possibility of considering Hansard material undermines the separation of powers,¹⁷ a primary concern, which caused Lord Mackay to dissent in *Pepper* itself, was that recourse to the *Pepper* jurisdiction would be invoked improperly, or too frequently. An empirical review of the use of this jurisdiction in practice helps to inform such debates: we can determine, or try to determine, the reasons behind the use of *Pepper*, or at least how often the power is invoked.

To do so, a dataset was constructed, which recorded all reported cases in which *Pepper v Hart* was considered expressly. This necessarily limits the analysis to *express* invocations of *Pepper*, as it would be too difficult to divine an objective list of cases where the tool is applied in some implicit, ambiguous, or disputed way. This means that the inclusion of cases in the study is less contestable, being *obviously* or *self-evidently* relevant to the inquiry.

Relevant decisions of all senior courts¹⁸ in the UK (including Northern Ireland and Scotland) handed down between November 1992 and July 2024 were included. Applicable cases were determined using Boolean search methods in BAILII, Westlaw, and LexisNexis.¹⁹ Where *Pepper v Hart* was considered by multiple courts in the same appeal, only the most senior court's judgment was recorded. Basic information about each case (its name, neutral or reported citation, date of hand down, names of parties, the name of the court, and the territorial jurisdiction) was recorded, alongside the coding referring to the court's approach to Hansard material. This method involved allocating a code—A, B, or C—to each case. Category A cases were those in which Lord Browne-Wilkinson's conditions were *not* met and Hansard was *not* consulted. Category B cases were those in which Hansard *was* consulted, but it was found that the material was of no use to the case at hand. Category C cases were those in which Hansard *was* consulted, and the material was of some utility to the case.

Of course, there were methodological imperfections. There might be cases where *Pepper v Hart* was cited, or where the invocation of Hansard was put forward, but this was rejected by the Court without it seeing fit to mention this in the reported judgment. The coding performed by the author is necessarily imprecise, and there is a risk of some subjectivity creeping in. Further, there might be cases in which *Hansard* was in fact consulted without express reference to the *Pepper v Hart* authority, which may have slipped under the radar. Nonetheless, a total of 427 judgments were recorded and coded, which created a robust dataset of cases.

3. HOW OFTEN WAS PEPPER SUCCESSFULLY INVOKED?

It emerged that Category A cases—those where the *Pepper v Hart* criteria were not satisfied—were by far the most frequent kind of case in the dataset. This means that overall, over three-quarters²⁰ of attempts to rely on Hansard material were rejected. Most of the remaining

¹⁷ Kavanagh (n 14).

¹⁸ This was taken to include any decision of the High Court (and its equivalents) and above. Decisions of the Upper Tribunal were recorded, as well as decisions of the Employment Appeal Tribunal; decisions of the First-Tier Tribunal and Employment Tribunal were not. Decisions of both the Inner House and Outer House of the Court of Session were recorded.

¹⁹ In addition to using the 'All Cases Cited' function in Westlaw and its equivalent in LexisNexis.

²⁰ 75.64%.

cases, one-fifth²¹ of the dataset, were Category C cases—those where Hansard material was considered and added something of substance to the enterprise of interpretation. There were very few Category B cases overall. This is perhaps surprising in light of Lord Nicholls’ assertion that Hansard references ‘seldom assist’ the judges.²² However, there is an obvious overlap between Category B cases and certain Category A cases—where the third ‘limb’ of the *Pepper v Hart* test is not satisfied. In the former, Hansard is examined but found to be of no help. In the latter, Hansard is *not* examined precisely *because* there is considered to be no statement capable of shedding light on the provision in question (ie it will be of no help). The difference between *consulting Hansard but finding it of no assistance* and *choosing not to consult Hansard because it will be of no assistance* is only slight, and many Category B cases could easily have been re-classified if the language of the judgment was slightly different.

Figure 1 sets out how each of the 427 cases in the dataset was classified under this schema.

