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Original Citation

Curley, Sean (2011) The Jurisprudence of Lord Denning and his contribution to the Law of Tort. In: Law Research Group, March 2011, The Business School University of Huddersfield. (Unpublished)

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Lord Denning

The jurisprudence of Lord Denning and his
contribution to the law of tort

Alfred Thompson Baron Denning of Whitchurch



Outline

- Why Denning
- Aim of the Research
- Brief Biography
- Jurisprudence of Denning
- An illustrative Case

Why Lord Denning

“ One of the greatest and most influential Judges to sit on the English bench”

(Lord Goff – ODNB Sep 2004)

“The best known and the best loved judge in our history”

(Lord Bingham – Times 18th June 1999)

- One of the longest serving judges ever – he sat for 39 years
- Appellate Judge for 34 years 1948 – 1982
- Master of the Rolls from 1962 to 1982
- Everyone thinks they know all about him

Questions

- Was he just a maverick?
- Where his judgments influential?
- He was undoubtedly an individualist but why?
- Did he have a set of guiding principles?
- Did these influence his judgements?

His Jurisprudential approach

- Look at his background – how far did it shape his approach to the law
- Look at what he says about his own approach to judgement
- Look at examples of his judgments and examine them to see how far they are consistent with this approach

Born 23rd January 1899
Whitchurch Hampshire



Family

- 4th out of 5 sons and 5th out of 6 children of Charles and Clara Denning
- Father was a draper in Whitchurch
- Mother Clara was the strong one of the family and Tom was a clear favourite
- Scholarship boy to Andover Grammar in 1909 together with Gordon
- Up to Magdalen in 1916 first in Mathematics in 1917

Tom and Gordon as sailor boys

The Elementary School, Whitchurch. Tom (second row from front, fifth from left) with Gordon
beside him (sixth from left)



First World War

- A profound influence on Denning
- The Oldest Brother Jack went out to France in 1915 and was a Captain in the Lincolns when Killed on the Somme in September 1916
- Reg serves throughout and is severely wounded
- Gordon is a midshipman in the Navy and serves at Jutland
- Tom is commissioned into the Engineers
- Gordon contracts TB in the Navy and dies at home in 1918







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To the Bar

- Returned to Oxford
- Eldon Law Scholar
- Prize Student at the Inns of Court
- Called to the Bar 13th June 1923 by Lincolns Inn
- Pupillage 4 Brick Court Temple Mr Henry O'Hagen
- Commercial Set with both senior members becoming judges
- Still a prominent commercial set



At The Bar

- Practiced on the Western Circuit and the High Court
- Married in 1932 to Mary, Daughter of the Vicar of Whitchurch
- Edited Smiths Leading Cases and Bullen and Leakes encyclopaedia of precedents and pleadings
- Chancellor of the Diocese of Southwark 1937



To The Bench

- Silk 1938
- Robert Born august 1938
- Mary died of TB in November 1941
- 1944 Appointed Recorder of Plymouth
- 1944 March Appointed Puisne Judge in Divorce division
- The youngest High Court Judge at 45

Mr Justice Denning and Robert



Onwards and Upwards

- Appointed to KBD in 1945 - a Red Judge!!
- Married to Joan in December 1945
- High Trees is his most famous case from this time (1946)
- War Pensions work was what he always considered his best
- Presumption that is a man is accepted for service and becomes unfit the will be a presumption that the disability is due to war service



Appellate Judge

- To Court of Appeal in 1948
- His most significant case in tort whilst here was the dissenting judgement in *Candler v Crane, Christmas and Co* which established the grounds for negligent misstatement - Denning's view was that the accountants had behaved badly and should be liable.
- This is of course the basis of *Hedley Byrne et seq.*
- He was a great individualist and had a big fall out with Viscount Simonds LC over the doctrine of binding precedent – see *Rahimtoola v Nizam of Hyderabad*

“Quite the Nicest Judge”

- The Profumo Affair
- This concerned the Minister of War, a Russian spy and a call girl! Or two plus an osteopath
- Denning was asked by McMillan to conduct an enquiry into the affair
- Produced the Report in 60 Days
- Some say it was a whitewash, it wasn't but it's not the whole truth.
- Mandy Rice- Davies called him “ quite the nicest judge I've ever met.



