

IT'S THE WAY YOU SAY IT: when Punctuation really Matters

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As a Brit, educated at an all-girls' grammar school, grammar and punctuation were *very* important, the pinnacle of punctuation marks being the comma. It was as if the grammar and punctuation of an assignment were more important than the subject-matter itself, and the more commas used, the better.

As a self-confessed grammar geek, and following my emigration to Canada, I noticed that grammar and punctuation are much more relaxed in North America. At first, I was loath to give up my slavish adherence to the rules regarding the use of the almighty comma, but, over the years, I think I have become more complacent (although some would disagree).

For all you grammarians out there, you likely know that the Oxford comma^[1] (aka the 'serial comma') is the one that is placed immediately before 'and' or 'or'^[2], in a series of three or more terms. For example, a list of three colours might be punctuated as:

- (a) red, white, and green (with a serial comma after "white"), or
- (b) red, white and green (without a serial comma).

In this example, the comma doesn't really add anything in terms of meaning; it is simply there as a matter of convention or style.

The Oxford comma can be crucial, however, when used to resolve an ambiguity. For example, a comma should arguably be used after "yellow" in "These items are available in black and white, red and yellow, and blue and green". Otherwise, there would be an ambiguity.

Not all writers and publishers use the Oxford comma as a matter of convention, but many use it to avoid an ambiguity. For example, reporters, editors, and producers at *The New York Times* typically leave out the serial comma, but Philip Corbett^[3], who oversees language issues for the newsroom, wrote, in a 2015 blog post, that exceptions are sometimes made:

We do use the additional comma in cases where a sentence would be awkward or confusing without it: Choices for breakfast included oatmeal, muffins, and bacon and eggs. [emphasis added]

It is obvious that if the comma after “muffins” is omitted, the sentence would be ambiguous.

The *Guardian*, too, would use a serial comma to avoid ambiguity at the breakfast table: “He ate cereal, kippers, bacon, eggs, toast and marmalade, and tea.” [the serial comma being after “marmalade”].

The following US decision demonstrates what can happen when a comma is not used to resolve an ambiguity. It is a stark reminder that a seemingly trivial omission can have unintended, dire consequences.

O’Connor v. Oakhurst Dairy

In *O’Connor v. Oakhurst Dairy*[\[4\]](#), the opening words of Circuit Judge David J. Barron, writing on behalf of the Court, say it all: “For want of a comma, we have this case”. The absence of an Oxford comma in a provision of Maine’s overtime legislation cost a dairy company an estimated US\$10 million.

The facts in *Oakhurst Dairy* are relatively straightforward. In 2014, three truck drivers sued their employer, Oakhurst Dairy, in the context of class proceedings, for more than four years’ worth of overtime pay, which had been denied by Oakhurst Dairy.

Maine’s overtime law[\[5\]](#) requires workers to be paid 1.5 times their normal hourly rate for each hour worked in excess of 40 hours, subject to a few exemptions. In particular, Exemption F covers employees whose work involves the handling of certain defined food products. It provides that the overtime law does not apply to:

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fish products; and
- (3) Perishable foods. [emphasis added]

The entire decision was based on the absence of an Oxford comma after “shipment”.

The drafters of this overtime legislation had followed the guidelines articulated in the Maine Legislative Drafting Manual[\[6\]](#), which specifically instructs lawmakers to not use the Oxford comma. In particular, it provides that one should not write “trailers, semitrailers, and pole trailers”, but instead write “trailers, semitrailers and pole trailers”.

The writers of the *Manual* caution, however, that if an item in a series is modified, then instead of trying to resolve the problem with a comma, the entire sentence should be re-written, so that a comma is not required.^[7]

The problem in *Oakhurst Dairy* arose with respect to the words, “packing for shipment or distribution of”, which give rise to two potential meanings:

1. [reading the phrase without a comma after “shipment”] Employees who pack for shipment or distribution of agricultural produce, meat and fish products, and perishable foods, are not entitled to overtime pay.
2. [reading in a comma after “shipment”] Employees who distribute agricultural produce, meat and fish products, and perishable foods, are not entitled to overtime pay.

