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**Lord Denning: Towards a theory of adjudication.**

**An examination of the judicial decision making process of Lord Denning and his creation and use of the interstitial spaces within the law and legal process to assist in the exercise of his discretion and an examination of those factors which influenced that discretion.**

**Sean Raymond Curley**

**A thesis submitted to the University of Huddersfield in partial fulfilment of the requirements for the degree of Doctor of Philosophy**

**June 2016**

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## **Abstract**

This is an investigation into the methods and techniques used by Lord Denning in pursuit of his notion of doing justice to the case in front of him.

The thesis examines Denning's upbringing and biography to attempt to identify incidents and influences on his character which may have shown themselves in his later judicial career.

The thesis then examines his judicial style and philosophy to attempt to isolate a theory of adjudication which accounts for some of his decisions.

The theory of the interstitial spaces within the law wherein judges are entitled to exercise their discretion in coming to judgement is examined.

This is then set against Denning's actions in three cases which are examined at length to analyse his methods of obtaining the space to exercise his discretion and then the way he actually exercised that discretion is examined and analysed. There is an analysis of the legitimacy of each of these exercises of discretion and the legacy of each of them (if any).

The conclusion pulls all these threads together and expounds a theory of adjudication that may fit these decisions and his judicial style and then analyses this theory against the background of modern jurisprudential thought.

## Chapter 1

### Introduction and Thesis

#### Thesis

it is generally accepted that judges are entitled to exercise discretion where existing law does not provide an appropriate answer for the case currently in front of them, because the case is in that interstitial space between established precedent and/or statute law. Lord Denning, on many occasions during his judicial career, exercised his discretion. There are several questions to be answered. In the first case was he operating within the interstitial spaces that are recognised as a legitimate arena for judicial discretion or did he extend this beyond what is legitimate. Secondly if he did so extend, how far was this and his subsequent exercise of his discretion coloured by and influenced by those events in his early life and education which contributed to his overall philosophy. Thirdly, did the overall exercise of his discretion, taking into account all these factors, fall within any recognisable school of jurisprudential thought; in particular was Denning, as a judicial activist also a legal positivist or are there also elements of the natural lawyer there? The final question is whether the answers to all of the above result in Denning's legacy in the law being positive or overall was he a negative influence.

#### Background

Lord Denning was one of the twentieth century's most famous judges; from the 1950s through to his death in 1999 he was probably one of the few, if not the only judge that the average man in the street could name. After his death, one of his successors described him as *the best known and best loved judge in our history*<sup>1</sup>. For this reason alone he would be a worthy object of study but his influence and contribution go a lot deeper than this.

Denning lived to be over 100 years old, having been born in January 1899 and dying in March 1999 and therefore lived through the most tumultuous century in history. The 20<sup>th</sup> Century saw great changes in the law and the pace of change was accelerating throughout the century. The purpose of this study is to analyse Denning's contribution to what the law has now become but more importantly to understand what influences and philosophy combined to produce the seminal judgements that occur throughout Denning's

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<sup>1</sup> Lord Bingham of Cornhill , The Times 18<sup>th</sup> June 1999



judicial career. It is the how and why of judges decisions that are perhaps the most important part of any study of the judiciary. Denning was prolific and to some extent idiosyncratic in his judicial output and this coupled with his somewhat unusual background for a 20<sup>th</sup> century English judge means that an analysis of his judicial style and more importantly his judicial philosophy will lead to a better understanding of not just his particular judgements but the development of judicial reasoning subsequent to his career. As will be seen, in some ways, an analysis such as set out above, is somewhat assisted to a greater or lesser extent by his own writings both on his own judgements and his views on the process of judging. Also of course, during his career he attracted comment, both complimentary and adverse, from various judges who were above him in the hierarchy at any given time.

Denning was, in many ways, considered to be a maverick in that he would go out of his way to avoid a precedent if it interfered with what he considered to be justice in a particular case. He claimed to eschew traditional jurisprudence and championed the judge as the sole arbiter of the law and the only person able to do justice in the particular claim before the court. His judgements were, despite his professed reluctance to be bound by precedent, always carefully crafted and gave due attention to precedents even if Denning was only doing this in order to avoid a particular precedent. Many of his judgements contained novel and progressive views on particular aspects of the law especially when, in the early years, these were given as dissenting judgements. It is these progressive judgements that have led Denning to be labelled as a judicial activist by many commentators. Denning's approach to the judicial process will be examined in the next chapter however it is by no means certain that Denning himself would have seen himself as a judicial activist and it may at this stage be apposite to attempt to some extent to define judicial activism, or at least to set out what some commentators have chosen to describe as such.

Lord Bingham describes four steps in the progression from the judge declaratory to the judge activist.<sup>2</sup> in the first category, he places those judges who will hold that there is no role for the judge as lawmaker and that they would merely declare the law rather than decide what the law should be and perhaps the greatest exponent (if such a term is apposite) is Lord Simonds who was very much of a different stamp to Denning and his attitude is perhaps best summed up by his response to Denning in the *Scruttons* case

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<sup>2</sup> The Business of Judging - Tom Bingham OUP 2000

wherein Denning had invited Simonds to overrule the law on privity of contract, his response was

*To that invitation I readily respond. For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. It is reformed by the abrogation of those principles is the task not of the courts of law but of Parliament<sup>3</sup>*

this is very clearly an absolutist approach which we shall see is a long way from Denning's interpretation of the role of the judge. It is however important to note that in this case Lord Simon is not talking about interstitial spaces or lacuna as such but to the overturning of established principle which remains unattractive to this day. Even after the 1966 practice statement, the House has only overturned its own decisions about 20 times which indicates perhaps a real caution about creating uncertainty in the law.

Bingham would say that the second step is that judges do make law however there are those judges that would maintain that such judicial lawmaking should be hidden from view and indeed Lord Radcliffe espoused that was recently as 1960

*If judges prefer to adopt the formula-for that is what it is-that they merely declare the law and do not make it, they do no more than show themselves wise men in practice. Their analysis may be weak, but the perception of the nature of law is sound. Men's respect for it will be the greater the more imperceptible and subtle its development<sup>4</sup>*

There is no record of any comment from Denning upon this particular view however it is likely that Lord Radcliffe would have found himself numbered by Denning amongst those timorous souls that he identifies in Candler.<sup>5</sup>

The third approach is that which modern lawyers are thoroughly familiar with; in that it is acknowledged that judges do make law and that this is an entirely proper judicial function

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<sup>3</sup> Scruttons v Midland Silicones Ltd [1962] AC 446 at pp 467-8

<sup>4</sup>The Law and Its Compass, Lord Radcliffe Rosenthal Lecture 1960

<sup>5</sup> Candler v Crane Christmas and Co Ltd [1951] 2 KB 164

provided it is exercised within certain limits. In broad terms those limits are the interstitial spaces between legislation and precedent where it is conceded that there is no existing statement of the law and that the judge is entitled to exercise his discretion in such cases.

The fourth approach which Bingham identified is that which not only avowedly acknowledges a law making role for the judge but, in Bingham's words, "glories" in such a role<sup>6</sup>. Bingham identified the prime exponent of this fourth step as Denning himself.

The question to be asked is whether Denning is operating within the interstitial spaces or whether he considers that he is not bound by this formula and that he is entirely free to decide the cases before him relying solely on his own untrammelled judgement.

I would contend that that the truth lies between these two parameters and that Denning does exercise his discretion by applying his own judgement but that he does consider that he is operating in areas where the law does not appear to be settled. Furthermore I would also contend that it is his background and personality to which he gives licence when exercising his discretion. It must be acknowledged that all judges to some extent must rely on their experiences and their own values in arriving at judgement in these areas. Indeed Hart recognises this in some of his later work as follows:

*"Nonetheless there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his lawmaking powers. But he must not do this arbitrarily: that is he must always have some general reasons justifying his decision and he must act as a conscientious legislator would by deciding according to his own beliefs and values. But if he satisfies these conditions he is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."*<sup>7</sup>

This essentially is the crux of the matter and the question to be answered. Hart clearly accepts that in areas where the law is unclear (this must be what he means when he says the law fails to dictate any decision as being correct) then the judge may make his decision based on his own beliefs and values provided always that he can rationalise that decision. So this brings us to whether Denning exercised that discretion in any way which Hart would recognise or whether Denning is an example of a judge who is going beyond the

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<sup>6</sup> Bingham *ibid* at p28

<sup>7</sup> The Concept of Law H.L.A. Hart postscript to 2nd Ed published 1994 OUP

interstitial spaces and is continually deciding cases solely by reference to his own values and beliefs. I will show that this is not so and that whilst Denning was often a creative lawmaker he always had a rationale for his decision but that rationale is frequently coloured, sometimes to a considerable extent, by his own values and beliefs.

The use of the term interstitial is taken from Oliver Wendell Holmes in *Southern Pacific Company v Jensen*.<sup>8</sup> it is more apposite than the more usual legal term of lacuna. Lacuna implies a rather larger gap than is necessarily the case. We are looking here at the gaps that have to be found by analysis and to some eyes they may not seem to exist and identifying the gap is as much a part of the process as exercising discretion.

When it is suggested, as Hart does, that judges have discretion, this should really be taken to mean that judges are charged with the responsibility of interpretation, and that the outcome of their interpretive deliberations cannot be made precise and predictable there is no doubt, as Hart says, that there is a penumbral area wherein rules require judicial imagination and wherein the exercise of discretion is inevitable. It is the seeking out of that penumbra that is the subject of the first part of the judicial exercise that Denning carries out.

We have referred to these as the interstices of the law, and it is here that we might see the most important skills of adjudication being brought into play to make the law appear seamless in the sense of imparting to it completeness, coherence and consistency which are all required for legitimacy in decision making. The way Denning goes about this exercise of discretion is what we should properly understand when we speak about his judicial style and it is the place we should look to uncover his moral and constitutional character.

Jurisprudence can perhaps strive to suggest ways in which the concept of law demands that this discretion should be exercised in adjudication. These range from the view that the judge is entirely at liberty in these interstitial circumstances to interpret the laws as he sees fit, to the view that far from adjudication being dependent upon the personal views and experience of individual judges, the very idea of the authority of the state expressed through the rule of law demands that a Herculean effort to achieve the answer consistent with the foundational values of a democratic polity must be brought to bear. Either way,

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<sup>8</sup> (1917) 244 US 205

looking at how a judge interprets his or her obligations in this regard must be the focus of just what and who we take that judge to be.

Another reason for choosing Denning as a subject is the amount of secondary and primary sources available. He wrote copiously throughout his life and particularly towards the end of his career when he published four books detailing what he saw as vital developments in the law and in particular his contributions to those developments.<sup>9</sup> After his somewhat enforced retirement in 1982 he set out what he considered to be the most notable cases in English legal history<sup>10</sup>. These consist more of historical meanderings through some highlights of English History rather than any structured attempt to analyse the development of the law. Even in these meanderings however there is much to be gained both from the selections which he makes and from his commentaries on those cases. It is clear that he sees the cases as forming a coherent narrative of improvement of English law and he of course includes himself in this narrative at the pinnacle of development. He describes cases such as the Protestant Martyrs and the trial of Roger Casement in a manner which throws more light on Dennings' views and character than on the law itself. There is no attempt at critical analysis of the judgements nor does he attempt any essay in the direction of a theory of adjudication but rather he writes for a nonlegal audience, which is of course a feature of many of his judgements. He does however set out what he considers to be his most important case and somewhat surprising to the lawyer (but not to anyone who had read his earlier work) he chooses the Profumo affair in connection with which he was commissioned to conduct an enquiry and produced the first government report to become a best seller<sup>11</sup>. His judicial contribution was recorded and to some extent analysed immediately after his retirement<sup>12</sup>. The aim of this thesis will be to assess his judicial style and the theory of adjudication that he adopted (whether consciously or otherwise) and how that has affected the law of tort as it presently stands and a comparison with contemporary assessments will assist the better understanding of that contribution.

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<sup>9</sup> The books are *The Discipline of Law* (1979); *The Due Process of Law* (1980); *What Next in The Law* (1982) and *The Closing Chapter* (1983)

<sup>10</sup> *Landmarks in the Law* (1984)

<sup>11</sup> *Profumo Affair – Lord Dennings Report*, Cmnd. 2152

<sup>12</sup> Lord Denning *The Judge and The Law* Jowell and McAuslan Ed Sweet and Maxwell 1984

## Research Scope

Lord Denning's judicial career encompassed 38 years and during that time he sat successively as a puisne judge in the Family Division of the High Court followed by the Kings Bench Division of that court and then as a Lord Justice of Appeal in the Court of Appeal before being appointed to the Judicial Committee of the House of Lords. His final and most famous appointment was as Master of the Rolls, a post which he occupied from April 1962 until September 1982. This is a tenure which is unique in modern times and which is unlikely to be surpassed as the Judicial Pensions Act 1959 made retirement at 75 compulsory for all Judges appointed after the act came into force, Denning was of course exempt having been appointed in 1944 and indeed was the last such exempt member of the judiciary to sit. In the course of his long and distinguished career he sat on many cases and his reported cases number in the thousands<sup>13</sup> covering all aspects of the law. From this it can be seen that any attempt at an analysis and assessment of his contribution to the law as a whole would be beyond the scope of this study if it is to have any depth. Denning's contribution can be broken down into discrete strands some of which overlap to a greater or lesser extent. It is however largely, but not solely, in the field of tort law that this study will concentrate to attempt to answer the question posed above. This is a field in which Denning was judicially active and indeed many would say creative and indeed was in some instances at his most creative but it is not seen by previous commentators as having been a field in which he was prolific or particularly influential, a view that this dissertation will challenge. As an example of this view Jowell and McAusland<sup>14</sup> devote only 22 pages to tort in contrast to 52 on family law. In choosing tort as an area to study it is necessary to define tort at the outset and a good definition is that it is a civil wrong committed against an individual who is protected by a court by an award of damages or an injunction<sup>15</sup>. Denning was active in many areas of tort law, in particular; negligence; negligent misstatement; trespass and damages together with contributions in the area of economic loss and defamation. It was however his jurisprudential contributions to the philosophy of tort law (which he never claimed nor indeed you acknowledged) that provide the best insight to his judicial style and reasoning as well as perhaps his most lasting contribution to English law.

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<sup>13</sup> The All England Reports alone have a total of 1795 cases for Denning

<sup>14</sup> *ibid*

<sup>15</sup> Paraphrased from Law of Tort 9<sup>th</sup> ed (2009) John Cooke, Pearson Longman

## **Biography**

It will be necessary to include a brief outline of Denning's life and times as it is only within that context that it is possible to evaluate his contribution or begin to understand his reasons for deciding certain cases as he does. He wrote what is to some extent his autobiography in *The Family Story*<sup>16</sup> in which he sets out certain aspects of his life and career and in particular deals with his early life and his siblings. It is clear that this is tremendously important to him and he is proud of his family and their achievements. It should be remembered that Denning was a teenager during the Great War and served in the latter stages himself. Two of his brothers died in the war and he was affected by this as might be expected. To the end of his life he always read out the roll of the fallen at the Remembrance Sunday service in his Parish Church and many of the names he read out would be of young men he was familiar with from his childhood. Two biographies have been written about Denning, both being published in his lifetime. The first being "Lord Denning a Biography" by Edmund Heward<sup>17</sup> and the second, "Lord Denning a Life" by Iris Freeman<sup>18</sup>. Both were written with Denning's co-operation and are as might be expected fairly uncritical of in their treatment of Denning. So far there is no posthumous biography of Denning which may perhaps be a little more detached in dealing with its subject. This particular chapter will be one of the most important within the thesis as it will attempt to tease out those influences which had the most marked effect on his judgements and will start to relate some of those influences to particular judgements and to start to put together a theory of adjudication which can explain to some extent why Denning in particular reason decisions that he did in certain cases therefore draw the war along a path which leads to, in some instances, where we are today.

## **Methodology**

Denning himself once confessed to having little patience with the philosophers of the law<sup>19</sup> and revealing that he only obtained a gamma in that subject at University. This however is countered by the his own writings in which he reveals that he does have a very decided philosophy of the law it's just that it is his own philosophy based on his own experiences and drawing very little on the more mainstream legal philosophers. If this however were the case, and he was to stand completely outside a theory of jurisprudence that could

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<sup>16</sup> *The Family Story* Lord Denning Butterworths 1981

<sup>17</sup> Wiedenfield and Nicholson 1990

<sup>18</sup> Hutchinson 1993

<sup>19</sup> In interview with Professor J.C.Smith

be recognised then there would be very little point in assessing his contribution as it would have been unlikely to have stood the test of time. Within this we should see, to some limited extent, that Denning's judicial activism does to some extent fall in with, and indeed precede Harts theories on legal positivism and activism. It is in the exercise of his discretion that Denning is at his most creative and it is that which has given rise to most of the criticism of his judgements, by higher courts, his fellow judges and by academic commentators. He very usefully expounded his views early on in his judicial career in a series of lectures and addresses he gave to students in South Africa, Canada and the USA during 1954 and 1955, he published these addresses as *The Road to Justice*<sup>20</sup>. In his preface to the book he expressly states his intention as "I determined to show, as well as I could, what is the right way to arrive at justice"<sup>21</sup> This is as good a definition of jurisprudence as any. The book will be dealt with in greater detail in a later chapter will help to form and inform theory of adjudication to deal with at least some of Denning's judgements. It is a clear statement by Denning of his own approach to the question of justice and in 118 pages he ranges over questions such as what is justice?<sup>22</sup> and the nature of a fair trial<sup>23</sup> and goes on to consider the Just Judge<sup>24</sup> where he looks at independence and the place of evidence in the law and then sets out that a judge must be beyond reproach<sup>25</sup>. He never expressly states the proposition but is clear from the tone and content that he considers himself to embody these qualities that he is setting out as essential in a judge. He does not expound how a judge should, in any philosophical sense, arrive at his judgements nor how a judge with these qualities would fit into any societal view of judges duties but simply regards it as self-evident that a good judge is good for society as a whole and that this is what a good judge looks like. It should be noted at this stage that one message that comes through in all of Denning's writings is that he considers himself to be an exceptionally good judge if not indeed a great judge. This is another question which will be examined in later chapters. One of the outcomes of this work will be to try and answer as far as possible within the narrow scope selected how far that self-confidence was justified. It is worth noting in passing at this point that a judge without confidence in his own ability would be an exceptionally poor judge and indeed The Judicial Appointments Commission seems to agree with him as it list amongst the

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<sup>20</sup> Stevens and Sons London 1955

<sup>21</sup> Ibid page vii

<sup>22</sup> Ibid p4

<sup>23</sup> Ibid p7

<sup>24</sup> Ibid p10

<sup>25</sup> Ibid pp10-30



attributes for appointment to judicial office; integrity, independence of mind, sound judgement decisiveness and objectivity<sup>26</sup>, qualities which Denning would have unhesitatingly identified in himself.

There are a number of possible ways to approach research in this area ranging from an assessment of the reported cases on through an analysis of academic writing on the subject to reliance on Denning's own words. All of these have some validity but to assess Denning's contribution at the present time it is essential to identify the principles enunciated in his judgements and follow these through subsequent judgments of his own and other judges, identify and analyse any legislation arising from the principles and then to set out the law as obtaining today clearly identifying any contribution from Denning. The obvious starting point is Denning's own judgments tracing back if necessary through cases he identifies as founding the principle which he is propounding, it is a trait of his that he would often retreat through legal history to find some justification for even the most radical propositions. Contemporary academic comment is a useful barometer of the effect of the judgement and is considered at this stage. As this dissertation is concerned with the enduring legacy of its subject, the next stage is to consider the immediate judicial reaction to the judgement, in some cases this will be contained in the same case as in some of his most important contributions Denning was in a minority usually of one. A good example of this is *Candler v Crane Christmas and Co*<sup>27</sup> which will be considered in detail in a later chapter of this dissertation. There are instances where Denning was conscious at the time that he was being controversial and indeed seems to have used the controversy in an attempt to overturn cases he regarded as flawed. A good of example of this, which is discussed at length later, is *Broom v Cassell and Co*<sup>28</sup>. In this case Denning decided that the law on exemplary damages was wrong and advised lower courts to ignore what he saw as a per incuriam decision of the House of Lords, this provoked an irate reaction from Hailsham LC on appeal<sup>29</sup> and a rueful acknowledgement that his approach may have been wrong but no real contrition from Denning who continued to consider himself in the right. This is by no means the end of the matter and lead to the introduction of Order 18 r3 of the Rules of the Supreme Court which required specific pleading of any case on exemplary damages. Denning's view of the author of the offending book, David Irving that he was simply trying to get a scandal to sell his books was borne out many years later when Irving

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<sup>26</sup> Qualities and Abilities Judicial Appointments Commission 2006

<sup>27</sup> [1951] 2 K.B.164

<sup>28</sup> [1971] 2 All ER 187

<sup>29</sup> [1972] A.C. 1027

again appeared before a court on a libel action and had his own reputation severely criticised but this time by the trial judge.<sup>30</sup>

After considering the immediate reaction, which may be more indicative of contemporary attitudes than any considered criticism of the case itself, later academic comment and criticism would be relevant in showing how the case has endured and the contribution made to the particular thread involved.

The final step would be to show how these judgements are considered today by analysis of more recent cases and articles. Denning's legacy in this area is by now mature and a proper balanced view can now be taken.

### **Expected Outcome**

It is expected that this analysis will indicate that his contribution was considerable and enduring. It is expected that much of his judicial philosophy will be linked to his upbringing and his own deep attachment to his roots. Denning was considered by some to be a maverick and in some of his judgements he does indeed appear to be somewhat swimming against the tide but far from being capricious or indeed has been suggested, mischievous it will be apparent that he was entirely consistent with his own philosophy of what constitutes justice and that certain aspects of that jurisprudence have survived into the present day and that we have echoes of Edwardian Hampshire

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<sup>30</sup> Irving v Penguin Books Ltd, Deborah Lipstadt [2000] EWHC QB 115

## Chapter 2

### Biography and Influences

In this chapter I will examine Denning's upbringing and identify those early influences on his character which later manifest themselves in his approach to the business of judging. His early life was marked by the turbulence of the early twentieth century and his own experiences of the First World War.

Alfred Thompson Denning was born on the 23<sup>rd</sup> January 1899. He was the fourth son (of an eventual five) and fifth child of Clara and Charles Denning. He was born at the family home in Newbury Street in Whitchurch Hampshire, a small town which he always proudly identified as home throughout his long life. His father Charles was a draper in a small way of business in the town and was by all accounts a pleasant if somewhat diffident man. Denning himself describes him as a “dreamer, a singer and a poet”<sup>31</sup>. His business skills do not appear to have been well developed as the family were always in somewhat straightened circumstances.

The family home in Whitchurch was modest and Denning himself describes it as being unfit for human habitation by modern standards<sup>32</sup>. With no mains water, electricity or sewerage it was typical of most houses at the end of the nineteenth century and whilst to modern eyes it would seem to be inadequate it would have been a respectable dwelling by contemporary standards in Whitchurch. The importance of the perception by Denning of the humble nature of his origins is to be found by contrasting it with the origins of many of his contemporaries at the bar and bench. Lord Goddard ( 1877- 1971) for instance was the son of a successful solicitor and was born in Ladbroke Grove, then a fashionable area of London<sup>33</sup>, Lord Devlin (1905-1992) was the son of a successful architect from Chislehurst<sup>34</sup>. His Successor as master of The Rolls, Lord Donaldson (1920-2005) was the son of a successful consultant Gynaecologist<sup>35</sup> and his predecessor Lord Evershed (1899-1966) was again the son of a successful solicitor<sup>36</sup>.

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<sup>31</sup> The Family Story p13

<sup>32</sup> Ibid p17

<sup>33</sup> Lord Goddard, A Biography, Fenton Bressler, Harrap London 1977 at p6

<sup>34</sup> ODNB Tony Honore OUP 2004

<sup>35</sup> Daily Telegraph Obituary 2nd September 2005

<sup>36</sup> The Times Obituary 4 October 1966

Denning was however anxious to stress the antiquity of his family and makes a case that Denning is from the old English meaning “son of the Dane”<sup>37</sup>. This is perhaps a little fanciful as there are many alternative explanations for the etymology of the name but Denning’s explanation echoes Bressler in his opening to his Biography of Lord Goddard who ascribes the origins of the name Goddard to the Norse “Godr”, or sacred race<sup>38</sup>. It is probably not a coincidence that Denning wrote the foreword to Bresslers biography.

Denning goes on to trace the family line through the Poyntz line through from the Norman Conquest through the Civil War and up to his father. It must be noted that for all the colour that Denning injects into his forebears, the first established ancestor is his great grandfather who was born in 1798 in Frome and became an organist and music teacher<sup>39</sup>

Denning was clearly not ashamed of his background but was concerned to show continuity and an essential Englishness.

Clara Denning was clearly the main driving force behind the family and Denning is very clear about this, he describes her as “very intelligent, very hardworking. Determined to succeed in whatever she undertook.”<sup>40</sup>

Hard work was a feature of Denning’s early life and he had a strong work ethic all his life. The drapers shop was open 6 days a week with his father serving in the shop in the mornings and then loading up his horse drawn cart every afternoon and driving it round the outlying villages and farmsteads.

Tom Denning seems to have been regarded by his family as someone special from an early age and throughout his life this persisted in the family with all his siblings reposing unusual confidence in him<sup>41</sup>

Denning started his schooling at the Modern School in Whitchurch which was run by his parents’ friends, Mr and Mrs Greer.<sup>42</sup> This was a small school of some 25 to 30 pupils which definitely had a part to play in the formation of Denning’s later attitudes. He provides this description of the school and it’s teacher,

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<sup>37</sup> Ibid p 6

<sup>38</sup> Ibid Bressler p 1

<sup>39</sup> Lord Denning A Life Iris Freeman Arrow Books London 1994 p4

<sup>40</sup> Ibid p15

<sup>41</sup> Iris Freeman ibid p 12

<sup>42</sup> Ibid p13

*He had He had never taken a degree but wore a scholars gown – torn and tatty- to show his learning. The boys called him “cave” not knowing what it meant. I now know it is Latin for “beware.” But there was nothing in him to beware of - except wrong –doing. His prime concern was to build character, and next to teach his pupils to write good English and to speak it. He always saw to their cricket, urging them in the game – as in life- to keep a straight bat.<sup>43</sup>*

In 1904 as a result of straightened circumstances (Clara’s father provided a life boat loan of £100) Charles and Clara made the decision that the elder children Marjorie, Jack and Reg would finish their schooling at the Modern school but that Tom and Gordon must move to the free elementary school<sup>44</sup>. This must have been quite a traumatic event in Denning’s life but he never seems to mention it. It is omitted from The Family Story entirely but as can be seen he made much of the Greer’s school. The conclusion must be that he was to some extent ashamed of it. The Modern School was regarded as a cut above the Elementary School which was a much larger establishment of some 400 pupils. According to Freeman the main difference between the two was that

*Mr Greer “wanted to make gentlemen” of his pupils, while the aim of the elementary school was to produce literate working men and women.<sup>45</sup>*

We don’t know what Denning made of his time there but it may be that he felt that he was a cut socially above the other pupils and it may be that this accounts for the occasional glimpses of snobbery that one encounters in his later life and judicial career.

Whatever Denning’s opinion of the National School may have been it was good enough to get both him and Gordon up to sufficient standard to obtain scholarships to Andover Grammar School here he went in 1909<sup>46</sup>. This was a famous old school, largely fee paying, but the Denning boys both got scholarships. Andover is about 8 miles from Whitchurch and required a train journey both ways.

Again this was small school, Denning says it had 80 pupils and 5 masters<sup>47</sup>. Denning refers to the strong discipline that the Headmaster exerted and makes reference to his propensity

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<sup>43</sup> The Family Story p 20

<sup>44</sup> Freeman p16.

<sup>45</sup> Ibid p16

<sup>46</sup> Now John Hanson ( the original founder) Community School which whilst it does have Andover Grammar’s foundation date of 1569 on its badge makes no reference to its famous Old Boy.  
[www.johnhansonschool.org.uk](http://www.johnhansonschool.org.uk)

<sup>47</sup> Ibid p32

for physical punishment but he himself does not appear to have suffered. He won numerous prizes at the school and he says that it was at this stage that he first declared his intent to become a barrister<sup>48</sup>

Whilst at Andover Denning was steered by the Headmaster Mr R. O. Bishop towards a university education and began studying for the University entrance examinations and after winning a place at University College Southampton he persevered further and was finally offered an exhibition at Magdalene College Oxford. In itself this is remarkable achievement.

Denning went up to Magdalene in October 1916 and thanks to the influence of the President of the college, Sir Herbert Warren, his exhibition was converted to an £80 demyship with an additional £30 from the Goldsmiths Company<sup>49</sup>. In *The Family Story*, Denning exaggerates the extent of his poverty by stating all he went up with was his £30 exhibition<sup>50</sup>, in fact his exhibition was worth £50 and in addition Hampshire County Council awarded him a £50 scholarship<sup>51</sup>.

The First World War had of course started before Denning went to Oxford and his elder brothers had all joined the services and by 1916 all were commissioned officers, Jack and Reg in the Army and Gordon in the Navy. A remarkable record for three draper's sons and a testament to Clara's drive and determination which she had clearly imbued in all her sons.

Denning himself was conscious that he would be joining the forces when he reached eighteen and a half and his early Oxford career was combined with preparation for that entry. Magdalene is credited by Denning himself as being a prime influence on him

*I do not use the Latin, Alma Mater,. I prefer the English Fostering Mother. For Magdalene has been the college that has helped me to grow to what I am.*<sup>52</sup>

At Magdalene, Denning was clearly uncomfortable with his Grammar School background as he says himself

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<sup>48</sup> Ibid p35

<sup>49</sup> Ibid p34

<sup>50</sup> Ibid 34

<sup>51</sup> Freeman p38

<sup>52</sup> Ibid p34

*Often freshmen ask one another “what school were you at”. Most men in my day were apt to name a famous public school. I turned the question to one side or prevaricated in one way or another. I felt ashamed at having been at a grammar school.*<sup>53</sup>

He does go on to say that he need not have worried but he obviously did worry and one wonders if he was still worrying 65 years later when he wrote that passage as he does seem sometime ambivalent to his origins, at one time proud of them and at others conscious of the contrast between them and the background of his colleagues at bar and bench.

At this time, the bar was to a large extent upper middle class in origin. For example Rayner Goddard, who was Lord Chief Justice at the time Denning was in the Court of Appeal (albeit older than Denning) was a product of Marlborough and Oxford. He was by no means aristocratic coming from a family of city solicitors. The public school ethos does however run strong through both bench and bar during Denning’s time. A glance at his contemporaries illustrates this. If we look at the two judges who sat with him on Candler and Crane Christmas, Lord Cohen was a product of Eton and New College Oxford and Lord Asquith had the benefit of an education at Winchester and Balliol as well as having the advantage of being the fourth son of HH Asquith, a former Prime Minister. Similarly his near contemporary Patrick Devlin was educated at Stonyhurst and Christ’s Cambridge. It would seem that Denning’s origins were more modest than this but he was by no means unique in this. As examples, Lord Atkin was educated at a Welsh Grammar School and like Denning obtained a scholarship to Magdelene, Lord Diplock, a near contemporary of Denning, was educated at a local grammar school in Croydon followed perhaps inevitably by University College Oxford.

Despite these examples, there is no escaping from the fact that the young Denning was being thrust into an environment populated in large part by the products of the major English public schools. Whilst there is no evidence that Denning was ever treated with anything other than courtesy and certainly he himself never give any examples of anyone slighting him for his origins, it is likely that the air of effortless superiority that these schools imparted to their pupils at that time was intimidating to a young man who had up to this point lived his whole life within the confines of his own family and a small Hampshire town.

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<sup>53</sup> Ibid p37

As this town was his home and almost his total environment for his formative years, it is inevitable that it would play a large part in forming Denning's character and to that end it will be instructive to look in some detail at Whitchurch as it stood in the early part of the 20<sup>th</sup> century.

Whitchurch is a small town in Hampshire which even today has a population of only 4500, the population at the start of the 20<sup>th</sup> century was around 2000. The Hampshire Star newspaper had this to say about it in 1888

*Whitchurch is in Hampshire. People who live **IN** it call it a town. People who live **OUT** of it call it a village. It is about as big as a good-sized pocket handkerchief. It has three shops and 19 public houses.<sup>54</sup>*

By 1899 it had of course acquired the draper's shop of Charles Denning but in other respects it is highly unlikely to change much in the 11 years since the comment was made and would have been a typical small country town of the era.

This is reinforced by the entry in the County history of Hampshire which has this to say about Whitchurch in 1911

*the small town of Whitchurch is situated at the junction of the London to Andover and Newbridge to Winchester roads. The market place is in the centre of the town and from it diverged these four roads and a fifth running north-west around Hurstbourne Park towards St Mary Bourn. The Test flows to the south of the marketplace and is famous for its fishing. It is crossed by a modern brick bridge of 5 arches on the Winchester Road. There is a railway station on the London and South Western Railway about half a mile north of the centre and another on the Newbury Winchester branch of the Great Western Railway to the north-west.*

*Beyond the church there are few buildings of interest in the place probably the most interesting being the White Hart Hotel an old posting house at the corner of the London and Newbury roads; it dates from the time of Queen Anne and contains a good ceiling of that period. Opposite the hotel in the Newbury Road is the town hall, a plain small structure dating perhaps to the same period as the hotel; its lower part is now used as a reading room et cetera, several of the cottages and small shops about the marketplace are of some age and contain picturesque half timber work,*

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<sup>54</sup> Whitchurch Town Website 2015 <http://whitchurch.org.uk/>



*but the town is now fast being modernised. The vicarage opposite the church probably contains some remains of the house in which Mr Richard Brooke entertained Charles I in 1644, but all its details are now modern.*<sup>55</sup>

of the 11 pages dedicated to Whitchurch in the County history nor less than four concentrate solely on the church. This church played a large part in Denning's life, both his early life and later in life when he returned to Whitchurch at the height of his career and in retirement. Denning is buried in the churchyard and the bell tower contains a new tenor bell named "Great Tom" which was commissioned and hung for his 100<sup>th</sup> birthday in 1999. This close connection with the church has contributed throughout his career to his judicial decision-making. He was a very religious man, being a communicant Anglican for all his adult life. He was for many years president of the Lawyers Christian Fellowship and the influence of religion on his life and his judicial philosophy was stated explicitly by himself in an address he gave to the Fellowship in 1954

*So I ask you to accept with me that law is concerned with justice and that religion is concerned with justice. And thence I asked the question - what is justice? That question has been asked by many men far wiser than you or I and no one has yet found a satisfactory answer. All I would suggest is that justice is not something you can see. It is not temporal but eternal. How does one know what is justice? It is not the product of his intellect but of his spirit. Religion concerns the spirit in man whereby he is able to recognise what is justice, whereas law is only the application, however imperfectly, of justice in our everyday affairs. If religion perishes in the land, truth and justice will also. We have already strayed too far from the faith of our fathers. Let us return to it, for it is the only thing that can save us.*<sup>56</sup>

Denning had his £30 exhibition at Magdalen increased to an £80 Demyship and this led to an incident which is instructive in illustrating the sheltered life that Denning had led up to that time and his personal inclinations which on occasion are reflected in his judgement.

One of the conditions attached to the Demyship was that the holder was occasionally required to read a lesson in Chapel. Denning was taken unawares and simply took the first reference that was available, this turned out to be Genesis 39.7 which is the tale of

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<sup>55</sup> A History of the County of Hampshire Vol 4 Victoria County History London 1911

<sup>56</sup> Denning, Address to The Lawyers Christian Fellowship November 1954

Potiphar's wife and her sexual advances to Joseph. Having to read this passage out loud caused him acute embarrassment. Denning himself said that

*our good professor of philosophy, Clement C.J. Webb, who was always kind to me took me aside afterwards and consoled me*<sup>57</sup>

it is clear from this that Denning's upbringing had been particularly sheltered in matters such as this. The passage in question is tame even by the standards of the King James Bible:

*And it came to pass after these things that his master's wife cast her eyes upon Joseph; and she said lie with me*<sup>58</sup>

Denning clearly had an unshakeable faith in monogamy and faithfulness and perhaps it is this clear moral view that influences his judgement in later times particularly in cases such as *Ward v Bradford Corporation* which will be discussed later.

The three older brothers at this time were in the thick of the fighting with Reg being wounded in France and Gordon taking part in the battle of Jutland. Jack was killed as a company commander on the Somme in September 1916. This was a devastating blow to the whole family. Denning describes his mother swooning when the telegram was received<sup>59</sup>. Denning himself always regarded Jack and Gordon as the best of them.

It may be trite to say it but the First World War was the dominant formative event in Denning's early years. Jack was the eldest son and very much a hero to Denning and it is clear that his death affected Denning greatly. When he came to write *The Family Story* in 1981 he confessed that Jack's last letter still had the power to move him to tears. He ends that chapter on Jack in his book with Rupert Brooke's poem "*The Soldier*" out in full. The poem of course reflects the high Victorian values of the early part of the war rather than the later cynicism of the 20s and 30s which there is no evidence that Denning ever adopted.

Reg joined up at the beginning of the war as a private and served in Flanders. It was commissioned in 1915 and was wounded on the Somme in 1916 when he suffered a head wound. He was evacuated to England and eventually returned to serve in France at the

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<sup>57</sup> *The Family Story*, Denning p36

<sup>58</sup> Genesis 39,7 KJB

<sup>59</sup> *The Family Story* p41

end of the war. Denning says that Jack's death affected him so much that he attempted to take Jack's place and that in the army henceforth he was known as Jack rather than Reg.

Gordon had joined the Merchant Navy in 1913 as a cadet and when the war started was called up into the Royal Navy and commissioned as a midshipman in the Royal Naval Reserve. After an initial posting to HMS Hampshire, a cruiser, he was posted to HMS Morris, a destroyer and was present in her at the battle of Jutland in 1916.

Immediately after Jutland, Gordon was appointed Sub Lieutenant in the Royal Navy, this was a considerable achievement and Denning remained proud of Gordon's achievements throughout his life.

