

LORD DENNING'S CONTRIBUTION TO CONTRACT LAW

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I don't suppose there are many people present who have suffered the indignity of being censored by order of the Court of Appeal. It happened to me in 1981, not, I hasten to add, because of anything I myself said or did, but because I had the misfortune to take part in a television programme which was adjudged to fall foul of the law of breach of confidence. Adjudged, that is, by a majority of the Court of Appeal.¹ Lord Denning dissented. In his judgment the Master of the Rolls described the television programme and had the kindness to say of my modest contribution that it "was all very sensible and straightforward." Ever since then I have felt that I owe Lord Denning a debt, and I am glad today to be able to repay it, even if it stretches things a little to say that his contributions to the law were "all very sensible and straightforward." But then my contribution to the television programme lasted about five minutes, while Lord Denning's contribution to the law of England was spread over 38 years.

My brief today is to say something about Lord Denning's contribution to the law of contract, and I am sure others will speak of Lord Denning the man. But in assessing his contribution to the law it is right that we pause for a moment to remember what we are today actually celebrating. After all, Lord Denning's chief claim to fame rests on his role as a moderniser and innovator, but we do not usually associate modernisation and innovation with octogenarians or even septuagenarians. Speaking for myself, I have to say that as I approach my seventieth year I find the usual decline in the faculties, both physical and mental, of people of my age a serious deterrent to understanding and tolerating the modernisation that goes on around me. Memory begins to fail, case names become elusive, and the urge for an afternoon nap is often irresistible. But when Lord Denning was my age he was just getting into his stride as Master of the Rolls, with fifteen years of judicial creativity still ahead of him. The older I get the more I marvel that Lord Denning was able to do this job at all.

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¹ See *Schering Chemicals v. Falkman* [1981] 2 All E.R. 321.

As I have said change and modernisation are usually thought to be the job of the young - such as our Prime Minister who is just half Lord Denning's age. To really appreciate the difference between Lord Denning's age and Tony Blair's age, let us for a moment cast our eyes back to 23rd January, 1899 when young Tom was born and let us try to do this like true historians which means we must forget that the twentieth century has happened, and see the world as it appeared to those living at that time. What we see, then, in January 1899 is the old Queen still on the throne; we see Lord Halsbury sitting on the Woolsack, a man who had been born in 1823 and very nearly lived to celebrate his own hundredth birthday; we remember vividly that barely six months ago the greatest political figure of the century - W.E. Gladstone - had been laid to rest in Westminster Abbey; and that only four months ago there had taken place in far away Africa the Battle of Omdurman in which a young lancer called Winston Churchill had taken part in what few may then have realised would be the last cavalry charge in the history of the British army. Many lawyers in 1899 would also have had clear memories of the monumental decision in *Allen v. Flood* handed down by the House of Lords only eighteen months earlier.² At Magdalen College, Oxford, where Tom Denning took a first in mathematics and then a first in law just after the first world war, there was still growing in 1899 an elm tree planted around 1661 which was thought to be the largest tree in Britain. Not the least remarkable thing about Lord Denning is that a man born at that time was still doing his best to modernise the law in the 1980s.

Before I look in any detail at Lord Denning's work on contract law I want first to address briefly a problem which anyone encounters when trying to assess a large number of Lord Denning's cases. The problem is that of trying to identify the value system or systems which underlay Lord Denning's approach. Was he, for instance, a man of the Right or a man of the Left? Of course he believed in change and modernisation and he had little patience with conservatism for its own sake, so that might make him seem like a man of the Left; but the values that activated him in modernising the law were often rather old-fashioned values. Then again, he is also often to be found upholding the rights of the small person against the big battalions, but since he did this just as enthusiastically whether the big battalions were governmental or business organisations, this again makes him difficult to classify in any simplistic manner. In cases involving matrimonial or sexual immorality and some cases of sex discrimination, Lord Denning often seems quite old-fashioned, even by the standards of his day; yet he was far ahead of most of his contemporaries when he declared that a wife was just as entitled as a husband to decide where they were to

²[1898] A.C. 1.

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live.