The drivers distributed perishable foods - milk - but they didn't pack it. Consequently, in order for them to win their case, they had to persuade the Court to adopt the first interpretation - without the Oxford comma.

The drivers argued that, absent the comma, “distribution” modifies “packing”, and that “distribution” isn't a separate concept that would serve to exempt them from being paid overtime. In other words, the drivers said: ‘We don't package milk, so we aren't exempt from receiving overtime pay’.

Conversely, *Oakhurst Dairy* argued: ‘The drivers distribute perishable goods, so they aren't exempt’ [it interpreted the clause with the benefit of a serial comma].

A Very Quick Lesson in Contract Interpretation

The doctrine of *contra proferentem* (Latin: against the offeror) applies to contract interpretation. In the insurance context, it provides that when a term within an insurance policy is ambiguous, and there are two or more reasonable interpretations (reading the policy as a whole), and the ambiguity cannot be resolved by the application of any other applicable rule of interpretation, the preferred interpretation would be the one that goes against the interests of the drafter. The doctrine is often applied in situations involving standardized contracts, or where the parties are of unequal bargaining power (e.g. insurer and insured).

The Court of Appeals in *Oakhurst Dairy* sided with the drivers, concluding that the absence of a comma after the word “shipment” resulted in sufficient ambiguity that the impugned phrase should be interpreted narrowly, and in favour of the drivers, in order to accomplish the remedial purpose of the overtime law.

Although *Oakhurst Dairy* appears to have been decided on the basis of the doctrine of *contra proferentem*, the same result could have been achieved by the application of another rule of interpretation: If two concepts are described differently, then they must each mean something different. So in this case, if the drafter had meant to exclude distributors of perishable foods from benefiting from the overtime law, all he/she would have had to do was insert an Oxford

comma after “shipment”. Since there is no comma, the meaning is different from the same phrase with the comma.

Discussion and Recommendations

Essentially, the Court of Appeals gave a ‘shout-out’ for the use of the Oxford comma in circumstances where it would resolve an ambiguity^[8], thus thrilling grammar geeks (including myself) around the world.

Love it or hate it, the *Oakhurst Dairy* decision highlights the potential cost of not using an Oxford comma when it would resolve an ambiguity. And, as we all know, in the insurance business, there is no room for ambiguity.

The message of this article is not that drafters of insurance policies ought to immediately aspire to become grammar/punctuation *aficionados*, but to always ask the question: can the drafted sentence or clause be interpreted in any way other than intended? If the answer is ‘yes’, then an Oxford comma may remove the ambiguity. If it doesn’t, then rewriting the sentence entirely could be the safest bet. The Oxford comma should be used with extreme caution.

For all grammar geeks out there, the *Oakhurst Dairy* decision is a good read - Justice Barron appears to have a sense of humour, and raises several other interesting points in the decision: <https://law.justia.com/cases/federal/appellate-courts/ca1/16-1901/16-1901-2017-03-13.html>.

Editorial Notes:

1. Although I have carefully proof-read this article (in light of its subject-matter), if any reader identifies a grammatical error, or error in punctuation, please feel free to let me know!
2. Some citations have been omitted. For a comprehensive list of citations, or if anyone requires additional information relating to the rules of interpretation for insurance policies, please contact the writer at: acasemore@blaney.com.

^[1] Traditionally used by printers, readers, and editors at Oxford University Press.

^[2] These words are known as coordinating conjunctions.

^[3] Associate Managing Editor for Standards.

^[4] No. 16-1901 (1st Cir. 2017) - a US decision of the United States Court of Appeals for the First Circuit.

^[5] Chapter 7 of Title 26 of the Main Revised Statutes.

^[6] 113 (Legislative Council, Main State Legislature 2009).

^[7] It is stated in the *Manual* that commas “are the most misused and misunderstood punctuation marks in legal drafting and, perhaps, in the English language...Use them thoughtfully and sparingly”.

^[8] There are many examples of cases where sloppy punctuation has turned out to be

expensive. For example, see *Rogers Cable Communications Inc.*, Telecom Decision CRTC 2006-45.