Unfortunately shortly afterwards, Gordon was diagnosed with tuberculosis. In 1916 this was a killer disease with no known cure. He lingered on finally dying on 23<sup>rd</sup> of May 1918, five days after his 21<sup>st</sup> birthday. At the time of his death Denning was serving in France.

Denning signed up for the army in August 1917 when he reached 18 ½, the youngest age which he was allowed to join. There is an interesting quote from him at the time he joined the Army and by reference to Shakespeare in Henry V refers to soldiers being

*"full of strange oaths, and bearded like the pard,"*<sup>60</sup>

he then goes on to say:

*Nor was I full of "strange oaths," our parents had forbidden them. Damn was a swear word-not to be used, profane, irreligious, meaning, "condemn to hell". Bloody was worse-why I know not. Even Brewer's dictionary does not help much except that it gives an illustration from Swift "it was bloody hot walking today". At any rate it was never to be used in our family. In the Army I heard all kinds of strange oaths-four letter words and the rest-but I never copied them. I never put them into common use so strict was my upbringing.*<sup>61</sup>

Even in 1917, this was a particularly sheltered upbringing and is in many ways evidence of a strong puritanical streak in Denning's upbringing. This may of course in part have contributed to his judicial attitude which is particularly evident in the Ward case which is considered in a later chapter.

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<sup>60</sup> Henry V Act 3 Sc1

<sup>61</sup> The Family Story at p72

Denning was commissioned as a Second Lieutenant in the Royal Engineers and was sent out to France in April 1918. At this time the Germans counter-attacked and the fighting it was bloody. Denning was involved in the crossing of the Ancre under fire, followed by further crossings of waterways all under fire until the armistice in 1918 at which time Denning was in hospital with Spanish flu. This was a particularly virulent strain of flu and Denning recalls many men dying on his ward. He was justifiably proud of having taken part and quotes Shakespeare's Henry V eve of battle speech in the Family Story.

There is some justification for considering that throughout his life Denning felt a strong sense of obligation to the fallen and this in many ways coloured his approach to the judicial task where there was any element of that generation concerned.

Until his last years, on Remembrance Sunday, he read out the roll of the fallen in the parish church in Whitchurch in memory of those men of Whitchurch who had given their lives in both world wars. It is impossible that this did not leave a strong impression on Denning, and indeed it would be a strange man who was not affected by such cataclysmic events and there are threads in his judgements which reflect this.

In the case of *Broome v Cassell and Co*, which will be considered in a later chapter, there are elements of this sympathy for those who served (and in particular those with distinguished service records) which are particularly evident in that judgement. The plaintiff was a distinguished naval officer who was being libelled by a young author's behaviour which Denning considered to be particularly egregious.

After the war, Denning was discharged on 6 February 1919 and returned to Oxford where he resumed his studies in mathematics; one of his biographers has speculated that this grounding in mathematics, which involved building from point to point, a line of thought, was reflected in his later decisions, in fact the biographer comments on the lucidity of his decisions<sup>62</sup>. As will be seen that this is not always the case and there is little evidence of his mathematical background in his later career.

There is no evidence that whilst he was at Oxford he took part in the wider social life of the University or indeed so much interest in anything much beyond his studies. The sole exception to this was his growing friendship with Mary Harvey, the daughter of the Vicar of Whitchurch.

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<sup>62</sup> Freeman at p63

He graduated with a first in mathematics and started as a master at Winchester College in the autumn term of 1920. There is some evidence that he was a good teacher however he decided that this was not a career for him, he was also turned down by Mary Harvey at this time.

This may be another spur to Denning's ambition, one reason why Mary may have been so reluctant to accept his proposal is that as the daughter of the Vicar she would have been of considerable higher standing than the son of the local draper, notwithstanding Denning's temporary commission and Oxford degree. Once again Denning would have been brought face-to-face with his humble origins.

Tom left Winchester at the end of the summer term and returned to Oxford to read jurisprudence in the autumn. He was awarded an Eldon scholarship and joined Lincoln's Inn.

At this time at Oxford the leading legal scholars were Sir Paul Vinogradoff and William Holdsworth both of whom successively held the Vinerian chair and both were distinguished legal historians. Throughout his career, Denning was always prone to delve into the distant past of the common law to support whatever decision he had come to in a particular case. It is hard not to come to the conclusion that this is as a result of the influence of these two scholars.

Denning graduated with a first in jurisprudence in June 1922. Then he formed a friendship with a young law professor by the name of Jeffrey Cheshire, a friendship which would affect both their lives in unforeseen ways in years to come. Many years later Cheshire showed Denning his marks, amongst a plethora of alphas was one gamma, for jurisprudence. This led Denning to write

*"Jurisprudence was too abstract a subject for my liking, all about ideologies, legal norms and basic norms, "ought" and "is", realism and behaviours and goodness knows what else. The jargon of the philosophers of the law has always been beyond me. I like to get down to the practical problems which called for decision. Contracts, torts, crime and the like."<sup>63</sup>*

this lead people to conclude that Denning knew little of jurisprudence and cared even less. This is not the case. It is clear from his judgements that he had a very well developed

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<sup>63</sup> Denning The Family Story

sense of his own theory of the law and as he says quite clearly, it is the jargon of the philosophers of the law of which he disapproves and the not the theories themselves.

At the time the main school of jurisprudential thought at Oxford was that of English positivism as proposed by Austin, this this had, as its main tenet, a system of top-down law propagated by an all-powerful sovereign backed up by threats and coercion. As can easily be seen this was not in any way the view that Denning shared.

At Oxford and later at the Bar, Denning was a near contemporary of H.L.A. Hart who attended New College between 1925 and 1929, he is of course responsible for one of the most important texts in 20<sup>th</sup>-century jurisprudence<sup>64</sup> which rejects Austin's view of positivism and any sovereignty theory of law. There are interesting parallels between Harts fully formed theories and those threads of jurisprudence which can be pulled from Denning's judgements. It is tempting to ascribe this similarity to Oxford in the 1920s however this is to mistake coincidence and cause. There is similarity in their backgrounds in that both were the sons of minor tradesman in provincial towns (in Hart's case, the family were furriers in Harrogate), Denning did at least have the social advantage that he was a communicant Anglican whereas Hart was Jewish. There is no record that they ever met at Oxford although they must have been aware of each other.

Denning started pupillage at Brick Court in the Temple in September 1922 with Henry O'Hagen as his pupil master. He remained in Brick Court for the next 22 years until he became a judge.

The same time Denning applied for a fellowship at All Souls, he was unsuccessful, a fact he ascribes to his deficient Latin pronunciation.

*"I could answer the legal questions all right, but we had to read Latin out loud. My pronunciation was mixed between the old and the new. That did not suit that stronghold of classicists. So I joined the distinguished company of "Failed All Souls."!"<sup>65</sup>*

it is clear that even 60 years later Denning does not agree with this judgement

Denning made up for this failure (if such it was) by coming out top in the bar examination in June 1923 and being awarded the prize studentship which was a very useful 100

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<sup>64</sup> The Concept of Law HLA Hart 1<sup>st</sup> Ed 1961 Oxford University Press

<sup>65</sup> The Family Story at p39

guineas for three years and was accompanied by a seat in Chambers where he was to remain for many years until he took on chambers of his own.

As is usual, in his early years at the bar, work was somewhat difficult to come by. He was asked to work on a new edition of Smith's leading cases, this was a mainstay of the legal profession for 100 years. The book consisted of, as the title implies, a digest of the leading cases of the time together with commentary upon them. It was this commentary that Denning was engaged to write together with another young barrister. The fee was 600 guineas which was a considerable sum at the time. Denning himself said this was a considerable undertaking which involve him in prodigious research but which he claimed taught him most of the law he ever knew.<sup>66</sup>

Whilst he may be exaggerating to claim that this was the sole source of his legal knowledge it is clear that he had a prodigious, indeed encyclopaedic, knowledge of common law cases, many of which were obscure to start with and had faded into the mists of time by the time Denning chose to resurrect them in support of some contention in a judgement. He had a habit of bringing cases from within his own knowledge rather than relying on those which counsel had already laid before the court. It could be said that continual judicial activism arose from the voluminous but unstructured wealth of cases that he reviewed for this 13<sup>th</sup> edition of Smith. It should be noted that this was the last edition of Smith's leading cases and not for the final time Denning managed to have the last word.

His practice at the bar was starting to prosper at this time and he had got work from his home county of Hampshire appearing for the prosecution at Winchester Assizes. It is worth noting that this brief came from Mary Harvey's uncle who was Clerk of the Peace to the City of Winchester. He obtained a number of briefs before Winchester Assizes and thus cut his teeth as a barrister on his home turf further reinforcing the influences of this small corner of Hampshire on him early in his career much as it did in his childhood.

He also obtained regular work from the Southern Railway Co travelling round the region prosecuting people for non-payment of fair. This grew into more demanding work from the railway and his practice continued to grow. In 1926 he obtained his first brief in the High Court where he was to spend much of the rest of his career.

Tom became engaged to Mary Harvey 25<sup>th</sup> of January 1930 the courtship prove rapid however before the wedding may was diagnosed with tuberculosis which at that time was

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<sup>66</sup> The Family Story p 94

largely a death sentence this delayed matters and it was over two years before they were finally married.

Denning then started up started chambers at 4 Brick Court in 1932 , initially with four tenants and with himself as Head of Chambers.

In 1934 Denning was instructed by the defendant company in the famous case of *L'Estrange v Graucob*<sup>67</sup>. The case concerned exclusion clauses in contracts for hire of an automatic slot machine. The shop owner had won the case in the County Court, not surprisingly as the slot machine completely failed to work. Denning was instructed to take the matter to the Court of Appeal on the basis that the contract contained an exclusion clause which stated that any express or implied condition or warranty, statutory or otherwise was excluded. Denning of course won this case and developed a lucrative line of business in taking this judgement round various county courts for the company and winning judgement for them. That judgement Denning says:

*in those days I wasn't concerned so much with the rightness of the case. I was concerned only, as a member of the bar, to win it if I could.*<sup>68</sup>

whilst acknowledging that this is a fairly succinct rendering of the barristers duty it is nonetheless worthy of note that this is very much at variance with Denning's attitude to exclusion clauses when he became a judge he goes on to say following the above quotation

*when you are a judge you don't care who wins exactly. All you are concerned with is justice.*<sup>69</sup>

From this we can take away the fact that whatever may be identified as influences on his jurisprudence when he became a judge, he did not give free rein to those instincts and influences in his time at the bar.

It is invidious to accuse Denning of being mercenary, and almost certainly untrue in any event but it is worthy of note that it is recorded that in 1936 as a junior barrister he earned £3000. This is an enormous sum for the time and by way of comparison it was more than

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<sup>67</sup> [1934] KB 399

<sup>68</sup> The Family Story at p 98

<sup>69</sup> *ibid*



was earned by the Permanent Secretary to the Lord Chancellor and Clerk to the Crown in Chancery that year.<sup>70</sup>

The average working man's wage that year was £100 which shows that Denning was, at the age of 36, a wealthy man. Financially, he had left behind the drapers shop in Whitchurch but its influences were to stay with him when he became a judge.

It was also at this time also that Denning took his first steps into the judicial world on his appointment as Chancellor of the Diocese of Southwark the plan which he held to 1944. The Chancellor is the bishop's legal surrogate and effectively is the judge of all cases that come before the diocesan court. In this role Denning would have been involved in determining matters as mundane as the positioning of candles on an altar and as important as the exhumation of bodies. Proceedings of the diocesan courts are very rarely reported and it is only when matters are appealed to the Dean of the Arches Court that they reach the law reports. There are no records of Denning's work in the Diocese of Southwark or from his later and concurrent appointment as Chancellor of the Diocese of London.

These appointments however highlight Denning's attachment to the Church of England. Appointments to post of Chancellor of the Diocese, where at that time, restricted to practising barristers who were also communicant members of the Church of England. Clearly Denning would fit that bill as well as being the son-in-law of a Church of England clergyman.

The next logical step was to take silk which he did on 1 April 1938. One of only 15 appointed that year.

On the outbreak of war in 1939, Denning volunteered for service and was appointed as legal adviser for the north-east region, it was envisaged that in the event of invasion country was split into regions and Denning would be senior legal adviser in the north-east. In this capacity Denning was responsible for detaining, without trial, people suspected of being a danger to the realm under wartime regulations. He appears to have no qualms in doing this despite his later espousal of liberty under the law. He does quote with approval Lord Atkin's dissent in *Liversedge v Anderson*<sup>71</sup> which he refers to in the *Family Story*<sup>72</sup>

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<sup>70</sup> Heward p26

<sup>71</sup> [1942] AC 206

<sup>72</sup> At p130

Notwithstanding that, he does not seem to have been in any way disturbed in exercising what was effectively an unfettered discretionary power. Presumably this is in line with his view that judges are the ones who are to be trusted with discretionary power and that he in particular had all the attributes of a good judge.

Denning first sat as a High Court Judge in December 1943 when he was asked to sit as Commissioner of Assize in Manchester and was finally appointed to the High Court bench on 6 March 1944 and was assigned to the Probate, Divorce, and Admiralty Division.

Moving on to events in his personal life which were to have profound effects on his later career and which in particular were was to influence his judicial style.

In November 1941 Mary finally succumbed to tuberculosis and died leaving Denning alone with his son Robert who was only three-year-old three years old. The other event was Norman's burgeoning career in naval intelligence. Norman was effectively the chief intelligence officer to the First Sea Lord, Admiral Sir Dudley Pound and it was Norman who was responsible for conveying the intelligence reports regarding the Tirpitz's movements in May 1942 which resulted in Pound's disastrous interference with the convoy PQ 17, which interference contributed to the destruction of this convoy. Denning, many years later had an appeal in a libel case involving the convoy escort commander and a young author, one David Irving<sup>73</sup>. The line that Denning took in this case involved him in an undignified spat with the House of Lords resulting in a rebuke from the then Lord Chancellor, Lord Hailsham.<sup>74</sup>

As will be seen, it is hard to think that in that case that Denning was not to some extent perhaps unconsciously influenced by the family connection.

Denning remarried on 27 December 1945 choosing a widow of around the same age as himself and he was to remain married to Joan until her death in 1996. There is no doubt that it was her support of him, both moral and physical (for instance, he never learned to drive so she drove him everywhere) that enabled him to effectively discharge his duties as a judge.

Denning had a rapid rise through the judicial ranks moving to the Queen's Bench Division and then to the Court of Appeal as soon as the 12 October 1948.

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<sup>73</sup> Cassell and Co Ltd v Broome [1972] 2. WLR 645

<sup>74</sup> Ditto [1972] AC 1027

There is only one case from his time as a Queen's Bench judge where he came in for any sort of criticism from higher up the judicial hierarchy and this is a case involving a barrister and MP, in the same person, namely one Mr David Weitzman MP<sup>75</sup>, the defendant was known to Denning having been his junior in a case some years earlier. The case involved contravention of regulations designed to limit the manufacture and distribution of certain toilet preparations; this was designed to husband scarce resources following on from the war. Weitzman was convicted and sentenced to 12 months imprisonment which would also have disqualified him from the House of Commons. The matter was appealed and was heard before the Lord Chief Justice who at the time was Lord Goddard. The conviction was overturned with the Court of Appeal stating that there was no shred of evidence against the defendant and that there had never been any and furthermore Denning should have stopped the trial at the close of the prosecution case. There was further criticism that evidence favourable to this defendant had not been put properly before the jury by the judge.

This is a damning criticism and is indicative perhaps of Denning's inexperience in criminal trials. He never had a strong criminal practice nor indeed much contact with the criminal law at all. One of his biographers has speculated that the fact that Weitzman was a Jew may have influenced Denning's conduct of the trial. This is unlikely as there is no other evidence anywhere in his career either at the bar or as a judge which indicates any degree of anti-Semitism. It is more likely that he was influenced by the black market nature of the alleged offences and the involvement of a member of the bar from whom he would have always expected the highest standards. Notwithstanding this it is clear that the Court of Appeal considered that a miscarriage of justice had occurred and Denning presided over that miscarriage.

During this time than Denning developed his unique style of judgement which is by turns, entertaining, absorbing and irritating. He set out his approach as follows

*I try to make my judgement live-so that it can be readily understood, I start my judgement, as it were, with a prologue-to introduce the story. Then I go on from act to act as Shakespeare does-each with its scenes-drawn from real life. I draw the characters as they truly are-using their real names-. I avoid long sentences like the plague: because they lead to obscurity. It is no good if the hearers cannot follow them. I strive to be clear at all costs. Not ambiguous or prevaricating. I refer*

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<sup>75</sup> R v Weitzman [1948] 1 KB 709 [1948] 1 All ER 718

*sometimes to previous authorities-I have to do so-because I know that people are prone not to accept my views unless they have support from the books. But they are mere lawyer's stuff. They are unintelligible to anyone else. I finish with a conclusion-an epilogue-again as the chorus does in Shakespeare. In it I gather the threads together and give the result.*<sup>76</sup>

This is extremely illuminating and gives an insight into Denning's judicial philosophy as much as it does into his prose style, which is of course extremely idiosyncratic, particularly in its use of the hyphen. It has to be said that there is little of prevarication or ambiguity about any of his judgements and it must be acknowledged that there is seldom any dispute as to the meaning of any particular judgement of Denning's as distinct from whether it was right or not.

Perhaps however the most interesting phrase is his reference to precedent,

*"I refer sometimes to previous authorities-I have to do so-because I know that people are prone not to accept my views unless they have support from the books"*

What he appears to be saying here is that he forms his judgement from his own personal environment and philosophy and then effectively dresses it up in precedent to establish its legitimacy. If this is what he is saying then it effectively validates the thesis that whereas all of us are shaped in our opinions and judgements by our environment and experiences and judges are no exception, Denning seems to regard this as entirely proper. It comes back to his view that judges are the right persons to have unfettered discretion in the law, that he is an embodiment of all the qualities that make a judge and therefore his judgements must be right. This is perhaps a rather extreme exposition of his view and he would never have made such a bold statement himself but as we shall see this is borne out in some of his judgements and is an entirely legitimate conclusion to draw from this statement. As we've seen, Denning had developed an encyclopaedic knowledge of cases and the statement throws light on some of his later judgements which will very often overlook the obvious case and trawl back through the history of a particular line of reasoning and jurisprudence to find cases which he would then deploy in support of his particular argument. What this does indicate is that Denning was, to put it at its lowest, not indissolubly wedded to the doctrine of binding precedent.

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<sup>76</sup> The Family Story p208

Denning sat as an appeal court judge on this first occasion from 1948 to 1957 and sat on many cases during that time, in particular his dissenting judgement in *Candler v Crane Christmas and Co*, which is perhaps his most important contribution from this time and will be fully considered in a later Chapter. It is his first case in the Court of Appeal which once again illustrates how the influences identified here came to colour his judicial approach. His first case in the Court of Appeal was the case of *Wingham*<sup>77</sup>. This case concerned a will made by a young airman who was killed in a training exercise in Canada during the war. The will did not comply with the formalities of the Wills Act 1837 and the court of first instance declared it to be invalid and the appeal was on the basis that the will had been made by a serviceman in privileged circumstances. The test was whether at the time the will was made the testator serviceman could be considered to be *in expeditione* as the Latin would have it.

Denning said this:

*“the words of our statutes are plain English: “in actual military service” I found this easier to understand and to apply than the Latin: in expeditione. If I were to enquire into the Roman law, I could, perhaps, after some research say how Roman law would have dealt with its soldiers on Hadrian’s Wall and the camp at Chester, but I cannot say how it would have dealt with an airman in Saskatchewan who was only days flying from the enemy. Nor can anyone else. This supposed throwback to Roman law has confused this branch of the law too long. It is time to get back to the statute.”*<sup>78</sup>

In actual fact of course this was not and never was a question of Roman law and the use of Latin was merely a term of art which had been employed for some considerable time, Denning was of course right in that the question before the court was the definition of actual military service. His judgement here is perhaps a reflection of his impatience with lawyers who attempted to interfere with what he considered to be the lawful rights of a serviceman who fell in the late conflict. This judgement has been described as “a song of thanksgiving for those who served in the war so recently ended and a promise to those who might serve in the future.”<sup>79</sup>

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<sup>77</sup> *Wingham, Re, Andrews v Wingham* [1949] P 187, [1948] 2 All ER 908, [1949] LJR 695, 92 Sol Jo 660, 64 TLR 594

<sup>78</sup> *Ibid* 195

<sup>79</sup> *Freeman* at p195

In this judgement Denning was concerned that the law should reflect and serve the needs of those bereaved by the war needing to rely on Wills made in privileged circumstances. Again we see that, perhaps mindful of sacrifices his own family had made in the First World War he is sympathetic to the claims of serviceman on the law. As has been mentioned above, this is an attitude we shall see reflected later in his career.

We have seen that Denning was a religious man with a strong Anglican faith and it would be surprising if this did not to some extent to influence his judicial outlook. Indeed he delivered a public lecture on the subject of “the influence of religion on law”<sup>80</sup> in which he expounded the theory that many of the fundamental principles of the common law have been derived from the Christian religion, whether this is so or not is outside the scope of this thesis but suffice to say that a strong argument could certainly be made in favour of the proposition. But perhaps a remark that throws the most light on Denning’s religious approach to the judging process is where he said

*“I cannot help thinking that the literal interpretation of contracts and statutes is a departure from real truth. It makes words the master of men instead of the servant”*

This highlights the purposive approach which characterised so many of his judgements and his persistent refusal to abide by what some would consider to be the literal letter of the law if he could find any excuse not to do so. It follows from this that he considered that if the literal interpretation was a departure from the real truth then, in refusing to apply the literal interpretation, he was the guardian of that real truth. To indicate perhaps where he felt his claim to be the bearer of this truth rested, he said in conclusion:

*“Religion concerns the spirit in man whereby he is able to recognise what is truth and what is justice; whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs.”*

Denning was also the president of the Lawyers Christian Fellowship and gave time to many charitable organisations. More significantly, in 1952 he became Chairman of the trustees of the Cheshire Homes, set up by Group Captain Leonard Cheshire VC. Leonard Cheshire was the son of Professor Jeffrey Cheshire, Denning’s old tutor and friend. Denning remained Chairman of the trustees until his appointment as Master of the Rolls in 1962.

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<sup>80</sup> 33<sup>rd</sup> Earl Grey Lecture, Newcastle 27<sup>th</sup> May 1953.

In April 1957 Denning was appointed to the House of Lords Judicial Committee as a Lord of Appeal in Ordinary.

Is fair to say that Denning did not enjoy his time in the House of Lords and his famous comment was

*“to most lawyers on the bench the House of Lords is like heaven-you want to get there someday-but not while there is any life in you”<sup>81</sup>*

Denning was not in any real sense a rebel in the House of Lords, he only dissented in 16% of the cases which he took part in. This is a much lower percentage than several of his contemporaries, for example Lord Keith, who was regarded as a very orthodox judge, dissented in 22% of his judgements.

In April 1962, Denning got the appointment which he craved as Master of the Rolls. This uniquely placed him to influence and develop the law. As the senior judge on the civil side of the Court of Appeal, he could pick and choose cases and additionally, pick and choose the judges who sat with him. Shortly after his appointment came the incident which thrust him to the forefront of national affairs and for a time, made his name a household word.

Denning was appointed in June of 1963 to enquire into the circumstances surrounding what became known as the Profumo affair. This was at the time a matter of great public interest involving, as it did, a government minister, a call girl and a Russian spy with a supporting cast of socialites, gangsters and pimps.

Denning was appointed on 21 June and his report was published on 26 September, he interviewed all the witnesses himself and produced the report himself. The report has often been criticised as a whitewash and there is no question but that it is supportive of the establishment. However it does contain some trenchant criticism of the government. The report sold 4000 copies in its first day and has been reprinted many times, a unique distinction for a government report.

The allegation which the report was essentially set up to investigate was whether the government tried to stifle the Profumo affair. In this Denning was clear that there was no such attempt. However the Prime Minister (Harold Macmillan) and his handling of the affair was criticised. Denning considered that they had not asked themselves the right questions

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<sup>81</sup> Denning, Quoted in Heward at p89

*“did the ministers ask themselves the proper question? They concentrated their attention on the matter of immorality. And the one question they asked themselves was whether Mr Profumo had in fact committed adultery: whereas the proper question may have been: was his conduct, proved or admitted, such as to lead ordinary people reasonably to believe that he had committed adultery? If that were the proper question the answer was clear. His conduct was such as to lead to that belief”<sup>82</sup>*

This approach came in for some criticism with some ministers equating this view with a reversal of the presumption of innocence, which would have meant ministers condemning a colleague on mere suspicion only. Denning however was right, Profumo had admitted an association with Christine Keeler and Stephen Ward which had given rise to rumours which brought discredit on himself and the government, whether they were true or not, they were such as it was as it would be reasonable for ordinary people to believe and it was this conduct that ministers should have dealt with and didn't. The government seems to have worked on the “good chap”<sup>83</sup> principle and taken Profumo's word at face value.

Denning, without a public school background, coupled with his education in the law, was not impressed by this and felt that ministers should have looked behind Jack Profumo's denials. Whilst not reversing the presumption of innocence, he considered that Profumo's admitted behaviour, in itself, was enough to give ministers cause to investigate further and they didn't.

It was around this time that Denning returned to what is perhaps the greatest influence on his life and work when he went back to live in Whitchurch. In the early 1960s the Denning's bought “The Lawn” in Whitchurch, this was at the time perhaps the grandest house in Whitchurch. Denning, after quoting sales particulars of 1868 had this to say about it:

*“That is the sort of establishment which judges of olden days used to have. They used to live in style befitting their standing. In the 17<sup>th</sup> century Lord Coke had his great house at Stoke Poges and 1000 acres. Near the house, a stream was dammed to make a lake, after the fashion when a man improved his country place. His domestic accounts showed his attraction to pleasant country living-sheep to*

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<sup>82</sup> The Denning Report p97

<sup>83</sup> A good chap doesn't tell a good chap that which a good chap ought to know



*crop the turf, cows grazing near the house, the stables within sight and sound, and so forth. He loved it. Just as I love The Lawn .”<sup>84</sup>*

There can be no doubt at all that Denning would have enjoyed being able to buy The Lawn and he would not have been human had he not got a certain pleasure from rising from his humble beginnings to being the undoubted top of Whitchurch society.

All that he says about it though is this:

*“so you see I am back in the place where I was born. It is good for a man to have his roots deep down. It is good for him to return to the place of his childhood. It is good for him to meet and to talk with those whom he knew when he was a boy. And to feel that he has done something to keep its character as a period piece.”<sup>85</sup>*

Once again we are coming back to the place of Whitchurch in Denning’s character; this is an acknowledgement by Denning himself of the importance he attaches to place in his life. Denning was to remain at the lawn for the rest of his life and indeed he is now buried in the churchyard next door.

Denning had always been involved in external lecturing and overseas tours. However, as Master of the Rolls, these tours took on a more official character. In 1963 and early 1964 Denning went on official tours to India and Pakistan making a great impression where ever he went.

It was as Master of the Rolls that he began to exercise that judicial activism which characterised the later part of his career and in particular he began a campaign to win the Court of Appeal freedom to depart from previous decisions of the court. This was ultimately doomed to failure but is very illustrative of Denning’s approach to judicial decision-making.

As we shall see later, in the case of Broome, Denning attempted to take this campaign one step further and even attempted to take the Court of Appeal away from being bound by decisions of the House of Lords. This is not an example of megalomania but a reflection of his belief in his own judicial capacity and a desire to right what he perceived as wrongs inflicted on individuals. Ultimately as we have seen his intent was always to do justice, as he saw it, to the individual before him.

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<sup>84</sup> Denning ; The Family Story p 154-155

<sup>85</sup> Ibid p158

It was in the field of trade union law that Denning next exhibited his independent line of reasoning and his determination to do justice.

Denning was certainly not anti-union but there is a consistent line running through his judgements wherein he seeks not to limit union power but to ensure that that power was properly utilised and not abused. This reached its zenith in the case of *Duport Steels Ltd v Sirs*<sup>86</sup>. This was a case of secondary industrial action which was exercising all strata of government and society at the time.

It was always this extension of union power beyond what Denning considered to be a legitimate trade dispute and the consequent impact on unconnected and innocent individuals and companies that led to many of his most controversial judgements and in many minds he became known as a judge who was antagonistic to trade unions. This was not the case and in more than one case he gave judgements which protected trade unions.

Denning's zeal for reform was not always frustrated by higher courts and a good example of this is his development of the *Mareva* injunction<sup>87</sup>, now known as freezing injunctions. This is an entirely new procedure which enabled a creditor to freeze the assets of his debtor before obtaining a judgement for the debt. The principal identified by Denning was to prevent a debtor from avoiding a judgement by removing his assets from the jurisdiction of the court either by taking them overseas or by dissipating them.

Unfortunately however, whilst the *Mareva* injunction itself survived, a later attempt to extend the scope and reach of the *Mareva* injunctions resulted in yet another rebuke from Lord Hailsham. This was in the case of the *Siskina*<sup>88</sup>. In this case Denning sought to extend the jurisdiction of a *Mareva* injunction outside England and Wales. The brief details of the case are that the buyers of the cargo on the *Siskina* had paid for the cargo prior to delivery, the ship disappeared and the Cyprus-based owners claimed the insurance money. The buyers applied for a *Mareva* injunction to stop the dissipation of those insurance monies pending the determination of the claim.

In his judgement Denning clearly demonstrates his judicial approach once again

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<sup>86</sup> [1980] 1 WLR 142

<sup>87</sup> *Mareva Compania Naviera of Panama in the SA v International Bulk Carriers SA (The Mareva)* (1975) 2 Lloyds Rep 509 and [1980] 1 All ER 213 as a practice note

<sup>88</sup> (1977) 2 Lloyds Rep 203

*It was suggested to us that this course is not open to us, it would be legislation; and that we should leave the law to be amended by the Rules Committee. But see what that would mean. The ship owning company will be able to decamp with the insurance money and the cargo owners would have to whistle for any redress. To wait for the rules committee would be to shut the stable door after the steed had been stolen and who knows that there will ever again be another horse in the stable? I ask, why should the judges wait for the Rules Committee? The judges have an inherent jurisdiction to lead in the practice and procedure of the courts: and we can invoke it now to restrain the removal of these insurance monies. To timorous souls I would say in the words of William Cooper:*

*Ye Fearful Saints, fresh courage take,*

*The Clouds ye so much dread*

*Are big with mercy, and shall break*

*In blessings on your head.*<sup>89</sup>

Not surprisingly this approach did not find favour with the House of Lords and Lord Hailsham aimed a personal rebuke that Denning

*The second point upon which I wish to comment is the argument of Lord Denning MR fortified by authority of a quotation from Hymns Ancient and Modern that judges need not wait for the authority of the Rules Committee in order to sanction a change of practice, indeed an extension of jurisdiction in matters of this kind. The jurisdiction of the Rules Committee is statutory, and for judges of first instance or on appeal to preempt its function is, at least in my opinion, for the courts to usurp the function of the legislature.*<sup>90</sup>

Denning was always minded to find ways round inconvenient rules if he felt that justice, in a particular case before him, demanded it. In doing this he did not always plough a lonely furrow. In 1961 the House of Lords had decided that judgements must always be given in Sterling<sup>91</sup>. This was a case in which Denning himself had sat. By the mid-1970s however the economic situation had changed and Sterling was no longer the strong currency it had

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<sup>89</sup> God moves in mysterious ways: Hymns Ancient and Modern

<sup>90</sup> The Siskina [1979] AC 210

<sup>91</sup> United Railways of Havana v Regis Warehouses [1961] AC 1007

been in 1961 and commercial pressures were demanding that judgements be given in Sterling and other currencies if appropriate. Denning supported this<sup>92</sup> and got round the earlier judgement, to which he had been a party by the simple expedient of a Nelsonic blind eye<sup>93</sup>.

This approach was later affirmed by the House of Lords who on this occasion did not feel it necessary to wait for the rules committee.

Denning was also involved in the gestation of the Anton Pillar<sup>94</sup> order. In one of the first cases concerning such an order which reached the Court of Appeal Denning was in a minority in rejecting the appeal. Once again his judgement demonstrates his firm view to do what he saw as justice for the party appearing before him in the instant case:

*to allow wrongdoers to take advantage of the wrongdoing in this case was an affront to justice in itself. It is a great disservice to the public interest. It should not be allowed. If this illicit trade is to be stopped strong measures are needed. Whitford J has much experience in cases of this kind. He has made a strong order. I agree with it. I would dismiss the appeal.*<sup>95</sup>

the Anton Pillar order prove to be a step too far for the House of Lords who disagreed with Denning and upheld the appeal however the matter was resolved by Parliament who gave the Anton Pillar order statutory force.

Throughout his career, Denning frequently found himself at odds with the House of Lords some of these cases will be analysed in greater detail in succeeding chapters, but the overriding concern of Denning was always never to let the law get in the way of what he saw as being justice. in some instances this of course was of great benefit to the development of the law and some of Denning's greatest and most enduring contributions to the law have arisen either from his dissent or a Court of Appeal judgement which whilst it was overturned by the House of Lords nonetheless later gave rise to the change in the law which Denning advocated. Probably the best example of a dissenting judgement giving rise to profound change in the law was Denning's powerful dissent in *Candler v Crane Christmas & Co. Ltd.*<sup>96</sup> again this will be examined fully in a later chapter that it is no

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<sup>92</sup> *Schorsh Meir v Hennin* [1975] AC 396

<sup>93</sup> Denning in *The Discipline of Law* p305

<sup>94</sup> *Anton Pillar v Manufacturing Processes Ltd* [1976] Ch 55

<sup>95</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380

<sup>96</sup> [1951] 2 KB 164

exaggeration to say that Denning's judgement was at least as influential on the law of negligence as that of Lord Atkin in *Donoghue v Stevenson*<sup>97</sup>, the judgement which Denning sought to expand in *Candler*.

Perhaps the clearest illustration of the difference between Denning's approach and that of the more cautious and orthodox Law Lords is that the clash between Denning and Lord Simonds in the case of *Magor and St Mellons District Council v Newport Corporation*<sup>98</sup>

the details of the case are discussed elsewhere however it is the contrast in statements made by Denning and Simonds which provide the illustration. Denning's view is

*"we do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. We sit here to find out the intention of Parliament and of Ministers and to carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis"*

This was anathema to Simonds who couched his disagreement in these terms:

*"the general proposition that it is the duty of the court to find at the intention of Parliament, and not only Parliament but ministers also, cannot by any means be supported. The duty of the court is to interpret the words that the legislators used, these words may be ambiguous, but even if they are, the power and the duty of the court to travel outside them on a voyage of discovery are strictly limited"*

it is of course Denning's approach which has found modern favour, albeit not perhaps to the extent that he would himself have advocated and courts are now not only expected to find out the intention of Parliament in appropriate cases but are specifically allowed to refer to extraneous aids in doing so.<sup>99</sup> Lord Simonds would not have approved.

In another dissent which led to another rebuke from Lord Simonds, Denning upheld the rights of a third party to rely on a contractual document to which they were not a party.<sup>100</sup> Simonds held that it was an elementary principle that only a party to a contract could sue on it and that it was for Parliament, and Parliament alone to change this. In this case Simonds was right. However Parliament agreed with Denning eventually and gave third

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<sup>97</sup> [1932] AC 562

<sup>98</sup> [1951] 2 All ER 839

<sup>99</sup> *Pepper v Hart*

<sup>100</sup> *Scrutton v Midland Silicones Ltd.* [1962] AC 446

parties with an interest the right to sue on a contractual document to which they were not a party<sup>101</sup>.

Denning gave a dissenting judgement in his first and his last cases in the House of Lords and the many others in between. On occasions Denning's dissent was less than measured but never merely capricious. On other occasions however Denning showed himself to be ahead of current judicial thinking whilst clearly showing the way that others should follow. There are instances where he could take the steps himself but if not others would take up the battle as in *Candler* which led directly to *Headley Byrne*<sup>102</sup> and *Caparo* and hence the modern law of negligence.

During his later career Denning sat down to write several books expounding his views and theories on the law as well as giving his view on his life and career. In 1979 he published in *The Discipline of Law*, in 1981 *The Due Process of Law*, in 1981 *The Family Story* and in 1982 *What Next In The Law* was published. It was this latter book which led to his resignation and in some minds cast a shadow over his judicial career.

In writing this book Denning had intended to be controversial as he felt that he needed to push the agenda for reform in the law and one area that he chose for that reform was the rights of peremptory challenge of the defendant to obtain a sympathetic jury, in his view, others may of course have taken the view that the defendant would use his right to obtain a fair and balanced jury. Unfortunately Denning chose the then recent Bristol riots to illustrate his point and referred to a trial of *12 coloured people* where he considered the jury had been packed. He proposed several reforms to the jury system and then included this unfortunate passage

*it grew up in the ages when the English were a homogenous race, they shared the same standards of conduct, the same code of morals, and the same religious beliefs. Above all they adhered uniformly to the rule of law. The English are no longer a homogenous race. They are white and black, coloured and brown. They no longer share the same standards of conduct. Some of them come from countries where bribery and graft are accepted as an integral part of life: and stealing is a virtue so long as you are not found out. They no longer share the same code of*

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<sup>101</sup> Contract (Rights of Third Parties) Act 1999

<sup>102</sup> *Hedley Byrne and Co. Ltd v Heller and Partners CA* [1962] 1 QB 396 HL [1963] 2 All ER 575

*morals. They no longer share the same religious beliefs. They no longer share the same respect for the law.*

Denning appears to have been genuinely not aware of how offensive this paragraph was until he was interviewed by Ludovic Kennedy for the BBC. He was then shown a transcript of the trial in Bristol which quite clearly showed that the challenges were prompted by the judge who was anxious to secure a representative jury. Denning was threatened with libel actions from black jurors and was subjected to criticism from all sides of the political spectrum. An example of this was an article in the Times which said:

*Lord Denning's ill-considered remarks on the unsuitability of many blacks for jury service have, understandably, caused considerable offence in the black community. Should he have to give judgement in a case in which race is a factor, he will be exposed to charges of prejudice and to suggestions that his decision might be affected by his personal feelings on racial matters. Such criticism would, it is hoped and expected, be unwarranted. Lord Denning has only himself to blame for placing himself in a position where such attacks could be made. It was the same on issues affecting industrial relations. The accusations which the political left and many trade unionists have made against Lord Denning have only partly been based on the judgements he has given against unions in a number of court cases. Much of feeling against him has resulted from remarks he has made in lectures and in his books.<sup>103</sup>*

Denning realised that feeling was such that he would have to retire and he brought this to the Lord Chancellor, Lord Hailsham, who suggested that rather than retiring immediately he should retire at the end of the long vacation. Denning sat until 29 July 1982 with his valedictory sitting being held on 30 July. As a postscript to the longest judicial career in English history, the valedictory sitting was full and the compliments fulsome.

