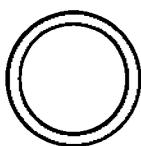


# Lord Denning of Whitchurch

25 January 1899 – 5 March 1999

By Steven Rares S.C.



ON 5 MARCH 1999, six weeks after his 100th birthday, Alfred Thompson (Tom) Denning, passed away. Lord Denning left a rich legacy to generations of current and expired lawyers... to some, his judicial decisions were heresy, to others, they epitomized justice according to law.

Who else could have commenced a judgment which sought to revolutionize the law of estoppel with the words ‘Old Peter Beswick was a coal merchant in Eccles, Lancashire’.<sup>1</sup> The authors of *Equity: Doctrine and Remedies*<sup>2</sup> cannot be said to be his most enduring admirers. Castigating Lord Denning’s judicial style they said:

To speak of well-established and soundly-based authorities as ‘trip wires’ over which the bold judge must step in his quest for his idea of justice (*Hill v Parsons* [1972] Ch 305 at 316) is to debase legal method. To offer as authority moral precepts from Holy Writ and one’s own previous utterances is to provide no substitute.

But Lord Denning continued his work with undiminished vigour.<sup>3</sup>

Unfortunately, as the same authors noted at the conclusion of this tirade, many of his Lordship’s ‘inventions’ had ‘not yet perished utterly’ – indeed a number, such as the right to work which Equity protects<sup>4</sup>, and that fell creature, the *Mareva* injunction<sup>5</sup> are now established law both in England and Australia. One can be sure that Meagher, Gummow and Lehane did not intend to compliment Lord Denning<sup>6</sup> when explaining how limits came to be fashioned around the edges of the *Mareva* remedy:

It is as if the leaders of the Gadarene Swine murmured to each other as they approached the cliff ‘I wonder who has maneuvered us into this position?’

Other remedies devised by his Lordship’s fertile brain did not fare so well. The ‘deserted wife’s equity’ in a matrimonial home in the husband’s name was ‘blow[n]...to smithereens’.<sup>7</sup>

## Career

Lord Denning came from a remarkable Hampshire family; one of five brothers, two of whom perished in the carnage of the First World War, one of the surviving brothers became an admiral, another a general, and, Tom, the Master of the Rolls. In 1922 after graduating from Oxford, he was called to the Bar as a member of Lincoln’s Inn. He took silk in 1938 and was appointed as a judge in 1944 attached to the Probate, Divorce and Admiralty Division. In 1945 he moved to the King’s

Bench Division and by July 1946 he had unleashed one of his most influential judgments: the *High Trees* case.<sup>8</sup> In contrast to the discursive judgments given today, the reasoning in that decision occupies 3 pages of the report,<sup>9</sup> its thrust – the principle of promissory estoppel – summed up in the pithy, direct and homely style which characterizes his work.<sup>10</sup>

I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply.

He was appointed a Lord Justice of Appeal in 1948 where, again, his ingenuity flourished. The action for negligent misstatement was anticipated in his landmark dissenting judgment in *Candler v Crane Christmas & Co.*<sup>11</sup>

By 1957 he was appointed a Lord of Appeal in Ordinary, a misdescription, so he said, for ‘really extraordinary’.<sup>12</sup> Of accepting his promotion, he wrote: “I was hesitant about it. We all know the quip: ‘The House of Lords is like Heaven: Everyone wants to get there but not just yet.’”<sup>13</sup>

He had summarized his philosophy under three headings:<sup>14</sup>

(i) Let justice be done; (ii) Freedom under the law; (iii) Put your trust in God.

The first heading he put in his coat of arms *Fiat justitia*. And in *re Vandervell’s Trusts (no. 2)*<sup>15</sup> he gave vent to his philosophy in unmistakable terms:

Mr Balcombe realised that the claim of the executors here had no merit whatsoever. He started off by reminding us that ‘hard cases make bad law’. He repeated it time after time. He treated it as if it was an ultimate truth. But it is a maxim which is quite misleading. It should be deleted from our vocabulary. It comes to this: ‘Unjust decisions make good law’: whereas they do nothing of the kind. Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law. But in the present case it has been prayed in aid to do injustice on a large scale – to defeat the intentions of a dead man – to deprive his children of the benefits he provided for them – and to expose his estate to the payment of tax of over £600,000. I am glad to find that we can overcome this most unjust result.

But 5 years after becoming a Lord, he was appointed Master of the Rolls, a position he held till retiring, in controversy, in 1982. That office has existed since at least 1290; but there was nothing in the Denning style of presiding in the civil division of the Court of Appeal which appeared as fusty.

As always in collegiate courts, Lord Denning frequently was in the minority. Sometimes, it was a minority which occurred because the practice of the Court of Appeal had been to deliver *ex tempore* judgments at the conclusion of oral argument. Lord Denning's<sup>16</sup> judgments were often masterpieces of phrasing and reasoning. Sir Frederick Lawton<sup>17</sup> recalled the time that he and Lord Denning had reached one view, and Lord Brandon of Oakbrook had disagreed, saying: "As we came out, Tom said to Henry Brandon: 'I think you're right and I was wrong' That's the sort of man he was."<sup>18</sup>

No doubt the losing litigant received little comfort from that - though one does not know if the House of Lords reversed in that case. Lord Donaldson of Lynton, who succeeded him as Master of the Rolls recalled of Lord Denning that "He might come to a different conclusion overnight, so as the number two judge you had to be ready with a fully worked up judgment and not just think you could say, 'I agree'".