There were 88 successful invocations of *Pepper v Hart* over the course of over 31 years, averaging at around 2–3 cases per year. By contrast, judges were nearly four times as likely to find that the *Pepper v Hart* conditions were not satisfied. This provides some evidence that the use of *Pepper* is limited, in a relative sense, to ‘rare cases.’²³ But it also suggests that Vogenauer is wrong to suggest that ‘the scope of *Pepper v Hart* has been reduced to such an extent that the ruling has almost become meaningless.’²⁴ Hansard has been, and continues to be, resorted to *some* of the time.

3.1 Category A cases: which condition—(a), (b), or (c)—was flouted in each case?

Category A cases were marked according to which of Lord Browne-Wilkinson’s three conditions provided the reason for disqualification in each instance. Figure 2 sets out how often each of the conditions—(a) relating to the need for an ambiguity or absurd interpretation; (b) relating to the need for the statement to be made by the promoter of the Bill in question; or (c) the need for the statement being put forward to be clear—were flouted. The numbers here do not add up to 427 because, in a number of cases, multiple reasons were put forward for disqualification. Thirty-eight cases involved a breach of two of the three conditions. All three conditions were flouted in five cases.

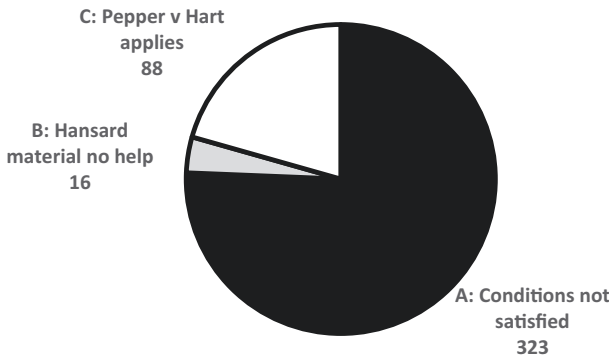


Figure 1. Number of cases involving each approach.

²¹ 20.61%.

²² *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262 at [65] (Lord Nicholls).

²³ *Pepper* (n 1), 617 (Lord Bridge).

²⁴ Vogenauer (n 10), 654.

Two hundred and twenty-seven cases involved a breach of condition (a). Eighteen cases involved a breach of condition (b). Sixty-three cases involved a breach of condition (c). In 24 cases, the court did not reveal which of the conditions was breached; it simply confirmed that the conditions in *Pepper v Hart* were not met, without further specification. Breach of condition (a) was therefore the primary reason for not admitting Hansard material. In other words, in many cases, the statutory term being interpreted was not considered to be ambiguous, nor did its natural reading give rise to an absurdity. *Pepper v Hart* was not systemically used to find the meaning behind statutory terms where the interpretation of those terms were, on their face, clear enough.²⁵

3.2 Category B cases: how many cases involved skipping the relevant criteria?

Remarkably, of the 16 Category B cases in the dataset (cases where Hansard was examined, but it was found to be of no use to the enquiry at hand), a clear majority—12—involved the court ignoring the question as to whether need for the three *Pepper v Hart* criteria were in fact satisfied, and looking at the material anyway. In just four cases did a court say that the *Pepper v Hart* criteria were satisfied, but that the material examined was not helpful. As alluded to above, this is because of limb (c) of the *Pepper* test: it requires that any material examined must provide a clear answer to the question of interpretation being considered to be admissible. Therefore, to satisfy the *Pepper* criteria in the first place, it is likely that the material examined will be of *some* use to the court. Otherwise, limb (c) could not be satisfied.

3.3 Category C cases: were the courts exclusively applying the ambiguity criterion?

Interestingly, sometimes condition (a)—the ambiguity criterion—was the only one reviewed by the court when determining whether the *Pepper v Hart* jurisdiction should be exercised. This makes sense in Category A cases as *any* breach of *any* of the three conditions would lead to the disapplication of the *Pepper v Hart* jurisdiction. Once one condition—condition (a), for example—is breached, this is determinative of the question of whether Hansard material can be admitted. However, this made less sense in Category C cases, where all three conditions must



Figure 2. Which *Pepper v Hart* condition is unsatisfied?