No writs for libel were ever issued and the offending passages were withdrawn from later editions of the book. The reference to the Bristol trial now reads:

*there was a recent case about the disturbances at Bristol. The accused were encouraged by the judge to use the peremptory challenges so as to secure a representative jury. So the accused were fully justified to use them as they did. It is always desirable that a jury should reflect the community from which its members*

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<sup>103</sup> The Times 24<sup>th</sup> May 1982 London

*are drawn. The use for that purpose it is quite proper but it is not right to use it otherwise*<sup>104</sup>

So which one is the real Denning, the answer must be that they both are. The first is drawn from his Whitchurch boyhood and the certainties of Edwardian England whereas the second is based on his experiences and is a result of reflection.

That Denning was not a racist was acknowledged by Rudy Narayan the President of the Society of Black Lawyers who said:

*A great judge has erred greatly in the intellectual loneliness of advanced years; while his remarks should be rejected and rebutted he is yet, in a personal way, entitled to draw on that reservoir of community regard which he has in many quarters and to seek understanding, if not forgiveness.*<sup>105</sup>

Denning was active in retirement, attending the House of Lords until 1988 when ill-health forced his retirement from the house. Denning remained, even in retirement, true to his principles and did not shrink from taking any opportunity to expound them. On 20 October 1988 there was a government statement that they intended to change the law on the right to silence. Tom King the Northern Ireland Secretary was interviewed on the television news and gave his views in favour of the change and Denning was interviewed by Channel 4 News again supporting the change. At the same time there was a trial in Winchester of three alleged IRA terrorists who would exercise their right to silence. The three were all convicted and sentenced to 25 years. This was appealed to the Court of Appeal which quashed the convictions and once again Denning was mentioned in a Court of Appeal judgement:

*The statements of Mr King and Lord Denning, which were powerfully made, were on the face of general application, but had a particular relevance to the trial of the accused. Their Lordships were left with the definite impression that the impact which the statements made in the television interviews may well have had on the fairness of the trial could not be overcome by any direction to the jury and that the only way in which justice could have been done and have been seen to be done is by discharging the jury and ordering a retrial.*<sup>106</sup>

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<sup>104</sup> Denning: What Next in The Law OUP 1982 at p59

<sup>105</sup> Letter to The Times, 26<sup>th</sup> May 1982.

<sup>106</sup> R v Cullen (1990) 92 Cr App Rep 239



This did not please Denning at all and he had no right of reply to the court and indeed had not even known about the proceedings, he did however send a trenchant letter to the Times setting out his views. The letter is worth quoting at some length.

*The right to silence had been brought under public scrutiny on October 20, 1988 by a written answer by the Home Secretary to Parliament. It was a matter of general public interest which all others were entitled to comment. My comment on television was the same as those which I have made publicly many times before and was based on the report of the Criminal Law Commission in 1972, who proposed that the so-called right to silence enjoyed by suspects should be greatly restricted.*

*I knew, as most people knew that three people were being tried at Winchester for conspiring to murder Mr King but I knew nothing of the course of the trial. I have read nothing of it and had no idea that it involved the right to silence. If I had been charged I should have pleaded the defence of freedom of speech given by section 5 of the Contempt of Court Act 1981: a publication made as or as part of the discussion in good faith about public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.*

*That section was inserted into the statute on the recommendation of the Contempt of Court Committee supported by speeches of distinguished Law Lords. Yet the Judges of the Court of Appeal have condemned me without hearing my defence. They did it under the cloak of an absolute privilege. In the face of it, all I can do is to write to you. My view is that justice was done in the Crown Court at Winchester by Mr Justice Swinton Thomas (the presiding judge of the Western Circuit) and a Hampshire jury. It was not done at the Old Bailey in London by three judges of the Court of Appeal.<sup>107</sup>*

This is very much in line with his judicial approach throughout his career and shows that even at the age of 90 his principles remained the same and still reflected those influences which were brought to bear upon him during his childhood in Whitchurch and were honed during his time at the bar and his subsequent long judicial career. In this statement are contained many of his strands of judicial philosophy. His belief that the law and the

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<sup>107</sup> The Times 30<sup>th</sup> April 1990

interpretation thereof is best left in the hands of a competent sensible judge, usually himself but in this case Swinton Thomas J; his belief in the good sense of the reasonable man, in this case the jury and finally the sentimental tug of his Whitchurch childhood, a Hampshire jury in fact.

As the years advanced Denning paid the penalty of increasing old age as his companions and contemporaries were taken from him. The first to go was Norman who died of a heart attack in December 1979. Norman had risen to the rank of Vice Admiral and had served as Vice Chief of the Defence Staff (intelligence) and was knighted as Vice Admiral Sir Norman Denning GCB, a remarkable achievement for a non-seagoing officer in the Royal Navy at any time. This was a severe blow to the Dennings, especially as Norman was the youngest of the family and his death was unexpected.

Reg died on the 23<sup>rd</sup> of May 1990, he was by this time a Lieutenant-General and a Knight. He had served as GOC Northern Ireland and was the first Colonel of the Royal Anglian Regiment. In addition he was for 20 years chairman of SSAFA. Denning admitted to being desolate at Reg's death, he had this to say in writing

*"If I were to name his qualities, I would put above all his courage, his courage when severely wounded; his courage against all odds."*<sup>108</sup>

It was a sign of Denning's increasing frailty that he was not well enough to go to London for the memorial service.

In July of that year he was interviewed by A.N Wilson for an article in the Spectator and made several unwise comments about the recent overturning of the convictions against the Guildford four.

Denning had reached that stage in life when in the words of one of his biographers he was no longer subject to restraint and self-examination<sup>109</sup> and simply did not realise how offensive some of his remarks and opinions could be to others. Fortunately Denning still had a large reservoir of public approval for him to draw upon and his extreme old age inclined some commentators not to treat his pronouncements as seriously as perhaps Denning himself would have liked<sup>110</sup>

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<sup>108</sup> Daily Telegraph 25<sup>th</sup> May 1990.

<sup>109</sup> Iris Freeman Lord Denning a Life: Arrow 1994

<sup>110</sup> The Times 18<sup>th</sup> August 1990

Joan Denning died on 23<sup>rd</sup> October 1992 and was buried in the church next to their home in Whitchurch. Denning soldiered on alone passing his hundredth birthday in January 1999. He died on 5<sup>th</sup> March 1999 in the Royal Hampshire County Hospital in Winchester of an internal haemorrhage. He lies buried next to Joan in the churchyard in Whitchurch not far from his birthplace in Newbury Street.

This is not a detailed examination of all Denning's legacy but it is perhaps appropriate to put in a final word on his life and career (borrowing from a comment made about another great Englishman, the Duke of Wellington). He wasn't always a good judge but he was always a great one<sup>111</sup>.

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<sup>111</sup> Paraphrased from Wellington: The Iron Duke, Richard Holmes Harper Collins 2002

## Chapter 3

### Denning's Approach to The Judicial Process

#### And a theory of Adjudication

Throughout his life, Denning was always open about his view of a judge's role and expounded it at length both in his writings and in judgements. Early in his career he set out his views in *The Road to Justice*<sup>112</sup> He was always anxious to portray himself as the defender of the common law tradition but in many of his writings and judgements he betrayed himself as having a much more purposive and indeed continental approach. It was this approach which led, in some degree, to him being labelled as a judicial activist.

His own position on Jurisprudence was somewhat ambivalent in that he affected a disdain for legal philosophy and seemed to be almost proud of the Gamma minus he achieved in this subject at Oxford.

*Many Alphas in most subjects .But one Gamma. That was in jurisprudence. Gamma Minus. Jurisprudence was too abstract a subject for my liking. All about ideologies, legal norms and basic norms, ought and is, realism and behaviourism: and goodness knows what else. The jargon of the philosophers of the law has always been beyond me. I like to get down to the practical problems which require a decision. Contracts, torts, crimes and the like.*<sup>113</sup>

What he is actually saying here is not that there is no philosophy underpinning the law but that the philosophy expounded by legal philosophers is not relevant for English law and it becomes clear that he thinks that judges are the right men to expound English legal theory. He does not expound any explicit jurisprudential theory nor for that matter support of contemporary judges such as Patrick Devlin. Devlin expounded a theory that the judge was bound, by his judicial oath, to give justice according to law. Devlin contrasts this with judgements according to the merits of the particular case which is in front of the judge at that moment, this is the polar opposite to Denning's view

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*“the hallmark of judgements according to law is its conformity with a set of rules. The rules should be designed so as to ensure justice in the normal case and also in*

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<sup>112</sup> *The Road to Justice* Sir Alfred Denning, Stevens and Sons London 1955

<sup>113</sup> *The Family Story* p 240

*any foreseeable exceptions, at least to the extent the provision for the exceptions does not make the rule intolerably cumbersome. But to frame a set of rules that would do complete justice in every case which could be brought within them, would be, if not theoretically impossible, at any rate practically unattainable”.*<sup>114</sup>

We will contrast this view with Denning’s later in this chapter.

Denning maintains that he developed his own judicial philosophy in the Court of Appeal;

*Not many of the judges – even of the Court of Appeal - have any conscious philosophy of the law: but subconsciously each develops his own philosophy. During my term as a Lord Justice of Appeal – from 1948 to 1957 – I found myself evolving a philosophy of my own.*<sup>115</sup>

He then goes on to set out his philosophy as falling under three headings:

- let justice be done;
- freedom under the law
- put your trust in god.<sup>116</sup>

These are interesting headings and shed a considerable amount of light in themselves on his approach but they are far from a comprehensive philosophy and as this was set out at the end of his judicial career there is more than a hint of post hoc rationalisation in it. Perhaps more useful is the more comprehensive philosophy he set out nearer the beginning of his long judicial career.

He sets out his agenda at the beginning of the Road to Justice

*I have often heard judges say “we are only concerned with what the law is not what it ought to be” or “If this leads to an unjust result, it is a matter for Parliament not for us.” They wash their hands of it as if it was not their concern. It is my purpose here to challenge that facile assumption”*<sup>117</sup>

This is a sweeping statement of intent and also a condemnation in many ways of the doctrine of binding precedent, an attitude which Denning would often display throughout

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<sup>114</sup> The Judge Patrick Devlin Oxford University Press 1979 at p 84

<sup>115</sup> Ibid p 172

<sup>116</sup> Ibid p172

<sup>117</sup> RTJ p1

his career. Indeed it is this point which underpins the assertion that he would often exercise his discretion outside that legitimate arena which was identified in chapter 1.

He goes on to explain that statutes are drafted by lawyers and interpreted by lawyers and that it is often in the lawyers' part that injustices occur.<sup>118</sup> The clear implication of this is that he considers that unjust outcomes are a result of either bad drafting or poor interpretation. It must be remembered that this was at a time when a much more literal approach to statutory interpretation was the norm. This part of his philosophy can perhaps best be summed up as "Parliament cannot have intended an unjust result, the result is unjust and therefore not intended by parliament and I am therefore free to interpret this statute in such a way as to avoid the injustice." This is an explicit statement that there are occasions in which Denning does not feel that he is stepping outside the legitimate arena for the exercise of his discretion and in effect what is doing here is self-legitimising the exercise of his judicial discretion outside of those normal interstitial spaces where we have seen that it is considered acceptable and indeed necessary for the judge to exercise his discretion in accordance with the accepted norms. The alternative argument which Denning himself would propound is of course that he is not operating outside the legitimate arena of the interstices as he is particularly, possibly uniquely, able to interpret these interstices to come to a judgement which he considers just on the facts of the case before him. This is in many ways to extend the boundaries of what is considered legitimate and in doing so if the judge in a particular instance wants to gain acceptance for the judgement that he eventually delivers in the wider world of the law outside of the parties to the particular case then that view expounded in the judgement will have to command a consensus in society. Alternatively of course, if it is a minority judgement, which some of Denning's most influential judgements are, then to achieve a legitimate acceptance, the judgement will need to lead to the building of a consensus in favour of the particular innovation in the law which the judgement intends to bring about. This can best be seen in Denning's minority judgement in *Candler v Crane Christmas and Co Ltd*<sup>119</sup> which is considered more fully in a later chapter. In this judgement Denning explores the existing precedents and dissects them in an attempt to create the space in the interstices that he needs to develop law along the lines that he considers just.

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<sup>118</sup> *Ibid* p1

<sup>119</sup> *Cassell and Co Ltd v Broome and anr* [1972] AC 1027 [1972] 2 WLR 645

There are other cases however when he is not able to create the space that he needs in order to at least appear to legitimately exercise his discretion and on occasions he will simply ignore an inconvenient precedent. Or if this is not possible he will contend that it is wrongly decided.

This is a dangerous attitude in many ways and we shall see the outcome later. Denning clearly does not agree with judges who simply state that they are compelled by law to come to an unjust result and he considers this to be drawing a line between law and morality and having no interest in the moral dimension.<sup>120</sup> This is coupled with a belief in the jury system, which he ascribes (not entirely accurately) to the reign of Henry II. Whereas it more probably owes its place in English law to the impetus given to criminal procedure by the 2<sup>nd</sup> Lateran Council of 1215, which banned the clergy from taking part in trial by ordeal. The ascribing of the rise of the jury to Henry is perhaps significant as an example of Denning's belief in the ancient nature of the common law and its place in his jurisprudence.

This is at variance with the *ex-aequum et bonum* which we will consider later in the chapter.

In his opinion he sees the jury as an essential element in the habit of obedience to the law which he sees as central to the English way of life.

*This participation in justice has, I believe, done more than anything else to establish the English habit of obedience to law which a great historian has described as "the strongest of all forces making for the nations peaceful continuity and progress".*<sup>121</sup>

He doesn't identify the quotation but it is probably from G M Trevelyan's *History of England* (1926). It does of course have some advantage from Denning's point in that the decisions of juries are to a large extent opaque to any theories of adjudication or jurisprudence.

He ties this observation in with his view of the role of the judge by stating that it is an essential part of the compact between the law and the people that the law must deliver justice<sup>122</sup>.

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<sup>120</sup> *Ibid* p2

<sup>121</sup> *Ibid* p3

<sup>122</sup> *Ibid* p3

This is of course poses the question “what is justice” and Denning sets out to answer this. It is really at this stage that we can see the almost mystical nature of his view of the law and therefore of the role of the judge as the upholder of the law,

*All I would suggest is that justice is not something you can see; it is not temporal but eternal. How does man know what is justice? It is not the product of his intellect but his spirit.*<sup>123</sup>

This is an unusual statement for Denning as to some extent it appears to support a natural law theory in that he seems to suggest that there is immutable concept innate within mankind. It can perhaps be reconciled by noting that he is not espousing any particular set of rules or laws as being natural, but merely the desire for justice, although he does seem to suggest that every man will know justice when he sees it.

He then goes on to try and relate this rather high minded abstract to the more mundane

*The nearest we can get to defining justice is to say that it is what the right minded members of the community – those who have the right spirit within them – believe to be fair.*<sup>124</sup>

This is closer to the positivist viewpoint than the natural lawyer and would seem to be getting closer to the view of Denning which comes across in some of his judgements.

This is an explicit espousal of justice as a somehow immutable and eternal concept but also a concept only available to those who have the right spirit and no doubt Denning would place himself among those. Indeed we shall see that this is in many ways the central theme of much of his judicial career that he knew best and this page of his judicial manifesto perhaps starts to get to the heart of why he had this unshakeable belief in his own judgment.

He quotes Bunyan in the Pilgrims Progress when Christian was advised to seek advice from Legality. According to Bunyan, Christian followed this advice with disastrous consequences and was only rescued by recourse to Evangelist. Denning takes this and expands it thus

*“There are two great objects to be achieved: one is to see that the laws are just: the other that they are justly administered. Both are important: but of the two, the more*

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<sup>123</sup> Ibid p4

<sup>124</sup> Ibid p4



*important is that the law should be justly administered. It is no use having laws if they are administered unfairly by bad judges or corrupt lawyers. A country can put up with laws that are harsh or unjust so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness.*<sup>125</sup>

This again is Denning placing the judge at the centre of jurisprudence and essentially saying that provided a judge is just then he can be trusted to do the right thing. This is clearly not a theory that would appeal to law makers or indeed many of his colleagues on the judicial bench. An example of the explicit rejection of this approach can be found in the case of *Magor and St Mellons Rural District Council v Newport Corporation*<sup>126</sup>.

Leading into this Denning had taken some steps down the road in the case of *Seaford Court Estates and Asher*<sup>127</sup> the case involved interpretation of an obscure section of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. The facts are mundane and the amount in question relatively small but this was a test case arising from wartime conditions. Denning clearly set out the facts as follows:

*The flat was let from 1935 to 1939 at 175l. a year. The landlords were then under no obligation to provide hot water, but they did in fact do so. The flat was empty from 1939 to 1943. Then it was let at 250l. a year, but with the significant difference that the landlords bound themselves to provide hot water. The cost of fuel and labour had, of course, greatly increased between 1939 and 1943; and, whilst in 1939 it was no doubt economically possible for the landlords to provide hot water free for his tenants, it may well have been economically impossible for them to do so in 1943 unless there was some increase in the rent. At any rate the tenant then agreed to pay 250l. a year for the flat. Now the tenant says that the increase from 175l. to 250l. was invalid. If his contention is correct it means that in return for 175l. a year he will not only get the benefits which the 1939 tenant got for that sum, but he will also get this additional benefit thrown in; he will be able to insist on the landlords providing hot water free of any cost to the tenant no matter how much the cost of fuel and labour has already increased or may hereafter increase, and he will be able to recover two years' over-payments at 75l. a year.*<sup>128</sup>

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<sup>125</sup> *Ibid* p6

<sup>126</sup> [1952] A.C. 189 in the House of Lords on appeal from [1950] 2 All ER 1226 in the Court of Appeal.

<sup>127</sup> [1949] 2 KB 481

<sup>128</sup> *Ibid* at p497

The central issue was that under the legislation, unless the tenant had obtained an extra benefit or the landlord had incurred an extra burden then any purported rent increase would essentially be unenforceable. The section in question, S2 (3), was notoriously obscure.

*"Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as a result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant when, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purpose of this Act."<sup>129</sup>*

Lord Greene MR said

*I may say, however, that the true interpretation of s. 2, sub-s. 3, of the Rent Restrictions Act, 1920, is a matter which appears to me to be left by the authorities in some obscurity<sup>130</sup>*

This in many ways left the field clear for Denning to take an early opportunity to exercise his ideas and he seized on the opportunity

*The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also*

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<sup>129</sup> Increase of Rent and Mortgage Interest (Restrictions) Act 1920 S2 (3)

<sup>130</sup> [1949] 2 KB 481 at p 486

*from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy,*<sup>131</sup>

He was not, however, at this early stage of his career, prepared to take his views to the full extent that he set out in the Road to Justice. He set what he saw as the limit with these words

*A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.*<sup>132</sup>

At the first glance this is an unobjectionable comment but on closer inspection, the point which arises is precisely who is to decide where the creases are. The answer is of course the judge and again Denning is chafing at the restrictions imposed on his discretion by the doctrine of binding precedent and of the rules of statutory interpretation as they then existed.

A year or so later in *Magor and St Mellons*<sup>133</sup> he was prepared to go much further and in doing so, drew down a magisterial rebuke from the incumbent Lord Chancellor. Not the last such rebuke that he would receive in his career.

The case again revolved round a question of statutory interpretation, in this case ss151 and 152 of the Local Government Act 1933. The facts of the case are complex and they do not need to be set out here. The crux of the case was whether the new Rural District of Magor and St Mellons was entitled to receive financial compensation from Newport Borough Council for the richer areas of the district which had belonged to the original authority that had been merged to form the new rural district. The formation of the new district, the transfer of property to Newport and the extinguishment of the former districts had all taken place simultaneously which meant that the new authority of Magor and St Mellons had either never held the property or if it had it was for a scintilla only and in either case no compensation was payable.

The majority decision (Somervell and Cohen LJJ) was that no compensation was payable to the new Authority. Denning could not agree.

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<sup>131</sup> Ibid at p 499

<sup>132</sup> Ibid at p499

<sup>133</sup> *Magor and St Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226

Denning summed up the position as he saw it as follows

*I confess that I find it difficult to deal with these questions of interpretation in the abstract. I like to see their practical application, and for that reason I propose to set out a hypothetical sets of facts which, I suppose, are probably the true facts although they are not stated in the Case. Newport, Monmouthshire, is a very progressive borough. By 1935 it had expanded beyond its original boundaries into the adjoining rural districts. This had proved very helpful to the original ratepayers of those rural districts, because the new residents brought more money in to the rates than it cost the rural district councils to look after them. The new rich grounds, in effect, helped pay for the old poor grounds in the rural districts. But the time came in 1934 when the borough of Newport obtained an Act of Parliament extending its boundaries so as to take these rich grounds into the borough and out of the rural districts. This meant, of course, that, if nothing was done about it, the rates in the rural districts would have to go up, because they would be left with the poor grounds and with no help from the rich grounds which they had lost. To remedy this hardship on the ratepayers in the rural districts, Parliament expressly enacted that the Borough of Newport should pay compensation to the rural district councils. The amount was to be agreed between them, or if not agreed was to be decided by an arbitrator. Parliament laid down rules to guide him. He was to have regard to the increase in rates which would fall on the ratepayers of the rural districts because they had lost the rich grounds and to the length of time their rates would have to be increased on that account.*

*That is all intelligible enough. The new boundaries were to take effect on 1 April 1935, and, if the matter had been left where Parliament left it, the arbitrator would probably have solved all his difficulties and awarded the appropriate compensation without consulting the court about it, but the trouble has arisen because in 1935 the Minister of Health made an Order on top of the Act of 1934. He made an Order combining two of the rural districts, shorn as each was of its rich grounds, and made them one district, and he said that this combination was to take place also on 1 April 1935, but immediately after they had lost their rich grounds to the borough. No one would suppose that this innocent combination would take away from the ratepayers of the rural districts the right to compensation which Parliament had given them, but the judge has held that it has. If he is right, it means that the rural*

*ratepayers have to bear all of the increased burden themselves, without any help from the borough, and the borough gets off scot free by reason of a ministerial Order with which it had no concern.*<sup>134</sup>

This is worth quoting at length because as can be seen he has expressly either made up facts or at the very least filled in the gaps in the factual matrix of the case to suit his hypothesis, albeit he was probably right.

Denning went on to distinguish what the actual effect of the judgement was, he contended that whilst the entity had changed, the increased burden still fell on the ratepayers of Magor and St Mellons and it mattered not to them who they had to pay their increased rate burden to.

It is very clear here that Denning is quite consciously taking the opportunity to express his views on what he considers to be an injustice against the ratepayers of the communities concerned. He must have known that he had no support from his fellow judges and in that respect this was a safe exercise. It is however an interesting example of another way in which Denning sought the space to exercise his discretion, to continue with the theme, he is extending the interstitial space by hypothesising from the results of the original intention of the Minister. In essence what Denning is saying is that this is an unjust result and that the Minister could not possibly have intended such an injustice and therefore the interpretation that the lower court and arrived at must have been wrong.

He goes on to say

*I cannot think that the judge is right about this. The Minister's Order expressly provided that the property of the two Rural District councils should be transferred to and vest in the combined council. The right of the two councils to compensation was clearly "property" which vested in the combined council, and the judge so held, but he thought that the right was worth nothing because the two councils only lived for a moment of time after they had been shorn of their rich grounds. Much as I respect his opinions, I cannot agree with him about this. The effect of the Minister's Order was, if I may use a metaphor, not the death of the two councils, but their marriage. The burdens which each set of ratepayers had previously borne separately became a combined burden to be borne by them all together. So, also, the rights to which the two councils would have been entitled for each set of*

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<sup>134</sup> Ibid at p 1236

*ratepayers separately became a combined right to which the combined council was entitled for them all together.*<sup>135</sup>

Whilst this does appear on the face of it to be logical, this is not what the legislation actually says and he has used, as he admits, a hypothetical series of facts to aid the trail of logic which leads to this conclusion. It cannot be that in any sense Denning is operating in the legitimate arena which has previously been identified. Indeed he makes no pretence that this is so.

He need go no further than this but in a fashion which became increasingly familiar as his career advanced; he took the opportunity to set out his view of the judicial role.

*This was so obviously the intention of the Minister's Order that I have no patience with an ultra-legalistic interpretation which would deprive them of their rights altogether. I would repeat what I said in Seaford Court Estates Ltd v Asher. We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.*<sup>136</sup>

It was this paragraph which attracted the ire of the House of Lords. It is apparent from the foregoing that what Denning has actually done is to set out the political position. The legislation has produced a result which disadvantages the two smaller communities on this occasion. Denning has, as we have seen, reached his conclusion by hypothesis. In the real world it may well be that the interpretation that Denning puts upon the legislation is capable of producing a similar injustice from a different set of facts. As was pointed out forcefully to Denning by the House of Lords, he had overstated the judges' role and it is for Parliament to amend defective legislation. That indeed was the case here.

By the time the appeal reached the Lords<sup>137</sup>, the legislation in question had been repealed and the 4 page judgement revolved solely around their Lordships criticism of Denning's judgement

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<sup>135</sup> Ibid p1237

<sup>136</sup> Ibid p1237

<sup>137</sup> Magor and St Mellons Rural District Council and Newport Corporation [1952] A.C. 189

*The criticism which I venture to make of the judgment of the learned Lord Justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions, and I am content to say that I agree with my noble and learned friend. But it is on the approach of the Lord Justice to what is a question of construction and nothing else that I think it desirable to make some comment; for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned Lord Justice lays down for the guidance of himself and, presumably, of others.*<sup>138</sup>

He then sets out his view of Denning's attempt at setting out the judicial role.

*It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act.*<sup>139</sup>

Simonds had been appointed as Lord Chancellor by Churchill in 1951; this was a surprise choice and he was considered by many to be deeply conservative in outlook and would therefore be a natural antagonist to Denning's perceived judicial activism.

Denning commented

*"So injustice was done. The new approach was scotched. It took a long time to bring it to life again"*<sup>140</sup>

Whilst Denning may well have felt that way, there is clearly no injustice here as the legislation has been repealed. The comment is clearly indicative of his later view that he was able to interpret statute, unfettered by any restraint, solely to do justice as he saw it to the case before him. This is unquestionably outside any legitimate arena for the exercise of judicial discretion and Denning quite definitely does not embrace the *aequum et bonum* approach.

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<sup>138</sup> Per Lord Simon at p192

<sup>139</sup> Ibid at p 192

<sup>140</sup> The Discipline of Law Denning at p14

This will remain a recurring theme for Denning but it never stopped him trying and throughout his career as a judge he drew down criticism from colleagues by his insistence on interpreting statutes in his own way to avoid what he perceived as injustice but what his colleagues saw as unwarranted judicial interference in the sphere of the legislature. Even as he neared retirement he did not hesitate to explicitly put his own interpretation onto a statute when he felt that an injustice would otherwise arise, or indeed as we shall see later, when it did not accord with what he saw as just.

An interesting example is the case of *Duport Steels Ltd and others v Sirs and others*<sup>141</sup>. This arose from a protracted dispute in the steel industry in the winter of 1979/80. At the time the majority of the industry was 80% comprised by the nationalised British Steel Corporation (BSC) with around 20% of production being the output of several private companies. The new Conservative Government of Margaret Thatcher had told BSC that the corporation must now cover its own operating losses rather than these being made up from public funds and accordingly the company sought to impose some level of wage restraint on its employees. These employees were represented by the Iron and Steel Trades Confederation (ISTC) who engaged in negotiations on behalf of their members and making little progress they eventually called out on strike that portion of their membership employed by BSC. The strike did not have the effect that the ISTC wanted and they resolved that they would then call out their members employed by the private steel companies although they acknowledged that there was no dispute with the private employers.

It was at this point that the private employers sought an injunction to prevent the strike. The defendants being William Sirs, the General Secretary of the ISTC and the members of its executive.

Legislation, in a chain back to 1906<sup>142</sup>, gave Trades Unions immunity from liability in tort where actions were taken in furtherance of a trade dispute. At the time of this particular case, the relevant legislation was The Trade Union and Labour Relations Acts of 1974 and in particular ss13 and 29 thereof.

Denning expressed himself in robust terms

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<sup>141</sup> [1980] 1 W.L.R. 142 the case was only reported once under this citation but incorporates the first instance decision of Kenneth Jones J, the Court of Appeal and the House of Lords. The case went through all these courts in two days due to the urgency of the issues in question.

<sup>142</sup> Trade Disputes Act 1906



*It seems to me that that the second dispute cannot be regarded as a trade dispute within section 29 at all. In so far as the acts done — or the calling out of these workers — was in furtherance of that second dispute, they are entitled to no immunity whatsoever. It is not a trade dispute. It is not a dispute between employers and workers. It is a dispute between the union and the government.*<sup>143</sup>

The other two members of the Court of Appeal, Lawton and Ackner LJJ. Concurred and the private steel companies got their injunction. Denning may well have been right that this was not at the heart of it a trade dispute but was a political dispute between the unions and the incoming government, it must be remembered that only five years before the government had called a general election on the question of who runs the country, trade unions or the government and had lost that election. With the benefit of the longer view given by the passage of time it does become abundantly clear that this was the first round in an ideological dispute between the Thatcher government and the trade union movement<sup>144</sup>. This would not necessarily have been clear at the time and should be questioned that even if this had been clear to Denning, would he have been entitled to take the essentially political stance that he did. As will be seen the conventional answer was no.

The ISTC appealed to the House of Lords and whilst their Lordships were no more impressed than Denning by the ISTC's action they nonetheless felt that the act could not be interpreted as Denning sought and that yet again Denning was straying into the province of the legislature.

Lord Diplock in allowing the appeal stated the orthodox view that Denning had railed against throughout his career.

*My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases),*

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<sup>143</sup> Ibid at p152

<sup>144</sup> Margaret Thatcher The Authorised Biography Vol 1: Not For Turning, Charles Moore, Allen and Hart London 2013

*the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.*<sup>145</sup>

A politer but perhaps a more reasoned and emphatic rebuke than that delivered by Lord Simonds earlier.

Diplock here is explicit in that Denning is not operating within the legitimate arena for the exercise of his discretion. He talks about the invention of fancied ambiguities where there is a plain meaning to be discerned from a simple reading of the words of the statute. This was not quite the stance that Denning had taken, what he was doing was attempting to give himself the latitude to exercise his discretion by concentrating on the meaning of a trade dispute. If we look back to Bingham's definitions of judicial activism, notwithstanding that he would put Denning into a fourth more extreme category, it could be said that there is some legitimation of Denning's stance in that he is responding to a societal consensus, evidenced by the victory of the Conservative Party at the recent general election. This of course is not the full story and it does appear that for approval of judicial activism there needs to be both an element of responding to a consensus in society and some legitimate exercise of discretion within that response to consensus. On the face of it that is an irreconcilable dilemma in that Hart would say that judicial discretion can only be exercised in the interstices between the law. Whereas Bingham is saying judicial activism, which obviously by definition must include an exercise of discretion, can be legitimised by reference to the consensus. Could it be that Denning has found a way of legitimising the extension of those interstitial spaces by saying, in effect, that where there is a societal consensus for change then it must follow that there is a gap in the law, an interstice, which provides him with the legitimate arena in which he can exercise his discretion and mould the law in the direction which he thinks it should go.

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<sup>145</sup> Ibid p 157

The issue was indeed later resolved by legislation to bring the law in line with that which Denning had stated<sup>146</sup> but this is of course wholly consistent with the stance taken by Diplock in that it is for the legislature to amend defective legislation and not for the judges to interfere with the expressed will of Parliament. Denning does not agree with this as we have seen and it is this insistence on doing justice as he sees it that characterises and underpins his judgments and indeed colours his whole judicial career. As we will investigate, in the exercise of his discretion he very often draws upon those incidents and influences from his early life that we have identified in a previous chapter.

He frequently went well beyond the immediate case before him in order to further this agenda and we will see the most egregious example of this in a later chapter when we consider the case of *Cassell and Co Ltd v Broome*<sup>147</sup>. He continued to set out his belief that a judge must do justice to the parties before him. No judge would argue but that this is the essence of the judicial task but the fundamental disagreement is around what is meant by doing justice. Denning is clear

*Some people seem to think that now that there is a Law Commission the judges should leave it to them to put right any defect and to make any new development. The judges must no longer play a constructive role. They must be automatons applying the existing rules. Just think what this means. The law must stand still until the Law Commission have reported and Parliament passed a statute on it: and, meanwhile, every litigant must have his case decided by the dead hand of the past. I decline to reduce the judges to such a sterile role. They should develop the law, case by case, as they have done in the past: so that the litigants before them can have their differences decided by the law as it should be and is, and not by the law of the past.*<sup>148</sup>

It is interesting that Denning said “the law as it should be and is,” what he means by this of course is what he thinks the law should be and what he thinks it is. There is no mention of the limits of judicial discretion at this point or at any other within the judgement which we are about to consider. Not for the last time in his career Denning is blind to, or ignores the value of certainty, which is of course the distinguishing mark of binding precedent.

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<sup>146</sup> Trade Union and Labour Relations (Consolidation) Act 1992 s 224 is the current legislative provision.

<sup>147</sup> *ibid*

<sup>148</sup> *Liverpool City Council v Irwin* [1976] QB 319

This particular case was one which would be bound to attract all of Denning's sympathy. The facts of the case were that Liverpool City Council had built some tower blocks in the late 60s in Everton and these had by bad design, vandalism etc, become almost uninhabitable despite all that the council could do. This was a test case brought by a hard working family man. Denning's father was just such a hard working family man and Denning himself, as we have seen, always espoused this virtue. This is a case whereby his upbringing and early experiences are brought fully into play in considering the circumstances of the case and the facts behind it.

The question before the court was, in essence, whether the duty to repair implied into the letting contract by The Housing Act 1961 s32 extended beyond the demised premises to the common areas which the council had retained to itself and which were in a dreadful state of repair. The other members of the court absolutely declined to do so and stuck to the orthodox view that only those terms which are necessary to make the contract work should be implied into any contract and that to extend the scope of this statute beyond the clear and precise circumstances it outlines is beyond the remit of the judiciary.

This position was outlined by Ormerod LJ

*I sympathise with the tenants and agree that their rights in this respect ought to be defined. It is an ideal subject matter for the Law Commission, and in fact it is the subject of a paper and a draft Bill recently published by the commission after full inquiries. The court is not able to conduct inquiries and cannot form a reliable judgment on issues like this. So far-reaching a change must be made by Parliament.*<sup>149</sup>

This of course was the very reasoning that Denning had expressly condemned in *The Road to Justice*. It was his view that the court should always seek to do justice in accordance with the facts of the particular case that was in front of the court at the time and should not be blind to the issues and slavishly follow precedent even when the judge himself thought the precedent was bad. Denning himself felt that this was leaving a legacy of problems to which judges in future cases could give divided answers. He did however feel that the House of Lords should have gone so far as to kill off the "official bystander" test in so far as it might apply to statutory interpretation. This is going a long way down the road to judicial invention in pursuit of statutory interpretation.

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<sup>149</sup> Ibid at p343

In another example of creative statutory interpretation Denning was prepared to go beyond the words of the statute and examine as far as he could, the expressed intentions of the legislator. It should be remembered that at this stage it was not possible for courts to examine Hansard directly, that had to wait for the decision in *Pepper v Hart*. Denning used considerable ingenuity to get round this problem and in the case of *R v Local Commissioner for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council*<sup>150</sup> he was prepared to look at textbooks which quoted Hansard.

This again was a case that was designed to engage Denning's sympathies. This was a case of a mother with two children aged five and four who were both received into care by the local authority. There was a history of court applications but the long and short of it was that throughout the proceedings the mother objected to the way the local authority had been acting and it was clear that she was not prepared to grant consent to adoption, a matter that was at that time pending before the County Court. The substance of her grievance was that she had complained to a councillor who had declined to send her complaint forward to the Local Commissioner (what we would know today as an ombudsman), nonetheless the Commissioner did become aware of the substance of the complaint and he had addressed himself to the issues.

The case was brought by the council who contended that the local Commissioner had no grounds upon which he could exercise the discretion conferred upon him by section 26 of the Local Government Act 1974. This was dealt with by Denning on the basis that whilst there was some procedural irregularity there was nonetheless a proper basis on which the decision could be investigated.

The essential question for Denning to consider was whether there had been maladministration. Maladministration is expressly not defined in the act and Denning referred to the fact that the Parliamentary Ombudsman acknowledged that he had used the reports of the debate in Parliament to inform his decision as to what and what wasn't maladministration.

In this case it does seem that some extent Denning is attempting to operate within the legitimate arena of his discretion although of course he does not himself define it as such.

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<sup>150</sup> [1979] 2 All ER 881

There was a lacuna in the law at this point and it is at least debatable that this could be defined as an interstitial space which required the application of judicial discretion.

At the present time Denning was inhibited indeed expressly prohibited, from referring to Hansard by the decision in *Davis v Johnson*<sup>151</sup> and he acknowledged this fact in his judgement.