In June 1963 he was appointed to enquire into the Profumo affair - the Secretary of State for Defence John Profumo had had a liaison with a call girl - Christine Keeler - described by Lord Denning in his report as a person who 'had undoubted physical attractions'. The report was 'a best seller'.<sup>19</sup> Another call girl involved, Mandy Rice-Davies at the trial of their pimp, Stephen Ward, famously said in response to Lord Astor's denial of her allegations 'He would, wouldn't he.'

## Retirement

In 1981-82, he wrote another book *What Next in the Law*. When it was launched it attracted widespread criticism for his remarks that some coloured or black jurors should not have served on a jury. He announced that he had decided to retire, though a cartoon in *Private Eye* had one barrister saying to another 'I expect the House of Lords will overrule his decision'. That did not occur, but in *George Mitchell (Chesterall) Ltd v Finney Lock Seids Ltd*<sup>20</sup> Lord Diplock referred to 'the inimitable style of Lord Denning MR's judgment', upon the grounds of which the House (unusually perhaps) dismissed the appeal saying:

I cannot refrain from noting with regret, which is, I am sure, shared by all members of the Appellate Committee of this House, that Lord Denning M.R.'s judgment in the instant case, which was delivered on September 29, 1982 is probably the last in which your Lordships will have the opportunity of enjoying his eminently readable style of exposition and his stimulating and percipient approach to the continuing development of the common law to which he has himself in his judicial lifetime made so outstanding a contribution.

Whether '[i]t was bluebell time in Kent' is problematic but Lord Denning's farewell<sup>21</sup> commences with:<sup>22</sup>

### In outline

Many of you know Lewis Carroll's *Through the Looking Glass*. In it there are these words (Ch.IV):

'...justice is not  
a temporal thing,  
it is eternal;  
a thing of  
this world.'

" 'The time has come', the Walrus said,  
'To talk of many things:  
Of shoes-and ships-and sealing-wax-  
Of cabbages-and kings-'"

Today it is not of *cabbages and kings* - but of cabbages and what-nots.

And, of course, Lord Denning in that case overturned an exclusion clause, a favourite stalking-horse. In 1985 he wrote as Chairman of the Magna Carta Trust<sup>23</sup> that the decision of Moore DCJ in *Reg. v McConnell*<sup>24</sup> to discharge an accused who had been brought to trial in breach of the promise of in Magna Carta that 'To no one will we sell, to no one will we will deny right or justice' was 'a decision after my own heart.'

Sadly, the source of the influence which pervaded the law schools and courts of the common law world for practically 40 years while he sat as a judge has now left us. Lord Denning was a remarkable man - a hero to many - a villain to others - Sir Leslie

Herron CJ welcomed him to the opening of our law term in 1967<sup>25</sup> in terms as having 'been truly described as an apostle of justice'.

Lord Denning rejoined:<sup>26</sup>

Finally, sitting in this Court, I would remind you of our task to do justice. You may well ask: 'What is justice?' Many men have asked that question-you and me- and no one has found a satisfactory answer. Plato asked it 2000 years ago. But justice is not a temporal thing, it is eternal; a thing of this world. The nearest approach to a definition which I can give is that justice is what the right-thinking members of the community believe to be fair.

The efflorescence of the common law and equity in the last two decades of this century owes no small part to Lord Denning. The evaluation of whether his creativity and leadership has enhanced or detracted from justice will be made for years to come. But the world of law is the poorer for his passing, the richer for his erstwhile presence.

1 *Beswick v Beswick* [1966] Ch 538 at p.549C  
2 (3rd ed) Meagher, Gummow and Lehane at e.g. pars [306], [2186] - [2188]  
3 At par [306]  
4 *Buckley v Tutty* (1971) 125 CLR 353 following *Nagle v Feilden* [1966] 2 QB 689  
5 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612  
6 op. cit at par [2188]  
7 *The Due Process of Law* (1980) Lord Denning p.215 in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175  
8 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130  
9 pp.138.7-136.3  
10 p.136.2  
11 [1951] 2 KB 164; the dissent inspiring the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 to change the law; cf here: *The Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 (HC); (1970) 122 CLR 628; [1971] AC 793 (PC)  
12 *The Family Story* (1981) Lord Denning p.184  
13 *Ibid* p.184  
14 *Ibid* p.172  
15 [1974] Ch 269 at p.322B-D  
16 And his colleagues'  
17 A former Lord Justice  
18 See *The Times* 6 March 1999: Lord Denning: Tributes: 'Champion of the Little Man'  
19 *The Due Process of Law* (1980) Lord Denning p.68  
20 [1983] 2 AC 803 at p.810F-G  
21 [1983] QB 284  
22 p.294B-C and note the signature heading  
23 Letter to the author 5 August 1985  
24 (1985) 2 NSWLR 269 (since reversed: *Jago v The District Court of New South Wales* (1989) 168 CLR 23)  
25 See [1967] 1 NSWLR at p.9  
26 [1967] 1 NSWLR at p.10