²⁵ Despite this, sometimes different judges sitting in the same case in the House of Lords came to different views on whether the language in a given statute was actually free from ambiguity: *Harding v Wealands* [2006] UKHL 32; [2007] 2 AC 1; *Jackson* (n 22); *Spath Holme* (n 7). For an example of division in the Court of Appeal, see *Eliades v Lewis* [2003] EWCA Civ 1758; [2004] 1 All ER 1196.

be met in order for material to be admissible. Yet in a surprisingly high number of cases—some 15 judgments—once an ambiguity was identified, this was considered the end of the story and the Hansard material was then considered.²⁶ This is a straightforward misapplication of *Pepper v Hart*, which requires all three conditions to be satisfied, not just condition (a). Being charitable, it might be said that in some of these cases, evidence of conditions (b) and (c) was so obvious that it did not need to be spelled out. But given how *Pepper v Hart* represents a (principled) exception to a default rule, this should not be left to the inference of the reader.

3.4 Category C cases: did the invocation of *Pepper v Hart* confirm existing presumptions about legislation?

In *Jackson v Attorney General*, Lord Nicholls suggested that recourse to *Pepper v Hart* was ‘especially’ useful as a ‘confirmatory’ tool.²⁷ Indeed, of the 88 cases in which *Pepper v Hart* both applied and led to something useful for the judges, 39 (44 per cent) involved the judges confirming their pre-existing views about how the legislation should be construed. In 46 cases (52 per cent) the judges looked at Hansard without offering any prior view of their own. In just three cases (3 per cent) of cases did Hansard material cause the judges to go against their tentative conclusions.

In *Sunderland Polytechnic v Evans*,²⁸ the Employment Appeal Tribunal had to consider the meaning of ‘any deduction’ in section 1 of the Wages Act 1986. Recourse to Hansard materials convinced the tribunal to go against not only their own intuitive view, but to depart from an earlier decision which had found that the statute term be read as meaning, in effect, ‘any lawful deduction.’²⁹ In *Innes v Information Commissioner*,³⁰ the Court of Appeal was tasked with interpreting the meaning of the word ‘form’ in section 11 of the Freedom of Information Act 2000; Underhill LJ was persuaded to go against his own ‘preferred reading’³¹ of the term in light of the fact that it would be ‘inconsistent with what [the Bill’s promoter] told Parliament’.³² Finally, in *Beaton v the Board of the Pensions Protection Fund*,³³ Nugee J was required to construe the phrase ‘benefits attributable to pensionable service’ taken from Schedule 7 of the Pensions Act 2004. The judge admitted that looking at the *Pepper v Hart* material required him ‘to depart from the conventional meaning’ that he would have attributed to the terms, ‘in order to shoehorn the effect of the legislation into the narrow confines of [the Bill promoter’s] statement.’³⁴

It seems that *Pepper v Hart* can, and has, been used to persuade judges to depart from their presumptive conclusions regarding the interpretation of legislation. But this is very rare. In the vast majority of cases, Hansard material is used to confirm prior judgments, or as a means of forming judgments in the first place. Perhaps some judges are reluctant to admit that they were tempted to adopt a construction at odds with that suggested by Hansard material, and omit any such references from their judgments. We can never know. All we can see is that, based on the

