

Larry Potter and the Deathly Canon

By Mark Cooney

“All rise. The Honorable Albert Dumbledore presiding.”

“Be seated, please,” said Judge Dumbledore. “Appearances, counsel.”

“Dragor Malfoy for the People, Your Honor.”

“Larry Potter for the prisoner of Allegan, Your Honor.”

“Very well. Mr. Potter, this is your motion?”

“Yes, Your Honor, my motion to dismiss. My client’s been charged with carrying a concealed weapon under MCL 750.227(1), but that section doesn’t apply.”

“Your Honor, this case is open and shut,” replied Malfoy. “The defendant used his coat to hide a sorcerer’s staff topped with a transmutation orb.”

“*Ejusdem generis!*” blurted Potter, arm extended.

A startled silence fell.

“Any particular reason you’re waving your pen at Mr. Malfoy, counsel?” asked Judge Dumbledore.

“I beg your pardon, Your Honor,” said Potter, dropping his arm.

“Would you kindly explain your emphatic incantation?”

“It’s a venerable canon of construction: *ejusdem generis*.”

“And I suppose, Mr. Potter, that you’ve derived this bit of bewitchery from some cloaked coven that presides beyond the realm of ordinary mortals?”

“The United States Supreme Court.”

“Ah.”

“The canon appears in the Court’s opinions at least as far back as 1869¹—and as far back as 1858 in the Michigan Supreme Court.”²

“Hm.”

“*Ejusdem generis* means ‘of the same kind or class,’” said Potter.³

“Oh, not another Latin lesson. Maybe I’ll adjourn and go get some pumpkin juice.”

“Your Honor, it’s simple, really. When a statute adds a broad catchall to a list of specific items, the catchall only captures items that are ‘of the same kind, class, character, or nature as those specifically enumerated.’”⁴

“Sounds a bit academic—and suspiciously definitive,” said Judge Dumbledore.

“Just the opposite, Your Honor. It’s infinitely practical and sensible. Imagine an apartment lease that bans pets but makes an exception for *parrots, parakeets, finches,*

and other birds. Would *other birds* allow a vulture in the apartment? An ostrich? Certainly not. A court would surely limit *other birds* to other similar birds, meaning small birds that are commonly kept as pets, like cockatiels or canaries.”⁵

“Your Honor,” said Malfoy, “I hasten to add that courts reject this canon when the result is at odds with the drafter’s seeming intent.⁶ And the canon has vocal critics.⁷ I can offer my own examples. Would a lease that reads *no cats, dogs, or other pets* seem as straightforward?⁸ Does *other pets* mean only four-legged pets with fur? So bring on your snakes, fish, frogs, turtles, and birds even though the lease says *no cats, dogs, or other pets?*”⁹

“Yes, yes, gentlemen, I get it. All right, Mr. Potter, make your point.”

“Your Honor, § 227(1) makes it unlawful to conceal and carry ‘a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon.’ A sorcerer’s staff doesn’t fit into that list.”

“A sorcerer’s staff with transmutation capability isn’t ‘any other dangerous weapon?’ Didn’t Cedric Sneezewort turn Phineas

“Plain Language,” edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 36 years. To contribute an article, contact Prof. Kimble at WMU-Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, Google “Plain Language column index.”

“When a statute adds a broad catchall to a list of specific items, the catchall only captures items . . . ‘of the same kind’ . . . [But] the canon has vocal critics.”

“I wonder how many [legal] drafters are aware of this canon’s potential to narrow their broad catchalls. Maybe drafters shoot themselves in the foot by creating these lists”

Fuscus into a salamander with just such a device?”

“I understand, Your Honor, but we’re not talking about its qualities and capabilities in general. We’re focused on this subsection of this statute. And as the Michigan Supreme Court observed in *People v Smith*,¹⁰ every item listed in § 227(1) is a stabbing weapon, something in the knife family—dagger, dirk, stiletto, double-edged stabbing instrument. So why would the *other dangerous weapon* catchall include something like an orb-topped magical staff, which can’t be used to stab someone?”

“It could poke, Your Honor,” urged Malfoy.

“But the fact remains that its function isn’t to stab or cut like the listed items. It’s a completely different type of weapon—as was the military rifle in *Smith*. In *Smith*, the Michigan Supreme Court acknowledged that the defendant’s M-1 military rifle was, of course, a dangerous weapon in the general sense.¹¹ But it wasn’t the type of dangerous weapon that § 227(1) envisions. The court held that the *other dangerous weapon* catchall, under *ejusdem generis*, includes only other stabbing weapons.”¹²

“Mr. Malfoy, what say the People?”

“The People ask you to apply the plain meaning of *other dangerous weapon*, Your Honor. And I’d add that the catchall includes the word *any*. It says *any other dangerous weapon*. *Any* means ‘any.’ A magical staff that can transmute people into salamanders is a dangerous weapon if ever there were one. I should add that as recently as 2018, the Michigan Supreme Court reversed a lower-

court decision that had relied on *ejusdem generis* to narrow a statute’s protections. Ours is a different statute, true. But courts mustn’t be hasty in narrowing the legislature’s broad terms.”¹³

“*Smith* is a bit long in the tooth, isn’t it, Mr. Potter?” said Judge Dumbledore. “1975?”