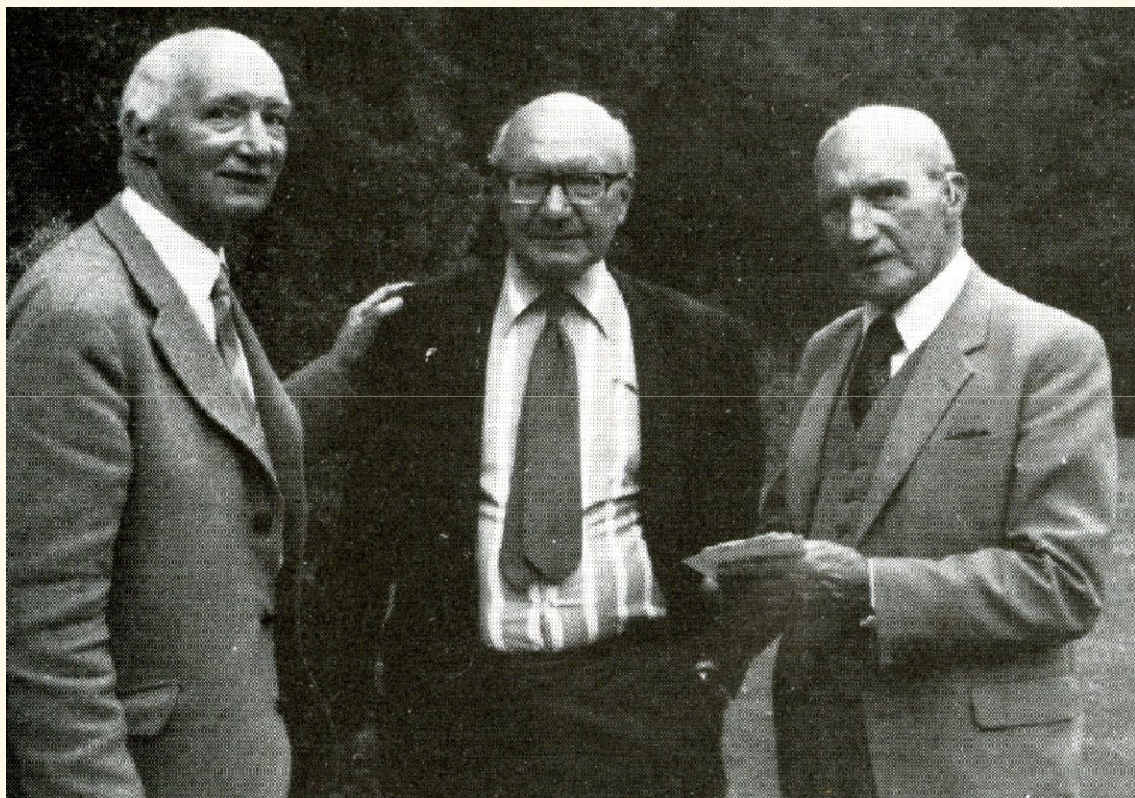
Master of The Rolls

- Appointed Master of the Rolls in December 1962
- Presided there for 20 years
- Many of his most famous judgements come from this period but in terms of legacy perhaps not necessarily his most fruitful
- Our case is whilst he is Master of the Rolls again another fall out over the doctrine of Binding Precedent with a Lord Chancellor – This time Hailsham

Retirement

- Moved back to Whitchurch in 1962 and bought the Lawns – one of the grandest houses in the town
- Retired in July 1982 as Master of the Rolls after some ill judged remarks about black jurors in his book
- Still active in public life lecturing, sitting as trustee etc. Trustee of Cheshire Homes.
- Always read the roll on Remembrance Sunday in Whitchurch
- Joan died 23rd October 1992
- Denning Died 5th March 1999 aged 100





Jurisprudence

- Denning would claim he never had any – he famously got gamma for jurisprudence at Oxford, alpha for everything else of course.
- “Jurisprudence was to abstract a subject for my liking, all about ideologies, legal norms, “ought” and “is”, realism and behaviourism...The jargon of the philosophers of the law has always been beyond me, I like to get down to the practical problems that come up for decision”
- (Denning, *The Family Story* 1981)

His Philosophy

- Clearly he does have a philosophy and he sets it out very clearly in his own writings over the years.
- His Anglicanism is an example of this, there is a hint of prudery in some of his judgments (Mandy notwithstanding)
- He set out some of his philosophy in 1952 in *The Road to Justice*
- His view is that judges and lawyers are not always concerned with the morality and justice of the law but in its enforcement
- He is adamant that law is not an end in itself