²⁶ R (HM) v Secretary of State for the Home Department [2022] EWHC 695 (Admin); [2022] 1 WLR 5030; *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd* [2022] EWHC 303 (Ch); [2022] Ch 289; *MacMillan v T Leith Developments Ltd* [2017] CSH 23; 2017 SC 642; R (*Gudanaviciene*) v Lord Chancellor [2014] EWCA Civ 1622; [2015] 3 All ER 827; *Petch v HM Advocate* [2011] HCJAC 20; 2011 SCRR 199; R v Tilley [2009] EWCA Crim 1426; [2010] 1 WLR 605; *Cassidy v Stephensons* [2009] EWHC 1562 (QB); *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43; [2008] 1 AC 1399; *Liverpool City Council v Marks & Spencer Plc* [2004] EWHC 1141 (Admin); [2004] 3 All ER 868; *Eliades*, *ibid*; *Secretary of State for Trade and Industry v Davies* [2001] EWCA Civ 1845; [2001] All ER (D) 296; R v Secretary of State for the Home Department *ex p Howitzer Products Ltd* (unreported, 18 February 2000); *Harvey v Mactaggart & Mickel Ltd* 2000 SC 137; *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573; *Sunderland Polytechnic v Evans* [1993] ICR 392.

²⁷ *Jackson* (n 22) at [65].

²⁸ *Sunderland Polytechnic* (n 21).

²⁹ *Home Office v Ayres* [1992] ICR 175.

³⁰ [2014] EWCA Civ 1086; [2015] 1 WLR 210.

³¹ *Ibid* at [36].

³² *Ibid* at [35].

³³ [2017] EWHC 2623 (Ch).

³⁴ *Ibid* at [61].

reported judgments, Hansard very rarely caused judicial *u-turns* when it came to the interpretation of statutory materials.

3.5 Did the arguments of counsel make a difference?

Occasionally, judges remark on the intentions of the parties, and arguments of counsel, when considering whether recourse to Hansard was appropriate. In *Navarro v Secretary of State for the Home Department*,³⁵ Turner J helpfully confirmed that the operation of the rule is *not* dependent on the arguments put forward by counsel, and that agreement between the parties as to the propriety of considering Hansard material does not supersede the need to make sure that the three *Pepper v Hart* conditions are in fact satisfied.³⁶ As such, on a number of occasions, judges have refused to look at Parliamentary material on the basis that (for example) the term being interpreted was unambiguous, despite both parties urging consideration of Hansard.³⁷ However, on other occasions, the agreement of parties that Hansard should be looked at provided a strong reason in favour of considering it.³⁸

Conversely, in some cases, where neither party suggested that Hansard should be consulted, judges have felt bound to close their eyes to any possible Hansard material.³⁹ Yet in other cases, judges will consult this material of their own accord, notwithstanding the lack of arguments from counsel that this endeavour should be undertaken.⁴⁰ It seems that the views of counsel act neither a requirement for, or a barrier against, consultation of Hansard in practice.

4. HAS THE USE OF *PEPPER V HART* CHANGED OVER TIME?

One interesting question to be considered is whether the judicial use of Hansard material has changed over time; in particular, whether this has become more, or less, prevalent since *Pepper v Hart* was first handed down in 1992. There were, of course, fears at the time that loosening the then-absolute prohibition on consulting Parliamentary material would lead to a flood of cases.⁴¹ By 1995, senior judges warned that litigants urging fruitless recourse to Hansard should be penalized with costs orders.⁴² And, in *Robinson v Secretary of State for Northern Ireland*,⁴³ a number of judges, looking back over this early period, lamented the additional expense and time judges had spent on pointless appeals to the *Pepper v Hart* principle.⁴⁴

However, in 2005, Lord Nicholls remarked that ‘the *Pepper v Hart* principle is currently under something of a judicial cloud’.⁴⁵ Writing in 2006, Elisabeth Laing remarked that the rules had become more strict over time.⁴⁶ In the same year, Lord Carswell remarked that recourse to *Pepper v Hart* had fallen ‘out of judicial favour’ following a period of ‘overuse’.⁴⁷ Around the same time, Krishnaprasad made an assessment that *Pepper v Hart* was met with an ‘initial enthusiasm’ which had waned somewhat over time.⁴⁸ The mood appeared to shift again by 2012, when the

³⁵ [2015] EWHC 507 (Admin).

³⁶ *Ibid* at [37].