*Now the question at once arises: Are we the judges to look at Hansard when we have the self-same task? When we have ourselves to interpret the word "maladministration." The construction of that word is beyond doubt a question of law. According to the recent pronouncement of the House of Lords in Davis v. Johnson [1978] 2 W.L.R. 553 , we ought to regard Hansard as a closed book to which we as judges must not refer at all, not even as an aid to the construction of statutes.*<sup>152</sup>

Having expressed himself in this way he then proceeded to get round the express prohibition of the House of Lords.

*By good fortune, however, we have been given a way of overcoming that obstacle. For the ombudsman himself in a public address to the Society of Public Teachers of Law quoted the relevant passages of Hansard (734 H.C. Deb., col. 51 (October 18, 1966)) as part of his address: and Professor Wade has quoted the very words in his latest book on Administrative Law, 4th ed. (1977), p. 82. and we have not yet been told that we may not look at the writings of the teachers of law. Lord Simonds was as strict upon these matters as any judge ever has been but he confessed his indebtedness to their writings, even very recent ones: see *Jacobs v. London County Council* [1950] A.C. 361 , 374. So have other great judges. I hope therefore that our teachers will go on quoting Hansard so that a judge may in this way have the same help as others have in interpreting a statute.*<sup>153</sup>

Whilst some extent this could be characterised as pure sophistry in that Denning was ignoring the spirit of the prohibition while sticking to the letter thereof, a most unusual reversal of the normal state of affairs for Denning.

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<sup>151</sup> [1978] 2 WLR 553

<sup>152</sup> 1979] 2 All ER 881 at p901

<sup>153</sup> *Ibid* at p901

This case was never appealed and therefore we have no way of knowing what on this occasion their Lordships may have made of Denning's judicial lawmaking. It can be said however that on this particular occasion he was at least trying to show some evidence for his interpretation and trying to follow the intentions of Parliament. Denning himself makes no great play of the fact that he managed to circumvent precedent and consult Hansard at least obliquely. In the *Discipline of Law* he has this to say

*The judges cannot look at what the responsible minister said to Parliament-at the object of the statute as he explained it to the house-or to the meaning of the words as he understood them. Hansard is for the judges a closed book. But not for you. You can read what was said in the house and adopt it as part of your argument-so long as you do not acknowledge the source. The writers of law books can go further they can give the very words from Hansard with chapter and verse, you can then read them whole to the judges. That is what happened in a recent case about the ombudsman, Parliament give him power to investigate complaints of maladministration: but deliberately did not define it in the statute. The only person who attempted a definition was Mr Richard Crossman, the Lord President of the Council. He made a speech in Parliament giving illustrations of what "maladministration" means. His illustrations became the guidelines for the ombudsman himself and his advisers. They were known as the "Crossman catalogue". They were quoted in full in a public address given by the ombudsman and also by the professors and text writers. In that form they could be, and were, read by the judges: and helped them as much as they did the ombudsman.<sup>154</sup>*

This case is clearly one which did contain within it the relevant matter for the exercise of judicial discretion. It is clear that there is a space between the words of the statute and the accepted practice of the ombudsman that this space is filled by the guidance given by Richard Crossman in Parliament. On this occasion Denning was clearly right to take the action that he did and if we are talking about this is an act of judicial creativity and activism then it is plainly not only in: in accordance with a societal consensus for such a consensus as was expressed by a government minister in Parliament. In passing it is worth noting that it is strange that the guidelines had never been published and communicated formally to the commissioners.

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<sup>154</sup> *The Discipline of Law* p 10

In the quote above, there is no mention here that he was the judge involved. This is somewhat at variance with his usual approach that he is not shy in claiming credit for what he sees as an innovation. Was it that on this occasion he was conscious that he had gone too far and did not want to draw attention to it? That is unlikely given the lapse of time and the fact that the case had never been appealed but had been mentioned favourably on several occasions. It is more likely that on this occasion he was merely reflecting a mainstream approach which was made explicit by the House of Lords later.

It was some years after Denning's retirement when House of Lords acceded to the logic that in trying to determine the intentions of Parliament it was permissible in certain circumstances to look at the words of the legislators themselves<sup>155</sup>

By this stage Denning had long since retired from judicial office and at the age of 92 he was no longer actively writing and publishing. He has never commented publicly on his view of Pepper and Hart but given his constant striving throughout his career; it is difficult to see any circumstances in which he would not have approved of this judgment. To some extent the ability to refer to Hansard and to try and define the intention of ministers does extend that legitimate arena for the exercise of judicial discretion that we have previously referred to but in doing so it limits the exercise of that discretion in that it is only possible to exercise discretion in some far as it can be demonstrated that the interpretation put upon a statute by a particular judge was in accord with the intention of Parliament as evidenced by Hansard. It is interesting to speculate how Denning would have dealt with that particular restriction is nothing we can be satisfied that he would have been equally creative and extending that space as he was creating the space needed in the first place.

Denning, at least publicly, merely said that this was a matter of statutory interpretation and allied himself with the purposive approach to statutory interpretation. In the case of *Nothman v Barnet London Borough Council*<sup>156</sup> he had this to say:

*The literal method is not now completely out of date. It has been replaced by the approach Lord Diplock described as the "purposive approach"... In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the judges to wring their hands and say: "there is nothing we can do about it".*

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<sup>155</sup> *Pepper v Hart* [1993] Ac 893

<sup>156</sup> [1978] 1 WLR 220



*Whenever the strict interpretation of statute gives rise to an absurd or unjust situation, the judges can and should use their good sense to remedy it-by reading in, if necessary-so as to do what Parliament would have done, had they had the situation in mind.*<sup>157</sup>

This case concerned the inequality in retirement age is between men and women teachers, the complaint was one of unfair dismissal by a woman teacher sacked on the grounds of incompetence by the defendant local authority. She had made a claim to the employment tribunal and the council had taken the preliminary point against her that she was not able to bring the claim under the terms of the Trade Union and Labour relations Act 1974 as she had passed normal retirement age. In this case the claimant had a letter of engagement which expressly stated her retirement age to be 65; no differentiation was made between men and women.

The issue was that by schedule 19 para (10) of the act it was quite clearly said that an employee would not be subject to unfair dismissal if the employee:

*On or before the effective date of termination attained the age which, in the undertaking in which he was employed, was a normal retiring age for an employee holding the position which he held,-if a man he had attained the age of 65, or if a woman attained the age of 60...*<sup>158</sup>

The Employment Appeal Tribunal had felt that they were effectively barred from hearing the complaint by what they considered to be clear statutory provision. Although they expressed themselves in trenchant terms about the absurdity of the law they felt unable to come to any other conclusion than to dismiss the claim

*Clearly someone has a duty to do something about this absurd and unjust situation. It may well be, however, that there is nothing we can do about it. We are bound to apply the provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of Parliament and is not, as many mistaken persons seem to imagine, the privilege of the judges or the judicial tribunals.*<sup>159</sup>

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<sup>157</sup> Ibid p 228

<sup>158</sup> Ibid p227

<sup>159</sup> Ibid p228 quoting EAT

As it can be imagined this was not an approach which commended itself to Denning and he had this to say:

*In the light of what I have said it seems to me a sensible interpretation can well be put upon this provision. As Miss Nothman has just pointed out to us, "upper age limit" points to only one limit for any one person. The whole provision can be interpreted, so as to do justice, by inserting the words "where there is no normal retiring age" before the second part. If those words are inserted, it means that there is only one upper age limit for any one person. Everything fits together. If there is a "normal retiring age," the first part applies. The person cannot claim for unfair dismissal if he has passed that age. If there is no normal retiring age, the second part applies. A man cannot claim if he is over 65: a woman cannot claim if she is over 60. On the other hand, in order to get the appeal tribunal's interpretation, it is necessary to insert other words. You must have to insert "either" at the beginning or "whichever is the earlier" at the end: or you would have to divide sub-paragraph (b) into two separate parts and put a "( c )" in. I much prefer to read in the words "where there is no normal retiring age." So that is what we should do.<sup>160</sup>*

it is difficult to see how he can justify this is an example of the purposive approach when what he is in fact doing is rewriting the statute to get to the result which he thinks is fair. The only other judgment that was made out in anything like the same length as Denning's was that of Lawton LJ who agreed with Denning but without entering into the exercise of justifying himself on the basis of a purposive approach to statutory interpretation.

The words of the statute were express and clear and whilst they may well have created an injustice there is no evidence that that this injustice was not in accordance with Parliament's intentions. The statute is remarkably clear and whilst Denning may feel that there is no justice in this case, and indeed it is clear that his view is shared by all the judges it is nonetheless clearly within the scope of that "naked usurpation of the legislative function" that Lord Simon railed against in *Magor and St Mellons District Council*.

In these judgments Denning would contend that all he is doing is using a less rigid form of statutory interpretation to do justice to the case that is before him. This as we have seen is what he considers the judge's duty to be, however there are occasions on which his view of what constitutes justice is less concerned with what he believes the law should be and

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<sup>160</sup> Ibid p228

is more concerned with his particular views on the case before him. As we have seen this is not necessarily outside the judges role but these examples demonstrate that Denning's view of the judges role was ahead of his contemporaries, who would take a more restrictive and some would say, logical view.

The question to be asked at this stage is whether there is any structure to Denning's developing portfolio of judgements or whether it is simply ad hoc improvisation on the facts of the case before him. There is a structure and whether it fits into any recognised theories of adjudication is a vital subject which must be examined.

There are two questions which need to be answered, namely, what is adjudication and why is it important.

Adjudication, at its simplest, is the process by which judges arrive at their decisions. Views on how this process works have evolved over the years. The historical attitude was to regard the judiciary as the keepers of the ancient rules and traditions. The maxim associated with this is "*In scrinio pectoris sui*" the best translation of which is "all laws in the shrine of his breast" this maxim is often associated with the papacy and illustrates the often sacerdotal status that was ascribed to judges at this time. Whilst this would not be a view that Denning would subscribe to, he does on occasion exhibit an almost sacred reverence of the judicial role.

Adjudication does not stand on its own. it is contended that the role is part of what is described as an institutional nexus of conduct. What is meant by this is that the judge together with the written and customary law, rules of procedure and other institutions of the law are interconnected and the judicial process must act in a relationship with these other institutions.<sup>161</sup>

Society does expect judges to act in a certain way to resolve disputes; judges are an essential part of the social order. Hart did put forward a version of society where there were no judges of any sort however this can only be effective in very primitive societies and has many disadvantages not least by being entirely dependent on universal recognition of all aspects of the particular law of that community which is often largely unchanging.<sup>162</sup>

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<sup>161</sup> The Social Construction of Reality P Berger and T Luckman 1966 at p 92

<sup>162</sup> Concept of Law at p 92 et seq.

Once society has accepted the role of the judge, he or she is expected to carry out this role in a rational way, conforming to accepted standards and applying a set of rules and procedures that are transparent and largely agreed.

Hart developed the concept of the rule of recognition. Being that process by which society has accepted and validated particular laws. In a complex system such as English law, Hart maintains that the rule of recognition is correspondingly more complex in and of itself and relies on such elements as a written constitution, enactment by the legislature and judicial precedent.<sup>163</sup>

It is perhaps this last element that has caused the most difficulty to Denning and has also been the source of some of his most important decisions. The doctrine of binding precedent is central to the common law and whilst it has its strengths and weaknesses most judges will acknowledge its place. Denning is one of the few judges who has, on occasion, ignored it completely.

As is well known the doctrine has its origins in the principle of stare decisis, the decision stands. This is then reinforced by a hierarchical system of courts, subordinating decisions of junior courts to those of more senior courts.

Given Denning's propensity for ignoring it, it is important to establish the justification for the doctrine.

There are several models that have been postulated to justify adherence to the doctrine, the first is the natural model which would say that past decisions naturally generate reasons for deciding cases along the same lines. Llewellyn has argued that this is desirable because it reinforces a universal sense of justice that says that men are to be treated alike where the circumstances are alike<sup>164</sup>.

Following on from this Cahn argued that

*“if decisions differ, some discernible distinction must be found bearing an intelligible relation to the difference in result.”*<sup>165</sup>

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<sup>163</sup> Ibid p100 et seq

<sup>164</sup> Case Law in Encyclopaedia of the Social Sciences vol 3 K Llewellyn 1930

<sup>165</sup> The Sense of Injustice E Cahn 1940 quoted in Lloyd's Introduction to Jurisprudence 8th Ed M Freeman Sweet and Maxwell London 2008 at p 1543

In other words, if a judge comes to a different result he must be prepared to explain it in rational terms. This takes us back to Hart's criteria for the exercise of judicial discretion; whereby in those interstitial spaces where the law does not cover the particular case, the judge is entitled to exercise his discretion provided he can give reasons for his decision and acts as a conscientious legislator would by deciding according to his own beliefs and values.<sup>166</sup> To extend this we will also say that if the judge is engaged in expanding those spaces he must also be able to justify that expansion in a similar fashion.

The second model is a rule-based model which in effect says that the Superior Court has the authority not only to decide the case before it but to rule that subordinate courts are bound by the decision.

Third model is results based, it is the result that binds rather than any rule. What this rule requires is that the court

*“must decide its case for the party analogous to the winner in the precedent case if the constrained case is as strong a case or a stronger case for that result than the precedent case was for its result.”*<sup>167</sup>

Of these rules, it is the first that would best describe Denning's approach to precedent. The justification for this is often given as certainty and equality before the law. As we've seen however Denning would argue that if certainty and equality were to give rise to an absurdity then the precedent should be overridden. He often extends this to give himself the room to override precedent if it gives rise to what he perceives to be an injustice in the case in front of him.

We have already considered what some of his contemporaries as judges considered to be a just exercise of discretion. Denning was by no means alone in recognising that the law can sometimes do what might be perceived as an injustice in any particular case.

The concept of *ex aequo et bono*, (what is just and fair according to equity and good conscience) was often used by agreement in arbitration and was proposed by some judges that it could be used by English judges to fill out those gaps that were left in

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<sup>166</sup> Concept of Law at p 273

<sup>167</sup> Precedent in A Companion to Philosophy of Law and Legal Theory L. Alexander (ed.) D.Patterson 1996

statutes and precedents, precisely those interstitial gaps that were identified by Hart as the legitimate arena for the exercise of judicial discretion.

Patrick Devlin developed this argument and provided the counter argument to limit that arena. Devlin contends that judgements according to law help to secure legitimacy by imposing a norm.

*“Against the number of cases in which the law hinders the good judge from expressing the aequum et bonum, there must be put the number in which it prevents the judges from giving effect to idiosyncratic notions. For most of the law’s history the public has looked upon it as a protection against corrupt or stupid judges.”<sup>168</sup>*

Denning is clearly neither corrupt nor stupid but he is arguably idiosyncratic. Devlin however goes on to develop the argument in a way which is much more sympathetic to the Denning jurisprudence.

Devlin identifies four ways which he says exists to mitigate the harshness of the normative rule and bring the result of the case more in line with justice. It is the third of these which does concern here. That is the discretion of the judge. Devlin refers to a road map analogy contending that the judge has a discretion in what he refers to as uncharted areas.

*“They are the wild spaces which the motorist sees on his map, framed in by the motorways and trunk roads, avoided even by the first and second class roads, crossed only by thin white lines, sometimes dotted, quite far apart. In these fields that are at best only roughly marked the judge must act- more or less, according to the state of the map-in his own discretion.”<sup>169</sup>*

This is a more picturesque description of the interstitial spaces identified by Hart. Devlin however does not comment on how the judge should exercise that discretion as Hart does, he does however, by stretching the road map analogy, shed some light of how far he thinks the space to exercise that discretion extends. He would allow an absolute discretion only if the map is “quite unrouted” he would allow a limited discretion in cases where there are some routes and signposts, that is to say that there is some law to be followed and some principles not to be ignored. This really does not take the debate much further as it is simply saying that there is no discretion where the law is clear and it is in the spaces

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<sup>168</sup> The Judge Patrick Devlin Oxford University Press 1979 at p 88

<sup>169</sup> Ibid at p 102

between that discretion can be exercised. It is precisely these spaces and the identification and creation thereof that are the basis of Denning's adjudication style.

Thus it can be seen that in substance, there was support for Denning's approach. There was some uniformity of opinion that in these spaces where the law is not clear that a proper exercise of judicial discretion is legitimate. Whether the spaces are referred to by the road map analogy or as interstitial spaces does not alter the fundamentals. It is how that discretion is exercised that is important to any further consideration of Denning's jurisprudence.

Bingham would tie the definition and exercise of discretion as follows:

*An issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judges assessment (within such boundaries as have been laid down) of what is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of a discretion.*<sup>170</sup>

Bingham then would limit a judge's discretion only to areas where the law doesn't operate at all and veto any exercise of discretion without this arena.

It follows inevitably then that if an exercise of a discretion is considered to be outside the legitimate arena then it must, by definition, be arbitrary. Denning himself would not have recognised any arbitrary jurisdiction.<sup>171</sup>

This is the central question to be answered, was Denning an arbitrary judge or was he always exercising his discretion legitimately, by identifying correctly that arena between the expressed law where judicial discretion is allowed. It may be so even if, as may often have been the case, this was not appreciated by his contemporaries in equivalent or higher courts.

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<sup>170</sup> The Business of Judging at p 36

<sup>171</sup> The Road to Justice at p 29

Arbitrary justice is most likely to give rise to feelings of injustice and Denning identified fairness and justice as the hallmarks of the good judge and as we have seen he attributed to himself the essential characteristics of the good judge.

To answer the question posed we should look to the work of the man in question and turn to some of his judgements. These have been chosen, not at random but in order to illustrate some facet of the exercise of his discretion which is particularly coloured by those experiences and influences which have been earlier identified.

The cases chosen each illustrate how he creates the space to exercise his discretion and then how he uses this space. Consideration is also given to the legitimacy of the space and the usage thereof.

The individual cases represent a progression (albeit not chronological) through Denning's judicial creativity and show each stage of that creativity in action; the wholly illegitimate both in creation of the space and the use of discretion, the legitimate use of discretion failing because of an illegitimate creation of the space and finally the masterclass in the creation of a legitimate space and the legitimate exercise of discretion.

Ward was chosen because it is well known and attracted much opprobrium at the time. It shows Denning at his worst, acting in a fashion which verges on the arbitrary and may appear to be motivated by his own restricted and out of date view of morality.

Broome in contrast shows him in an altogether better light. It also is famous in its own way, mainly for the rebuke delivered by Hailsham. Once again Denning's own values come very much to the fore here, his respect for the military man, strong family identity and his deep attachment to the virtues of the common law. He exercises his discretion in accordance with these values in a manner that would have been unassailable if his creation of the space for such exercise had been legitimate, unfortunately it wasn't.

Candler is in many ways a masterclass in the deployment of this theory of the creation of the interstitial space and the legitimate use of judicial discretion. It is arguably the bedrock of much of the modern law of negligence and represents a large part of Denning's enduring legacy. In addition the judicial style evidenced in this dissenting judgement may be said to have influenced later generations of judges to find that path through obstructive precedent towards justice in a particular case.



## **Chapter 4**

### **Gillian Ward – Legitimate Discretion or Manifest Injustice?**

As we have seen previously, Denning's judicial approach was very clearly expressed in that he was firmly of the opinion that it was the duty of the judge to do justice to the case that he was at present hearing, unfettered by what he perceives to be unjust previous decisions or ambiguous statutes.

That does of course mean that he considers that he is entitled to exercise his discretion to deliver that justice and his discretion is coloured by his own personality and views. We have seen how the exercise of judicial discretion can be legitimate in the areas between the various pronouncements on the law.

In this case Denning had to consider the construction of disciplinary rules adopted by a college which was constituted pursuant to an act of Parliament. He then had to consider the conduct of the disciplinary body enforcing those rules and to rule on an irregularity in that conduct which was at least arguably covered by existing precedents.

He created the space to exercise his discretion without much difficulty in that he did not conduct an in-depth analysis of the rules or existing precedents but employed the

interesting device of effectively brushing them aside. Having created the space he needed he then used his discretion to arrive at a result which, whilst it may be argued did not entirely do justice to the case in front of him, nonetheless gave scope for the expression of some of those values and influences we have identified

That case was that of *Ward v Bradford City Council*<sup>172</sup>. This is a case which at the time was said to have generated much adverse comment at least in the popular press. There is however little in the way of academic criticism of the decision. There does appear to be scope to argue that, in reaching his decision, Denning was more interested in his own views than in applying the law as it stood which he could quite easily have done and arguably should have done. There was no need on the facts of the case to create the space to exercise any discretion. He could have found for Gillian Ward by a straightforward reading of the rules as originally drafted and by following existing precedent. In the final analysis the simple application of the rules of natural justice would have demanded he find in her favour. He did not do so. His judgement makes clear that as he morally disapproved of her conduct he found himself backing a decision and a process which is, arguably, inherently unjust.

The case arises from female students at the Margaret McMillan Memorial College of Education in Bradford allowing men to spend the night with them in Halls of Residence. The rules of the College Halls expressly precluded such arrangements. The College was engaged in training teachers and had as students both men and women, the living accommodation for the sexes were separate. Information came to the attention of the College Principal to the effect that a man was living in college with one of the women students. The rumour further said that was that he was connected with drugs. The staff organised a night-time raid on the female student accommodation with the police on hand. Five men were found to be in several different female students rooms. One of whom was with Ward. Ward admitted that he had been in residence for two months and that he did have a record of minor drug offences but that he had no current connection with drugs and was not taking any at the college. The Principal told Miss Ward that it might be better if she left the Hall of Residence and search to find other accommodation. Six days later Ward moved to private lodgings elsewhere in Bradford.

It was the Principal's intention to deal with the matter informally by using the house committee which was a less formal procedure than the disciplinary rules and was under

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<sup>172</sup> (1972) 70 LGR 27

the control of the Principal. Before she had the chance to take this step, the affair got somewhat out of hand in that the local press got involved and approached Ward for comment. Miss Ward then seems to have made comments which got reported in the local papers and shocked certain people. The actual words are not reported in the law report but it is likely that they were somewhat dismissive of the College's attitude and perhaps displayed attitudes which were deemed unsuitable for a prospective teacher. It is unfortunate that the actual words are not reported given that both the Governing body, who were the original decision makers and Denning himself, attached weight to them as demonstrating her unsuitability for the role she was then training for.

The students of the college organised a petition which was signed by 200 of them who stated that they had all broken the terms of occupancy by allowing members of the opposite sex to spend the night in College Halls of Residence, clearly this was then a widespread practice and the College must have been aware of it at least to the extent of normally turning a blind eye.

As this was now to some extent in the public domain and it was felt to be somewhat damaging to the reputation of the college, consideration was then given to what, if any, disciplinary action could be taken against the various offenders. The governing document was the College Constitution which was set up in accordance with the Education (No.2) Act 1968. This was an act which gave colleges a greater degree of autonomy from local authority control than had previously been the case and it was this to some extent which was the driver behind some of the problems thrown up by this case. Donald Naismith the then Assistant Director of Education for the council characterised the new relationship as a question of who was running the college, the Principal or the Council<sup>173</sup>. A sensible answer would have course have been both of them.

The College had a Disciplinary Committee which was set up in accordance with the Constitution. The Committee consisted of nine members in total composed as follows: three members of the governing body, three members of College staff, and three students. The main issue confronting the Disciplinary Committee was that according to rule 4 of the disciplinary rules, the Disciplinary Committee could only consider cases of misconduct which were referred to them by the Principal. The Principal herself was not willing to refer these particular cases to the disciplinary committee for whatever reason. The Governing body of the College then decided to take matters into their own hands. At a meeting on

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<sup>173</sup> Very Near the Line Donald Naismith Authorhouse 2012 Bloomington Illinois

23<sup>rd</sup> March 1971, they first amended the rules of the Disciplinary Committee so that the governing body could refer cases of misconduct to the Disciplinary Committee as well as the Principal. This amendment was effectively retrospective as it was not in force at the time of the events forming the substance of the complaints to the committee. They then resolved that the cases of the seven female students it was alleged had broken the terms of occupancy should be referred to a meeting of the Disciplinary Committee on 31<sup>st</sup> March 1971 and that the report of the Disciplinary Committee should be considered by the governing body on the following day. Finally the clerk to the governing body sent a letter to each of the students telling them that they were in breach of the terms of occupancy and that the matter would be considered by the Disciplinary Committee of 31<sup>st</sup> March.

It is to be noted that this is a retrospective change of rule that had been brought in by the governing body, effectively substituting their judgement for that of the Principal and is more than likely to be in response to public pressure within the local community in Bradford. This in itself is arguably to some extent unjust and is conduct of which it is to be expected that in the normal course of events Denning would have disapproved.

The Governing body and the Disciplinary Committee then went further. At the meeting on 31<sup>st</sup> March there were present the nine members of the committee itself (three governors, three staff and three students), but additionally three persons who were not members were present, namely; the clerk to the governing body, the Assistant Town Clerk of Bradford and the Assistant Education Officer<sup>174</sup>. The accused students attended together with friends and there appears to be little to criticise in the conduct of the hearing itself. After the substantive part of the hearing, the students withdrew and the committee discussed the cases amongst themselves. At this stage it should have been only the committee members who were party to the discussion however the clerks and the Assistant Education Officer remained with the committee, notwithstanding that they were not members of the committee. From the report, the clerks appear to have said nothing very much but the Assistant Education Officer, Donald Naismith did take part in the discussion. This is unfortunate on many counts; not least that Naismith was very much concerned to address what he saw as declining standards in teacher training and in education generally.<sup>175</sup> What must be acknowledged at this stage is that he did not desire the

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<sup>174</sup> This was Donald Naismith who was later to be Director of Education successively for Richmond LBC, Croyden and Wandsworth LBC

<sup>175</sup> Very Near the Line *ibid*

eventual outcome and regretted Gillian Ward's expulsion and he did acknowledge his own central part in that expulsion.

*The Gillian Ward case which hit the headlines in 1971, was the appeal of a student against her expulsion, for which I hold myself largely responsible, from Bradford's Margaret McMillan teacher training college, an unexpected outcome I regretted then and have done ever since; at the time, new to the job of assistant education officer for further education, I did not think anyone would pay much attention to what I had to say.<sup>176</sup>*

The outcome of the hearing was that the only student who was required to leave her course of study was Miss Ward. In the records of the committee's discussion is a comment from Donald Naismith in which he said that he "considered that Miss Ward's apparent lack of concern merited more severe treatment than the others. It was a serious offence and Miss Ward had knowingly flouted the regulations over a long period." He also said that he had "been in touch with the Department of Education and Science and that they viewed the matter with concern and that because of the press report, the College had been made to look a fool" Thus the committee had allowed itself to be addressed by a non-member and further allowed that non-member to express his own opinion and recorded that opinion in the minutes. In addition, the committee had considered extraneous material (the conversation with the Department of Education). Gillian Ward was of course not at this stage aware of these facts, they had not been put to her and she had had no chance to respond. In any event the press content was not the subject of any disciplinary complaint which was merely concerned with the breach of the agreement by allowing a man to stay over in College Halls.

These comments clearly influenced the committee as otherwise they would not have gone to the trouble of ensuring they were recorded in the minutes. The decision was made by six votes with three members abstaining, probably the student members, that Gillian Ward would be expelled from the College forthwith. This recommendation was approved by the governing body at a specially convened meeting the following day and Ward was duly expelled.

There are clearly many grounds on which the decision of the Committee could be challenged, the rule change and therefore the validity of the original complaint to the

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<sup>176</sup> Ibid at p119

committee, the presence of non-members, participation by those non-members in the deliberations of the committee and the consideration of material in deliberation which had not been the aired in the hearing.

Gillian Ward applied for an injunction to restrain the college from expelling her. The injunction was refused and she appealed to the Court of Appeal. The Appeal came on Before Denning and Philmore and Orr LJJ.

The claim before the Court of Appeal was that effectively a de novo hearing that the decision of the committee was invalid and Ward applied for an interim injunction

There were three grounds of appeal, the first being that the reference to the Disciplinary Committee was invalid because the rules had been changed and retrospectively applied. Denning dealt with this shortly by saying he could see no reason why the Governing body should not make a rule by which they themselves could refer cases to the Disciplinary Committee, so long as they are careful themselves to see that justice is done<sup>177</sup>. Quite what Denning meant by this is unclear. It is quite clear that in this case there was a severe risk that justice would not be done as the Governing body was to some extent acting as both prosecutor and tribunal. What Denning said was this:

*In order to avoid that criticism, it would be desirable that the reference should be made by a sub-committee, none of whom is a member of the Disciplinary Committee. That was not done in this case. But we have seen the Minutes. These show that the Governing Body, when they decided to refer these cases, were careful not to discuss the merits of any individual case. They simply decided that there was a situation of such gravity that the cases ought to be referred to the Disciplinary Committee. I see nothing unfair or unjust in what the Governing Body did. I cannot accept, therefore, this ground of appeal.<sup>178</sup>*

Here Denning's has accepted the minutes at face value, and pays no attention to the appearance of bias, not to say vindictiveness, that this rule change indicates. On the matter of the change being made to apply retrospectively, he simply says that there is nothing wrong in this, the amendment was a matter of procedure only. He quoted as

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<sup>177</sup> Ibid p5

<sup>178</sup> Ibid p5

authority the case of Attorney-General v Vernazza<sup>179</sup>. (Interestingly the reference is actually wrong in the original report).

This was a case in which Denning had been a member of the House of Lords that had heard the case and he had delivered what was broadly a consenting speech following in large part the leading speech by Viscount Simmonds. Denning was the only one of the Law Lords who actually dealt with the question of the legislation being retrospective and indeed on that point he differs from Viscount Simmonds who did not consider that the legislation considered by that particular case was retrospective and to that extent Denning's comments in that case are obiter dicta, which makes no comment about his judgement in Ward but does none the less show that he had a different opinion on retrospective provisions in that case which contrasts to that which he exhibited in Ward.

This is Denning giving himself the space to exercise his discretion and he does it simply by brushing aside any suggestion that the rules amendment was not valid, he does not analyse this in any way. It may well be that the point was in fact valid. Philmore LJ considered the point at more length and whilst he did not consider that the rules had been invalidly altered he was clearly concerned with a provision that allowed the Governing body to be both the instigator and the final decision point in the disciplinary process.

Philmore LJ observed that

*To allow a reference by the Governing Body to the Committee could involve, if proper care were not taken, a danger that the requirements of natural justice may not be observed.*<sup>180</sup>

Given that the proceedings themselves had been conducted with a degree of irregularity it must have been clear that the necessary care would not be taken by this governing body in this case.

The Vernazza case concerned a vexatious litigant who was appealing against an order of the High Court which stayed proceedings he had commenced prior to the enacting of the Supreme Court of Judicature (Amendment) Act, 1959. The effect of that act was to enable the High Court to make an order staying proceedings that were in progress before the court prior to the date of enactment. Any reading of the two cases to would allow a judge

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<sup>179</sup> 1960 AC 965

<sup>180</sup> (1972) 70 LGR 27 at p36

to find ample grounds for distinguishing the facts in Ward from those in Vernazza if he so wanted.

In Vernazza, the procedural steps taken were pursuant to a general act of the UK Parliament covering the entirety of the jurisdiction and made for the general conduct of courts in England and Wales. In Ward, by contrast, the amendment which was applied retrospectively was limited in scope and had been passed with the sole object of capturing the particular students in question and enabling the governing body to take disciplinary proceedings against those students. It was in fact merely an amendment to internal disciplinary rules and is couched in such a way as to subvert the original disciplinary procedures which required the principal to institute disciplinary action. The amendment was made by the body which ultimately would rule upon the disciplinary case itself and apply the sanction. In the normal course of events it would be expected that Denning would take exception to this. There are strong indications in the way that the amendment was framed and passed that the governing body took a dim view of the alleged behaviour and to some extent it could have been said that they had prejudged the issue. This in itself would have been enough to invalidate the disciplinary proceedings however Denning was content to rely on Vernazza in support of the validity of the amendment which enabled him to go on to rule on the validity of the proceedings. It is by no means clear that Vernazza itself is unequivocal support for the contention that retrospective amendments can be effective.

Indeed in the leading Speech of Viscount Simmonds in Vernazza he says this:

*I would respectfully doubt whether this could in any view be strictly called retrospective legislation, but, if it has this characteristic in any degree, it is of a procedural nature and, as I think, amply covered by the authority of Quilter v. Mapleson. 24 The cases of In re a Debtor (No. 490 of 1935)<sup>25</sup> and Colonial Sugar Refining Co. Ltd. v. Irving<sup>26</sup> are distinguishable. I do not find the former case in all respects easy to understand, but in both cases the distinction is drawn between enactments which provide new remedies and those which affect substantive rights. An enactment without leave appears to me to fall within the former category. It would, I think, be wrong to say that a man was deprived of a vested or substantive*



*right, if it was still left open to him to prosecute any claim which was not an abuse of process and for which there was a prima facie case.*<sup>181</sup>

This is clearly a very different case from Ward and in any event Viscount Simmonds considers the point to be unclear in the extreme. What it is not is any sort of authority for saying that retrospective procedural amendments are lawful without more.

Both Lord Keith and Lord Reid merely concurred with the leading speech. Denning, as was often the case expanded on his concurrence. He did conclude that the act in question was retrospective, this was not required by the case and indeed in his speech he demonstrated this:

*Applying this principle, the Act of 1959 was, as I have said, retrospective. So the Court of Appeal could give effect to it. And they should, I think, have done so. When Mr. Vernazza appealed to the Court of Appeal, seeking a finding that he was not a vexatious litigant, and asking that no order should be made against him, he thereby opened up the case for a rehearing, and by so doing, he let in the rule of court which authorises the Court of Appeal to make such order as the case may require. And the case required certainly this, that if he was found by the Court of Appeal to be a vexatious litigant, he should be prohibited then and there from continuing his pending litigation unless he obtained the leave of the court. It would be a work of supererogation to require the Attorney-General to go back to the High Court for an order when the Court of Appeal had seisin of the whole case and could make the order themselves.*<sup>182</sup>

Denning makes it clear that in considering the case in the Court of Appeal, the Court of Appeal was entitled to make the order as it had the procedural right to do so and this particular order was not retrospective as it relied on legislation current at the date of the appeal. The essential point in Vernazza being that the law changed between the case falling to be considered by the High Court and being considered by the Court of Appeal. Presumably Denning's argument is that this is a procedural change and that the rule amendment brought in by the Board of Governors was also a procedural change. This is a very weak argument and takes no account of the yawning gulf between the facts in the two cases.

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<sup>181</sup> Ibid p975

<sup>182</sup> Ibid p981

Lord Morris also gave an extended judgement and he disagreed that the legislation was in any event retrospective. His view was that the word retrospective was not wholly apt in that the amendment was in fact a new power that was given to the High Court and that the Court of Appeal was merely exercising that power when the matter came before it.

This is not the same as Ward where the Board of Governors arrogated a power to themselves which had previously existed before and had been properly structured in such a way as to avoid the possibility of confusion between the rules of investigator, prosecutor and tribunal. The reason why the governors saw fit to take the power on themselves, it is clear, was to deal with the situation placed before them in accordance with their own views. They may have not been able to persuade the Principal to refer the matter to the Disciplinary Committee and had therefore determined to make the reference themselves. The original purpose of the rule was clearly to allow the person on the spot, the Principal, to investigate the complaint or issue and then to determine whether there was sufficient cause to refer the matter to the disciplinary hearing. In this case the Principal had conducted that investigation and had clearly taken the view that there was not sufficient cause for referral.

What this demonstrates quite clearly is that it would not only have been open to Denning to find that the reference to the Disciplinary Committee was unfair but further that it was fully in accordance with the law as it stood and in following the law, the proper course would have been to strike down the disciplinary committee's decision. There would be no need for any exercise of discretion, nor to manoeuvre to create the space for that exercise. Denning clearly, on this occasion, was minded to find space to exercise his discretion and to do so he first needed to validate the rule change which assisted in facilitating the referral to the Disciplinary Committee.

Donald Naismith himself was not entirely happy with the changes in the disciplinary process and in particular with its retrospective application

*Whatever arrangement the governors were minded to make to deal with future cases, surely the matter in hand would need to be left where it was. How could the students receive a fair hearing from governors who had already discussed their cases, and had not the students been properly punished? Such niceties, however, did not weigh with the councillors nor the governors now alarmed at their weakness in the tug-of-war with an obdurate principal. The governors set up a disciplinary*

*committee, changed the rules to enable themselves as well as the Principal to refer cases to it, and, acting on this new authority, dealt with the alleged offences of the four(sic) students accordingly.*<sup>183</sup>

this is a clear contrast with Denning's view and even given Donald Naismith's brief from the council that had to bring some order to the disarray at Margaret McMillan, it is clear that he was a fair-minded individual who was concerned with due process being followed and he did not consider that such due process had been followed in this case, Denning obviously disagreed.

Of more concern was Denning's treatment of the presence of the Assistant Education Officer (Mr Naismith) during the deliberations of the committee. In his judgement, Denning quoted the words of the then Master of the Rolls in the case of *Middlesex County Valuation Committee v West Middlesex Assessment Committee*<sup>184</sup> who gave an explicit judgement

*It would be most improper on general principles of law that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision.*<sup>185</sup>

it would appear that this would be clear authority which invalidated the decision of the disciplinary committee, indeed it was authority Denning chose to use. He referred as well to the case of *Leavy v National Union of Vehicle Builders*<sup>186</sup> in which clear support was given to the Middlesex decision.

That case would have given even more support for the decision that the proceedings of the Disciplinary Committee were a nullity.

This case concerned the decision of a union branch committee to expel a member for non-payment of subscription. The deliberations of the committee were attended by a nonmember who was present as the delegate of a member who was at the time of the meeting in hospital and unable to attend. This nonmember took part in the discussions and voted on the eventual outcome of the deliberations.

