LAW and SOCIETY 1975

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THE HON. SIR HENRY FISHER

I REGARD it as a great honour that I should have been invited to deliver the first Bar Association lecture.

It is also a pleasure for one who was concerned with the law as Barrister and Judge over a period of some 23 years, but who has for the past five years been engaged in other pursuits, to be allowed the opportunity to deliver himself of some reflections on Law and Society in 1975. It may be that a person who has for a time been detached from practice can have a clearer perspective of some aspects of the administration of the law than those who are heavily engaged day in day out in the work of the courts.

The attention which has been attracted by Lord Justice Scarman's Hamlyn lectures demonstrates the interest which a great many people have in the general question of the function of law and the role of lawyers in the society of 1975.

I cannot hope to rival Lord Justice Scarman in the skill and elegance of his presentation. Nor should I seek to follow—dare I call him the Pied Piper of Hamlyn—along some of the paths which he trod. I must confess that I have grave doubts about the feasibility and value of a Bill of Rights, unless it were to be confined to anodyne propositions which no one in his right mind in any age would challenge. The law reflects or should reflect the balance or distribution of power in the community, a balance which changes from time to time. A Bill of Rights which did not correspond to the actual power situation would be untenable. A Bill of Rights which corresponded to the power situation at the date of its enactment would merely hamper the subsequent process of adjustment of the law to changes in the power situation. Judges are not elected, are not representative, and are not gifted with a divine faculty for detecting changes and trends in opinion on social topics. However imperfect our system of democratic government may be (and it clearly could be improved by the introduction of proportional representation), it is the best instrument we have for adjusting legal rights, duties and privileges to changes in the economic and social structure.

The United States in the circumstances of 1776 had perforce to have an

entrenched constitution, couched in broad, general phrases. But in the conditions of today the process of constitutional interpretation by the Supreme Court, and the testing of contemporary legislation against the terms of an eighteenth century document, are clumsy instruments for adjusting the law to social requirements. In the United States it is the powerlessness or unwillingness of the legislative and executive branches to deal with such questions as segregation which has made the use of the clumsy instrument of constitutional interpretation by the courts necessary. I believe that we have done better in this country where Parliament and the executive have had both the power and the will to deal with race relations.

I recognise that special problems are created for our Government, Parliament and Courts by our membership of the E.E.C. and by adherence to the European Convention of Human Rights, and that further problems will arise if the United Kingdom is going to become the Disunited Kingdom. But I do not myself believe that they require the wholesale breach with our traditions suggested by Lord Justice Scarman.

I would add in parenthesis that I do not believe that it would be to the general advantage to give an appeal to the courts on the merits from decisions of administrative tribunals. Supervision through the prerogative orders is of course essential, and could be made more effective. But, I do not believe that either the legal system or the social security system could without great strain and inconvenience adapt to the regime of appeals on the merits.

I am going to express views rather different from those of Lord Justice Scarman. The role which I see for the courts and lawyers is in my opinion just as valuable to society as that which he delineates. It is not however so sensational, and does not have the same neat, comprehensive, all embracing sweep as Lord Justice Scarman's vision. It is however, I believe, more realistic. It recognises the limits within which courts and laywers can operate efficiently and successfully and make a useful contribution. It seems to me that the law serves the community best when there is an explicit recognition throughout society of the limits to what courts and lawyers can be expected to perform, and of the conditions which are necessary if they are to perform efficiently and successfully their proper function within those limits.

Let me first summarise my argument in a number of propositions which I suggest that both legislators and judges should always have in the forefront of their minds. They are propositions to which lip service is often paid by judges and politicians. But the practice of both often conflicts with these propositions, and indeed some judges have a view of their role which is not consistent with them. Here they are:

1. The law should so far as possible be clear and certain.

2. Individuals and companies need to be able to obtain confident advice as to what their rights, powers, obligations and liabilities are.
3. The occasions on which it becomes necessary to go to the courts for determination of legal questions should be reduced to a minimum.
4. It follows that Parliament should legislate in a way which leaves as few questions for determination by the courts as possible.
5. Parliament should, in particular, avoid broad general propositions and imprecise terms or expressions, and should not give wide discretions to the courts to exercise or vague criteria for them to apply.
6. Judges should remember always that their function is an ancillary one, namely to lay down the law in such a way that more and more future disputes can be settled without recourse to the courts, and to give clearer guidance to individuals and companies in the conduct of their affairs.
7. Judges should refrain from broad statements of principle, and from obiter dicta.
8. They should be scrupulous to apply the law as it exists, even if they think it to be wrong or unfair or unjust or unattractive.
9. They should resist the temptation to twist the law to conform with their sympathies or their theories.
10. The proper instrument for the reform of the law is Parliament aided where necessary by the Law Commission, the Law Reform Committee, or Royal or departmental commissions.
11. Judges are not trained to legislate; judicial legislation is inevitably coloured by the facts of the particular case which chance has brought forward, whereas legislation should be based on wide-ranging enquiry, research, investigation and canvassing of views.
12. Judges may have sometimes to 'legislate', in the sense that they have to deal with legal questions not precisely covered by statute or by previous decisions; instead of welcoming such occasions as opportunites, they should reduce them as much as possible and 'legislate' with the minimum disturbance to, and with the closest possible analogy to, established law.