³⁷ *Taylor v Secretary of State for Transport* [2017] EWHC 121 (Admin); [2017] 1 WLR 2166 at [69]; *Cleveland Bridge (UK) Limited v Whessoe-Völker Stevin Joint Venture* [2010] EWHC 1076 (TCC); [2010] All ER (D) 206 at [57]; *New Southern Railways Ltd v Christopher Rodway* [2005] EWCA Civ 443; [2005] ICR 1162 at [28].

³⁸ *R (Rights Community Action) v Secretary of State for Levelling Up* [2024] EWHC 1693 (Admin) at [65]; *Nikonovs v The Governor of HM Prison Brixton* [2005] EWHC 2405 (Admin); [2006] 1 WLR 1518 at [16]; *R v Human Fertilisation and Embryology Authority ex p Blood* [1999] Fam 151 at 168; *Short’s Trustee v Keeper of the Registers of Scotland* 1994 SC 122 at 138.

³⁹ *O’Shea Construction Ltd v Bassi* [1998] ICR 1130 at 1133.

⁴⁰ *Clark v Novacold Ltd* [1999] ICR 951, 964.

⁴¹ *Pepper* (n 1) (Lord Mackay).

⁴² See *Melluish (Inspector of Taxes) v BMI (No 3)* [1996] AC 454.

⁴³ [2002] UKHL 31; [2002] NI 390.

⁴⁴ *Ibid* at [40].

⁴⁵ *Jackson* (n 22) at [65] (Lord Nicholls).

⁴⁶ Laing (n 16) at 54–5.

⁴⁷ *Harding* (n 25) at [81].

⁴⁸ KV Krishnaprasad, ‘*Pepper v Hart*: Its Continuing Implications in the United Kingdom and in India’ (2011) 32 *Statute Law Review* 227, 231.

Supreme Court felt able to remark that ‘the rather strict rules that were laid down in that case have become gradually more relaxed’.⁴⁹

It seems, then, that these commentators envisage three broad ‘eras’ concerning the use of *Pepper v Hart*: an initial period of zealous use during its first decade, followed by a period of greater reluctance in its second decade, then a (possible) return to a more ‘relaxed’ approach as the judges approached its third decade. But does the data bear this out?

The dataset covered cases decided over a period of over 31 years. The cases were therefore split into three groups, each covering 10–11 years. The first covered the years 1992–2002, broadly covering the first decade of *Pepper v Hart*’s use, with the cut-off point broadly coinciding with the House of Lords’ criticisms in *Robinson*. The second period covered 2003 to 2013, representing the second decade of *Pepper v Hart*, and with a cut-off point broadly coinciding with the Supreme Court’s comments about relaxing the *Pepper* standard. The third period covered 2014 to 2024, representing the most recent decade of *Pepper v Hart*. Interestingly, the number of *candidate cases*—those cases in which the court seriously considered whether to look at Hansard or not—was consistent over each period. 146 such cases were handed down during the first period; 143 during the second period; 138 during the third.

For each period, the number of Category A, B, and C cases were counted. To recap, Category A cases were those in which the *Pepper v Hart* conditions were not satisfied. Category B cases were those in which Hansard was consulted, but it was found to contribute nothing to the case. Category C cases were true *Pepper v Hart* successes: where Hansard was consulted and this brought something useful to the case at hand. The number of cases falling into each category for each period is set out below, in Figs 3–5.

It is clear that the proportion of Category A cases—those in which the *Pepper v Hart* conditions were not satisfied—has increased over time, from 68 per cent in 1992–2002, 77 per cent in 2003–13 and 82 per cent in 2014–24. As such, whilst it has *always* been disproportionately likely that an attempted invocation of *Pepper v Hart* would be rebuffed by the court on the basis of one or more of the strict conditions not having been met, the tendency of the court to do this has increased over time. Conversely, the proportion of Category C cases—those in which *Pepper v Hart* was looked at and found to be of use—was noticeably higher during the first period examined compared with the post-2002 periods. There is therefore *some* evidence that there was an initial enthusiasm for recourse to *Pepper v Hart*, which waned somewhat over time. There is, however, less evidence of a second resurgence of enthusiasm post-2013. If anything, it seems that more potential Category B cases—those in which Hansard is consulted but found to be of no help—are being treated as Category A cases—possibly cases where recourse