Many will be baffled by these apparent inconsistencies in Lord Denning's value systems, as revealed in his judgments, and I would not pretend that these matters can easily be resolved. Like most of us, Lord Denning was no doubt a man with likes and dislikes, with prejudices and predilections. For instance, he liked cricket and disliked trade unions. But if there is a key to these apparent inconsistencies in his approach it may lie in Lord Denning's belief that he could identify the values of the ordinary man or woman in the street; and that it was the proper role of the judge to give effect to those values. I do think he tried to decide cases in a way which he thought would reflect the sense of justice of the ordinary person. I have in my possession a precious document which perhaps provides some little evidence for this statement. It is a letter which Lord Denning wrote to me, in his own (almost illegible) handwriting, on 12th February, 1980. Normally I would not think of quoting from a private letter to a gathering like this, without first seeking the permission of the writer. When I first received this letter, in fact, I put it aside thinking there would be time to publish it perhaps in the distant future after Lord Denning's death. But I have waited nearly twenty years, during which Lord Denning has himself published many private views about his judgments, and I hardly think he would now object to this letter receiving a little publicity. The letter was written to me just after the Court of Appeal's judgment in *Duport Steel v. Sirs* had been overturned by the House of Lords, presided over by Lord Diplock.³ As Labour lawyers will remember, the case concerned the trade union immunities for actions done "in furtherance" of a trade dispute. Lord Denning and the Court of Appeal were for interpreting the statutory immunities narrowly,⁴ but the House of Lords, declaring that the judges had nothing to do with policy, insisted on a wider interpretation, and at the same time insisted that the choice between a narrower or wider interpretation was not itself a policy decision. Following this decision I wrote a letter to *The Times* in which I criticised the law lords for pretending that policy had nothing to do with their own decision, even if the policy they were following was thought by them to be less interventionist than the policy followed by the Court of Appeal. It was in response to this letter of mine that Lord Denning wrote to me, telling me how much he agreed with what I had written. I will quote from one part of his letter:

"I like your last paragraph [he wrote - this was the

³ [1980] 1 All E.R. 529.

⁴ For the technical points at issue, and criticism of Lord Denning's position see the chapter on Labour Law by Paul Davies and Mark Freedland in *Lord Denning: the Judge and the Law* ed.s Jowell and McAuslan (Sweet & Maxwell, 1984) at pp. 387-411.

paragraph in which I suggested that the law lords' decision was itself a policy decision] *a propos* of which I have had hundreds of letters of support for our view - and none against - whereas Lord Diplock has had only letters of abuse. One trade unionist of over 30 years' standing wrote and told him that we were right - and sent me a copy of the letter. Surely at bottom the law must depend on the support of the majority of the people."

This is the first time that I have ever heard of judges receiving letters from the public approving or disapproving of their decisions; and I wonder what sort of a hoard of such letters awaits research by future biographers of Lord Denning. Some people may think that this letter reveals, or confirms, that there was a simplistic streak in Lord Denning's value system. Could he really identify from a handful of letters like this what the majority of the people wanted the law to be? Where cases involve, as they so often do at the appellate level, conflicts of fundamental principle, both or all of which have plenty of popular support, is it enough simply to follow one of these principles with resounding declarations of its justice and fairness, without explaining why other conflicting principles involved in the case are not equally decisive?

I do not think Lord Denning's choice of value systems can escape the accusation of often being simplistic, but at least in the field of contract law, this does not often give rise to problems. In this area Lord Denning had, I think, two basic principles which he followed pretty consistently, and which would be largely applauded both by the general public and by most lawyers too. He believed, first, that there was a strong obligation on anybody who had given his word, to abide by it; secondly, this belief was tempered by the qualification that someone who had only given his word by signing up to a detailed and basically unfair contract, should not be treated as though he had consciously agreed to all the contents of the document.

But to my task: Lord Denning's contribution to the law of contract. In my chapter of the book, *Lord Denning: The Judge and the Law* published shortly after his retirement, I surveyed Lord Denning's contribution to the law of contract in detail, a survey which occupies some 20 pages. Obviously there would be little point in my going over this survey again now, so what I propose to do is to select three or four cases which illustrate different facets of Lord Denning's work in contract law, as well as some of the problems to which the innovator's work can give rise.

Any detailed review of Lord Denning's contribution to the law of contract must inevitably start with the celebrated *High Trees* case, the

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foundation of the modern law of promissory estoppel.⁵ Of course the case and its subsequent history are too well known to require detailed examination today, so I am not going to talk about promissory estoppel itself. I propose to mention a number of side issues of some interest. The first is that it undoubtedly required courage to do what Lord Denning did, and use the case as a vehicle for introducing what was a substantially new doctrine into the law, even though it was one which had respectable antecedents, and could easily have been developed in the nineteenth century, had it not been for the troublesome House of Lords' decision in *Jorden v. Money*. But in 1946 judges were not expected to introduce new doctrines into the law, least of all newly appointed puisne judges. Let me quote from Lord Devlin's Foreword to the book on Lord Denning:

“When Tom and I were young the law was stagnant. The old-fashioned judge looked to the letter of the statute and for the case on all fours. He knew that he had to do justice according to law. Either he assumed that the law when strictly applied would always do justice or else he decided that if it did not, it was not his business to interfere.”