The Judicial Oath

- “I swear by Almighty God” – an affirmation in god and his belief in a true religion
- “I will do right”- this means I will do justice not I will do law
- “To all manner of people” – all rich or poor, pagan or Christian, capitalist or communist
- “After the laws and usages of this realm.” – yes justice according to law and not injustice according to law
- This is really the central tenet of Dennings judicial career – to do justice

The Just Judge

- Judges must be independent
- Only dismissible by an address from parliament to the crown
- No Promotion – all judges at that time paid the same
- No man to be a judge in his own cause
- Justice must be seen to be done
- Judge must hear both sides
- A judge must only decide on the evidence
- A judge must be beyond reproach

Overriding Belief

- The overriding belief that comes through is that a judge is there to dispense justice not law
- Who decides what is just?
- The judge does – Denning believed that judges were the cream of the profession “ the finest characters and the best legal brains we can produce” (RTJ p16)
- Therefore if he won't be bound by precedent he is judging by his own preferences and prejudice, that is why *Whitchurch* is so important in *Denning's Jurisprudence*.

The Limits of the Approach

- Exemplary Damages
 - Binding Precedent
 - Another row with another Lord Chancellor
 - A case which exhibits Strong personal views.
-

- Broome v Cassell and Co and Another

[1971] All ER 187

Jackie Broome

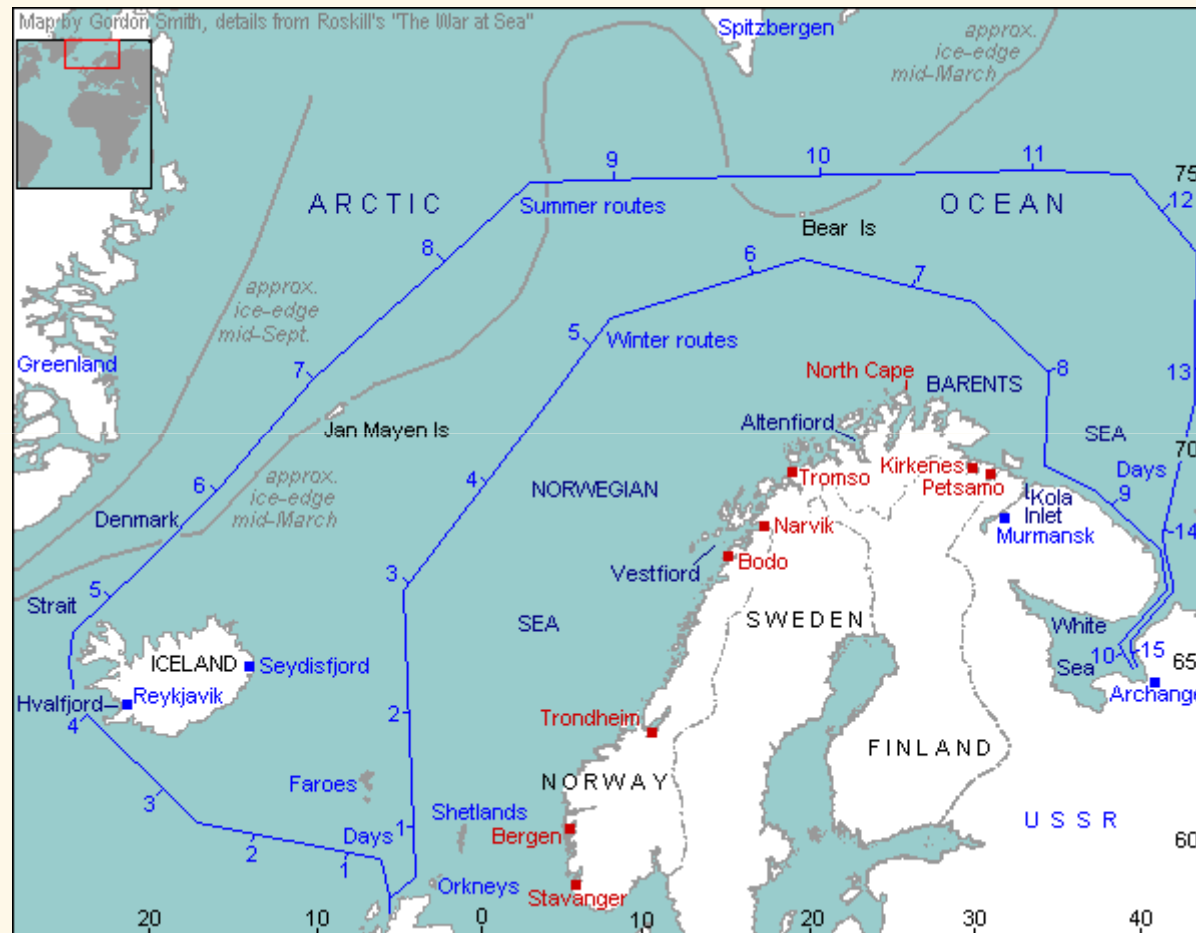


David Irving



PQ17

- Arctic Convoys the result of Churchills personal commitment to support Russia in her war against Hitler
- The only way to get materials to Russia was by sea via the North Cape and the White Sea to Archangel and Murmansk
- Norway is in German hands – this is the most dangerous convoy route in the world