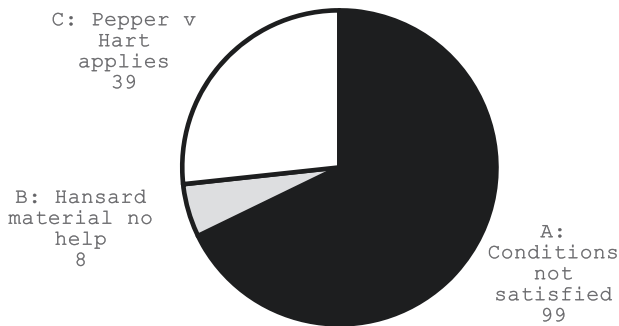


Figure 3. Use of *Pepper v Hart*, 1992–2002.

⁴⁹ *Gow v Grant* [2012] UKSC 29; [2012] All ER (D) 32 at [29].

to Hansard was excluded because there was no clear ministerial statement on relevant matters which would resolve the ambiguity of the provision under examination.

The data which indicates a possible early enthusiasm for *Pepper v Hart* is also reflected in some of the case law. In some early cases, such as *Scher v Policyholders Protection Board*⁵⁰ and *R v Jefferson*,⁵¹ the courts had recourse to Hansard material without any fanfare at all, and without properly examining the apparently strict criteria laid out in *Pepper*.⁵² Further, in some early cases, judges remarked that they were not strictly permitted to examine Parliamentary materials because (for example) the term being interpreted was unambiguous, but then went on to do so anyway as a kind of cross-check.⁵³ Whilst neither of these tendencies is *strictly limited* to the earlier case law,⁵⁴ it appears that both trends—looking at Hansard without recourse to the

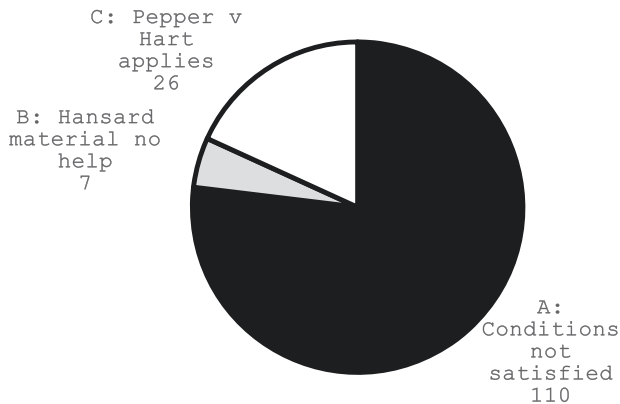


Figure 4. Use of *Pepper v Hart*, 2003–13.

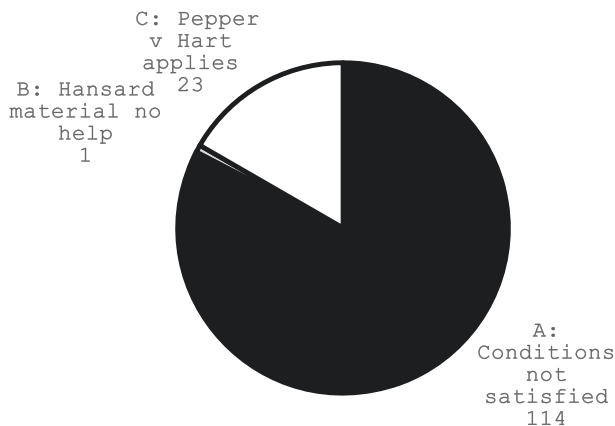


Figure 5. Use of *Pepper v Hart*, 2014–24.

⁵⁰ [1994] 2 AC 57 at 116.

⁵¹ (1994) 99 Cr App R 13.

⁵² *Scher* (n 50) at 116; *Jefferson*, *ibid* at 13.