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<sup>183</sup> Very near the Line at p120

<sup>184</sup> (1937) CHh. 361

<sup>185</sup> Ibid p371

<sup>186</sup> (1970) 3 WLR 434

In his judgment Megarry J relied on the authority of *Lane v Norman*<sup>187</sup> and quoted from that judgement the words of North J

*Because another gentleman was present who ought not to have been. He took part in the discussion, and of course it is impossible to say what effect his views may have had upon the minds of the other persons who were present.*<sup>188</sup>

He then goes on to express his agreement with this

*I would respectfully adopt and apply this view of the matter. No doubt there may be cases in which it is not easy to draw the line between mere attendance on the one hand and participation on the other; but I do not think that this difficulty can affect the principle*<sup>189</sup>

The effect of this precedent then is clear, where a non-member of a particular decision-making body is present in the room at the time the decision is made and participates to a greater or lesser extent than this invalidates the decision. The only discretion left to the judge is a finding of fact as to whether, in his judgement, there was such participation in the decision-making process.

On the face of it, in the Ward case it seems to be quite clear that Naismith was an active participant in the decision-making process but it was of course down to Denning to consider where he should draw the line.

It does seem that there can be little question that Naismith crossed the line between mere attendance and active participation in that he had clearly taken part in the discussions. Denning seeks to excuse this by saying that the general rule is subject to exceptions and cites in aid *R V Welshpool Justices ex parte Holley*<sup>190</sup>. This was a case where the Clerk to the Justices withdrew with the justices during their deliberations, which led to the defendant appealing by way of case stated. This case was presided over by Goddard CJ and he made it plain that the clerk's' presence was acceptable when the justices required advice on the law.

*I do not think that anyone can misunderstand what the court meant by their judgment in Reg. v. East Kerrier Justices, Ex parte Mundy. It was that the clerk's*

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<sup>187</sup> (1891) 66 L.T. 83

<sup>188</sup> (1970) 3 WLR 434 at p 454

<sup>189</sup> *Ibid* p 454

<sup>190</sup> (1953) 2 QB 403

*presence in the room when the justices were deliberating should be only for the purpose of advising them on the law.*<sup>191</sup>

Lord Goddard then went on to say that the mere presence of the clerk in the room did not invalidate the decision of the court but it was clear from his judgement that he did not expect the clerk to be taking part in any discussions on the facts.

In Ward not only did Naismith stay in the room but he actively contributed to the discussion. Denning himself says that Naismith drew the attention of the committee to circumstance which made Miss Ward's case (presumably in Naismith's opinion) more serious than the others. This was clearly conduct which could have had an effect on the views of other members of the committee however Denning says that Naismith does no more than draw attention to the obvious. He then says no harm was done by what he said<sup>192</sup>. It is not clear at all on what objective basis Denning arrived at this view. Naismith was the assistant director of education, a position of some seniority and influence (albeit at the time he was a relatively young man). He was the professional, the senior council officer and had pretty trenchant views on the behaviour in question. In the judgement it is quoted that he had been in touch with the Department of Education and Science who viewed the matter with concern and that because of the press report the College had been made to look fools.

Denning says this about the attendance of Naismith, which it could be said, clearly shows that he had every ground to invalidate the decision of the committee

*"If the Director of Education is entitled to attend, I think the committee can seek his advice if they need it. Otherwise there is not much point in his attending. I think however that the Disciplinary Committee must be careful to see that he does not overstep the bounds. He should not be allowed to give evidence as to facts or matters with which the students have not had a chance of dealing. He should not be allowed to voice his opinion as to guilt or innocence."*

Denning himself has already acknowledged the contribution made by Naismith, at least in part, regarding his contact with the DES and his views on the effect this has had on the College. For Denning to say that this is not taking part in the decision-making process and it is merely giving advice is verging on the disingenuous. What did he think that the

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<sup>191</sup> Ibid at p403 per Goddard CJ

<sup>192</sup> Ward at p6

committee would do with this information, it is not advice of procedure, it is not within the remit of a nonmember, and it is clearly prejudicial information which would weigh on the deliberations of any committee. Denning dismisses this albeit acknowledging that it is very near the line (the title of Naismith's autobiography indeed).

Naismith himself does not deal with any in any great detail his intervention but he does acknowledge the effect it had on the governors

*The disciplinary committee, which I attended, duly heard the case. It was clear that Gillian Ward's offence stood out from those of the others and as such, I pointed out, deserved a greater penalty. The governors decided on expulsion.*<sup>193</sup>

Taken as a whole Naismith's comments on this case clearly indicate his own view that he did influence the eventual outcome and indeed his comments quoted above to the effect that he holds himself largely responsible is a clear admission of this in the face of that it is hard to see how Denning arrived at a contrary view.

It is perhaps interesting to note and contrast this decision with Denning's stance in the case of *Bushell v The Secretary of State for the Environment*<sup>194</sup>. The facts in this case were not entirely congruent with the Ward case but the essential issue, that of a procedural unfairness, was very similar and there is little to distinguish the procedural unfairness and its effect in *Bushell* from that in *Ward*.

The *Bushell* case concerned an appeal against a planning inspector's decision to build a motorway (later the M42) through land near Alvechurch in Worcestershire. The inspector's enquiry had concentrated on the evidence of the expert witnesses for the Department of Transport in regards to traffic forecasts justifying the need for the new motorway. These expert opinions were based upon the "Red Book" which was a set of guidelines used at the time by the Department of Transport for traffic forecasting. The objectors to the motorway, of which *Bushell* was one, contended that the methodology adopted in the Red Book was unreliable in the conditions then prevailing and wished to cross examine the Department's expert witnesses. The inspector refused to allow them to cross examine and found in favour of the motorway proposal, *Bushell* then appealed.

Denning upheld the appeal. In giving his judgement he dealt with the position of planning enquiries in general and had this to say

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<sup>193</sup> *Very Near the Line* at p121

<sup>194</sup> (1980) 39 P. & C.R. 341

*It is that thought that those in the department come to these inquiries with their minds made up and that they are determined to build the roads no matter how strong or how convincing the arguments against them. The inspector is regarded as the stooge of the Department: he is just there to rubber-stamp the decision already made. These feelings have become so widespread that there have been vociferous protests made by highly respected citizens, such as those of Winchester. Inquiries have been disrupted so that they could not be continued.*<sup>195</sup>

Denning is highlighting that it is important that there is confidence in the impartiality and fairness of these hearings. It is perhaps telling that he refers to the highly respected citizens of Winchester which indicates where his sympathies lie, around his boyhood home in the county of Hampshire. Again an example of his upbringing affecting his judicial behaviour.

He then goes on to say on to say

*“Regrettable as these protests are they show to my mind that it is time for these courts to take a hand, we must use our authority to see that the inquiries are conducted fairly in accordance with the requirements of natural justice.”*

This is an admirable stance and in very much accordance with Denning’s principles that he has earlier set out. The thrust of this judgement is that it is essential to the process that the hearings are clear of taint and suspicion and further that all parties can be sure that the proceedings have been conducted fairly and that all participants have had a fair hearing. This is particularly important where there are disparities in resources and where it is an individual against the state or a large body corporate such as in the Ward case.

In dealing with the actual contents of the expert’s report he says:

*“For myself I do not regard these traffic forecasts as government policy at all. They are the predictions by the experts about the future. They are just as much matters of fact as the evidence of a medical man as to the prognosis of a disease. They are of much relevance to the inquiry. It seems to me that, on every principle of fairness, the objectors should be able to have them examined by the inspector, to cross*

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<sup>195</sup> Ibid p 348

*examine the department's witnesses on them and to call evidence of their own on the matter“*

There is a clear correlation here in that Naismith is placing issues before the committee that are of extreme relevance to the consideration of the penalty to be given, indeed that is the express reason that Naismith gives for bringing it to the committee. Gillian Ward did not have any opportunity at all to challenge Naismith's views in fact did not know of them at the time of the committee hearing. Denning could clearly have decided that this was contrary to the rules of natural justice and then take the opportunity to grant the injunction which would have prevented the disciplinary committee's decision being implemented.

His conclusion of the Bushell case was that the court did have power to intervene and expressed himself in clear and unequivocal language:

*“If there has been a failure of natural justice in coming to the decision-or, to use the expressive phrase of Lord Russell of Killowen in Fairmount Investments Ltd v The Secretary of State for the Environment, if the objectors have not had a fair crack of the whip - the court has power to intervene. In this case I do not think that the objectors have had a fair crack of the whip.”<sup>196</sup>*

Presumably Denning considers that Gillian Ward did get a fair crack of the whip. It is hard to see how he could think that and whilst the Ward case does predate Bushell by several years it is highly unlikely that his views had changed in the interim. The fact of the matter is that the solid landowners of South Worcestershire engaged his sympathy in a way that this young student teacher whose morals he disapproved of could not. The Bushell case clearly does express a clear view on procedural irregularities and it is worthy of note that the Court of Appeal decision in Bushell, in which Denning gives the leading judgement, sits between two contrary judgements of the Queen's Bench Division and the House of Lords which do not follow Denning's view. This leads to the view that he's quite prepared to exercise his discretion in favour of obtaining natural justice when he feels that the circumstances of the case before him demand it. It is hard to overcome the view that he let the behaviour of Gillian Ward, which he clearly considered immoral, influence his judgement in her case.

Denning's behaviour in this case does not square with his expressed views on the role of the judge. Gillian Ward quite clearly did not get a fair hearing by any standards. There

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<sup>196</sup> Ibid 352



was ample opportunity for Denning to have found in her favour, he chose not to do so, his conclusion was expressed robustly and bears quoting in full

*If there was any evidence that Miss Ward had been treated in any way unfairly or unjustly, I would be in favour of interfering. But I do not think she was treated unfairly or unjustly. She had broken the rules most flagrantly. She had invited a man to her room and lived there with him for weeks on end. I say nothing about her morals. She claims that they are her own affair. So be it. If she wanted to live with this man, she could have gone into lodgings in the town: and no one would have worried, except perhaps her parents. Instead of going into lodgings, she had this man with her, night after night, in the Hall of Residence where such a thing was absolutely forbidden. That is a fine example to set to others! And she a girl training to be a teacher! I expect the Governors and the Staff all thought that she was quite an unsuitable person for it. She would never make a teacher. No parent would knowingly entrust their child to her care. Six members of the Disciplinary Committee voted decisively for her expulsion. Not a single vote was cast against it, nor for any less sentence.*<sup>197</sup>

This is quite clearly a moral rather than a legal judgement and it does not lessen Denning's culpability in that Phillimore and Orr LJJ concurred.

This was an impression prevalent at the time prompting Griffith to say

*"In Ward's case, it is difficult to resist the impression that Lord Denning was more affected by moral conduct of which he disapproved... Than by the applicability of the rules of natural justice"*<sup>198</sup>

So what is Denning doing here? He is creating that interstitial space to exercise his discretion but is he creating a legitimate space and exercising his discretion in a legitimate fashion?

It would have been relatively easy for him to have found in favour of Gillian Ward, the case could have been said to fall fairly and squarely within existing precedent.

In the first instance the retrospective rule change, aimed as it was specifically at these particular students, could quite properly have been said to invalidate the reference to the

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<sup>197</sup> Ibid p7

<sup>198</sup> J.A.G.Griffith The Politics of The Judiciary, Fontana 1977 at p 166

disciplinary committee. Indeed all the members of the Court recommended in their judgements that in future references should be made by a subcommittee of the governing body, none of whose members would sit on the disciplinary panel. This clearly shows that there was unease at the method by which these cases had come before the disciplinary committee.

Denning chose not to do this and relied on a precedent which was easily distinguishable on the facts from this case.

The second issue was the participation of Donald Naismith. Naismith quite clearly participated in the discussion although he was not a member of the committee and there was ample scope to bring this within the ambit of existing precedents and declare the findings of the disciplinary committee void. Indeed it was difficult to see by applying the precedents how that conclusion could be avoided. The only matter properly left to discretion was a finding of fact as to whether there was active participation in the process i.e. was the line in fact crossed.

There was no interstitial space here for Denning to exercise his discretion when he created this by illegitimate means. He applied precedents to retrospective rule change which did not support a finding that he made, he did not analyse the precedent in any detail at all but merely quoted it in support. More importantly he made a finding of fact i.e. that Naismith had not crossed that line which was fully at odds with the facts before him. Naismith clearly crossed the line and it could be argued always intended to cross the line.

Why did Denning do this? As Griffith says, it was a moral judgement of conduct which he disapproved of. This is late 19<sup>th</sup>-century Whitchurch in the Court of Appeal some 70 years later. Denning is clearly influenced by his upbringing and his strong adherence to the Anglican Church which we have seen was a constant throughout his life, also of course he had for a short time at least, been a teacher himself. As we've seen in exercising his discretion any judge is entitled to draw on his own values and experience but must always act in line with any societal consensus. There is no such consensus here; Denning is on this occasion leading a rearguard action against what he perceives to be the forces of the permissive society.

The Individual appointed by the Council to do just that in this case, Donald Naismith did not think that Gillian Ward had got justice and reading the case and circumstances surrounding it is hard to disagree with this view.

In this particular case, Denning's desire to do justice as he sees it to the case before him, guided by those factors which we have identified as influencing him have led him to a grave injustice and he deprived Gillian Ward of the opportunity to pursue her career.

In summary; Denning here used an illegitimate method to create the space to exercise his discretion and then used that discretion in a way that accorded only with his own prejudices however strongly felt they may have been.

## Chapter 5

### Broome v Cassell and Co Ltd and Another

#### In Defence of the Navy

Of all Lord Denning's cases, the case of *Broome v Cassell and Co Ltd and Another*<sup>199</sup> is one which shows him at his most determined and some would say at his most maverick. I would disagree with this analysis; the case perhaps shows Denning at his most judicially inventive when his interest for justice was engaged. However it can be argued that this is a case where his interest in justice as an abstract, clouded his view of doing justice to the individual in front of him. It is unusual for Denning to take the abstract route as he was most often concerned with practicalities.

This judgement can also be characterised as forming part of Denning's on-going battle to free the Court of Appeal from what he regarded as the shackles of its own binding precedents and indeed the control of the House of Lords.

As usual in this analysis there are two aspects, in the first instance how did Denning create the space to exercise his discretion, was it legitimate? How then did he exercise that discretion? In this particular case, to create the space, Denning declared a binding precedent of the House of Lords as having been decided *per incuriam*. And in exercising his discretion it could perhaps be said that he was overly influenced by his own sympathy with serving officers and his own brother's involvement in the incidents which were the subject of the book which libelled Jack Broome. Denning may well also have been more influenced by the egregious conduct of the defendants in this case and there can be little argument that some form of exemplary compensation was called for. It is just unfortunate that the method that Denning chose resulted in more expense for the plaintiff which was the very person whom Denning set out to assist.

The case was originally heard by Lawton J and is unreported except on the restricted point that exemplary damages cannot be claimed unless specifically pleaded<sup>200</sup>. This is an issue which was to exercise Denning when the case came to the Court of Appeal. He was eventually able to make an award of exemplary damages which was an entirely defensible

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<sup>199</sup> [1971] 2 All ER 187

<sup>200</sup> [1971] 1 All ER 262

outcome but unfortunately in his zeal to do justice to the plaintiff as he saw it, he chose an illegitimate means of doing so.

The subject of the trial was the book written by David Irving and published by Cassell and Co Ltd Entitled "The Destruction of Convoy PQ 17" The publishers blurb gives a flavour of the book and its style

*"The true story of the biggest ever Russian convoy which the Royal Navy left to annihilation".(sic)*

It should perhaps be noted at this point that there is context missing from the above quote as it implies that there were other Russian convoys which the Royal Navy left to annihilation of which PQ 17 was merely the biggest. What is actually meant is that this was the biggest Russian convoy and the Royal Navy left this convoy to annihilation.

The story of PQ17 is central to any understanding of this case and is worth setting out in some detail. It had long been a matter of some controversy and was a very sensitive subject with the Royal Navy hierarchy at the time and subsequently who were conscious that the allegation had been made in the past that the Navy had, on the mere threat of an appearance of strong German surface forces, abandoned the merchantman to their fate.

The Russian convoys were one of the most arduous undertakings of the Second World War. Instigated in 1941 after Churchill promised Stalin support following the Nazi invasion of Russia. The only way that support could get to Russia was by the sea route around the North Cape and through the White Sea to the northern Russian ports of Archangel or Murmansk. The outward convoys were initially designated by the PQ series and inbound by QP. In addition to the often atrocious weather inside the Arctic Circle, the convoys had to endure the ever present risk of attack as the Germans occupied Norway and the convoys were therefore within range of aircraft and submarines based in Norway for most of the journey. In addition and most pertinent to this case, the battleship Tirpitz, sister ship to the Bismarck was based in fiords in the north of the country and an ever present threat to the convoys. The Admiralty and indeed Churchill himself were wary of the Tirpitz almost to the point of obsession

It follows from all this that the convoys would need a strong naval escort if they were to have any chance of arriving in Russia at all. The escort usually comprised a close escort of destroyers and other smaller ships with the convoy and a shadowing force of cruisers. In

the case of PQ 17 this was backed up by heavy units of the Home Fleet to guard against the possibility of attack by the Tirpitz.

It was the commander of the close escort on PQ 17 Commander (later Captain) J E Broome RN who was the target of the book and who was to become the plaintiff in this case. David Irving was, at the time, a young and aspiring historical author with an interest in the Second World War but with a decidedly individual slant which was to bring him before the courts again later in life.<sup>201</sup> These later cases have damaged his reputation as an objective historian almost irreparably and subsequent judges have agreed with Denning's assessment of Irving.

PQ17 assembled off Iceland in late June 1942. Consisting of 35 merchant ships it sailed on 27<sup>th</sup> June and was escorted by a close escort of the First Escort Group of 6 destroyers and various smaller vessels under the command of Broome in HMS Keppel, further back was a cruiser covering force commanded by Rear Admiral Hamilton in HMS London with the Home fleet under the C-in-C Admiral Sir John Tovey about 100 miles distant, both of these officers were very much senior to Jack Broome who at that time was a Commander.

All went well until the 2nd July when over the next two days the convoy came under repeated air attack losing three merchant ships; so far this was typical of the arctic convoy run. On the 4<sup>th</sup> July however matters took a more serious turn when the Admiralty received information which lead them to believe that an attack on the convoy was imminent.

Broome in the Keppel received three signals in quick succession:

*"9:11 Secret Most Immediate, cruiser force is to withdraw to westwards at high speed"*

*9:23 Secret, Immediate owing to threat from surface ships convoy is to disperse and proceed to Russian ports*

*9:36 Secret Most Immediate My 9:23 convoy is to scatter.*<sup>202</sup>

The order to disperse would entail the convoy splitting into smaller units and proceeding independently but still under escort, scatter was a more desperate expedient and required the convoy to spread out fanwise, each ship on an independent course and to make their

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<sup>201</sup> Irving and Penguin Books Ltd v Deborah Lipstat [2000] EWHC QB 115

<sup>202</sup> Admiralty signals quoted in The Second World War Vol IV, The Hinge of Fate p235 Winston Churchill (1951) Cassell and Co.

own way as best they could. Broome passed the orders on to the Convoy Commodore (the senior officer in charge of the merchant ships) and then turned with the other destroyers in company to join the cruisers to engage what he believed was a powerful enemy just over the horizon. The order to scatter was extraordinary and had only ever been given before when the convoy in question was actually under attack by powerful surface ships<sup>203</sup> and led the commanders on the scene to believe that the Admiralty was in possession of intelligence that the convoy was in dire peril and that the order given was the only alternative to its total destruction. Broome and Hamilton steamed at full speed westwards expecting at any minute to encounter the Tirpitz. Unfortunately the order was a mistake and the Tirpitz was already safe back in its base in the Norwegian Fjords. Of the 35 merchant ships of PQ 17 only 11 survived to reach safety in Russian Ports, the rest being sunk by aircraft and U Boats.

Broome's conduct was endorsed by his superiors and in particular Admiral Tovey who said

*"I do not consider that the commander of EG1 was in any way to blame for the subsequent heavy losses. From the signal which he had received, he deduced, quite reasonably, that surface attack was imminent: and was correct in his decision to concentrate his destroyers and join the Rear Admiral commanding First Cruiser Squadron"*

This was a major embarrassment to the Royal Navy and Tovey in his despatch after the operation said that

*"the order to scatter the convoy had been premature; the results were disastrous. "*

The whole issue was investigated in the Admiralty and the Cabinet were advised that the Admiralty had given the order to scatter.

The official historian Captain S. W. Roskill was of the opinion that the First Sea Lord at the time Admiral Dudley Pound was prone to interfering in operational matters that did not concern him.

In the official history he has this to say to conclude his description of the destruction of PQ17

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<sup>203</sup> For example it was given by Capt Fegan of the AMC Jervis Bay escorting Convoy HX 84 with the convoy under attack from the pocket battleship Admiral Scheer, Scheer sank the Jervis Bay but the majority of the convoy escaped.

*“There can be no doubt that Admiral Pound himself became markedly prone to make such interventions, often on trivial matters, such as telling individual ships to steer a particular course or to steam at such a particular speed. Nor did attempts to discourage such practices, made by senior members of the naval staff, who fully realised the dangers, meet with any success. When the Russian convoys became such difficult and dangerous operations, signalled interventions from London became very common indeed; and it has been mentioned that Admiral Tovey protested strongly on that score. That, sooner or later a serious misunderstanding would arise seemed all too likely to the Commander in Chief and the Flag Officers concerned; and the inevitable nemesis came with the attempt to exercise direct operational control over widely-spread forces, some of which were 1,500 miles or more from London, and working in conditions of which those ashore could not possibly be aware.”*<sup>204</sup>

It is clear therefore what the official view was, this was a serious misunderstanding, largely caused by the Admiralty, and specifically the First Sea Lord, in issuing direct orders to commanders on the spot who would have a better tactical appreciation than the remote authority in London. Specifically, Commander Broome did not suffer any censure as a result of PQ17. He was awarded the Distinguished Service Cross and promoted to Captain in 1943, he finished the war in command of the Battleship HMS Ramillies and later went on to have a successful career as a writer. There is some evidence that Nicholas Montserrat based the lead character in “The Cruel Sea” to some extent on Broome. All of which indicates that Jack Broome was a well-regarded man with a good reputation.

It was into this settled picture that David Irving came in the late 1960s. In originally conceiving the book, he had given it the title “the Knights Move” this being the title of the German operation against PQ17 (Rosselsprung). Irving had cast the whole debacle (for debacle it assuredly was) as the fault of Broome, the entire book was written in that vein. Irving accused Broome of two breaches of instructions with regard to the orders given by Rear Admiral Hamilton in that he had taken the convoy 30 miles closer to German bases in Norway and also that he was accused explicitly of cowardly deserting the convoy. The assertion was that he had taken his destroyers and all the escorts away from protecting the convoy, leaving the merchantmen to their fate. Irving suggested that Broome had lost his head and that he had misunderstood the Admiralty signals. There was no evidence for

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<sup>204</sup> History of The Second World War, The War at Sea Vol II S.W.Roskill (1956) HMSO London



these assertions and indeed at trial it was proven to be entirely false and as has been seen the outcome of the trial was a large damages award for Broome.

Irving had problems getting the manuscript published initially. He offered it in the first instance to William Kimber who were at that time his publishers, Kimber submitted the manuscript to Captain Stephen Roskill who was the official historian of the Royal Navy in the Second World War for him to read, his comment was as follows

*“In general this book reeks of defamation and any publisher should be very cautious before publishing it. I am no legal expert but I’d be surprised if the publisher of this book, as written, does not end up in the law courts”*

Irving then sent the manuscript to Broome. Broome read it overnight and telephoned Irving the following day and the conversation concluded with an explicit warning that if it was published in its current form then Broome would sue for libel.

Irving also sent his manuscript to a serving officer who had been on the cruiser HMS Norfolk at the time of the convoy this was Captain Lichfield and he wrote to Irving and concluded with this warning

*“Finally, Commander Broome, who is a central figure in your whole story, your criticisms are not supported by either the facts or, indeed by your own evidence. I do not believe that Nelson, Beattie or Cunningham would have acted differently to Jack Broome.*

Horatio Nelson, David Beattie and Andrew Cunningham being famous and revered Admirals from the Royal Navy’s history and therefore this is a ringing endorsement of Jack Broome.

There were also further submissions of the manuscript to other distinguished writers, historians and those who might well be expected to pass an opinion on the manuscript. It became clear to Irving that William Kimber were not prepared to publish the book and at this point he sought other publishers and finally settled on Cassell and Co. Denning in his judgement considered that all this was clear evidence that Irving deliberately set out to attack Jack Broome and despite being warned several times persisted in his attack. Denning came to the view that this was because it would help to sell the book. Denning attached importance to the fact that Irving, prior to publication went to the Admiralty and

was allowed to see Broome's report of proceedings which was written on 8 July 1942 this is what Denning had say

*"On the 6<sup>th</sup> of February 1967, the second defendant went to the Admiralty and was allowed to see the plaintiff's report of proceedings, it was written on 8 July, four days after the disaster to the convoy. Any fair man reading it could see that the plaintiff was a brave man who did his duty. In it he said*

*leaving PQ 17 and the remaining escort ships at such a moment was the most unpleasant decision I have ever had to make. I've seen the quality and spirits of those fine ships under their most able leader, Commodore J.C.K Dowding RNR and I had enjoyed the keen determination and splendid response of my escort.*

*The plaintiff's report was endorsed by Admiral Tovey who approved of all that he had done. Yet the second defendant (Irving) having seen that report did not make any modifications of substance to his manuscript, or at any rate not so far as they affected the plaintiff. He let the accusations stand"*

Denning made it clear also, that Cassell and Co. were well aware of the warnings and Jack Broome's attitude to the book yet they still went ahead and published. Indeed prior to publication Broome warned them once again that he intended to sue for libel and the reply from Cassell and Co was

*"You will be glad to know that in the light of your comments, Irving has made drastic revisions to the original text."*

As Denning pointed out no modifications of any significance with regard to the attack on Jack Broome nor indeed, in Irving's criticism of him, had been made in the book. It was eventually published in substantially the same form as Jack Broome had seen it.

It is not difficult to see what Irving and the publishers hoped to achieve by this widespread dissemination of prepublication material. The inescapable conclusion must be that they were generating publicity for a controversial and incendiary treatment of the story.

Cassell and Co released proof copies of the book and Broome sued, it was Cassell and Co.'s response to these writs that, not surprisingly, seems to have particularly come especially to Denning's notice, he sets out the sequence of events in some detail in his judgment.

*“On 5 March 1968 the plaintiff issued a writ for libel against the first and second defendants. This was in respect of the proof copies. On 21 May 1968 he served a statement of claim. On 14 June 1968 both defendants put in a defence pleading justification and fair comment. Meanwhile the stop order remained. The book was not published. Then, on 7 August 1968, the first defendants made a surprising decision. They published the book in a hard-back edition with the dust-cover which I have described. It was virtually the same as the proofs. On 23 August 1968, the plaintiff issued another writ for libel. The two actions were consolidated, and were heard by Lawton J and a jury in January and February 1970. But two days before the hearing the book was published in a paper-back edition. This must have been pre-arranged to coincide with the trial. The plaintiff has issued another writ for this; but it does not come into the two consolidated actions. That conduct speaks for itself. I have no doubt that the jury thought that the conduct of the first defendants in publishing the hard-back edition was absolutely outrageous. The first defendants had before them the writ in the first action, so they knew exactly what to expect. It was the most explicit warning possible. Yet they persisted in publishing it. Why did they do it? Presumably because they thought that the profits from sales would outweigh the damages in the libel action.”<sup>205</sup>*

The importance of this passage will become clear. Denning here is again applying his own values to the facts. The appeal was against the award of exemplary damages and Denning’s own judicial philosophy, coloured by those influences on him which have been earlier set out, led him to a conclusion which, whilst it may have accorded with his own philosophy actually damaged the party he had most sympathy with and had set out to help, how did that occur and what in particular were those influences that in this case led him into error.

As this was a libel case, the damages were determined by the jury. In this case the jury had fixed damages in the total sum of £40,000. They have divided the damages in the sums of £15,000 by way of compensatory damages and then exemplary damages in the sum of £25,000. Both defendants appealed the £25,000 exemplary damages and Irving alone appealed the £15,000 by way of compensatory damage. Broome obviously feeling that the exemplary award was not enough to reflect the level of behaviour and Irving considering that he had not libelled Broome at all.

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<sup>205</sup> [1971] 2 All ER 187 p198

It was at this point that Denning felt the law as it stood at the time of the appeal did not accurately reflect what he considered to be the equitable and fair position. In short he felt that the recent decision of the House of Lords in the case of *Rookes v Barnard*<sup>206</sup> was a fetter on the ability of the courts to award punitive damages. Certainly at the level he thought should be awarded in this case.

It was Denning's view that the existing common law position prior to the decision in *Rookes v Barnard* was not only the correct view but was fair and equitable. He outlined what he considered to be the previous position as follows:-

*'Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only when the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as when it discloses fraud, malice, violence, cruelty, insolence, or the like, or as it is sometimes put, when he acts in contumelious disregard of the plaintiff's rights ... Such damages are recognised to be recoverable in appropriate cases of defamation.'*<sup>207</sup>

It can be seen that this approach would appeal to Denning in that it leaves to the judge and the jury the power to punish wrongdoers who have acted with malice or at least in some way that would be regarded as calculating and increasing the level of harm suffered by the victim. The problem of course with this approach is that it imports the notion of penalty and punishment into the law of tort. This was acknowledged in *Rookes v Barnard* and indeed is one of the driving factors behind Devlin's judgement in that case. Devlin later commented that the reason why the Law Lords sought in *Rookes* to tidy up the law on punitive or exemplary damages was not to deprive or provide Mr Rookes with a greater or lesser amount of damages but because they considered the law was a mess on this point.<sup>208</sup>

Applying Denning's view on exemplary damages to the present case, he would have liked to have the power to punish what he clearly regards as outrageous behaviour on the part of Cassell & Co. and Irving. Denning considered that the decision in *Rookes v Barnard* had taken this power away. He was probably wrong on this in the particular facts of the case but it is certainly true that the House of Lords had taken away any general and unfettered

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<sup>206</sup> (1964) AC 1129

<sup>207</sup> Ibid p198 quoting from Mayne and Mecgregor on Damages 12<sup>th</sup> ed (1961) pp 196,197 paras 207 and 208

<sup>208</sup> The Judge Patrick Devlin OUP 1979 at p95

power that might have existed to award exemplary or punitive damages in a wide category of tort cases.

Rookes v Barnard was not a libel case. It was a claim which arose from a closed shop agreement that a union had with a company whereby all employees had to be members of a trade union. In this instance, Mr Rookes, a union member had resigned from the union and some of the remaining members had conspired together to threaten the management that unless their former member was dismissed from his employment then they, the remaining members, would come out on strike. The company had given in to these threats and dismissed the former member, Mr Rookes.

The trial had been held in May 1961 before Sachs J and a jury<sup>209</sup>. The appeal had been (inter alia) on the basis of a direction from the judge to the jury that deliberate illegality might be punished by exemplary damages.<sup>210</sup>

The question of exemplary damages was considered by Lord Devlin in his judgement when the matter finally reached the House of Lords in 1964. Devlin considered the common law position and covered all the relevant precedents on exemplary damages and came to the conclusion that the house could not, in 1964, reverse what had apparently been the common law position that exemplary damages could be awarded in civil cases however much their lordships may have wanted to do so given the view that punishment had no place in tort law. It is important at this point to note that at the time that Devlin gave his speech in Rookes there was, as he pointed out, no decision of the House of Lords approving an award of exemplary damages so this presented a unique opportunity to state the law on exemplary damages. .<sup>211</sup>

Devlin traced the history of exemplary damages back more than 200 years to the case of the famous MP John Wilkes. Wilkes had been a thorn in the side of the government of George III and had had his house searched under a general warrant as a sort of fishing expedition to see what evidence could be turned up. The damage itself was trifling but the Lord Chief Justice upheld a decision to award exemplary damages. The rationale was stated to be that

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<sup>209</sup> [1961] 2 All ER825

<sup>210</sup> The direction was not set out in the first instance report but quoted by Lord Devlin in his speech in (1964) AC 1129

<sup>211</sup> Ibid at 1221

*“damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty to deter from any such proceeding for the future, and as a proof of the detestation of the jury of the action itself.”*<sup>212</sup>

After rehearsing all the relevant precedents, Lord Devlin concluded that the common law position was, and always had been, that exemplary damages could only be awarded in two restricted categories.

In the first instance Devlin said it was always open to award exemplary damages in cases where there had been oppressive and arbitrary or unconstitutional action by servants of the government<sup>213</sup> and secondly where the defendant’s conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.<sup>214</sup>

That is an interesting reading of the law extent at the time and it is one with which Denning would clearly disagree as this view is that exemplary damages were effectively at large and would fall within the discretion, normally of the judge but in this particular instance that discretion is that of the jury. Denning was always minded to allow himself as wide an arena as possible in which to exercise his discretion and it is probable that he saw this judgement as an unnecessary fetter on the discretion of judges in the lower courts.

If we pause at this point, it can be seen that the defendant’s actions in the case before Denning could quite easily be said to fall within the second category. It was not therefore strictly necessary for Denning to embark upon the exercise that he did and it raises the question whether he did this to give justice to Jack Broome or whether it was part of his wider campaign to give the Court of Appeal freedom to overturn previous decisions both of itself and of the House of Lords.

This however may be an overly harsh criticism of Denning as it may well be that he thought it was not quite as easy to bring the case within the second limb of *Rookes* as might at first be presumed.

The first problem that Denning faced however was that Devlin had used the word “calculated” and whilst there was evidence that Irving and his publishers had expected that the profits from the book would outweigh any damages in a libel action, there was no

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<sup>212</sup> (1763) Lofft at p 18

<sup>213</sup> *Ibid* at 1221

<sup>214</sup> *Ibid* at 1226

explicit calculation of profit and loss with the publicity engendered by the defendants behaviour and without it. It could be argued that, given the restrictive nature of the House of Lords judgement it would be necessary to adduce evidence that the defendants had actually engaged in such an exercise and had reached the conclusion required by Devlin. On this point Denning decided to take a broad interpretation and to include within this category anybody who took their chance on their profits exceeding the damages<sup>215</sup>. This was a sensible and defensible position as it is highly unlikely that anybody, particularly someone with nefarious intent, would go so far as to conduct an accounting exercise to calculate whether their actions would be worth it or not. Denning used calculate in the sense of plan deliberately. He was undoubtedly correct in this interpretation.

A more serious problem was that Lord Devlin had said that the jury can only be directed to award exemplary damages in cases where the sum that they award by way of compensatory damages is, in the opinion of the jury, inadequate to punish the defendant for his conduct. In Devlin's words

*'... if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it ...'*<sup>216</sup>

Denning dealt with this by remarking that whilst the original trial judge's direction did not comply explicitly with those words and that therefore on a strict construction it could be criticised, nonetheless he decided that on a broader interpretation, the judge's explanation to the jury that exemplary damages were to be additional to any compensatory damages was sufficient to satisfy the conditions set out by Lord Devlin in *Rookes v Barnard*. Again he is probably correct here in that there is no such requirement for a direction in specific terms in *Rookes* and it must be enough that the jury understood that they were awarded an additional sum of damages to take into account the defendant's behaviour.

So far Denning has simply interpreted the previous judgements of the House of Lords in accordance with the facts in this case and there is nothing illegitimate in the way that this

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<sup>215</sup> [1971] 2 All ER 187 at p200

<sup>216</sup> [1964] AC 1129 at p1228

and it could be said that he has created a legitimate arena to exercise a limited discretion in this case it would have been in favour of the plaintiff in this case.

Denning could have left the matter there; he had done enough to deal with the points on exemplary damages and had at this stage complied with the binding precedent of the House of Lords in a way that was entirely legitimate. He then however mounted a scathing attack on the judgement and in particular on Lord Devlin in which he prayed in aid judgements in other common law jurisdictions.

*“The High Court of Australia has subjected this new doctrine to devastating criticism and has refused to follow it: see Uren v John Fairfax & Sons Pty Ltd. The Privy Council has supported the High Court of Australia in a judgment which marshals with convincing force the arguments against the new doctrine: see Australian Consolidated Press Ltd v Uren. The Supreme Court of Canada, together with the Courts of Alberta, Ontario, British Columbia and Manitoba, have repudiated the new doctrine: see McElroy v Cowper-Smith and Woodman; McKinnon v F W Woolworth Co Ltd and Johnston; Bahner v Marwest Hotel Co Ltd and Fraser v Wilson. The Courts of New Zealand also declined to follow it: see Fogg v McKnight. The Courts of the United States of America know nothing of this new doctrine. They go by the settled doctrine of the common law as to punitive damages and would not dream of changing it. It is well stated in the Re-statement of the Law of Torts (Vol 3, para 908).”<sup>217</sup>*

He considered that Devlin had overturned the common law and set up a new doctrine on exemplary damages. He went so far as to assert that the decision in Rookes v Barnard had been arrived at per incuriam. The paragraph in his judgement that deals with this is probably the strongest condemnation of the upper house by a lower court that could be found in any search of the Law reports, he said

*“All this leads me to the conclusion that, if ever there was a decision of the House of Lords given per incuriam, this was it. The explanation is that the House, as a matter of legal theory, thought that exemplary damages had no place in the civil code, and ought to be eliminated from it: but, as they could not be eliminated altogether, they ought to be confined within the strictest possible limits, no matter how illogical those limits were. Yet I am conscious that, in all that I have said I may myself be at fault.*

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<sup>217</sup> Ibid at p 199



*Some will say that it is our duty to follow the House of Lords and not to question their decision. We are not to reason why. Ours is but to do and die. If this be so, then I turn to consider the case on the footing that we are bound by Rookes v Barnard.*<sup>218</sup>

Even this, whilst it may well have irked the House of Lords, could not of itself have been grounds for substantive criticism of Denning and the Court of Appeal. However he concluded his judgement with an exhortation to trial judges to effectively ignore the House of Lords and apply what he considered to be the law prior to Rookes v Barnard.

*"I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by Rookes v Barnard are so great that the judges should direct the juries in accordance with the law as it was understood before Rookes v Barnard. Any attempt to follow Rookes v Barnard is bound to lead to confusion."*<sup>219</sup>

It was this paragraph that was to lead to the inevitable appeal to the House of Lords and the equally inevitable rebuke for Denning from the House of Lords.