- PQ 17 Sailed 1st July 1942 from Iceland
- Close escort 6 destroyers commanded by Cdr Broome in HMS Wilton
- Covering force of 4 cruisers and 3 destroyers under the command of Rear Admiral Hamilton
- Further off the Home Fleet under the C-in-C Admiral Tovey

Tirpitz

Photo # NH 71390 German battleship Tirpitz in the Alta Fjord, Norway, during World War II





- 4th July 1942
- Admiralty is worried about Tirpitz coming out
- Other heavy units thought to be in the area
- Admiralty gives order for the convoy to scatter and proceed independently – the convoy is annihilated
- Tirpitz did not get near the convoy

Irvings Book

- The destruction of PQ 17
- Irving's thrust is to impute cowardice to the escort commanders on the spot – he wants controversy to sell this book.
- He accuses Broome of losing his head and withdrawing the escort on his own initiative
- The words used are quite condemnatory

Punitive Damages

- Both Irving and Publishers are determined to extract maximum publicity for the book
- Even when they know that it is libellous the persist with the offending passages
- A comment made and disclosed “a libel action is first class publicity”

First Instance

- Mr Justice Lawton and a Jury
- Publishes the paperback edition two days before trial
- Judgment for £15000 compensatory and £25000 both defendants appeal.

Court of Appeal

- Denning, Salmon and Phillimore
- It is clear that this case has exercised Denning and he is not a fan of Irving
- Appeals are dismissed unanimously – so far so good

The Law

- The leading case is a House of Lords decision

Rookes v Barnard [1964] 1 All ER 367

Lord Devlin gives leading judgment

- Decision has not been followed in Australia or USA and has come in for criticism
- It is not a clear decision but limits exemplary damages to three categories of case
 - Oppressive conduct by government servants
 - Conduct calculated to make a profit
 - Express authorisation by statute

The Decision

- Unanimous decision
- Denning gives the leading judgment decides that Rookes v Barnard is per incurium but even if binding the case falls within the second category
- Then goes on to say-
 - “I think the difficulties presented by Rookes v Barnard are so great that judges should direct juries in accordance with the law as it was understood before Rookes v Barnard”

The House of Lords [1972] 1 All ER 801

- Lord Chancellor and five law lords – majority decision
- Rookes v Barnard is upheld but is clarified
- Appeal dismissed and damages claim upheld
- Magisterial rebuke for Denning
 - “ It is not open to the C of A to give gratuitous advice to judges of first instance to ignore decisions of the HoL in this way .. The course taken would have put judges of first instance in an embarrassing position forcing them to take sides in an unedifying dispute between the C of A and HoL (Hailsham LC at p809)



Why?

- Denning is clearly of the view that the job of judges is not blindly follow precedent but to do justice
- He didn't need to try and overrule Rookes as the conduct clearly came within the second category
- He could have used the leapfrog appeal procedure if he had wanted to

- He clearly disliked Irving and his conduct and his publishers was cynical and egregious
- This is close to home
- Jackie Broome was a man of a type Denning could identify with
- Norman was DNI at the admiralty at the time

- Denning believed he was right and this was about the limits of the common law and the power of juries
- The Judgment in Rookes was not well expressed and needed tidying up – this could have been done without declaring it per incurium
- Devlin was a noted intellectual judge was this Denning asserting his superiority
- Was he making a bid for freedom – autonomy for the court of appeal

Effect on the Law

- Broome (the HoL decision) is taken to be the definitive statement on exemplary damages in libel
- Rookes at the moment is good law but there is a lot of doubt as to what it means
- The Law Commission has criticised the limitations put on exemplary damages by the case and this was supported by *Kuddus v Chief Constable of Leicestershire* [2001] 3 All ER 193

Thoughts on Denning

- Was he a good man?
 - Was he a good judge?
 - Was he a great judge?
-

Alfred Thompson Baron Denning born
Whitchurch 1899 – Died Whitchurch 1999