Remember that only a year or so after the *High Trees* case the House of Lords in *Read v. Lyons* had magisterially proclaimed that it was not the function of the House of Lords to rationalise the law of England.⁶ But that, of course, was not Lord Denning's way, although it was not, I think, a desire to rationalise the law, so much as a desire to make it more fair, which motivated Lord Denning. In fact Lord Denning had clearly, as he tells us in his autobiography, earmarked the doctrine of consideration as a suitable subject for judicial reform even before he got on the bench, and in the *High Trees* case he discovered the perfect vehicle for what he wanted to do. It will be remembered that the landlords in this case had, in early 1940, agreed to a reduction in the rent of a block of flats because the tenants were having great difficulty in letting the flats during the prevailing war conditions. By mid 1945 these conditions had altered and the flats were fully let, and the landlords now claimed the full rent again. But they only sued for the full rent for the period after mid 1945. What was so useful about the case was that Lord Denning was able to have his say by way of obiter dicta rather than by way of actual decision. Of course, that might seem rather unsatisfactory, because the dicta of a puisne judge do not rank very high in the scale of legal authority. But from Lord Denning's viewpoint it was far more satisfactory for him to have his say by way of

⁵ [1947] 1 K.B. 130.

⁶ [1947] A.C. 156.

dicta, while actually giving judgment for the landlord for the rent foregone during the first two quarters after the end of the war, because he was then able to expound his view of what would have been the applicable law if the landlord had claimed the rent for earlier periods, without the risk of the case going to appeal and being reversed. An appeal, as he himself explains in his autobiography, might have “ruined everything.” He was almost certainly right too. Had Lord Denning’s dicta on promissory estoppel come before an appeal court in 1946 or 1947 it seems only too likely that they would have been rejected as contrary to the fundamental principles of the doctrine of consideration, and a great deal of trouble would have been caused subsequently as judges would have been forced to find new tools to do the job which is now routinely done by promissory estoppel.

All this throws a rather interesting side light on how an ambitious judge, who wants to make a name for himself as a moderniser, can pursue his own agenda. Some might wonder about the propriety of a judge having his own agenda even though in this particular case, the outcome was almost certainly beneficial for the development of the law. But then Lord Denning himself, a few years later, told us how judges could be divided into the “bold spirits” and the “timorous souls,”⁷ and there was never any doubt into which category he placed himself. So the result of the *High Trees* case can perhaps be expressed in modern terms, as Bold Spirits 1, Timorous Souls 0.

My second contract case is not strictly a contract case at all, nor is it just one case, but a whole series of cases. I refer to the cases dealing with the liability of stevedores for negligent damage to goods caused while they are being loaded or unloaded. As contract lawyers are well aware, stevedores have for many years been trying to escape or limit their liability for negligence by one means or another; and in particular, by relying on various limitations or exemptions in the bills of lading governing the relations between the carrier and the owner of the goods. In *Scruttons v. Midland Silicones* battle was joined on this issue.⁸ In this case the stevedores were sued by the consignees of the goods for negligently damaging the goods in question. Had the carriers sued the stevedores, the stevedores could have relied on a limitation clause restricting their liability to \$500. Had the consignees sued the carriers, the carriers likewise were entitled to limit their liability to \$500. It will be noted that the context is purely a commercial one, and is ultimately about the incidence of insurance. Realistically speaking it has nothing to do with making negligent parties pay for their negligence, or with exemption clauses in cases affecting consumers. Yet despite this context, Diplock J., at first instance, an unanimous Court of Appeal, and four judges in the House of Lords used

⁷ In his celebrated judgment in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164 at 178.

⁸ [1962] A.C. 446.

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the doctrine of privity of contract to justify a decision against the stevedores. The limitation clauses in the two contracts were simply evaded by this decision. Lord Denning dissented in splendid isolation, suffering not merely a crushing defeat by weight of numbers, but also the very pointed rebukes of Lord Simonds against judicial reformers and heretics.