The question which must be asked now of course is why Denning chose to do this. There are a number of possible reasons. Charles Stevens sees it as the culmination of Denning's campaign to gain acceptance for his view that judicial discretion should be able to overrule the doctrine of binding precedent in order to do justice to the particular individual<sup>220</sup>. Whilst there are many examples of Denning finding his way around precedents he didn't like, sometimes in a creative manner. Stevens makes the point that Denning had started his assault when in the House of Lords and had argued that the house should be able to depart from his own previous decisions in the interests of justice and indeed had spoken about this point in his 1959 Romanes lecture at the University of Oxford<sup>221</sup>. The force of Denning's argument was that the doctrine that the house was bound by its own previous decisions was an invention of the mid-19<sup>th</sup> century. Denning contended that once lay members of the House of Lords had ceased to take part in the judicial process, the remaining judicial members had felt that they had no political authority to back up their judgements and as a result had adopted a cautious approach.

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<sup>218</sup> Ibid at p 199

<sup>219</sup> Ibid at p 201

<sup>220</sup> Fiat Justitia: Lord Denning and the Common Law vol 1 (2009) Charles Stephens, Cambridge Scholars Publishing pp76-81

<sup>221</sup> From Precedent to Precedent Denning Oxford (1959)

It has to be said that Denning was probably right in that the doctrine that the House of Lords is bound by its own previous decisions is a construct of the mid-19<sup>th</sup> century and according to Louis Blom-Cooper<sup>222</sup>, can be traced to the decision in *Beamish v Beamish*<sup>223</sup>. This was a case considering an earlier decision of 1844 on what constituted a common law marriage.<sup>224</sup> In his speech in that case Lord Campbell said

*“that the law laid down as your ratio decidendi, be clearly binding on all inferior tribunals, if it were not considered as equally binding upon your Lordship’s, this house would be arrogating to itself the right of altering the law, and legislating by its own separate authority.*

Blom Cooper characterises this as a judicial affirmation of the sovereignty of Parliament. Denning himself probably had in mind the speech of Lord Halsbury in *London Street Tramways Co. Ltd v London County Council*<sup>225</sup> who based his decision on the inconvenience that would be caused by failure to adhere strictly to precedent. In a speech that is the direct antithesis of Denning’s judicial philosophy, Halsbury said:

*“Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such an opinion is erroneous; but what is that vocational interference with what is perhaps abstract in justice, as compared with the inconvenience-the disastrous inconvenience-of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there will be no real final Court of Appeal?.”<sup>226</sup>*

Denning was also correct in that this had not been the approach of the House of Lords prior to the middle of the 19<sup>th</sup> century and he may have had in mind Lord St Leonard’s speech in *Bright v Hutton*<sup>227</sup>

*“You are not bound by any rule of law which you may lay down, if upon the subsequent occasion you should find reason to differ from that rule that is, that this house, like every court of justice, possesses an inherent power to correct an error to which it may have fallen.”*

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<sup>222</sup> The Judicial House of Lords 1876 – 2007 ed Blom-Cooper et al (2009) Oxford at pp128-129

<sup>223</sup> (1861)9 HL Cases 274, 338-9

<sup>224</sup> R v Millis (1844) 10 Cl & F 534

<sup>225</sup> [1898] AC 375

<sup>226</sup> Ibid at p382

<sup>227</sup> (1852) 3 HLC341 at p389

This of course is much more in tune with Denning's own views and approach. Denning was not on all in his opposition to the doctrine being binding upon the House of Lords, Lord Reid had criticised the rule in *Midland Silicones Ltd v Scruttons Ltd*<sup>228</sup> when he said

*"I have on more than one occasion stated my view that this rule is too rigid in that it does not in fact create certainty but I am bound by the rule until it is altered."*

The modernisers finally prevailed and the practice statement of 1966 allowed the house to depart from its own previous judgements when it appears right to do so<sup>229</sup>

The statement in full says

*"Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.*

*Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice, and while treating former decisions of this house as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.*

*This announcement is not intended to affect the use of precedent elsewhere than in this house."*

This is perhaps somewhat less than the radical approach that Denning would have preferred and it goes without saying that it did not authorise the Court of Appeal to overrule or ignore decisions of the House of Lords.

It may well be that the promulgation of the practice statement had emboldened Denning in his stance against the doctrine.

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<sup>228</sup> [1962] AC 446

<sup>229</sup> Practice Statement (Judicial Precedent) [1966] 1 WLR 1234

Denning himself wrote about his attitude to the doctrine of binding precedent most tellingly perhaps in the Discipline of Law. Denning started his career in the House of Lords with a dissenting judgement in a case where he considered that the relevant authorities were out of date<sup>230</sup>. The case was considering the matter of sovereign immunity. Denning carried out his own researches during the long vacation and in his own words decided the case on the basis that when sovereign states are engaging in commercial transactions they should not be entitled to claim immunity. His speech in the case is illuminating of his personal jurisprudential approach to the doctrine.

*“My Lords, I acknowledge that, in the course of this opinion, I have considered some questions and authorities which were not mentioned by counsel. I’m sure they gave all the help they could and I have only gone into it further because the law on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that if there is one place where it should be reconsidered on principle, without being tied to particular precedents of a period that is passed, it is here in this house: and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net. This I have tried to do. Whatever the outcome, I hope I may say, as Holt CJ once did after he had done much research on his own: “I have stirred these points which wiser heads in time may settle.””*

As may have been expected, and indeed as Denning did expect, this did not appeal to his brother judges and Viscount Simonds speech sets out what was very much the orthodoxy at the time:

*“My Lords, I must add that since, since writing this opinion I have had the privilege of reading the opinion which my noble and learned friend, Lord Denning, is about to deliver. It is right that I should say that I must not be taken as assenting to his views upon a number of questions and authorities in regard to which the house has not had the benefit of the arguments of counsel or of the judgment of the courts below.”*

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<sup>230</sup> Rahimtoola v Nizam of Hyderabad [1958] AC 379

Denning continued his campaign throughout his time in the Lords and in his last case in the Lords, also gave a dissenting judgment<sup>231</sup> in which he attempted to overturn previous precedent. Once again his nemesis was Lord Simonds.

As Stevens has said, Denning used the Romanes lecture as a vehicle to set out his views. Denning acknowledged this explicitly in the Discipline of Law. He quotes at length from his lecture but it is perhaps the concluding paragraph of the lecture which illuminates his approach best.

*“And what does it all come to? I have shown you how in times past the House of Lords used to correct errors into which the lower courts had fallen and indeed errors into which the house itself or its predecessors had fallen, and how it used to create new precedents so as to meet new situations. If the law is to develop and not to stagnate, the House must, I think, recapture this vital principle, the principle of growth. The House of Lords is more than another court of law. It is more than another Court of Appeal. It is the Court of Parliament itself. It acts for The Queen as the fountain of justice in our land. It must, of course, correct errors that have been made by the courts below: but it should do more. It lays down, or should lay down, the fundamental principles of the law to govern the people; and, whilst adhering firmly to those principles, it should overrule particular precedents that it finds to be at variance therewith. Then only shall we be able to claim that freedom broadens slowly down from precedent to precedent.”<sup>232</sup>*

this was not Denning’s first attempt to overturn precedents set by the House of Lords and it may be that he was encouraged in his stance by the reception given to his dissenting judgement in *Conway v Rimmer*<sup>233</sup>. This is a case concerning crown privilege which had been considered settled by the 1942 House of Lords judgment in *Duncan v Cammell Laird & Co. Ltd.*<sup>234</sup>. Denning delivered a powerful dissenting judgement and threw the matter back to the House of Lords for reconsideration. In concluding his judgment and referring to judgements of commonwealth countries which had declined to be bound by the decision in *Duncan* he said

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<sup>231</sup> *Griffiths v J.P. Harrison (Watford) Ltd.* [1963] AC 1

<sup>232</sup> *From Precedent to Precedent* Romanes lecture 21<sup>st</sup> May 1959 Oxford

<sup>233</sup> [1967] 1 WLR 1031

<sup>234</sup> [1942] AC 624

*“Despite this impressive array, my bretheren today feel that we are still bound by the observations of the House of Lords in Duncan v Cammell Laird & Co Ltd. I do not agree the doctrine of precedent has been transformed by the recent statement of Lord Gardiner LC, this is the very case in which to throw off the fetters. Crown privilege is one of the prerogatives of the Crown. As such, it extends only so far as the common law permits. It is for the judges to define its ambit and not for any government department, however powerful. And when I say the judges, I mean not only the judges in England. I include the judges of the countries of the Commonwealth. The Queen is their Queen, as she is ours. Crown prerogative is the same there as here. At least it should be. When we find that the Supreme Courts of these countries, after careful deliberation, decline to follow the House of Lords, because they are satisfied it was wrong, that is excellent reason for the House to think again. It is not beneath its dignity, nor is it now beyond its power, to confess itself to have been in error. Likewise with this court. We should draw on the wisdom of those overseas, as they in the past have drawn on ours. Thus we shall be our part to keep the common law a just system yes, a just and uniform system throughout its broad domain.”*

When the case reached the House of Lords, the original decision was overturned however the Lords did not do this on the basis of the reasoning outlined by Denning in his judgment, this is a point Denning does not make in his book.

When he turned to talk about Broome in the Discipline of Law, he acknowledged that it was a disaster for him<sup>235</sup>. He does throw some light on his decision in that it was not clear for some time that the defendants were going to appeal. He does also acknowledge that he was a little strong in his criticism of the House of Lords.<sup>236</sup>

So the question falls to be asked, in this case was Denning trying to create a legitimate space to exercise his discretion, whether in fact it was necessary, or was he using this case, and by extension, Jack Broome to further his own judicial agenda.

We should therefore also look at whether there were any particular reasons why in this particular case he chose to take this stance, what factors may have caused him to take the

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<sup>235</sup> Discipline of Law at p309

<sup>236</sup> Ibid at p 310

position he did. Once again we will see Denning's individual experience colouring his judicial philosophy.

We have seen that Denning is influenced by his Edwardian upbringing in Whitchurch and that family formed an important part of that upbringing. Norman Denning, his younger brother, had joined the Navy as a paymaster officer. The paymaster branch in the Navy at that time provided the majority of the Navy's bureaucracy and secretariat. Norman was extremely successful and at the time that convoy PQ 17 sailed, he was a Commander in naval intelligence, by coincidence, the equivalent in rank to Jack Broome. As such he would have been responsible, at least in part for the interpretation of the intelligence relating to the sailing of the Tirpitz and it may be thought by some that he should have shared at least some of the blame for the eventual tragedy that befell the convoy. Roskill makes the point that whilst Pound has shouldered much of the blame down the years for the decision, and indeed as the senior officer responsible he would be expected to do so, the decision must to some extent have been collegiate and Admiralty staff officers would have been involved. There has however never been any attempt to lay any blame upon Norman Denning and as will be seen, as a matter of fact Norman was not in any way to blame.

By way of background and to show how integral Norman was to the processing of Naval Intelligence at that time. He had set up the operational intelligence centre in 1937. This was responsible for coordinating all sources of intelligence available to the Admiralty including photo reconnaissance. Norman together with Roger Winn QC (Later Lord Justice Winn) who was responsible for the submarine tracking centre advised Pound that there was no evidence of any movement by German surface units beyond the forward positioning moves that had already been reported, in other words there was no evidence that Tirpitz was threatening PQ 17. Despite this Pound still sent the fatal signals which directly led to the destruction of the convoy.

As we have seen, the Denning's were a particularly close family and it is inconceivable that Norman had not to some extent discussed PQ 17 with Denning at some time between the end of the war and this case. Irving did not accuse Norman of any complicity in the disaster and there is no mention of Norman in the book at all. Nonetheless, at least on the face of it, there is some suspicion perhaps that Denning felt that he must protect the Navy and by extension this meant Jack Broome. There is an argument that given his personal interest in PQ 17 that Denning should have recused himself from this case. There is no

evidence that this was ever considered. It is not suggested, that Denning was actively concerned to protect Norman but there is no doubt that given all the influences on Denning's character and development that we have discussed that Jack Broome will have engaged his sympathy far more than David Irving would.

Despite what Denning may have thought about appeal, the defendants did appeal to the House of Lords and a special panel of seven law lords led by the Lord Chancellor, Lord Hailsham, sat to determine the appeal.

The case is perhaps most known for the somewhat magisterial rebuke handed down by Lord Hailsham with regard to Denning's direction to lower courts to ignore the House of Lords decision in *Rookes v Barnard*.

*"The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.*

*Even this House, since it has taken freedom to review its own decisions, will do so cautiously."*<sup>237</sup>

Even though, through Lord Hailsham the house delivered this rebuke, nonetheless individual members clearly had difficulty in accepting the position set out in *Rookes*. The decision was not unanimous and three of the Lords of Appeal dissented.

Viscount Dilhorne in particular found that the reasoning in *Rookes* was less than clear. However Dilhorne would have reduced the amount of exemplary damages on the basis that the judge did not give the clear direction which he considered was required by Lord Devlin's speech in *Rookes*.

He does agree with Denning however that Devlin had restricted the categories of cases in which, prior to *Rookes*, courts would have been able to award exemplary damages. He then goes on to criticise the categorisation adopted by Devlin and refers to it as being too

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<sup>237</sup> [1972] 1 All ER 801 at 809



narrow. He again went on to say that he does not feel that the narrowing of the category was justified by the earlier cases upon which Devlin bases his decision. He says that the

*“Power to award exemplary damages may be an anomaly, but I doubt whether it is beneficial to the law to seek to reduce the area of that anomaly at the price of creating other anomalies and illogicality’s. Surely it is anomalous if a person guilty of oppressive conduct should only be liable to exemplary damages if a servant of the government. In these days there are others than the government who can be guilty of oppressive conduct. Why should they be treated differently? I can find nothing in the three cases to indicate that if the conduct complained of had been by persons other than servants of the government liability to exemplary damages would have been excluded.”<sup>238</sup>*

He also attacked the second category as set out by Devlin in quite strong terms

*“It may also be contended that Lord Devlin's second category is also too narrowly drawn, for why should conduct lead to exemplary damages if inspired by the profit motive or some material interest, and similar conduct due to other motives not do so? But the substantial criticism that can be made is that by his categorisation, the previously existing and recognised power to award exemplary damages is restricted. Lord Devlin indeed appreciated the novelty of what he was doing when he said that acceptance of his views would "impose limits not hitherto expressed on such awards" (p. 1226). I do not think that this should have or could properly be done. It should have been left to the legislature. This conclusion does not, however, mean that the jury's verdict as to liability must be interfered with.”<sup>239</sup>*

From this it can be seen that there was at least some justification in the stance taken by Denning however tactlessly he may have decided to formulate it.

Lord Reed however was perhaps a little more circumspect in his criticism of Rookes and chose instead to treat the judgment more as a jurisprudential exercise.

He chose not to have to disagree with Devlin’s speech but to concede, with hindsight, that perhaps there was a lack of clarity, albeit the main responsibility lay with those whose task it was to interpret Lord Devlin’s speech.

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<sup>238</sup> Ibid at p855

<sup>239</sup> Ibid at p856

*“The very full argument which we have had in this case has not persuaded me to change the views which I held when Rookes v Barnard was decided or to disagree with any of Lord Devlin’s main conclusions, but it has convinced me that I and my colleagues made a mistake in simply concurring with Lord Devlin’s speech. With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this house dealing with an important question of law. My main reason is that experience has shown that those who have to apply the decision to other cases and still more those who wish to criticise it come to find it difficult to avoid treating sentences and phrases in a single speech as if there are provisions in an act of Parliament. They do not seem to realise that it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive. Where there are two or more speeches they must be read together and often it is generally much easier to see what are the principles involved and what are merely illustrations of it.”*

Louis Blom-Cooper regards this speech as having been the best model for the appellate function.<sup>240</sup> this is certainly one view, however, it is abundantly clear that even minds as sharp as Denning’s can struggle to divine the true meaning from a judgement and perhaps he can be excused from thinking that Lord Devlin meant what he actually said on this occasion, which would go some way to explaining why he decided he needed the discretionary space that would have been provided by attempting to declare Rookes v Barnard to be per incuriam. .

Lord Hailsham himself, the deliverer of the magisterial rebuke to Denning acknowledged that the Court of Appeal could not be criticised for the view that Rookes v Barnard was in need of further consideration by the House of Lords.

He says

*“I make no complaint of their view that Rookes v Barnard clearly needs reconsideration by this house, if only because of the reception it has received in Australia, Canada and New Zealand.”*

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<sup>240</sup> The judicial House of Lords 1876-2009 ed Blom-Cooper et al Oxford 2011 at p154

This clearly is a very inconsistent position; he starts his speech by rebuking the Court of Appeal and reaffirming the principle that it is the job of the Court of Appeal and indeed all lower courts to follow, loyally, the judgements of the House of Lords. He then goes on to acknowledge that the original judgement in question, *Rooks v Barnard*, is in need of reconsideration. Given the nature of the hierarchical court structure it is hard to see how that reconsideration could take place unless the Court of Appeal delivered a judgement along the lines of that given in this case. Earlier in the speech Hailsham does suggest that the Court of Appeal could have made reference to the leapfrog appeal system set out in the Administration of Justice Act 1969 but this would depend on litigants in a lower court being prepared to appeal directly to the House of Lords and for the judge in the lower court to certify that the case was suitable for such a leap frogging appeal.

Hailsham defends Devlin's categorisation by disagreeing with Denning that before *Rookes v Barnard* the position of exemplary damages was settled. He quotes Denning and refers to Denning's reliance on the leading textbook of the time on the subject of damages. He sets out Denning's use of the textbook and quotes at length the passage relied on by Denning. He then refers to a later paragraph in the textbook which does contradict the stance which Denning had taken.

*"Through all these various cases however, runs another thread, giving a very different explanation of the position, for indeed it cannot be said that English law has committed itself finally and fully to exemplary damages and many of the above cases point to the rationale not of punishment of the defendant but of extra compensation for the plaintiff for the injury to his feelings and dignity. This is of course not exemplary damages at all. It is another head of nonpecuniary loss to the plaintiff."<sup>241</sup>*

This was not in any sense necessary to the judgement and Hailsham here is seeking to undermine Denning's decision and effectively deny him the space to exercise his discretion.

As we have seen Denning was often considered to be ahead of his time and therefore consideration should be given to the treatment given to the question of exemplary damages in the time since *Broome* to see if this lends support to the stance Denning took at that time.

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<sup>241</sup> Mayne and McGregor on Damages 12<sup>th</sup> Ed (1961) at para 212

Pausing before doing so however, it must be acknowledged that prior to Denning's attack on the decision in *Rookes* it had been expressly approved and followed by the Court of Appeal in *McCory v Associated Newspapers and others*<sup>242</sup> where Pearson LJ acknowledged that the difference between punitive and compensatory damages had now been settled by the House of Lords in *Rookes* and that the decision in *Rookes* should be followed not only in cases within the generality of tort law but also in defamation cases.

Also in the case of *Broadway Approvals Ltd v Odhams Press Ltd*<sup>243</sup> the Court of Appeal had again applied the full ratio in *Rookes* without demur.

All this lends credence to the proposition that it was the particular circumstances of Jack Broome allied to Denning's own views, arising and influenced by his background, that led him to seek to overturn, or at least avoid *Rookes*.

The decision was applied in many cases following Broome as it was not until 1985 when it fell to be considered again by the Court of Appeal. In this case<sup>244</sup> the court accepted that the position on exemplary damages in defamation was settled and relied on authoritative textbooks<sup>245</sup> to supply this definition

*“Exemplary damages can only be awarded if the plaintiff proves that the defendant when he made the publication knew that he was committing a tort was reckless whether his action was tortious or not, and decided to publish it because the prospects of material advantage over eight the prospects of material loss. What is necessary is that the tortious act was begun with guilty knowledge for the motive that the chances of economic advantage it when the chances of economic perhaps physical penalty. The mere fact that a libel is committed in the course of the business carried on for profit, for example the business of the newspaper publisher, is not by itself sufficient to justify an award of exemplary damages.”*

This would seem in many ways to be a vindication of Denning's stance. Denning's primary concern was that in cases where the tortfeasor's behaviour had been particularly egregious that the court should have available to them the ability to make an award in damages that reflected the jury's, and by extension society's, view of the tortfeasor's

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<sup>242</sup> [1964] 3 All ER 947

<sup>243</sup> [1965] 2 All ER 523

<sup>244</sup> *Riches v News Group Newspapers Ltd* [1985] 2 All ER 845

<sup>245</sup> *Duncan and Neill on Defamation* 2<sup>nd</sup> Ed 1983

behaviour and provided a message to the world at large that such behaviour would not be tolerated.

Whilst Riches affirmed Denning's view, it became clear in the case of *MGN v John*<sup>246</sup> that notwithstanding this jurisprudential line, the judiciary still wanted to retain the right to control exemplary damages to some extent.

This case concerned the famous pop star Elton John. In 1992 it was reported in the *Sunday Mirror*<sup>247</sup> that Elton John had embarked upon a bizarre diet characterised as "eat but don't swallow." This allegedly consisted of Elton John chewing whatever he wanted but spitting it out before swallowing it. The report in the newspaper purported to be that an eyewitness report had quoted that someone had seen John at a party in Los Angeles, chewing food and then spitting it out into his handkerchief. Before trial the newspaper had accepted that the allegation was completely unfounded. Notwithstanding this, at trial the newspaper ran the defence that was a case of mistaken identity, the witnesses had been sure that the person exhibiting that behaviour was in fact Elton John but the newspaper accepted that he had not actually been at the party in question. The jury did not accept this defence and awarded John the total sum of £350,000 being made up of compensatory damages of £75,000 and exemplary damages of £275,000.

The leading judgement was that of Lord Phillips MR, he dealt at length with the question of compensatory damages and then turned to exemplary damages. On reviewing the authorities he concluded that for exemplary damages to be awarded in a defamation case the jury had to be persuaded that the defamatory statement in question had to have been made either in full knowledge that it was not true or recklessly as to the truth. In coming to this conclusion he relied in part on Devlin's speech in *Rookes* which referred to a "cynical disregard for a plaintiff's rights."<sup>248</sup> He then followed this line through Lord Hailsham's speech in *Broome* where at page 1079 Hailsham said that what was required was

*"knowledge that what is proposed to be done is against the law or a reckless disregard as to whether what is proposed to be done is legal or illegal."*

This of course is exactly the stance which Denning took in *Broome*. Where Denning was at odds with the current legal thinking was that he was prepared to leave all this to the jury. In

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<sup>246</sup> [1996] 2 All ER 35

<sup>247</sup> 27<sup>th</sup> December 1992

<sup>248</sup> [1965] All ER 2 954 per Lord Devlin at p 957

the Elton John case, the judiciary was not prepared to allow the jury to have free rein with exemplary damages. Lord Phillips MR had this to say

*“It is plain on the authorities that it is only where the conditions for making an exemplary award are satisfied, and only when the sum awarded to the plaintiff in compensatory damages is not itself sufficient to punish the defendant, show that tort does not pay and deter others from acting similarly, that an award of exemplary damages should be added to the award of compensatory damages. Since the jury will not know, when making their decision, what costs order will be made, it would seem that no account can be taken of the costs burden which the unsuccessful defendant will have to bear, although this could in itself have a punitive and deterrent effect. It is clear that the means of the defendant are relevant to the assessment of damages also relevant are his degree of fault and the amount of any profit he may be shown actually to have made from his unlawful conduct”<sup>249</sup>*

Denning may have been minded to agree in part with this dictum, but it still relies in large part on satisfying the Devlin criteria set out in Rookes. It is clear also that Lord Phillips would regard himself as the ultimate arbiter of the amount of exemplary damages to be awarded. He does consider that there is an article 10 point under the ECHR to be taken in that excessive exemplary damages would be a potential breach of the defendant’s right to freedom of expression as he says

*“The authorities give judges no help in directing juries on the quantum of exemplary damages, since however, such damages are analogous to a criminal penalty, and although paid to the plaintiff play no part in compensating him, principle requires that an award of exemplary damages should never exceed the minimum sum necessary to meet the public purpose underlying such damages, that of punishing the defendant, showing that tort does not pay and deterring others. The same result is achieved by the application of article 10. Freedom of speech should not be restricted by awards of exemplary damages save to the extent shown to be strictly necessary for the protection of reputations.”*

This stance is of course illogical. The tort exists to protect reputations and when measured in the balance, the law over the centuries has clearly come to the conclusion that the protection of reputation is more important than unfettered free speech. If a jury, following

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<sup>249</sup> Ibid p58

Lord Phillips views on the criteria for awarding exemplary damages, decides that those criteria have been met then it must follow that the jury are those best placed to decide on the amount of damages which will best record society's view of the defendant's behaviour.

To attract an award of exemplary damages, under the criteria set out in the years since *Rookes*, a defendant's behaviour must have been either a deliberate lie or at the very least, in publishing a story, the defendant must have been reckless as to the truth. This is the very circumstances which actually pertained in *MGN v John*. It cannot be that the right to freedom of expression and hence a free press requires that publishers should be free from the fear of exemplary damages awards, even excessive exemplary damages awards, when they make reckless statements and particularly when they lie deliberately. There is nothing in the judgement of Lord Phillips that would suggest any support for this point of view and it is difficult therefore to understand why he felt it necessary to couch his decision, or at least this part of the decision in these terms and on that rationale.

Having decided that the compensatory element was too large at £75,000 and reducing this to £25,000, Lord Phillips then turned to exemplary damages and assessed them in the sum of £50,000. He justified this by reference to the following criteria:

*“The question is whether the sum which we have awarded for compensatory damages is sufficient to punish the newspaper and deter it and others. In our judgement it is not, since we do not think that this adequately reflects the gravity of the newspaper's conduct, or that it would deter it or other national newspapers of a similar character from such conduct in future. An award of exemplary damages is therefore, in our judgement necessary to meet these two requirements. We think that those requirements will be fully met by an award of £50,000 exemplary damages.”<sup>250</sup>*

This judgement in many ways reflects Denning's judgement in the earlier case. And it may well be said that Denning was leading a consensus towards changing the law and therefore it could be argued that this was a good example of judicial creativity. Denning of course explicitly said that he was attempting to return the law to the state it had been in prior to the judgement in *Rookes v Barnard*. These of course are not necessarily mutually exclusive it would be possible for Denning to be creative in guiding the law to what he

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<sup>250</sup> Ibid at p64

believed was a better outcome. In other words it is perfectly possible to be both restorative and creative.

We have said previously, that to exercise judicial discretion legitimately, the judge must create that interstitial space between settled law and may then exercise his discretion in accordance with a social consensus and applying his own views and values. Did Denning do that here?

Denning was explicit in that he thought that the judgement in *Rookes* was wrong and that it had changed the law for the worse and he set out to put that right. He had of course always been clear that he thought the first duty of the judge was to do justice to the case presently in front of him, how did he think that he would do justice to Jack Broome, who already had an award of exemplary damages in his favour, by seeking to avoid entirely the effect of *Rookes v Barnard*.

The answer is that in attacking the position set out in *Rookes*, Denning was seeking to some extent to protect Jack Broome from a possible appeal on the basis that the trial judge had misdirected the jury on exemplary damages. To do this you need to create the space for himself to operate and he did this in two ways. Firstly by giving a broad interpretation of the requirement that the defendant must have calculated that his conduct resulted in increasing his profit. This must surely have been right; it cannot be that the narrow interpretation of an accountancy type of calculation being put in evidence was what was required. The occasions on which this must happen are vanishingly small and the occasions on which the evidence itself would come into the hands of the plaintiff would be even smaller, if that were possible.

He then gave another broad interpretation of what was required by way of direction to the jury and decided that an explicit direction was not necessary and the guidance given by Lawton J was sufficient to satisfy the requirements set out in *Rookes*.

Having created the space he then exercised his discretion in favour of Broome and left the award as it was.

Pausing here, we should consider whether it is likely that an appeal would have been mounted had he left his judgement at this point.

On the first point, there was little chance of the House of Lords disagreeing with the Court of Appeal; Lord Hailsham was clear in his view on the facts before them



*“The jury were perfectly entitled to infer that they had calmly calculated that the risks attendant on publication did not outweigh the chances of profits.”<sup>251</sup>*

Denning must have known his would be the case as there was little that was controversial in his interpretation of the requirement for a calculation.

Denning was however much more percipient with regard to the second point as the House of Lords did struggle with this point and indeed Hailsham did say:

*I am bound to say that I found the greatest difficulty in accepting the summing up on this point as adequate.<sup>252</sup>*

Hailsham however did come to the conclusion, as he put it, that the direction was just adequate

Lord Reid again had little difficulty in accepting the first point

*“I say no more than that the jury were fully entitled to hold that the appellants knew when they committed this tort that passages in this book were highly defamatory of Captain Broome and could not be justified as true and that it could properly be inferred that they thought it would pay them to publish the book and risk the consequences of any action”.<sup>253</sup>*

On the second point, Lord Reid is equally robust than simply says:

*“I agree with your Lordships that that argument must fail. A judge’s direction to a juror is not to be considered in vacuo. It must be read in light of all the circumstances as they are then existed and I cannot believe that the jury were left in any doubt as to how they must deal with this matter.”<sup>254</sup>*

The other judges dealt with this in similar vein and Denning must have been able to calculate himself the chances of a successful appeal were negligible. That having been said why then did he go on to declare *Rookes v Barnard* as per incuriam and give the direction that he did give to lower courts to ignore a House of Lords judgment.

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<sup>251</sup> [1972] 1 All ER 801 at p813

<sup>252</sup> Ibid at p816

<sup>253</sup> Ibid at p839

<sup>254</sup> Again at p839

To keep the analysis congruent, we would say that he gave himself the space to restate the law on exemplary damages by declaring that the House of Lords had decided the case per incuriam. We should remind ourselves at this stage that per incuriam means “through want of care; inadvertently. A mistaken decision of a court”<sup>255</sup>

Leaving aside the question as to whether Denning was right or not, could this ever be a legitimate way of creating that interstitial space necessary for the exercise of discretion. The answer almost by definition must be no. As we have seen the interstitial space operates between the gaps in the law. There is no gap existing here, it is closed by the decision in *Rookes*. To create the Gap, Denning most dispose of that decision and he does so not by disagreeing with it but by declaring it to be wrong and thereby opening up a wide space in which he can operate. This cannot be legitimate and it follows from that in the way in which he exercises his discretion is also not legitimate.

This is an example of Denning being irked by the constraints imposed upon him by binding precedent and seeking to manoeuvre to avoid it. Unfortunately the impact of his attempt fell in the main on Jack Broome. Denning had invited Broome’s counsel to address the court on the validity or otherwise of *Rookes* and as a result of this, the House of Lords in a separate hearing<sup>256</sup>, deprived him of half of his costs in the Court of Appeal and the House of Lords. This of course meant that Broome had to pay these from the proceeds of the damages award and the net result therefore was that in seeking to protect the exemplary damages award, Denning had in fact substantially deprived Broome of the benefit of them.

Denning does not acknowledge any faults in his legal reasoning but lays the blame on the fact that he was insubordinate to the higher court:

*Yes-I have been guilty-of lese majesty. I had impugned the authority of the house. That must never be done by anyone except the house itself least of all by the turbulent Master of the Rolls.*<sup>257</sup>

as has been noted earlier, Denning considered that the outcome of the case was a disaster for him, it will be submitted that any disinterested observer may conclude that whilst the outcome of the case was a disaster, it was Jack Broome who bore the brunt of it, he was libelled in the most egregious manner and then ended up being dragged all the

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<sup>255</sup> Longman Dictionary of Law P H Richards and L B Curzon 8<sup>th</sup> Ed Longman and Co 2011

<sup>256</sup> [1972] AC 1136

<sup>257</sup> The Discipline of Law Lord Denning Butterworths 1979 at p313

way to the House of Lords at considerable cost because of what some may see as an error by one of the most senior judges in the land.

Denning's misgivings on the effects of *Rookes* may however not have been entirely without justification. The question arose again in *AB v South West Water Services Ltd*<sup>258</sup> and it was considered in that case that the combined effect of the speeches in *Rookes* and in the House of Lords in *Broome* was such as to restrict the ambit of exemplary damages to only those categories for which pre 1964 authority (date of *Rookes* in the house) could be found. The Court of Appeal considered the tenor of the speeches in coming to this conclusion and it can be seen why this might be the case

*"I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority"*<sup>259</sup>

It was this restraint on the provision of exemplary damages that had exercised Denning in his judgement. It was also of concern to the wider world of the law and this restrictive approach came to be considered further by the House in 2001 in *Kuddas*.<sup>260</sup> This was a case concerning exemplary damages for misfeasance in a public office. There was no question raised in this case that exemplary damages should no longer be available and the House was concerned that the provision of such damages should adapt to changing social conditions

*"The genius of the common law is its capacity to develop and it appears strange that the law in this particular topic should be frozen by decisions that had been taken prior to and including *Rookes v Barnard*. This has led Professor W H Rogers to comment in *Winfield and Jolowicz on Tort* (15<sup>th</sup> ed 1998) p746, that this decision commits the law to an irrational position in which the result depends not on principle but upon the accidents of litigation."*<sup>261</sup>

Lord Mackay then went on to consider whether the decision in *AB* was a fair reading of the dicta in *Broome* and whether that justified the conclusion freezing the question of exemplary damages in its pre-1964 position so far as the categories were concerned. He came to the conclusion which was unanimous that it was not justified and that the categories were not frozen.

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<sup>258</sup> [1993] 1 All ER 609

<sup>259</sup> Per Lord Reid [1972] AC 1027 at 1088

<sup>260</sup> *Kuddas v The Chief Constable of Leicestershire* [2001] UKHL 29

<sup>261</sup> *Ibid* Per Lord Mackay of Clashfern LC at p39

It was clear that the house was not entirely comfortable with the interpretation that has been placed on *Rookes v Barnard*, whilst in 1964 exemplary damages were regarded as somewhat of an anomaly, indeed it is possible to discern something close to embarrassment in certain of the speeches in the House of Lords in *Broome* Lord Nicholls was clear that they still have a place

*“from time to time cases do arise where rewards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant’s conduct calls for a further response from the courts. On occasion conscious wrongdoing by the defendant is so outrageous, his disregard of the claimant’s rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not be done. Exemplary damages as a remedy of last resort, fill what otherwise would be a regrettable lacuna”*<sup>262</sup>

Denning could not have put it better himself. This is to some extent vindication of Denning’s misgivings regarding the state that *Rookes* had left exemplary damages in at the time.

Shortly afterwards the Privy Council had occasion to consider the limits of exemplary damages in *A v Bottrill*<sup>263</sup> this was a New Zealand case concerning medical negligence. The Privy Council clarified further the criteria for an award of exemplary damages noting that it was not restricted to cases where the defendant intended to cause the harm or was consciously reckless as to the risks involved.

The question does continue to exercise the courts but insofar as it can be ascertained the current state of the law would seem to be that exemplary damages are available for all torts where the defendant’s conduct warrants it. This was the outcome that Denning had always aimed for in this case and perhaps to some extent this does legitimise his decision although it could be argued that by his direct challenge to the House of Lords he gave the opportunity for the Lords to augment *Rookes* and further muddy the waters and was to that extent the author of his own misfortune.

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<sup>262</sup> *Ibid* per Lord Nicholls of Birkenhead at p46

<sup>263</sup> [2002] UKPC 44

## Chapter 6

### Candler and Crane Christmas<sup>264</sup>

#### A Vindication

This case could perhaps be said to be Denning's most important contribution to the law of tort. Even though it is a dissenting judgement, the stance taken by Denning has been vindicated and having been adopted in later cases it is now right to assign to this judgment the status of the bedrock of the law of negligence. It is the principles that Denning enunciated in this case that enabled judges in later cases to develop the law in such a way as to give credence to the position outlined by Denning in his judgment.

As is noted above, this was a dissenting judgement and therefore it must be taken that the other members of the court could not discern any space within the interstices and therefore declined to exercise their discretion. Denning did find that space and was able to exercise his discretion in a way that clearly pointed the way to creating new law and perhaps even served to inform the consensus.

We must consider whether the methodology used to create that space and then the subsequent exercise of his discretion were legitimate. It is not enough to say that both of these were subsequently legitimised by the adoption of Denning's reasoning by other judges, there must be an internal legitimacy within the case for Denning to have operated legitimately and therefore for his judgement have any real validity.

The case came before the Court of Appeal consisting of Lords Justices Cohen, Asquith and Denning in December 1950 on appeal from a first instance decision of Mr Justice Lloyd-Jacob.

On the face of it there is nothing in the facts of this case that would cause one to think that it would lead to any startling new developments in the law. The essential point around which the case revolves is that there is no contractual nexus between the careless accountant and the victim who has lost his money. This is similar of course to *Donoghue and Stevenson*<sup>265</sup> which had been decided 19 years prior to *Candler*.

The facts of the case are central to Denning's reasoning and therefore need to be set out in some detail

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<sup>264</sup> [1951] 1 All ER 426

<sup>265</sup> 1932 AC 562

In November 1944 Mr Donald Ogilvy formed a company called Trevanance Hydraulic Tin Mines Ltd, the purpose of the company was to work a deposit of surface tin that Ogilvy had found in Cornwall. In June of 1946, Ogilvy instructed a firm of accountants, Crane Christmas and Co to prepare the accounts of the company as he had decided to seek a substantial injection of capital. He also asked them to place an advertisement in the Times and this was done for him in the following words

*“10,000l. Established Tin Mine (low capitalization) in Cornwall seeks further capital. Install additional milling plant. Directorship and active participation open to suitable applicant - Apply”, etc.”*

This appeared in the Times of 8 July 1946. The plaintiff replied shortly thereafter with these words

*“I should be interested to take an active part in a Cornish tin mine and have about 2,000l. to invest. Will you let me have particulars?”*

At this stage the defendants did no more than send on this reply, unopened, to Ogilvy.

A meeting took place in September 1946 between Ogilvy and the plaintiff. Ogilvy showed Candler round the Cornish workings and in return for a £2000 investment he offered a directorship of the company with a service agreement of £10 per week for two years. Candler very sensibly stated that he wished to see the balance sheet for the company first.