“But it’s still good law, Your Honor, interpreting the very provision at issue here. And the Michigan Supreme Court continues to refer to *ejusdem generis* in its modern cases.”¹⁴

“I confess that I’m at a bit of a loss,” said Judge Dumbledore. “I wonder how many legislative and contract drafters are aware of this canon’s potential to narrow their broad catchalls. Maybe drafters shoot themselves in the foot by creating these lists of particulars. Seems like settling on a carefully drawn general term, without a list, might be a better tack.¹⁵ Or perhaps leading with the catchall and following it with an abridged *including* example, though that might still be fuzzy in tougher cases . . . but perhaps less fuzzy in typical cases.”¹⁶

Judge Dumbledore sighed and stroked his beard for a long minute.

“I’m not entirely comfortable interpreting statutes with hocus-pocus rules dressed up in Latin. Yet there it is in *Smith* for this very provision. And it feels logical for § 227(1). There’s a tantalizing appeal to this *ejusdem generis* when it’s presented with favorable examples. Yet the People are correct in suggesting that the canon’s underpinnings might wobble when the drafter’s goals are less obvious.”

“Indeed, Your Honor,” said Malfoy.

“Thank you for the moral support, Mr. Prosecutor,” said Judge Dumbledore. “But I’m granting the motion. Case dismissed. Mr. Potter, tell your client to put his magical staff away in the closet.”

“Yes, Your H—”

“The *far, back* corner of the closet, if I make myself clear.”

“Quite clear, Your Honor,” said Potter.

“Thank you.”

The bailiff lifted the next case file: “Calling Fuscus versus Fuscus.”

“Mrs. Fuscus, you’ve filed for divorce because it seems that your husband is now a salamander?” said Judge Dumbledore.

“He is, sir. Yes.”

“And you’re convinced that this has materially altered the quality of your marriage?” ■



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on Legal Style. He was co-recipient (with Joseph Kimble) of the 2018 ClearMark Award for legal drafting and is a past chair of the State Bar’s Appellate Practice Section.

ENDNOTES

1. *Bigelow v Forrester*, 76 US 339, 348–349; 19 L Ed 696 (1869).
2. *American Transport Co v Moore*, 5 Mich 368, 385–386 (1858).
3. *Ejusdem Generis*, *Black’s Law Dictionary* (11th ed).
4. *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004).
5. Smith, *Linguistic Hooks: Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation*, 8 *Legal Comm & Rhetoric* 1, 6 (2011) (noting that ambiguity can arise when a nonprototypical item technically fits within a statutory category, yet clashes with that category’s standard stock structure—as with an ostrich’s falling into the *bird* category).
6. See, e.g., *People v O’Hara*, 278 Mich 281, 300; 270 NW 298 (1936).

(Continued on the following page)

7. See, e.g., Kimble, *Ejusdem Generis: What Is It Good For?*, 100 *Judicature* 48 (2016) (and sources quoted and cited within), available at <https://drive.google.com/file/d/0B91pJtj_681leXZITnJVdWNpNWM/view> [<https://perma.cc/YC56-UVYE>] (accessed August 8, 2020).
8. *Id.* at 48, 49, 53.
9. *Id.* at 49.
10. *People v Smith*, 393 Mich 432; 225 NW2d 165 (1975).
11. *Id.* at 436.
12. *Id.* at 436–437.
13. *Otto v Inn at Watervale, Inc.*, 501 Mich 1044; 909 NW2d 265 (2018).
14. See, e.g., *Neal v Wilkes*.
15. *Ejusdem Generis*, 100 *Judicature* at 50, 53, and 55, and Payne, *Lord Tenterden's Rule: Why a List Might Backfire*, 18 *Scribes J Legal Writing* 71, 76 (2018–2019), available at <https://5f83363a-ae4-4e75-a59d-83c22fd072d8.filesusr.com/ugd/3eec74_df1a80de08a54f58ace69e467b188db2.pdf> [<https://perma.cc/CKF7XCQL>] (accessed August 8, 2020).
16. *Ejusdem Generis*, 100 *Judicature* at 50–52 and *Lord Tenterden's Rule*, 18 *Scribes J Legal Writing* at 77–79.

The Contest Returns!

No doubt loyal readers have been yearning for the contest to reappear. And here it is, after a long hiatus.

At the moment, I'm in the thick of helping to "re-style" (redraft) the Federal Rules of Bankruptcy. This will be the fifth—and last—of the five sets of federal rules to be redrafted from top to bottom for greater clarity and consistency, without changing substantive meaning. The previous four were, in order, appellate, criminal, civil, and evidence.

In my view, the single greatest improvement in the restyled civil rules, which took effect in December 2007, was the much greater use of headings and subheadings. In fact, we more than doubled their number, from 359 to 757. As I said in the January column, "Headings are critical navigational tools for readers."

With that in mind, try your hand at this provision:

- (a) **General Right to Amend.** A voluntary petition list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in

interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

My suggestions:

- (1) Try to create two subsections with parallel subheadings. Even a short provision can be improved in that way.
- (2) Use the active voice in the one sentence that doesn't.
- (3) Break up the longish last sentence (and you'll gain another kind of parallelism).
- (4) Get rid of *shall*.

This exercise shouldn't be terribly challenging, but it might be eye-opening.

I'll send a free book to the first two persons who send me an "A" revision. You can choose either *Seeing Through Legalese: More Essays on Plain Language* or (for the young at heart or those with youngsters) my kids' book *Mr. Mouthful Learns His Lesson*. Send your revision to kimblej@cooley.edu. The deadline is October 19.