⁵³ *Re Gower Enterprises (No 2)* [1995] BCC 1081 at 1082; *R v Hampshire* [1996] QB 1 at 7; *Restick v Crickmore* [1994] 1 WLR 420 at 426.

⁵⁴ For an example of a case involving recourse to Hansard without fanfare during the most recent period examined, see *Chersteron Global Ltd v Nurmohamed*, UKEAT/0335/14/DM (decision of 8 April 2015) [36]. For an example of recourse to Hansard as a cross-check from the most recent period examined, see *Scottish Legal Complaints Commission v Murray* [2022] CSIH 46; 2023 SC 10.

Pepper criteria and looking at Hansard despite there being no ambiguity in play—were particularly prevalent during the earlier period examined.

5. DID DIFFERENT COURTS TAKE DIFFERENT APPROACHES?

It is, finally, worth considering whether different courts adopt different approaches to *Pepper v Hart*. Across the dataset, cases were first filtered according to the jurisdiction: that is, whether they were decided by the courts of England and Wales, Scotland, or Northern Ireland. These filtered datasets were then checked so as to identify any cases in which the *Pepper v Hart* criteria were considered satisfied, and where the material examined was considered to have *some* utility to the case at hand (aligning with Category C cases in the schema in the section above). The 36 cases decided by the House of Lords and Supreme Court were excluded from this modified dataset; otherwise, all cases in the dataset were tagged as falling into one of the three UK jurisdictions.

It was found that the courts of England and Wales would consult *Pepper v Hart* in around 20 per cent of cases.⁵⁵ The courts of Scotland were *slightly more* likely to accede to such an invitation, doing so in around 23 per cent of cases.⁵⁶ Conversely, courts in Northern Ireland were *slightly less* inclined to consult Hansard material, doing so in around 17 per cent of cases⁵⁷ (although the low number of cases in the dataset involving Northern Irish courts—just six across 30 years—means this last figure should be interpreted with some caution). Overall, it seems there is little divergence between the courts of different jurisdictions when it comes to deciding whether to invoke the *Pepper v Hart* jurisdiction.

What about the likelihood of different courts *within* one jurisdiction to have recourse to Hansard materials? One possible hypothesis—call it the *seniority thesis*—is that it might be felt that consulting Hansard should be reserved to the most senior judges sitting in higher appellate courts, rather than the judges sitting in the lower appeal courts and courts of first instance. To a limited extent, the data from courts in England and Wales support this hypothesis. Judges sitting in the Upper Tribunal in that jurisdiction looked at Hansard in 13 per cent of the cases in which they were invited to do so⁵⁸; the Employment Appeal Tribunal did so in 15 per cent of such cases.⁵⁹ The High Court of England and Wales was more likely to do so, with a figure of 22 per cent.⁶⁰ The Court of Appeal of England and Wales was, however, (slightly) *less* likely to consult Hansard compared to the High Court: it agreed to do so in 19 per cent of cases.⁶¹ The court which was *most* likely to consult Hansard was the House of Lords/Supreme Court, doing so in 25 per cent of cases in which it was invited to do this.⁶² Interestingly, however, it seems the appetite for Hansard materials was very much one held by the House of Lords rather than its successor, the Supreme Court. Only in *one* Supreme Court case did the judges consult Hansard materials, and this was done *despite* the Court expressing doubts as to its admissibility.⁶³ By contrast, the House of Lords looked at this material 8 times.⁶⁴ This further evidences the argument, set out above, that there was an initial enthusiasm for invoking the *Pepper* jurisdiction, which cooled off over time.

⁵⁵ 68 of 341 cases.

⁵⁶ 10 of 54 cases.

⁵⁷ 1 of 6 cases.

⁵⁸ 3 of 23 cases.

⁵⁹ 4 of 26 cases.

⁶⁰ 37 of 167 cases.

⁶¹ 24 of 125 cases.

⁶² 9 of 36 cases.

⁶³ *R (Ismail) v Secretary of State for the Home Department* [2016] UKSC 37; [2016] 1 WLR 2814 at [30].