In this commercial context it is not at all surprising that Lord Denning should have felt that the stevedores should be entitled to the benefit of the limitation clause, but he had also some very convincing arguments about the historical development of the modern law of negligence to back up his dissent. Today, lawyers are so imbued with the idea that liability in negligence has nothing to do with contract, and that it is a fallacy - the famous "privity of contract fallacy" - to suggest that liability in negligence can be defeated or restricted by a contract with a third party, that most lawyers are unaware that in the nineteenth century liability in tort in such circumstances would often not have arisen at all. In a series of cases dealing with the liability of the railway companies the courts showed a real awareness of the difficulties that limitation and exemption clauses would create, if, in such circumstances, contracts were brushed aside and liability imposed in tort. After *Donoghue v. Stevenson*⁹ these cases were largely forgotten and, as Lord Denning protested, the double unfairness was developed of first imposing a liability where there was a contractual context in which the liability was not assumed, and then secondly, denying the efficacy of any limits on liability that had been agreed between the contracting parties. So it looks very much as if the score here was Lord Denning 1, Timorous Souls 8.

But this was not the end of the story. As commercial lawyers are well aware, in *The Eurymedon*,¹⁰ in 1974, the Privy Council found a way of allowing stevedores to benefit from limitation and exemption clauses in bills of lading, by exploiting a loophole suggested by Lord Reid in *Midland Silicones*. By following a somewhat complex and possibly dubious contractual route it became possible, after all, to hold that the stevedores, in unloading the goods were accepting an offer made in the bills of lading, at least where they were aware of the terms of the bills of lading as they were in that case. I have always had a soft spot for this decision, because at the time when the case was wending its way through the lower courts in New Zealand I was teaching at the Australian National University in Canberra, and I actually visited New Zealand shortly after Mr. Justice Beattie had given his judgment in that case, in the same sense as the ultimate Privy Council decision. I told him in all humility that I entirely agreed with his opinion, and so I was naturally somewhat annoyed when it was reversed by

⁹ [1932] A.C. 562.

¹⁰ [1975] A.C. 154.

the New Zealand Court of Appeal. I remember telling my students that I thought the odds were about 6:4 that the Privy Council would restore Mr. Justice Beattie's decision, and when they did so by a majority of 3:2 my only regret was that I had not put a substantial sum of money on my prediction.

I have no doubt that Lord Denning would have felt pretty well vindicated by the Privy Council decision, even though the reasoning in that case was very far from his own reasoning in *Midland Silicones*. But even this was not the end of the story, because more recently, a further series of cases have been decided in the Court of Appeal and the House of Lords - in particular *Norwich City Council v. Hervey*¹¹ in 1989, and the *Marc Rich*¹² case about the liability of classification societies, in the House of Lords in 1995 - in which it has been held that a complex set of contractual relations, backed by standard insurance practices, may itself be a good reason for denying that liability in negligence arises at all. These cases provide almost total vindication for Lord Denning's analysis in *Midland Silicones*, and constitute a remarkable illustration of the wheel coming full circle with few judges, perhaps, fully aware of precisely what route the courts have taken. So after all, the score here must be at least, Lord Denning 3, Timorous Souls 2.

My third illustration of Lord Denning's work in contract law comes from a whole series of cases concerning the famous, or perhaps I should say, notorious doctrine of fundamental breach. Lord Denning himself has told the whole story in his usual limpid style in his judgment in the Court of Appeal in the famous *George Mitchell*¹³ case in 1982 and one of the great misfortunes of Lord Denning's long sojourn in the Court of Appeal is that his judgments even in cases largely upheld in the House of Lords are now unlikely to be read by students. In this particular case Lord Denning sets out the whole story of the extensive use of exemption clauses against consumers, their effectiveness despite the lack of real choice by consumers and even commercial concerns, the invention by the courts of the doctrine of fundamental breach, its elevation from a rule of construction into a rule of law, and its overthrow by the House of Lords coinciding largely with the movement for legislative reform which culminated in the Unfair Contract Terms Act 1977. Once again it is possible to see this history as an example of failure by Lord Denning to carry the day. After all, his attempt to turn the doctrine of fundamental breach into a rule of law was twice rejected by the House of Lords. But on closer analysis there is much to be said for the view that Lord Denning actually succeeded in what he was trying to do. In

¹¹ [1989] 1 All E.R. 1180.

¹² [1995] 3 All E.R. 307.

¹³ [1983] 1 All E.R. 108 at 113-117; affirmed [1983] 2 A.C. 803.