It was at this stage that the defendants’ clerk, Mr Fraser became involved. Ogilvy told Fraser that he wanted the accounts preparing as quickly as possible as he wished to show them to a potential investor in the company and he gave Fraser the name of Mr Candler. It is worth noting at this stage that at first instance Fraser was asked whether he assumed at that stage that the accounts that Ogilvy wanted had some relation to his negotiations with Candler. Fraser’s reply was

*“I thought there would be a connection, of course. Yes, I suppose so”*

Fraser began working on the accounts extensively and in evidence he stated that he went round to Ogilvy’s flat 2 or 3 times a day for his explanation of various items. The problem with this seems to be that Fraser had formed the impression that Trevanance was in fact Ogilvy’s business and that he therefore accepted all of Ogilvy’s statements and

explanations without the need for any verification. This would on the face of it seem to be at the very least careless if not actually negligent.

On 17 September 1946, Fraser met Candler at the request of Ogilvy in order to go through the accounts with Candler. Fraser was introduced by Ogilvy to Candler as the representative of Crane Christmas and Co who, Ogilvy stated, were the accountants and auditors of the company. Candler was introduced to Fraser as a person who was considering making an investment in Trevanance. It was established at first instance that Fraser knew that one of the prime considerations for Candler was that he should be satisfied with the balance sheet of the company. The draft accounts were shown to Candler and they included an unsigned certificate which stated

*“We have audited the balance sheet as above set forth. We have obtained all the information and explanations we have required and we report that such balance sheet is in our opinion properly drawn up so as to exhibit a true and correct view of the state of the company’s affairs, according to the best of our information and the explanations given to us and as shown by the books of the company.”*

Fraser assured Candler that the certificate would be signed within a couple of days and was only the subject to one or two small alterations which he wished to consider. At the meeting, Candler took a copy of the accounts which he wanted to place before his own accountant for advice. The judge at first instance made the following important finding of fact

*““Having regard to the fact that Fraser was plainly aware of the purpose for which the draft accounts were required, I entertain no doubt at all that he was aware of and acquiesced in the showing of these accounts to the plaintiff: indeed, the meeting would have been wholly pointless but for that purpose”.*

This clearly is important consideration and was further emphasised by the Judge’s next finding

*“that, when the meeting of the 17th broke up, Fraser must have been satisfied, not only that the plaintiff was considering an investment in the company, but that he was taking with him\_and relying on the draft accounts which he had prepared.”*

The parties met again on 20 September and after going through some small revisions which Fraser had made to the accounts, Candler told Ogilvy that he had received advice

from his own accountant and that he was satisfied and would invest £2000 in the company. Candler sent £500 to Ogilvy that day and paid the balance of £1500 on the 25th September.

The accounts, as seen by Candler on the 20<sup>th</sup> of September, were certified by the defendants on 27th September in precisely the same form as the draft.

The accounts were in fact completely inaccurate and there had been no verification by the defendants of any of the information they had been given by Ogilvy. Examples of this were insertions such as "Freehold cottages £650" when the company did not in fact own the cottages but Ogilvy owned them and had mortgaged them to support his own overdraft. Another example is "leasehold buildings £650" again these properties were not owned by the company but by Ogilvy and in fact the leases were ultimately forfeited. The defendants admitted that they had failed to use proper care and skill in the preparation of the accounts which was in any event self-evident.

The upshot of all this was catastrophic for Mr Candler. He had moved to Cornwall to work at the mine and indeed had invested a further £200 on top of his original investment. His suspicions first became aroused upon discovering that the £2000 he had invested had not been applied for the use of the business but had been withdrawn by Ogilvy for his own private purposes. Candler issued writs against the company and it was wound up 15 December 1947. The company had no assets and Ogilvy himself was bankrupt which resulted in Candler losing his £2000.

This was a significant sum of money at the time and Candler, not surprisingly, was looking to recover. Candler looked to Crane Christmas & Co. to compensate him. His contention was that had he seen accounts that had been properly prepared (it will be remembered that the defendants had admitted their failure in this regard) he would not have invested in the company and therefore of course he would not have lost his money.

Having made the admission that the accounts had been prepared negligently, the only defences which the accountants could raise at trial were that Fraser was not acting in the course of his employment and even if he was acting in the course of his employment, they owed no duty of care to Candler.

Denning gave a dissenting judgement and therefore before turning to that judgement it is perhaps more useful to look at the majority judgements which followed a more orthodox



line. By doing this we will be able to see not only what the current state of the law was considered to be but also to assess whether there was any space between precedent for the exercise of judicial discretion and also to consider why Asquith and Cohen declined to use that space and exercise their discretion.

The leading majority judgement was given by Lord Justice Asquith and it is worth setting out here the proposition upon which he based his disinclination to extend the duty of care to cover negligent misstatement. In starting his judgement he said<sup>266</sup>

*On two points I entirely agree with the judgment delivered by Denning, L.J. I agree that the cause of action based on an alleged breach of duty occurring after the plaintiff became a shareholder cannot be made out if only because the damage relied on preceded the breach. I also agree, for the reasons he has given, that Fraser was clearly acting within the scope of his employment by the defendant firm in showing the draft accounts and giving certain other information to the plaintiff.*

*But I have the misfortune to differ from my brother on the more important point raised in this case. The point may be put in this way: assume that Fraser's negligent misrepresentations had been made by his employers, the partners in the defendant firm. Assume further, as the fact is, that there was no fraud and no contract or fiduciary relationship between them and the plaintiff. Would they, in those events, have been liable to the plaintiff in respect of damage incurred by him through acting on those negligent misrepresentations? The defendants say "No". They do not question that in the absence of fraud, contract and fiduciary relationship there are cases in which A may be under a legal obligation to B to use reasonable care for some purposes. Their proposition is that, under the conditions assumed in this case, the defendants were under no duty, sounding in tort, to the plaintiff to take care that their representations of fact should be true. They rely in support of this contention on *Le Lievre v. Gould*, a decision binding on this court. I agree with the trial judge in considering that authority to be conclusive in their favour, unless it can be shown to have been overruled or to be distinguishable.*

It is clear that Asquith is relying on *LeLievre v Gould*<sup>267</sup> and is applying what he considers to be the binding precedent in this case. He does not see that there was any space within this to exercise his discretion and is not minded to do so.

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<sup>266</sup> Ibid at 185

As this case is central to the whole analysis it is essential that at this stage we look in more detail at the case before continuing. The reason for this is that it sets out the orthodoxy Denning was seeking to develop into his more creative vision for negligent misstatement.

The brief facts of this case are that the plaintiffs, a Miss LeLievre and a Mr Dennes were the mortgagees of properties intended to secure the mortgage advance to Mr Lovering, a builder. Lovering had received the mortgage advances in order to complete the building of certain properties. The mortgage advances, as is usual, were to be made in stages dependent on the building of the properties reaching certain specified goals. The defendant Gould (an architect) was to certify that the properties had reached these certain milestones which would then trigger payment of the mortgage advances.

Gould was given a copy of the schedule setting out the basis on which payment was to be made and the stages which needed to have been reached for the advances to be paid. Gould then issued certificates confirming that the stages had been reached ostensibly in accordance with the schedule, however it was found as a matter of fact that the certificates had been issued negligently and that the architect had not made the proper investigations when signing certificates but had relied on assurances from Lovering which of course later turned out to be false.

The issue at the centre of the case and upon which the case turned, was that there was no contractual relationship between the mortgagees who had lost the money and Gould who was the negligent architect.

In the context of this case there is some justification for the argument that the absence of a contractual nexus is fatal to any claim. The basis on which the money was to be advanced was contained in the mortgage deed between Hunt and Dennes. This was detailed and the specific details of the covenants to advance the money were clearly set out in that deed. The architect, Gould, was not aware of the contents of the deed. The certificates were addressed to Hunt and no evidence was produced to the effect that Gould had any knowledge of the business relationship between Hunt and Dennes. Dennes subsequently transferred the mortgage debt and the security to Miss LeLievre and it was she that brought the subsequent action against Gould. The original claim was couched in terms that Hunt was the agent of Dennes in employing Gould and that Gould did not use due care and skill and diligence in issuing the certificates and was in breach of a duty owed to

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<sup>267</sup> [1893] 1 QB 491]

the mortgagee. This is the essential point of the claim. The defence was a denial of employment by the mortgagee, a denial of any undertaking of any duty towards the mortgagee and an assertion that the certificates were neither fraudulent nor negligent and had been given in good faith.

It can be seen, even at this stage, that this is not in any real sense on all fours with Candler where there was a much closer connection between Crane Christmas and Co and Candler. In the instant case there is not even any evidence that Gould was aware of LeLievre.

The matter came on at first instance and it was held that no duty was owed by Gould to the mortgagee.

When the matter came to the Court of Appeal the leading judgement was given by Lord Esher, the Master of the Rolls at the time. He dealt firstly in short order with the contractual point and concluded that there was no contract between Gould and Dennes. This was fairly self-evident and it did not really occupy much space in the judgement.

Turning to the question of negligence, Lord Esher was in no doubt that Gould had given untrue certificates and that it was negligence on his part so to do. The important question in his view was whether a duty was owed as alleged. He started his treatment of this as follows

*“The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.”<sup>268</sup>*

He then reviewed the decision in Heaven v Pender<sup>269</sup> which was advanced in support of the mortgagees case and concluded that the circumstances of this instant case did not fall within the ambit of that decision, which in his judgement required proximity to either person or property. Clearly that does not apply in this case.

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<sup>268</sup> Ibid at p497

<sup>269</sup> (1882-83)L.R.>11QBD 503

Lord Esher relied on the judgement in *Derry v Peek*<sup>270</sup> which at that time was of course relatively new. The import of this case was to restate the long held common law view that in the absence of a contract an action for negligence can only be maintained where there is fraud. The decision at first instance, before the official referee, had found that although Gould had behaved negligently he had not been guilty of any fraud. The most that he had done was to give untrue certificates negligently and that being the case, no cause of action could arise in the absence of any contract. This decision was unanimous.

This is a strong judgement which, whilst it may be possible to distinguish it on the facts, it is a clear statement of the law which would appear to negate any possibility of liability to third parties for negligent misstatement.

This was the state of the law when *Candler* came before the Court of Appeal. The leading majority judgement was given by Lord Justice Asquith. He approached the case from the standpoint that the *LeLievre v Gould* was binding unless it could be shown to have been overturned<sup>271</sup>. He acknowledged that the plaintiff's case was based on the proposition that *Donoghue and Stevenson* had effectively overruled the previous case. He was clearly not concerned with the facts of the case if the space did exist for him to exercise his discretion.

The premise on which he said he approached *LeLievre v Gould* was on the basis of Lord Esher's judgement that:

*"All that [the defendant] had done was to give untrue certificates negligently, such negligence, in the absence of contract with the plaintiffs, can give no right of action at law or equity"*<sup>272</sup>.

He then proceeded to determine whether this had actually been overruled and apart from acknowledging that the authority was qualified by the decision in *Nocton v Ashburton*<sup>273</sup> only to the extent that the words

*"Or in some circumstances where a fiduciary relationship exists between the defendant and the plaintiff were to be added."*

This would seem to imply that he may be prepared to be creative but the implications of finding that there was a fiduciary relationship between *Candler* and *Crane Christmas & Co.*

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<sup>270</sup> (1889)14 App Cas 337

<sup>271</sup> *Ibid* at p437

<sup>272</sup> Lord Esher at [1893] 1 QB p498

<sup>273</sup> [1914] AC 932

would be far reaching and much more than was required to extend the law of negligent misstatement, it is not surprising, as we shall see, that he declined to take this path. At this point it should be noted that this is not a path which recommended itself to Denning and probably for much the same reasons.

He then turned to Donoghue and to Lord Atkin's formulation of the neighbour principle and concluded that the literal interpretation of Atkin's dicta would be such as to extend the law of negligence to such an extent as to bring negligent misstatement within it

*"This passage, if read literally and without regard to the qualifying effect of its context or of the "subjecta materies"<sup>274</sup>, might be taken to comprehend not only conduct causing physical injury to person or property through setting a certain kind of chattel in motion or in circulation (the case immediately under review); but also conduct of any kind, through any means (including negligent misstatement) causing damnum of any kind recognized by the law, whether physical or not, to anyone who could bring himself within Lord Atkin's definition of a "neighbour"<sup>275</sup>*

He was however not prepared to go anywhere near that far and refused to believe that an application of this broad interpretation could have been intended by Atkin himself. In support of this he referred to the fact that Gould's case was, in 1932, very well-known and Atkin must have considered it, yet he made only a passing comment on it in his judgement and therefore he has this to say on the effect of Donoghue and Stevenson on the instant case

*"The inference seems to me to be that Lord Atkin continued to accept the distinction between liability in tort for careless (but non-fraudulent) misstatements and liability in tort for some other forms of carelessness, and that his formula defining "who is my neighbour" must be read subject to his acceptance of this overriding distinction."<sup>276</sup>*

He then moved on to review the authorities which were being relied on to show that negligent misstatement had been accepted in the past. These were contentions which he rejected.

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<sup>274</sup>i.e. The subject matter in question, in this case ginger beer and a partially decomposed snail.

<sup>275</sup> Ibid at p439

<sup>276</sup> Ibid p 439

As has been previously noted, the facts in Candler are possible to distinguish from those in Gould particularly on the issue of proximity, this did not appeal to Asquith. He did not accept that the present case could be distinguished from Gould on the grounds of proximity, that is to say that proximity existed in this case in contrast to Gould. In Gould it was contended that there was not sufficient proximity as Gould was unaware of the contract between his own client and the mortgagee whereas in this case Fraser was clearly aware of the connection with Candler. Asquith did not accept this as in his view there was sufficient proximity in the Gould case, given that Gould must have known that the certificates would be relied upon by somebody it was not necessary to identify the ultimate recipient thereof. Similarly in Donoghue, there was no suggestion that the manufacturers of the ginger beer had to be aware of the identity of the ultimate consumer. Asquith dismissed the appeal with these words

*"In the present state of our law different rules still seem to apply to the negligent misstatement on the one hand and to the negligent circulation or repair of chattels on the other; and Donoghue's case does not seem to me to have abolished these differences. I am not concerned with defending the existing state of the law or contending that it is strictly logical - it clearly is not. I am merely recording what I think it is.*

*If this relegates me to the company of "timorous souls", I must face that consequence with such fortitude as I can command. I am of opinion that the appeal should be dismissed.<sup>277</sup>*

As we shall see the reference to being one of the company of timorous souls is in response to Denning's comments in his own judgement. Whether this is fair to Asquith will also be visited later. What is clear however is that Asquith had identified a space to operate in that he could have distinguished the case on the facts but he chose not to do so. It is arguable that if he had decided to go down that route it would not have produced the result of embodying negligent misstatement in the law as a general statement but would have given a more restricted reading of the principle which it would have been relatively easy to tie down to its own facts.

The next judgement was given by Lord Justice Cohen; he also relied on Gould which he considered to be binding on the court and directly applicable to the facts of this case.

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<sup>277</sup> Ibid p441

*“The principle of that decision seems to me directly in point in the present case. It is binding on us unless it can be said to be inconsistent with some other decision of this court or of the House of Lords. I am unable to find any such decision. Mr. Lawson asked us to say that it is inconsistent with the principle laid down by Lord Atkin in Donoghue v. Stevenson 215. It is to be observed that in Donoghue v. Stevenson 216 Lord Atkin himself cited with approval some passages from the judgments of Lord Esher, M.R., and A. L. Smith, L.J., in Le Lievre v. Gould, and I am unable to believe that if he had thought the ratio decidendi in that case was wrong he would have cited those passages without making it clear that he was not approving the decision. I think, therefore, that although the relevant passages in Lord Atkin's speech are couched in such general terms that they might possibly cover the case of negligent misstatement, that question was not present to Lord Atkin's mind or intended to be covered by his statement.”<sup>278</sup>*

Again, Lord Reid has identified the gap that is there to be exploited. To be precise it is the interpretation to be placed on Lord Atkin's formulation of the neighbour principle. He has chosen to give it a narrow interpretation and it must be said with some justification as it would have been open to Lord Atkin to have either ignored and failed to mention Gould or indeed to have deprecated it. Against that however, a narrow interpretation does not take into account the fact that in Donoghue, Lord Atkin was attempting to formulate a broad principle and to deconstruct the obiter dicta behind the principle to support a narrow interpretation seems to be a little perverse or at the very least not in the spirit of Donoghue.

Lord Reid has seen the opportunity but has declined to take it. As will be considered later, this would put him together with Asquith in the company of Denning's timorous souls. Whether this is entirely fair or not will be considered after an analysis of Denning's judgement.

If it were not for Denning's judgement in this case, then this would be just another case in a long line of failed appeals attempting to extend the neighbour principle. Denning grabbed the opportunity offered by this case to attempt to extend the ambit of the principle to cover negligent misstatement and it is that judgement which must be considered next.

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<sup>278</sup> Ibid p445

In this judgement, Denning lays out his essential judicial philosophy which we have seen in earlier chapters is to do justice to the case in front of him by his own lights.

It is very clear that where the matter to be decided is not cluttered by previous authority, he would unhesitatingly find in favour of Candler. He's very definite about the essential question in the case which is that the major concern is whether these defendants in this case owed a duty to Candler in all the circumstances.

*He has this to say.*

*“Now I come to the great question in the case: did the accountants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in the company. On the faith of those accounts he did make the investment, whereas if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money. In the circumstances, had he not every right to rely on the accounts being prepared with proper care; and is he not entitled to redress from the accountants on whom he relied? I say that he is,<sup>279</sup>”*

He then recited the words of Lord Justice Knight Bruce in *Slim v Croucher*<sup>280</sup>

*“a country whose Administration of Justice did not afford redress in the case of the present description would not be in a state of civilisation”*

This paragraph and subsequent quotation are a clear indication that Denning is not going to tamely follow what the majority of the court considered to be the then current state of the common law. He is not prepared to be one of the timorous souls that he will refer to later in his judgement. It is this willingness to depart from and to use when appropriate, precedent that has led to what is arguably the most fertile and useful application of the modern law of negligence.

After quoting, in outline, authorities which he considers may support him; he turns to the major obstacle in his path which is of course the decision in *Gould* which has just been considered.

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<sup>279</sup> [1951] 1 All ER 426 at p 430

<sup>280</sup> (1 De G F & J 527)



It is clear from the judgements of Lord's Asquith and Reid that there is some scope for fashioning a legitimate arena and then exercising a degree of creative discretion to drive changes in the law on negligent misstatement. This is what Denning proceeds to do.

Denning first identifies what he considers to be two principal errors in the reasoning behind the decision in *Gould* which he attributed to flaws in 19th-century legal analysis of the case.

As has been seen, the decision in *Gould* is posited on the lack of any contractual nexus between the architect issuing the certificates and the claimant in the case who was the eventual mortgagee.

Denning's view is that this requirement for a contractual relationship had bedevilled legal reasoning in the intervening period. It is inarguable that Bowen LJ did not consider negligent words within the class of things that created a duty to those who were not a party to any contract in question.

Denning considered that *Donoghue v Stevenson* had dealt a mortal blow to that proposition and in his view the essential point he took from that judgement was the presence of a contractual relationship did not necessarily defeat an action in negligence brought by a third party provided always that the circumstances of the case gave rise to such a duty.

Denning here is seeking to make the space that he needs to arrive at the position of being able to develop the law by the entirely justified expedient of distinguishing the cases on the facts.

The interpretation that Denning puts upon *Donoghue* is a very modern reading of *Donoghue* which would be recognised by any 21<sup>st</sup> Century common lawyer and that is to some extent indicative of the influence of this judgement of Denning that is being considered this chapter. It is by no means certain that in 1951 this view of the principle flowing from *Donoghue* would have found much support in the judiciary however the consensus that is required for legitimacy is not a judicial consensus. As has been considered earlier Lord Justice Asquith expressly deprecated the notion that Lord Atkin in the earlier case had intended any such consequences to follow from his speech in that case. He further considered that the other speeches in that case would not support any such reading of the outcome of that case. Lord Justice Cohen pointed to many cases

which had attempted to extend Donoghue as far as negligent misstatement and each of those cases had failed.<sup>281</sup> He quoted at length Mr Justice Wrottesley's emphatic rejection of the broader view espoused by Denning and it is that view which forms the orthodoxy in 1951

The textbook view is given by the second edition of Charlesworth on Negligence, which in 1951 was written by Charlesworth himself. Charlesworth has this to say

*The duty to take care is ultimately based on the possible consequences which will occur if care is not taken. What the consequences may be of any particular act or omission is often a very difficult problem involving enquiry into questions of causation. This enquiry is difficult enough in cases where physical damage is concerned in which the cars, whether it be defective vehicles or machinery lack of care and skill in management, can usually be accurately traced. To regard the issue of the certificate, an opinion, report is carrying the same duty of care as a delivery of a defective chattel will be to introduce a most disturbing factor into the mutual intercourse of society<sup>282</sup>*

Charlesworth then sees this as a policy decision which derives its reasoning both from the inherent difficulty of deciding on the necessary level of skill and care and presumably also because he thinks will introduce an unnecessary legal element to interactions both of the business world and socially.

These are enough to give a demonstration of the orthodox view of the post Donoghue state of the common law on negligent misstatement which was extant in 1951. Denning is prepared to go a long way beyond that view and as it is his view that has prevailed and it is argued now forms basis of the law, his argument in favour now needs to be examined.

Denning posited a second error in that previous legal thinking had ascribed to *Derry v Peek* the authority that no action can lie for a negligent misstatement even though it is intended to be acted upon, and is acted upon causing the plaintiff loss. Of the effect of this error Denning says this

*"This error led the Court of Appeal in *Low v Boucher* to deny the correctness of *Slim v Croucher* and in *Le Lievre v Gould* to deny the correctness of *Cann v Wilson*. The*

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<sup>281</sup> Ibid Cohen LJ at p 443

<sup>282</sup> On Negligence - Charlesworth 2<sup>nd</sup> ed at p16

*cases thus denied were so plainly just that the very denial of them was itself an error.”*

He then says that the error was exposed by *Nocton v Ashburton*<sup>283</sup> which in Denning's opinion decided that an action did lie for negligent misstatement when circumstances disclosed a duty to be careful. He then makes the bold sweeping statement that

*“In my opinion, these decisions of the House of Lords in Donaghue v Stevenson and Nocton v Ashburton are sufficient to entitle this court to examine afresh the law as to negligent statements.”*<sup>284</sup>

This then is Denning creating that space that he needs. He has done so by deploying existing precedent but not relying on them. He is not saying that he is bound by these precedents but merely that these precedents indicate that there was a sufficient body of judicial opinion in favour of the proposition that negligent misstatement is a cause of action to enable him to re-examine it, in effect that he is following a consensus.

Is this in any sense legitimate? Is this an interstitial space between the operation of the law or is it merely Denning choosing to ignore a precedent that he doesn't want to follow. That very much depends. Denning's fellow judges in the case are clearly of the opinion that the law is settled and that there is no space to exercise judicial discretion. Denning on the other hand has constructed a robust argument that there is such a space and that the law does not mean what it has been taken to mean for some time and that the cases cited are not authority to say that no action can lie for negligent misstatement.

Whether this is legitimate or not depends very much on the cases Denning himself deploys in support of his creation of the space. In which case therefore, before moving on to his re-examination of the law, it is worth considering whether the judgement in *Nocton* can stand the weight that Denning places upon it.

The claim in *Nocton* concerns advice given by a Solicitor to his client in respect of a substantial mortgage transaction which eventually resulted in the mortgaged property being insufficient security for the sum advanced with the consequence that the claimant was some £65,000 out-of-pocket, a significant sum in 1914..

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<sup>283</sup> [1914] AC 932

<sup>284</sup> *ibid* at 432

The claim in contract had become statute barred and therefore could not be sustained. The alternative claim was one of fraud and the House of Lords, relying on *Derry v Peek* stated that for such a claim to succeed then actual fraud must be proven. In this case it was taken not to be so and that dealt comprehensively with the claims at common law. The case turned on the House of Lords interpretation of the duty of a fiduciary in equity. The leading speech was given by the Lord Chancellor, Lord Herschell. He delved into the history of Chancery jurisdiction and resurrected the notion of constructive fraud which he defined as

*“The Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of dolus malus. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court,”*<sup>285</sup>

he expands on this by saying

*“it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.”*<sup>286</sup>

Denning of course had a background in equity and would have recognized the concept of a court of conscience and indeed it could be argued in many ways he considered himself such a tribunal.

Having said that though, however else this can be characterised it is a long way from Denning’s assertion that this case established that an action can lie for negligent

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<sup>285</sup> *ibid* at p 952

<sup>286</sup> *ibid* at p 953

misstatement where the circumstances dictate such a course. It is quite clear that the House of Lords in this case are dealing with the question exclusively within the realm of equity.

Where this case does lend some support to Denning is that it quite clearly enunciates the requirement for a special relationship and does not preclude finding that negligent misstatement could attract relief. Lord Herschel says this at the conclusion of his speech

*“As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would none the less, if proved, have afforded ground for an action for mere negligence.”<sup>287</sup>*

It is striking that throughout the various speeches, their Lordships never once state the proposition that an action cannot accrue to a person outside of the contractual relationship for the negligent statement. This would seem to leave the door open to further interpretation.

It is of course Denning's position that *Derry v Peek* has received a much more rigid interpretation than it warranted; he does not however expand on the *Nocton* jurisprudence and leans more heavily on more recent strands of thought.

He deals with the defendant's three propositions, namely that this was a novel action in that, apart from cases of either a contractual or fiduciary relationship, no action for negligent misstatement had ever been successful, a duty to take care only arises where a breach will cause physical damage to either persons or property. Finally that the correct interpretation in this case was that the duty was only owed as a contractual duty and therefore no duty could lie to a person outside the contractual relationship.

In respect of the first proposition Denning comments that this argument has been put forward in many cases that resulted in progress in the law and that it has nearly always been rejected. He called on the now famous dicta of Lord Macmillan in *Donoghue* when he said

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<sup>287</sup> *ibid* at p 957

*“The criterion of judgement must adjust and adapt itself to changing circumstances of life; the categories of negligence are never closed”<sup>288</sup>*

it is also at this point that he makes the comment about timorous souls

*“On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required.”<sup>289</sup>*

It is clear which side of the line Denning considers himself to fall and indeed this is a central plank of his judicial philosophy. He would always maintain that he was always prepared to drive the law along new paths if necessary to do justice in any particular instance.

He deals with the second proposition regarding physical damage being necessary for an action for breach of duty to succeed by simply stating that once duty exists, liability cannot depend on the nature of the damage; it is of course this very point which drives the majority in this case depending as it does on the judgement in Gould. This is an interesting proposition as of course the position of the majority is that liability does not exist. Denning does not at this stage deal with that point.

The third point regarded a contractual duty, he simply considers it to be dealt with and dismissed by Donoghue. He does not expand on this but he is of course right if all his other reasoning is right and a duty is found then the contractual nexus point will simply fall away.

Turning next to the creative part of his judgement. This is the construct upon which later judgements have built the law of negligent misstatement and as such is an essential and substantial part of the modern law of negligence. There is no question here but that Denning is creating new law, the question that does remain is how?

Denning starts by outlining the persons on whom he considers that the duty should lie. These are people whose profession and occupation is to examine books etc and prepare reports. He draws a distinction between professional men such as accountants and surveyors and others who are not expected to bring any professional knowledge or skill into the preparation of the certificates, reports or statements. He relies on established

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<sup>288</sup> [1932] AC 562 at p 619

<sup>289</sup> *ibid* at 432

common law principles that every man professing to hold a particular skill is expected to exercise that skill properly. He introduces a particular Denning touch at this point by referring to ancient authority and quotes Fitz-Herbert

*“If a smith prick my horse with a nail I shall have my action on the case against him, without any warranty by the smith to do it well for it is the duty of every artificer to exercise his art rightly and truly as he ought”<sup>290</sup>*

This of course is Denning as the creative positivist lawyer submitting that all he's doing is finding out and restating the ancient law in other words going back to a natural law tradition, in some ways that sits somewhat uneasily with his self-identification as a bold spirit who is driving the law in new directions but of course as has already been discussed this is the essential dichotomy at the heart of Denning's judicial life. It is this essential conservative feeling that he gets from his upbringing, his devout Anglicanism and other factors we have identified that drives the desire to for a connection to the past but his desire to do justice drives the need to move the law along new paths when he identifies the requirement.

Having identified who owes the duty, in his opinion. He then considers to whom that duty may be owed. This he says is firstly to the client or employer and then any third person that they show the accounts or other reports to and as, in this case, he is dealing with accountants he then crucially goes on to include any person to whom they know their employer is going to show the accounts with a view to inducing to invest money or otherwise rely on them, thus squarely catching Crane Christmas in the particular facts of this case.

At this point however it would seem that the decision in Gould would preclude such a finding, requiring as it does a contractual nexus. Denning deals with that by pointing out that it is a feature of that case that the mortgagee did not have to rely on the certificates produced but had the opportunity to have their own surveyor inspect the work. This, Denning says, is in contraindication of the position in Donoghue itself where there was no opportunity of intermediate inspection of the ginger beer bottle between factory and ultimate consumer. Therefore Denning's conclusion is that such a relationship is too remote to give rise to a duty of care and it therefore falls that Gould is correctly decided. Is this pure sophistry on Denning's part, a statement of the law or a subtle (or not so subtle)

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<sup>290</sup> *ibid* at p 434 quoting *New Natura Brevium* (1534) Fitz Herbert at 94D

attempt to avoid the precedent? The answer is that Denning is making what he believes to be a true statement of the law. An essential part of Atkins reasoning in Donoghue was that there was no possibility of intermediate inspection between the manufacturer and the end consumer Denning has the used this to distinguish Gould from Candler and create the space he needs.

Having said this then to whom does Denning consider that the duty is owed and how is that nexus arrived at?

To resolve this point he then turned to consider proximity. As is usual he seeks older authority to support his proposition that proximity is satisfied provided the accountants know that the accounts were to be submitted to a third party and used by that third party<sup>291</sup>. He relies also on *Cann v Wilson*<sup>292</sup> which is directly on the point, that case had been overturned by *Gould* but Denning finds a way around this by relying on the fact that the underlying case, *George v Skivington*<sup>293</sup>, which was at the time of *Gould* considered to be wrongly decided, was reinstated in *Donoghue v Stevenson*<sup>294</sup> therefore Denning considers *Cann v Wilson* to also be reinstated which provides good authority for his proposition that the accountants owe a duty of care in this case to Candler.

He restricts the ambit of this duty, however, to those transactions which flow directly from the reliance of the third party on the accounts. He concludes that in the instant case that means that the defendants are liable for the original £2000 invested but not for the £200 invested by Candler after he had been with the company for two months. He makes this distinction on the basis that by that stage Candler had had the opportunity to investigate the company and could make his decision based on his own observations of the company rather than relying on Crane Christmas accounts. That is of course entirely consistent with his earlier point that *Atkins* judgement turns on the impossibility of intermediate examination. He is saying that between the first investment and the later injection of funds an inspection was possible and Candler must bear the responsibility for his own decision here.

What Denning fails to explore at this point though is whether this goes to the reliance point. If after two months Candler, having seen the company and presumably in Denning's

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<sup>291</sup> *Langridge and Levy* (1837) 2 M & W 519, ^ LJEx 137

<sup>292</sup> (1888) 39 CHD 39, 57 LJCh 594

<sup>293</sup> (1869) LR 5 Exch 1, 39 LJEx \*

<sup>294</sup> at [1932] AC 562 at p584



view having gained some insight into its parlous state, then made the decision that he was going to invest a further £200 then it is at least arguable that he was not relying on the accounts prepared by Crane Christmas when he made his original investment of £2000. The counter argument must be put and that is that when he put the £200 in, he did know the true state of the company's finances but he put in the extra money in a desperate attempt to keep the company afloat and rescue his original investment this would have been as a direct result of the original negligent misstatement. The point is impossible to determine now and in any event it would not affect the central thrust of Denning's judgement on the duty of care as it would really only go to causation. Denning would not of course want to cloud the issue by introducing extra considerations and it is likely that he leaves this behind so he can continue with his agenda in the case.

Denning concludes his judgement by setting out the underlying philosophy behind his decision in which he says that the law should hold accountants and auditors liable to third parties in the particular circumstances he has set out because, without this, particularly in cases where a company or firm is controlled by one man, there is no motive for accountants to verify the information given to them by that one man who runs the company. That was of course the case here where the accountants took the word of Ogilvy at face value and his word turned out to be worthless.

Denning states categorically that:

*"In my opinion, accountants owe a duty of care not only to their clients, but also to all those with a reliance on the accounts in the transactions for which those accounts are prepared."*<sup>295</sup>

This is a strong statement in a minority judgement and it should be remembered that the decision of the majority of the court was to follow Gould and stated that in the absence of any contractual nexus and absent actual fraud, no liability would lie with the accountants and thereby ignored the opportunity to extend the law on negligent misstatement. Denning of course was aware of this and that is why he has drafted his judgement to lay out a very clear path to enable a later court to follow him and develop the law on the tort of negligent misstatement.

He did this by clearing away some of the clutter of accumulated precedent which was perceived by some to be blocking the way to this end. By giving a broader interpretation to

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<sup>295</sup> *ibid* at 436

Lord Atkin than his judicial brethren were inclined to give, and by distinguishing the main precedent of *Gould* on the grounds that there was the availability of intermediate inspection he was then able to exercise his discretion so that it was possible for liability to be incurred for negligent misstatement. To further develop the law it would need another court to utilise this line of reasoning and develop it into a majority judgement which would establish the precedent.

That opportunity arose some 10 years later in the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>296</sup>. The facts of *Hedley Byrne* are too well known to require setting out in detail here. In brief, the plaintiff's, who were an advertising agency agreed to place substantial advertising for a company by the name of *Easipower Ltd*. The terms of the contract were that they, the plaintiff's, were to be personally liable for the cost of all these orders. Not being acquainted with the company they asked their own bankers to enquire into the financial standing of that company and accordingly their bankers made request of the company's bankers, the defendants in this case. The defendant's reply to the bankers was favourable and *Hedley Byrne's* bankers passed the references on to them. In fact, at the date of the references, the company had serious financial problems and the bankers were aware of that, shortly after the references were given, the company went into liquidation and the plaintiffs lost the greater part of the money they had expended.

It is worth pausing at this point to note that on the face of it this was not the most promising case to bring before the court to try and change the law on negligent misstatement. The actual reference had been given in a telephone conversation between two bankers and the contents of the conversation were uncontroversial and had been expressed to be in confidence and without responsibility on the part of *Heller*. It is this latter consideration that makes it surprising that this case was pursued as far as the House of Lords. At this distance it is difficult to understand the motives behind the desire to take the case as far as this and the only conclusion can be the amount of money involved (some £8000) was enough to persuade the plaintiffs to expend what must have been considerable sums in pursuing the case to the highest court.

In addition of course the plaintiffs must have been reasonably confident of success in the High Court and that can only be because they were aware of the minority judgement of *Denning* in *Candler* and could see this being a strong point in their favour in establishing liability for negligent misstatement. This was further encouragement to bring the case.

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<sup>296</sup> [1962] 1 Q.B. 396 in the Court of Appeal

The Court of Appeal dealt with the case in fairly conventional terms and considered themselves bound by the decision in *Candler* and did not examine Denning's minority judgement at all and decided the case on the basis that in the absence of a contractual, fiduciary or other special relationship there could be no duty of care in the making of statements in the absence of fraud.

As was anticipated probably by all parties the matter in due course arrived at the House of Lords<sup>297</sup>

The decision itself turns on the very narrow point that the disclaimer contained in the telephone assertion was enough to exclude the defendants from liability on the facts of this case. As this was very different reasoning to the Court of Appeal who had relied on the line of authority culminating in the majority judgement in *Candler* which required certain species of relationship, i.e. a contractual nexus to found liability, the House of Lords examined the authorities and expressly disapproved both *Candler* and *Gould* and approved of Denning's minority judgement in the former case.

The leading opinion was that of Lord Reid. He does not refer much to Denning's judgement but it is quite clear throughout that he is following a strong line of reasoning set out by Denning in his judgement.

The reasoning starts from the premise that the then present state of the law required more than a mere negligent misstatement to give rise to liability and then moved on to examine the authorities to determine what more is required to fix liability.

Denning of course had set out in detail early in his appraisal that it was an overreliance on a strict interpretation of the judgement in *Derry v Peek* that had led to the rigid rule that in the absence of fraud a contract was required to make a representee liable for negligent misstatement. Lord Reid is quite clear that in his view *Derry* did not establish the rule often ascribed to it which led him to denigrate the statements to that effect in the cases on the point between 1889 and 1914. This of course includes *Gould*. Following the reasoning through Lord Reid arrived at the conclusion that *Candler* had been wrongly decided. It was at this point that he touched on Denning's judgement and noted that Denning had distinguished *Gould* on the facts.

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<sup>297</sup> [1963] 2 All ER 575

He then turned to Gould itself and referred to the rule which was stated in that case and has been restated in this chapter many times, that in the absence of a contract, fraud is necessary to maintain an action for negligence. However as later judgements of the House had to some extent removed the artificial limitations that had been put in place by Gould, Lord Reid had no hesitation in declaring that Gould was wrong and that the decision in *Cann v Wilson* ought not to have been overruled. This of course was the decision which Denning reached by a much more direct route.