⁶⁴ 4 of 8 instances fell within the first 12 months following the decision in *Pepper* itself.

So much for the courts of England and Wales. What about the courts of other jurisdictions? There were too few cases from Northern Irish courts to make for any meaningful analysis, but it does seem to be the case, although based on comparatively less reliable data,⁶⁵ that the *seniority thesis* does apply to Scottish courts too. There is indeed something of a divergence between the Inner House and Outer House of the Court of Session when it comes to these matters. The Outer House had recourse to Hansard material in just 10 per cent of cases,⁶⁶ whereas the superior Inner House agreed to do so in 32 per cent of cases.⁶⁷ The *seniority thesis* seems to apply with force to the Scottish courts, too.

6. CONCLUSIONS

Courts have now been dealing with invitations to consider Hansard material on the basis of *Pepper v Hart* for over 30 years. This study has attempted to illuminate our understanding of how judges have approached these invitations in practice. However, like any empirical study, its limitations and shortcomings must be acknowledged: I have looked only at the explicit use of *Pepper v Hart*, rather than cases where its use went unannounced, or where recourse to Hansard materials was necessarily implied. There is an inevitable degree of subjectivity in the coding and analysis, true of any study of this kind, but it is worth mentioning nonetheless. The study is limited to the use of Hansard in the UK courts; whether, and to what extent, these findings might be replicated in other jurisdictions may be a fruitful avenue to explore.⁶⁸ There is no attempt in this study to tie together the findings of this study with wider questions as to the propriety of the *Pepper v Hart* rule: I leave this for others to determine. Finally, whilst I submit this study tells us a lot about the use of *Pepper v Hart*, it does not tell us *why* judges approach the tool in the way they do. Again, I leave this question open for others to determine.

Notwithstanding these limitations, the study has shed light on a number of interesting and important trends. Generally, recourse to Hansard material was uncommon; courts were much more likely to decline an invitation to consult such material than they were to accept it. Hansard was considered, on average, just 2–3 times per year over the 31 years considered in the dataset, a total of 88 times overall. Lord Bridge was right to predict that the use of *Pepper v Hart* would be relatively ‘rare’ in practice.⁶⁹

As is well known, to invoke *Pepper v Hart* successfully, three criteria must be satisfied. Of this criteria, it was condition (a)—that there needs to be an ambiguity, or that a natural reading of the provision would lead to an absurdity—which was most likely to be found to have been flouted on the facts, and which therefore provided a reason *not* to consult Hansard. Arguments of counsel, particularly where both sides agreed that Parliamentary materials should be consulted, sometimes, but rarely, made a difference.

Importantly, there is some evidence that judicial attitudes towards *Pepper v Hart* have changed over time. In particular, there seems to have been initial enthusiasm for the doctrine, with Hansard being consulted more regularly during the decade immediately following the judgment, compared to later periods of time. Finally, there is also some support for the view that more senior judges, sitting in superior or appellate courts, are more likely to consult Hansard compared to their more junior colleagues sitting at a lower court in the judicial hierarchy.

⁶⁵ 19 cases handed down by the Inner House were featured in the dataset, alongside 20 cases handed down by the Outer House.

⁶⁶ 2 of 20 cases.

⁶⁷ 6 of 19 cases.

⁶⁸ On which see, eg, John Magyar, ‘The Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation’ (2012) 33 *Statute Law Review* 363; Krishnaprasad (n 43).

⁶⁹ *Pepper* (n 1), 617 (Lord Bridge).

The legacy of *Pepper v Hart* is therefore a balanced one: it has not led to judges becoming completely overwhelmed by invitations to consider Hansard, but equally it has not, as others have feared,⁷⁰ died off and become completely irrelevant. Rather, it occasionally provides assistance to judges in circumstances where it is considered that the strict criteria laid down in *Pepper* are satisfied. It remains an important, if relatively rarely invoked, element of modern statutory interpretation.

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⁷⁰ Vogenauer (n 10).