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the first place, for something like 15 years the “rule of law” theory held sway, and undoubtedly was applied in numerous cases dealing especially with hire-purchase contracts. There are probably a dozen reported Court of Appeal judgments from this period which can be interpreted in this sense, and very likely there were hundreds of County Court cases following them in which some sort of substantial justice was done by the application of this doctrine. Secondly, only when legislative change was already in the pipeline was the “rule of law” theory finally rejected by the House of Lords, so that this tool was only effectively discarded when other and better tools to do the same job became available. Thirdly, even the House of Lords, in rejecting Lord Denning’s “rule of law” theory admitted that the doctrine had served a useful purpose while it lasted. And finally, when the House of Lords did eventually settle the law, the law lords agreed with Lord Denning (rather than some of his more hesitant colleagues in the Court of Appeal) that the hairsplitting approach to the construction of limitation clauses could now be discarded.¹⁴ Once legislative control of limitation clauses was available, there was no longer any purpose in narrow and tortuous methods of construction. So once again, any realistic appraisal of Lord Denning’s efforts - and he would surely be the first to admit that that is the only sort of appraisal in which he would himself be interested - must concede the victory to Lord Denning. Perhaps this would be best expressed today by suggesting that he won on penalties.

My final example of the work of Lord Denning in the area of contract law does represent one of the real defeats suffered by him. I refer of course to Lord Denning’s efforts to evade or override the doctrine of privity of contract, whether by use of common law or equitable theory, or by invoking the famous section 56 of the Law of Property Act, which reached their climax in *Beswick v. Beswick*.¹⁵ Once again, the story is too well-known to require any detailed rehash on an occasion such as this. But I will make three comments on the case and its outcome. First, Lord Denning quite characteristically had a fall-back position in case his main attack failed. It seems to have been in the Court of Appeal that it was first suggested that the widow in this action could, in her capacity as administratrix of her husband’s estate, obtain a decree of specific performance of the agreement with the nephew, and it was this aspect of the decision which was ultimately upheld in the House of Lords. Indeed, had it not been that the parties were (as they surely must have been) legally aided it seems inconceivable that there would ever have been an appeal to the House of Lords at all, so trivial were the sums at issue, and so unlikely

¹⁴ Unfortunately there is still authority that this approach may have survived in the case of complete exemption clauses, but it is perhaps unlikely to survive much longer.

¹⁵ [1966] Ch. 538.

was it that the defendant would be allowed to escape scot-free. This may, therefore, have been one of those cases, like the *High Trees* case in which Lord Denning had foreseen that an appeal would “ruin everything,” and had tried to guard against that possibility by granting the decree of specific performance. If so (and all this is of course highly speculative) Lord Denning here failed to achieve what he had hoped. Appeal was taken, of course, and Lord Denning’s attempt to overrule the doctrine of privity with the aid of section 56 of the Law of Property Act was finally quashed by the House of Lords. So this must rank as a clear defeat for Lord Denning: perhaps best expressed as Bold Spirits 2, Timorous Souls 3. Yet looking back on all this, with the aid of 35 years of hindsight, I am far from convinced that this was not another game which Lord Denning should have won. Of course nobody really doubts that, as a matter of substantial justice, Lord Denning had right on his side; and if the law is really as settled by the House of Lords in *Beswick* then reform is needed. So the only real question is whether reform here should be left to Parliament or carried through by the judges. Is it really evident that the doctrine of privity is more suitable for statutory reform than for judicial reform? It is hardly an area of law where many members of parliament would concern themselves. It has no political interest, no sex appeal. Is it not just that sort of area of private law where incremental change, case by case development and analysis, actually works best? The changes are largely marginal after all, if only because so many of the most pressing cases where third party rights need to be recognised have and indeed had in 1963, already been dealt with by legislation. The consequential problems which may arise when third party rights are recognised may sometimes be serious, but could surely have been dealt with on a case by case basis by the courts. No other common law country has found this an insuperable difficulty. So perhaps at the end of the day this is one of those games in which the final result did not really reflect the merits of the play. The Timorous Souls may have won, but it is certainly arguable that they did not deserve to do so.

So after this brief and somewhat selective survey of Lord Denning’s contract cases, I find myself (at least retrospectively) cheering him on, very much as a football fan may support his own team. I have, of course, said nothing about the detailed play. We all know that Lord Denning’s judicial technique, his handling of precedents and arguments, can often be faulted. He does not always play fair. Precedents are often mishandled, and wilfully misinterpreted; the desired result dictates the nature of the reasoning more consciously and more determinedly than is usual with judges in the English tradition; the fairness of the desired result is often taken for granted rather than openly justified; and so on. All these faults are plain to see in many of the contract cases I have surveyed. And the faults would be serious indeed

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if they were indulged in by too many appeal judges at the same time but after all, Lord Denning was unique. It is perhaps a paradox to conclude that Lord Denning did a great deal of good to the law of contract, but at the same time to recognise that it is a good thing there was only one Lord Denning.