In his judgement, Lord Hodson dealt with Denning's judgement in *Candler* in more detail and had this to say about it

*"So far I have done no more than summarise the argument addressed to the Court of Appeal in Candler's case to which affect was given in the dissenting judgement of Denning LJ with which I respectfully agree insofar as it dealt with the facts of the case. I am, therefore, of opinion that his judgement is to be preferred to that of the majority."*<sup>298</sup>

The next judgement was that of Lord Devlin and to begin with he reviewed the authorities in much the same way as Lord Reid had done and came to the conclusion that Gould had been wrongly decided. Devlin decided that it was necessary for there to have either been an undertaking or voluntary assumption of responsibility, which was of course what Denning had argued in the Court of Appeal. On the question of what would constitute an undertaking to voluntarily assume responsibility Devlin had this to say

*"But insofar as your lordships describe the circumstances in which an implication will ordinarily be drawn, I'm prepared to adopt any one of your lordships statements showing the general rule; and I pay the same respect to the statement by Denning LJ in his dissenting judgement in Candler v Crane Christmas and Co .... about the circumstances in which he says a duty to use care in making a statement exists"*<sup>299</sup>

Denning's point of course was that the defendant would know that his work would be shown to the plaintiff and the plaintiff would rely on that work.

The established and accepted ratio of *Hedley Byrne* is of course that liability can lie for negligent misstatement just as much as for negligent acts and it is arguable that in large part this is due to Denning's dissenting judgement in *Candler*. Given that it is *Hedley Byrne*

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<sup>298</sup> *ibid* p 598

<sup>299</sup> *ibid* at p 612

which is the generally accepted basis of the doctrine and that at least on the face of it, the House of Lords in *Hedley Byrne* made no more than passing reference to Denning it is necessary to look beyond the words of the judgement itself to support this.

Denning himself was in no doubt as to the impact of his dissenting judgement he wrote about it at length in *The Discipline of Law*<sup>300</sup>. He starts by a full chapter (albeit a small one) on the subject which does admittedly consist mainly of verbatim quotes from his own judgement.<sup>301</sup> At the beginning of the next chapter will does say that

*14 years later my dissent in Candler v Crane Christmas was approved by the House of Lords*<sup>302</sup>

He is even more certain of his ground when dealing with impact of *Hedley Byrne* when he says

*The House of Lords, in a series of obiter dicta, considered the decision in Candler. I was gratified to find that they approved of my dissent and give reasoning on the same lines.*<sup>303</sup>

He is very clear that in his opinion this dissenting judgement altered the law

*“let me recall a few which pointed to the way ahead, and have led to decisions by the Lords which might never have taken place except for my dissenting from previous precedents; such as Candler v Crane Christmas about negligent statements....”*<sup>304</sup>

Denning was also prepared to ascribe this level of importance to his judgement in open court and referred to it many times in later cases. As an example in *Ministry of Housing v Sharp* he had this to say

*“The case comes foursquare within the principles which are stated in Candler v Crane Christmas and Co and which were approved by the House of Lords in Headley Byrne Ltd v Heller and Partners Ltd”*<sup>305</sup>

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<sup>300</sup> *The Discipline of Law* Denning Butterworths London 1979

<sup>301</sup> *ibid* p 229 et seq

<sup>302</sup> *ibid* at p 237

<sup>303</sup> *ibid* 245

<sup>304</sup> *ibid* 287

<sup>305</sup> [1970] 2 QB 223

On the face of it does seem that Denning may well be overestimating his contribution to this development especially given the fact that on a reading of the House of Lords various judgements in Hedley Byrne it does give the impression that their Lordships had arrived at the decision independently of Denning and really only gave a passing nod to his dissenting judgement.

This however is to ignore the effect that the judgement in Candler had on those contemplating bringing actions for negligent misstatement. If, Candler had been taken to have settled the point that no action can lie for negligent misstatement then no competent lawyer could have advised his client to bring such an action. Ironically if he had given advice to bring the action then such advice could have been deemed to be negligent and as there would have been a contractual relationship between lawyer and the client which even under the law as it then stood an action for negligence could have been brought against the lawyer, an irony Denning would surely have appreciated.

Looking for the influence that Denning wielded in this area of the law at this time, it is instructive to look at the arguments advanced by counsel in putting forward the proposition that liability should lie for negligent misstatement. Counsel for Hedley Byrne largely adopted Denning's position in Candler and Crane Christmas although at least in the Court of Appeal they were of course bound by the earlier decision and had to seek to distinguish it.

The position adopted was Denning's in that the majority stated the law too narrowly and that the law since Donoghue and Stevenson had developed beyond that stated in Gould's case. The question of negligent misstatement had not been canvassed or decided in Donoghue and in counsels view was still open for discussion. In argument counsel specifically referred to Denning's judgement and had this to say

*“There is logically no reason why there should be a distinction between liability for financial loss and liability for physical injury. The results in either case can be catastrophic. A banker in answering enquiries about the credit of a customer is in the same relationship of proximity as a surgeon about to operate on the patient. Each assumes responsibility likely to have important effects on another person who falls within Lord Atkin's definition of neighbour. Like a surgeon, a banker operates on a set of facts. He is a professional man holding himself out as giving a skilled*

*service to the public, and he is within the class of persons enumerating by Denning L.J. in Candler's case, for his is a particular art and he issues skilled reports.*"<sup>306</sup>

This is Denning's point of course which he makes by reference to the law going back to 1534 Denning says

*"It is, I think also applicable to professional accountants, they are not liable, of course, for a casual remarks made in the course of conversation, nor for all the statements made outside their work, or not made in their capacity as accountants: but they are, in my opinion, in proper cases, apart from any contract in the matter under a duty to use reasonable care in the preparation of their accounts and in the making of their reports."*<sup>307</sup>

Denning had the opportunity to clarify and refine his views in the case of Ministry of Local Government and Housing v Sharp and another<sup>308</sup>. This was a case in which the clerk for a local authority had been negligent in his keeping of the local land charges register and the question arose whether he owed a duty to incumbrancers and purchasers of the property for such negligence this was Denning's view

*"I have no doubt that the clerk is liable. He was under a duty at common law to use due care. That was a duty which he owed to any person - incumbrancer or purchaser - whom he knew, or ought to have known, might be injured if he made a mistake. The case comes four square within the principles which are stated in Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164, 179-185, and which were approved by the House of Lords in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465.*

*Mr. Hunter submitted to us, however, that the correct principle did not go to that length. He said that a duty to use due care (where there was no contract) only arose when there was a voluntary assumption of responsibility. I do not agree. He relied particularly on the words of Lord Reid in Hedley Byrne's case [1964] A.C. 465, 487, and of Lord Devlin at p. 529. I think they used those words because of the special circumstances of that case (where the bank disclaimed responsibility). But they did not in any way mean to limit the general principle.*

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<sup>306</sup> [1962] 1. Q.B. 396 at p 400

<sup>307</sup> [1951] All E.R. 426 at 434

<sup>308</sup> [1970] 2 Q.B. 223

*In my opinion the duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the faith of the statement being accurate. That is enough to bring the duty into being. It is owed, of course, to the person to whom the certificate is issued and whom he knows is going to act on it, see the judgment of Cardozo J. in Glanzer v. Shepard (1922) 233 N.Y. 236. But it also is owed to any person whom he knows, or ought to know, will be injuriously affected by a mistake, such as the incumbrancer here.<sup>309</sup>*

Here Denning is expressly rejecting the position that a voluntary assumption of liability is necessary and quite clearly considers that foreseeability is the test. It is this refinement of Denning's Candler judgement that has come forward.

Hedley Byrne lead to a positive avalanche of cases seeking to extend the ambit of the duty of care which reached its apogee in Anns v Merton London Borough Council<sup>310</sup> in which, effectively, liability was automatic unless there were policy reasons to exempt particular circumstances.

The retreat from the high water mark of Anns began with Yianni v Edwin Evans and sons Ltd<sup>311</sup> and in this case the judge at first instance (the case was not appealed) quoted large sections of Denning's judgement in Candler and noted that this had been approved in Hedley Byrne and considered that this was enough to fix liability for a negligent surveyor. It was Denning's requirements for some undertaking or assumption of responsibility rather than the blanket liability of Anns that formed the basis of the judgement in this case.

The issue of liability of surveyors and valuers reached the House of Lords in the case of Smith and others v Eric S Bush and others<sup>312</sup> which effectively overturned the decision in Anns. In the leading speech in this case, Lord Templeman quoted Denning's formulation for liability or negligent misstatement which is contained in pages 176 to 179 of his judgement.

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<sup>309</sup> [1970] 2 Q.B. 223 Page 269

<sup>310</sup> [1978] A.C. 728

<sup>311</sup> [1982] Q.B. 438

<sup>312</sup> [1989] 1 A.C. 831



*Denning L.J., at pp. 178-179 rejected the argument that:*

*"a duty to take care only arose where the result of a failure to take care will cause physical damage to persons or property. ... I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care; but, if once the duty exists, I cannot think that liability depends on the nature of the damage."*

*"The duty of professional men "is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports," p. 179. The duty of an accountant is owed:*

*"to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer, without their knowledge may choose to show their accounts ... The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?": pp. 180-181.*

*Subject to the effect of any disclaimer of liability, these considerations appear to apply to the valuers in the present appeals."<sup>313</sup>*

The current position of the law on negligent misstatement and indeed on negligence in general can quite reasonably be said to be represented by the House of Lords decision in *Caparo Industries plc v Dickman and others*.<sup>314</sup>

Denning's position on the matter was expressly approved. In his speech Lord Bridge made express referral to Denning's dicta in *Candler*

*"In advising the client who employs him the professional man owes a duty to exercise that standard of skill and care appropriate to his professional status and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty. But the possibility of any duty of care being owed to third parties with whom the professional man was in no contractual relationship*

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<sup>313</sup> *Ibid* at 845

<sup>314</sup> [1990] 2 A.C. 605

*was for long denied because of the wrong turning taken by the law in Le Lievre v. Gould [1893] 1 Q.B. 491 in overruling Cann v. Willson (1888) 39 Ch.D. 39. In Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164, Denning L.J., in his dissenting judgment, made a valiant attempt to correct the error”<sup>315</sup>*

Lord Harwich went on to set out that there are circumstances in which the defendant is fully aware of the purposes for which the plaintiff requires the information and that he will rely on the information in carrying out any transaction that is in contemplation. To support his analysis he quotes Denning’s judgement extensively and inserts approximately the four pages of Denning’s judgement in Candler within his own judgement (pages 180 to 184 of Candler)<sup>316</sup>

Having quoted extensively he then says

*“It seems to me that this masterly analysis, if I may say so with respect, requires little, if any, amplification or modification in the light of later authority and is particularly apt to point the way to the right conclusion in the present appeal.”<sup>317</sup>*

In the other substantial speech, Lord Oliver distilled Denning’s dissenting judgement into a three stage test.

*“Denning L.J. suggested three conditions for the creation of a duty of care in tort in such cases. First, the advice must be given by one whose profession it is to give advice upon which others rely in the ordinary course of business, such as accountants, surveyors, valuers and the like: p. 179. Secondly, it must be known to the adviser that the advice would be communicated to the plaintiff in order to induce him to adopt a particular course of action: p. 180. Thirdly, the advice must be relied upon for the purpose of the particular transaction for which it was known to the advisers that the advice was required.”<sup>318</sup>*

Both of the other judgements in Caparo referred to the dissenting judgement of Denning in terms that clearly indicated that they considered that Hedley Byrne had approved Denning’s judgement in Candler and that it was taken to be settled law.

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<sup>315</sup> Ibid at 619

<sup>316</sup> Ibid at 622

<sup>317</sup> Ibid at 623

<sup>318</sup> Ibid at 637

The judges in *Caparo*, took Denning's dissenting judgement, and used it as the basis of their test for proximity which of course is the first of the three requirements of the three stage test in *Caparo* the other two being that the damage that ensued was reasonably foreseeable and that in all the circumstances it is fair just and reasonable to impose liability on a particular defendant.

It could perhaps be said that the House of Lords managed to reach this point within 40 years of Denning.

Denning did not write anything substantial after retiring from the Court of Appeal except *The Closing Chapter*<sup>319</sup> which he finished in September 1983. He was of course still alive and very active in 1990 and must have been aware of the decision in *Caparo* but there is no evidence that he ever considered writing about it.

His first biographer (apart of course from himself) merely says that

*"The dissenting Judgement in Candler v Crane Christmas and Co widened the scope of negligence and was the start of a new era"*<sup>320</sup>

This is true but more than a little understated and as this is an authorised biography would presumably largely accord with Denning's view.

His later (also authorised biography) describes the judgement as one of the great dissenting judgements of the common law<sup>321</sup>

A.L. Goodhart wrote in the Law Quarterly Review of April 1951

*"There can be little doubt that Candler v Crane Christmas will give rise to more debate than any other case in recent years"*<sup>322</sup>

Warren A. Seavey said

*"It is the brilliant dissent by Denning LJ that makes the case memorable"*<sup>323</sup>

Not all comment was as supportive and it is asserted that Denning at this stage was engaged in an exercise of judicial lawmaking which did not do not attract the unreserved

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<sup>319</sup> *The Closing Chapter* A T Denning Oxford University Press 1983.

<sup>320</sup> Lord Denning, *A Biography* Edmund Heward George Weidenfield & Nicholson London 1990

<sup>321</sup> Lord Denning, *A Life* Iris Freeman Arrow Books London 1994 at 210

<sup>322</sup> LQR 1 (Apr) 1951

<sup>323</sup> HLR 11 1951

approbation of the judicial hierarchy. Lord Jowett the then Lord Chancellor was asked what House of Lords would do if there was an appeal to the House of Lords in Candler.

*We should regard it as our duty to expound what we believe the law to be and we should loyally follow the decisions of the House of Lords if we found there was some decision which we thought was in point. It is not really a question of being a bold or a timorous soul; it is a much simpler question than that. You know there was a time when the earth was void and without form, but after these hundreds of years the law of England, the common law, has at any rate got some measure of form to it. We are really no longer in the position of Lord Mansfield who used to consider a problem and expound it ex aequa et bona what the law ought to be... I do most humbly suggest to some of the speakers today that the problem is not to consider what social and political conditions do today require; that is to confuse the task of the lawyer with the task of the legislator. It is quite possible that the law has produced a result which does not accord with the requirements of today. If so, put it right by legislation, but do not expect every lawyer, in addition to all his other problems, to act as Lord Mansfield did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is<sup>324</sup>*

This is very much the voice of orthodoxy and no doubt Denning would have politely dismissed Lord Jowett as a timorous soul. This division of the judiciary is of course in line with Denning's own judicial philosophy but in this case there is merit in what Jowett has said and indeed it may even be said that this is an occasion on which Lord Simon's rebuke that Denning was undertaking a "naked usurpation of the legislative function." Was to some extent justified although in this case it would be perhaps more of a compliment.

What did Denning actually do in this judgement?

The first was to create the space around established precedent and what it was commonly the law would be. He does this by closely examining the history of the cases that have led to the law being in its present state. In particular the reasoning that led to the major binding precedent that of Gould. Having arrived at this he then analyses that judgement closely to find a way to distinguish that from the facts in Candler and finds that in the impossibility of intermediate examination, in effect the reliance point.

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<sup>324</sup> Quoted in Zander the Law Making Process 4<sup>th</sup> Ed 1994

To give support to his contention that there is a clear philosophy behind liability for negligent misstatement he takes on board Lord Atkin's judgement in *Donoghue* and then subjects that to analysis in such a way as to arrive at the conclusion that liability for negligent misstatement can lie and then further that the reasoning for it is the impossibility of intermediate examination. He then follows that through to consider the categories of negligence misstatement and arrives essentially at professional men giving professional advice in circumstances in which they know it will be relied upon. Thereby creating liability for *Crane Christmas and Co.*

Is this legitimate? The answer must be yes, there is an interstitial space within the law on negligent misstatement and that space is to be found by analysis of earlier judgements that lead to the conclusion that the law is not as settled and sure as may have been thought. Having created the space he then exercises his discretion by close reference to earlier judgements and very much in line with an increasing consensus to expand the law of negligence.

In examining this judgement, can it be said that Denning is simply considering what he thinks the law ought to be or as suggested by Jowett is he taking into account social and political conditions extant at the time of the judgement. Denning may well say that in this case he is doing neither of these; he is merely expounding what the law actually is. That is not the case. There is little question that Denning is being judicially creative but he is by no means being capricious and there is intellectual rigour and a clear logic to the path that he carves out to his ultimate conclusion. This was one of the earliest opportunities for him to follow the philosophy he had set out. Thus we can conclude in addition that he was following a consensus amongst lawyers given that at the first opportunity in a case that reached the House of Lords, his reasoning was followed and his conclusions adopted and now in the large part form the bedrock of the modern law of negligent misstatement if not negligence itself.

There can be little doubt that this one carefully constructed and well-aimed dissenting judgement is Denning's enduring and perhaps greatest legacy to the law of Tort.

## Chapter 7

### Conclusion

#### Coda and Finis

In the introduction the thesis to be explored is set out and is repeated here for clarification and ease of reference.

#### Thesis

It is generally accepted that judges are entitled to exercise discretion where existing law does not provide an appropriate answer for the case currently in front of them, because the case is in that interstitial space between established precedent and/or statute law. Lord Denning, on many occasions during his judicial career, exercised this discretion. There are several questions to be answered. In the first case was he operating within the interstitial spaces that are recognised as a legitimate arena for judicial discretion or did he extend this beyond what is legitimate. Secondly if he did so extend, how far was this and his subsequent exercise of his discretion coloured by and influenced by those events in his early life and education which contributed to his overall philosophy. Thirdly, did the overall exercise of his discretion, taking into account all these factors, fall within any recognisable school of jurisprudential thought; in particular was Denning, as a judicial activist also a legal positivist. The final question is whether the answers to all of the above result in Denning's legacy in the law being positive or overall was he a negative influence.<sup>325</sup>

#### Conclusion

In summary therefore, the threads need to be drawn together and the questions answered.

- What did Denning do?
- How did he do it?
- Why did he do it?
- Was it legitimate in terms of any accepted jurisprudential theory?
- What was the overall effect of what he did?

It must be accepted that within the confines of this exercise it may not be possible to answer all of these questions with the necessary degree of precision and in particular the last question can only be answered within the context of this study.

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<sup>325</sup> See chapter 1

## Creating the Space

The space in question here is that interstitial space between established laws, whether precedent or statute and the facts of the case in front of the judge at the time in question.

As has been explored earlier, interstitial space is a the more appropriate term here than the legal lacuna. This refers to a gap in the law (cf the non liquat jurisdiction in international law) somewhat bigger than would necessarily be required for any legitimate exercise of discretion. Interstices are more often taken to be narrow gaps and it is these that Denning exploits. If we restrict the legitimate arena only to what the law would regard as a lacuna then it would delegitimise most if not all of the space that Denning creates in these cases and many others and indeed would probably result in most judges being unable to exercise discretion. This is because it is not only the obvious gaps that are utilised, in fact Denning in these cases identifies and utilises gaps that at first glance may well not appear to exist. The use of the word seems to stem from Oliver Wendell Holmes in 1917<sup>326</sup> in an American Supreme Court judgement in which he was referring to precisely these small, almost indiscernible gaps in the law.

It is in creating this space that Denning is at his most active and has in general provided the most material for analysis. Where he was most careful with the creation of the space as in Candler<sup>327</sup>, in which he took care to deal properly with existing precedent and refer this to the facts of the instant case. Then the eventual result is more coherent and resists hostile critical analysis. Where he was less careful such as in Ward<sup>328</sup> where he was somewhat cavalier in his treatment of the law and indeed the requirements of natural justice, his judgement then is more open to question.

This demonstrates the need to carefully examine the legitimacy of this creation of the space as it is this which eventually determines the legitimacy of the final decision.

## Legitimacy

The concept of legitimacy is vital as it is only those decisions which are legitimate which can constitute valid law which will then be followed by subsequent judges. The concept of legitimacy is inextricably bound in with the exercise of discretion. It matters not if Denning

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<sup>326</sup> Southern Pacific Co. v Jensen (1917) 244 U.S. 205

<sup>327</sup> See chapter 6

<sup>328</sup> See chapter 4

creates the space in an entirely legitimate fashion if he does not then exercise his discretion in such a way as to arrive at a valid decision.

This leads inevitably to the moral basis of Denning's decisions, which themselves depend on those factors which have been identified in earlier chapters as influencing his judicial and indeed wider outlook.

Hart comments on the moral aspect of interpretation as it applies to judges as follows<sup>329</sup>

*at this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristics judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity "legislative." These virtues are: impartiality and neutrality in surveying the alternatives; considerations for the interests of all those who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision.*

Hart clearly feels that the gaps, the interstices, are narrow. The natural lawyer of course would argue that there are no gaps simply that the law exists and has not been stated in this particular concept. It must be true that the gaps that the more creative judge exploits are narrow as any settled system of law is reasonably comprehensive. No litigant comes to court and in effect says to the judge "there is no law that covers my claim, but I think I'm entitled to redress and I ask you to invent the law so that it will give me that redress." On the contrary the claimant will come to court and will be armed with a bank of statutory authority and prior precedent which he says he supports his claim to be entitled to redress under the law as it presently stands. This of course does not imply that there can never be any novel claims but that any novel claims will be based on an edifice of existing law.

There are other views on what constitutes legitimacy in judicial decision making; Dworkin, for instance, would argue that to have legitimacy a particular law (and that would include a judicial decision) must form part of a morally coherent system of law<sup>330</sup>, Dworkin would of course also argue that there is always a right decision which is a proposition that has not always met with universal acclaim. He would contend that the law is a complete set of rules and it is only the imperfect adjudication and appreciation of it that leads to a perception that there are any gaps. Dworkin would be of the view that judges do not in fact

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<sup>329</sup> The Concept of Law 3<sup>rd</sup> ed H L A Hart Oxford 2012 at p 205

<sup>330</sup> Laws Empire Ronald Dworkin



have any discretion in making law. He would consider that law is a set of principles which if applied in the correct way will only provide one answer to any given situation and it follows therefore that the answer provided must be the correct one.

It follows then that for any decision of Denning is to be considered to be a legitimate exercise of his discretion and for to have legal validity it must demonstrate continuity and be capable of a rational defence based on interpretation and precedent.

I would contend that it is impossible to demonstrate that in any particular situation the given decision is uniquely correct; however it can be made acceptable as a reasoned product of an informed impartial choice<sup>331</sup>.

It is the notion of impartiality which is most impacted by the deployment of those influences and views that Denning has absorbed exhibited throughout his career and in cases where he has let these have too much influence on his decision than it can be argued that impartiality is impaired and therefore this renders the validity of the decision questionable at best.

In each of the individual cases, Denning uses existing precedent to a greater or lesser degree to create that interstitial space that he needs in order to exercise his discretion to do what he considers to be justice in each of the case is in front of him. In broad terms he analyses existing case law to find the gaps that he considers must exist in the law, he would consider that the gaps are there in the main because he does not agree that applying the law as it is generally understood would allow him to give the judgement that he considers justice demands in each individual case. In other words what he is saying is that if the judge's job to do justice, the law as it is normally expounded will not do justice in this case therefore the law is wrong or misunderstood and I will correct it.

We will now look at each of the cases studied in turn to assess the techniques that Denning uses to create the space in each instance and assess the legitimacy of these techniques which of course will impact on the overall legitimacy of the final decision.

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<sup>331</sup> The Concept of Law at p205

In each case, the first thing that Denning does is expound the law and then analyse it to find the gaps. The main variations between these cases are in the depth of the analysis that applies in each instance.

In Ward he is at his least creative and his least analytical. He does not create the space by avoiding existing precedent but in this case by simply applying existing precedent on retrospective rule changes whilst declining, or at least omitting to analyse and apply that precedent to the case before him in any detail. He does little more than say that the case in question is sufficient authority to allow this rule change to have retrospective effect.

On the question of the presence and participation of Donald Naismith, he considers this under the rules of natural justice and again without any particularly deep analysis he concludes that the rules had not been breached, despite the considerable misgivings of Naismith himself and the appearance, to any unbiased bystander, that the proceedings are not entirely fair. He then declines to give any relief and allows Gillian Ward to be dismissed from the course and be effectively barred from her chosen profession of teaching.

In the case of Broome, he is much more rigorous in his analysis. The case that he has to deal with in this instance is *Rookes v Barnard*, the leading authority at the time on exemplary damages in tort. On the face of it this case should have given him little difficulty as it was more than possible to do what he considered to be justice to Captain Broome by applying *Rookes*. He then attempted to make his decision essentially unappealable. There was a risk that the House of Lords may have considered that the trial judge's direction was inadequate in terms of the decision in *Rookes* and to obviate this Denning mounted an attack on the decision itself. He invited submissions that the decision had been decided *per incuriam* and therefore was not binding on him and of course it follows that it would not bind lower courts. To cement this in, he then explicitly instructs lower courts to ignore the decision of the House of Lords. This really does create the space and he exercises his discretion. The results are catastrophic for the very person he intended to help.

The final case is, it is submitted, a masterclass in the legitimate creation of an arena followed by the legitimate exercise of discretion.

In *Candler*, Denning submits the whole line of cases which the rest of the court considers to be a constraint on the extension of negligence to cover misstatement to rigorous analysis. He constructs a reasoned and cogent argument, based on authority, which he contends would give him the opportunity to consider such an extension. He then deploys

the leading authority on negligence, Donoghue, to find a reasoned path to allowing a claim for negligent misstatement to be brought under the tort of negligence. Whilst this was a minority judgement nonetheless it was so well constructed and so clearly legitimate that later judgements were able to utilise that path beaten out by Denning to achieve the end that Denning had in mind

The reason why he felt it necessary to create the space and exercise discretion was given by Denning early in his judicial career and has been quoted extensively previously. He considers that it is the job of the judge to do justice on the facts of the particular case before him at that time. The issue that he faces of course is that the words of the oath do actually require that justice is administered according to law. Denning makes it clear in the *Road to Justice* and many times later that he is a firm believer in the rule of law, as would be expected. This leaves Denning, in common with other judges, the task of squaring the circle where the application of the law as it stood would lead to an injustice. This is of a course a dilemma that has faced other judges before and despite their best efforts they have not succeeded in finding that interstitial space. The case of *Fitzpatrick v Sterling Housing Association Ltd*<sup>332</sup> is an interesting illustration of the point. This was a case concerning the right to succession to a tenancy under the Rent Act 1977. The claim was from the same sex former partner of the by now deceased tenant. The wording of the act extended the right to succession beyond a lawful spouse to those living together as man and wife. The House of Lords considered the wording of the act and decided to give the words a restricted meaning in that man and wife implied a partnership between persons of different sexes. This is understandable but society had moved on between 1977 when the act was passed and 1999 when the claim was brought and the House had the perfect opportunity to find the space and create the law in accordance with a societal consensus. They declined to do so; would Denning have taken the opportunity? That is of course impossible to answer and it is also impossible to speculate how his own morals would have come in to play in circumstances such as these. Would he have recognised the changing social mores and given them expression in the law or would there have been a repeat of the *Gillian Ward* case albeit without the overt injustice.

In Denning's case, as we have seen, he considers that the just judge is the ideal person to administer the law and it is this that drives him to find these interstitial spaces particularly

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<sup>332</sup> [2001] 1 AC 27

in cases where his sympathies have engaged those influences from his early life that we have identified then come into play.

In the Ward case it was his long-standing and profound commitment to the Anglican church which he absorbed in Whitchurch as a boy and then reinforced throughout his adult life which led him to the conclusion that Gillian Ward's morals were such that she should not be allowed to teach children. The presumption being no doubt that she would pass on what Denning considered to be her dubious morals to her charges. This resulted in him creating a space to enable him to exercise his discretion to refuse an injunction and, it is submitted, to allow a manifest injustice to prevail. This profound Anglicanism has been explored in earlier chapters, he was a regular churchgoer, a founder of the Christian Lawyers Association and of course he married a vicars' daughter.

In Broome, there are two influences at work. The first and more obvious of the two is his sympathy with Jack Broome. This, it is contended, stems at least in part from his close association with the Royal Navy in that both Gordon and Norman were naval officers and indeed Norman was closely connected with the PQ17 incident. It is important to distinguish that influence from any conscious or unconscious bias. The influence does not leave him to take the path that he does but perhaps renders him a little less analytical in his methods. The second influence is his respect for the common law and the damage that he perceives that the decision in Rookes has wrought upon it. It is perhaps this rather than his sympathy to Jack Broome that leads him to try and overturn that binding precedent. Additionally it may also be that this was another shot in his campaign to free the Court of Appeal from the strict application of the doctrine.

Turning next to Candler: as we have seen, Denning cleared space by a rigorous and exhaustive review of the authorities. There is no doubt that he was motivated by a desire to do justice to Mr Candler but that is not enough to explain why he exercised his discretion in the way that did. In this case it is his extensive knowledge of the law which he had gathered from his time as editor of Smith's leading cases and his instinctive respect for the common law coupled with a clear vision that the law should be developed in this way. As has been noted there was a consensus building in the profession and in the wider societal context that this was needed and was possible to some extent overdue. He was however aware of the fact that this would be a minority judgement and to have any lasting impact it needed to be much more than mere dissent. It was for that reason that he constructed his judgement so carefully so as to lay down a clear path leading from

established authority, praying in aid the seminal judgement of Lord Atkin in *Donoghue* and then laying down very definite markers for a subsequent court to adopt his judgement and thus give effect to this significant change in the law.

We have looked at the notion of legitimacy and the requirements that need to be satisfied for a decision to be considered legitimate. Essentially it is necessary that in creating the space and exercising his discretion, the judge complies with a set of established norms and follows the rules of interpretation and adjudication that are normally accepted within the law as it stands at the time. In exercising his discretion he is impartial and neutral and there is a valid and acceptable narrative to validate his decision.

How does Denning measure up to those criteria in the individual instances that are the subject of this study.

It is reasonably clear that in the case of *Ward*, there is a strong argument that the decision lacks legitimacy. There is no clear and cogent reason expounded to explain why the authorities that Denning relies upon are in fact applicable to the facts in *Ward* and binding on the court. This is followed by an unreasonably brusque treatment of the requirements of natural justice in the deliberations of the committee. This is then concluded by the moralistic nature of the final judgement which is clearly influenced by Denning's personal beliefs. To follow the model, he does not legitimately clear a space for himself which precludes him from exercising his discretion even before we address the question of whether discretion was validly exercised. We have seen how it is legitimate for judges to rely on their own experience and values. Denning had not even reached that space and therefore the exercise must be illegitimate.

In *Broome*, there is a much more coherent narrative and there is legitimacy in the way which clears the space by relying on previous authority however he ultimately fails. It is a paradox that he has a coherent narrative with a powerful rationale for arriving at the decision that he doesn't arrive at but by ignoring established rules and norms (the doctrine of binding precedent) he renders the final decision illegitimate by attempting to bypass the authority of the House of Lords.

*Candler* can be dealt with quite shortly. A comprehensive and rigorous analysis of the authorities provides the narrative which identifies the interstitial space. He then utilises the space to create a coherent rationale for his decision which establishes a clear path to follow. It is not deprived of legitimacy simply because it is a minority judgement.

Notwithstanding that Dworkin maintains there is always one correct answer we are not obliged to accept that the majority judgement must always be the right answer. It can also be argued that the decision can acquire its legitimacy from its subsequent effect on the law including having been cited with approval by other judges.

Legitimation by acclamation or approval is nonetheless valid as it indicates that Denning was acting in accordance with a respectable consensus in society and the law albeit it could be said that in this particular instance he was somewhat anticipating it, this does not detract from the legitimate exercise of his discretion in this instance.

There are two possible threads leading from each of these judgements. The first is the immediate and proximate effect of the judgment on the law as distinct from its consequences for the parties involved. The second is the contribution made by the judicial style of reasoning to the overall climate of judicial decision making. This is harder to assess than the former and will require a further more extensive study to properly assess that contribution.

In Ward there is no evidence of any long term or widespread effect following the judgement especially as society had moved or was in the process of moving from the more regimented and repressive laws of the immediate post-war period to the more permissive attitudes of the late 1960s, some sections of society faster than others and it was clear that in this instance Denning was neither leading a consensus nor even keeping up with it. The Ward case is more of interest for its illustration of the effects of Denning's upbringing and influences on his exercise of his judicial discretion.

The immediate legal effect of Broome was to cement in the authority of the House of Lords even more firmly than it had previously been. In the longer term however it caused a re-evaluation of the law on exemplary damages and Denning's influence was recognised in Kuddas<sup>333</sup> which reiterated that exemplary damages were available for all torts and that they had a place in the common law. The Privy Council in Bottrill<sup>334</sup> confirmed in a New Zealand case that all that is required is outrageous conduct by the defendant thus expanding the ambit beyond servants of the government and perhaps restoring the position to that which Denning considered the common law represented. The wider ambit of the decision is the gradual loosening of the absolute grip of the doctrine of binding

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<sup>333</sup> Kuddas v The Chief Constable of Leicestershire [2002] AC 122

<sup>334</sup> A v Bottrill [2002] 3 WLR 1406

precedent but for that Denning was only reflecting the zeitgeist of the times and responding to a gradually forming consensus. Denning was concerned that the availability of exemplary damages should not disappear from the armoury of the common law and in that he has been vindicated.

It is in *Candler* that we see the most effective use of judicial discretion by Denning. The immediate effect was negligible, The lasting effect however was that the opportunity was given to subsequent court's to use the line of reasoning set out by Denning to establish the tort of negligent misstatement.

There is no reason why Denning's methodology has to sit within any recognised theory of adjudication or any jurisprudential system. There are in fact elements of several schools in his approach. There is a definite natural law element in that he seeks to return to the law as he thinks it has been established, on occasions such as in *Broome* where he seeks to affirm exemplary damages. This does not make him a natural lawyer although he would endorse Aquinas definition that law is "an ordinance of reason made for the common good"<sup>335</sup> Denning would not endorse the positivist approach that there is a disjuncture between law and morality. What the decisions examined show is that there is a clear connection between the law as expounded by Denning and his own moral compass. In each instance he has used his own values as a guide. Firstly in deciding that there is an arena for his discretion and then creating that arena. Secondly, in its influence on the exercise of that discretion. That is shown vividly in *Ward* where it could be said that he gave particular free rein to his own values which in that case might even be said to be verging on prejudice against the behaviour which Gillian Ward had exhibited.

It is not of course the case that positivism would disdain any connection between law and morality and in later works Hart came to accept that there could be such a connection. In the second edition of *Law and Morality* he was moving to the view that there could be a connection if morality, whilst not itself a source of law was validated by things that are a source of law.<sup>336</sup> Hart attempts to develop a theory of inclusive positivism which, whilst it is not possible to examine this in detail here (Hart never really finished this) it is clear that he did consider that the sources of law could include morality. He set this out in 1958 when he said that

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<sup>335</sup> *Summa Theologica* St Thomas Aquinas 11-1 q 90

<sup>336</sup> *The Concept of Law* 2<sup>nd</sup> ed H L A Hart OUP 1985 at p247

*“In some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice, or substantive moral values..”<sup>337</sup>*

There is no such explicit incorporation in English law as there is no written constitution as there is in the United States however this does not of itself preclude substantive moral values from validating legal decisions. Denning was very clear in the road to justice that he did not endorse the view that lawyers are only concerned with what the law is not what it ought to be and that leads to an unjust result then so be it.

*The legal profession, by its exponents in days past and present must account for every injustice done in the name of the law.*<sup>338</sup>

Hart started moving towards a view of inclusive positivism but it was his successor as Professor of Jurisprudence at Oxford, Ronald Dworkin who took this further. Dworkin, in *Laws Empire*,<sup>339</sup> posited that there is a place for morality in legal systems. This has resulted in a division within legal positivism. Inclusive positivists accept that it is possible, as a concept that a norm should depend for its validity on accepted moral principles but that this is not essential for a norm to be valid. As might be expected, the supporters of exclusive positivism would take the opposite view and assert that a norm can never depend upon any moral content for its validity. The exclusivists' position rests on the proposition that if the law lays claim to authority and to being the guiding principle in human conduct then the inclusivists' assertion that morality can play a part in decision making is logically inconsistent with that claim leading to the position that law derives its ultimate authority from morality, a proposition that positivism has rejected.

The point here is that if the law does not extend to the case and there are these interstices which we have identified then what can fill these gaps. Noting here of course that any follower of Dworkin would assert that there cannot be any gaps and the law always provides the right answer. Experience however shows that there are gaps and the only logical answer must be that values are the only thing that can fill that gap.

Where are these values derived? These values are those of the judge and must derive from his own moral compass. This means the value system that any particular judge holds.

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<sup>337</sup> Positivism and the Separation of Law and Morals 71 Harvard Law Review 598 (1958)

<sup>338</sup> The Road to Justice Denning, Stevens and Co 1955 p1

<sup>339</sup> Laws Empire : Ronald Dworkin Fontana 1986 London



Values are not inherent and are a product of experience, education and societal norms and this is the proposition that we have been examining in this study. The issue in question is the effect that the influences which acted on Denning in his formative years and early life had on his later decisions as a judge. These influences would in large part form Denning's Value system and his morality.

This does to some extent suggest, that at least for practical purposes in connection with adjudication that the large scale distinction between natural law and positivism is to some extent illusory in that they are inextricably linked with each needing elements of the other to provide a coherent basis for adjudication.

So where does that take the argument? As set out earlier, the act of interpretation of the law cannot be divorced from morality. Interpretation of the law must inevitably involve an evaluative process which cannot be divorced from the values and morality of the evaluator i.e. the judge. In chapter two, Denning's view of the qualities that make a judge was set out; it is these qualities which he ascribed himself that he deploys in his judgements. Labels are to some extent iniquitous but to some extent Denning could be described as an inclusive positivist with a natural lawyer's instinct for the connection between morality and the law. The shorthand for this perhaps would be to label him a Denningist.

## **Coda**

This study has attempted to show in some small way how one of our most famous judges used the law to administer justice and how he himself was shaped by his upbringing and early influences which led in turn to those influences being perpetuated through his influence on the law. It was noted at the outset Denning was chosen as the subject because of the fecundity of his judgements and the wealth of material to work with. This has inevitably meant that selections have had to be made to fit within the constraints of this study. There is much more research to be done both on Denning himself and on his contemporaries at a time when judicial activism was becoming more prevalent and it is these judges who have shaped the current senior judiciary and legal thinking. A more extensive project will allow a proper evaluation to be made of Denning's approach coupled with that of the likes of Devlin and others and how this has influenced modern judicial decision-making in the interstices of the law.

**FINIS**

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