I said that lip service was from time to time paid to this kind of reasoning. Lord Hailsham in *Cassell and Co. Ltd.* v. *Broome* (1972) AC 1027; (1972) 1 AER 801, 809 gave powerful support to the idea that 'in legal matters some degree of certainty is at least as valuable a part of justice as perfection.' And more recently Lord Diplock in his dissenting speech in *Black Clawson* v. *Papierwerke* (1975) 1 AER 810, 836 said: "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences which will flow from it."

Earlier, Lord Diplock had said extrajudicially: "The judicial process fails it if is not predictable, for its true success is in inverse ratio to the number of cases which have to be brought to trial. If it is working well, parties to disputes can settle them without expending time and money on litigation, because they can foretell what the results of the litigation would be". (Holdsworth Society lecture—The Judge as Legislator). If I may inflict on you one more quotation, in the 12th Report of the Law Reform Committee (a unanimous report signed among others by Lords Pearson, Donovan and Diplock; Buckley LJ; Megarry and Walton JJ, and myself) you will find these words:

> "We think that if the courts were given power to apportion loss . . . it would introduce into a field of law where certainty and clarity are particularly important that uncertainty which inevitably follows the grant of a wide and virtually unrestrained judicial discretion. Such a discretion is not appropriate in the case of transactions involving the transfer of property, and we do not regard as desirable any change in the law which is likely to increase litigation and make it more difficult for businessmen and others to obtain reliable legal advice or to assess the likely financial outcome of their dealings and insure against the risks involved."

I have to confess to authorship of that particular passage in the Report.

But what is one to say of this statement which you will recognise as coming from Lord Justice Scarman's lectures:

"The rule in *Rylands* v. *Fletcher* like so many judicially created rules contains its own obscurities and raises new problems, but the cynic may say that this is one of the strengths of the common law. The illumination of obscurity and the process of first asking, and then perhaps years later answering fresh questions, has given and still gives the law and the judges a degree of flexibility and the room for manoeuvre which in turn brings the gift of survival." (Scarman, English Law, The New Dimension, p. 52.)

But at what expense and inconvenience to the citizens! In answer to Lord Justice Scarman I appeal to the original cynic, Diogenes, who when Alexander the Great asked him if he wanted anything replied:

"Μικρόν ἀπὸ τοῦ ἡλίου μετάστηθι"

"Yes, one small thing: that you should move out of my light."

I have a deep feeling that light is better than darkness, knowledge better than ignorance, security better than insecurity, certainty better than doubt. Flexibility born of obscurity is too dearly bought.

I have said that in many ways legislators and judges, even though they may subscribe in principle to the doctrine or clarity and certainty, depart from the principle. I am going to mention a few examples.

1. Statutory Drafting

It seems to me to be a fault in a legal system if an individual or company cannot with reasonable certainty determine what are his or its legal rights, powers, duties or liabilities without going to the courts to find out. In the context of statute law, Parliament could do a great deal more to achieve this end if it required that every Bill should give a clear answer to certain questions which if not answered by the statute are notorious causes of litigation, e.g. where a statutory duty is created, is civil liability to exist for breach of it? Where a criminal offence is created, is MENS REA an essential element? Again, the practice of legislating in wide general terms, and leaving it to the wretched citizens to give precision to the law by the vastly expensive and time consuming process of litigation, which is commonly adopted in the U.S.A. and on the Continent but has never been much used here, is in my opinion one which should at all costs be avoided in this country.

I have had occasion recently to study the U.S. experience in coping with insider dealing, and am appalled by what I see. The law in the U.S.A. has been developed by the use of statutory provisions and regulations in a very general form which were for the most part not specifically devised to deal with the problem of insider dealing. Regulation 10(b) (5) of the General Rules and Regulations under the Securities Exchange Act, 1934, the principal instrument employed, reads as follows:

"EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

1. to employ any device, scheme, or artifice to defraud,
2. to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
3. to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

On this foundation the courts have by judicial legislation created a highly artificial and complicated structure of law. This method of law-making relies on the willingness of individuals to engage in litigation, and is only made possible by the fact that in the U.S.A. the law and professional rules permit lawyers to act for a contingent fee. I do not believe that the public interest would be served by permitting a similar system over here. The legal profession has always (rightly in my opinion) feared a lowering of standards if contingent fees were permitted.

2. Statutory Interpretation

When lawyers have to advise on the interpretation of a statute, they should, apart from the limited external reference permitted by the mischief rule, be able to confine their attention to what Parliament has actually said in the statute. This is the only sure guide. The House of Lords in *Black Clawson* v. *Papierwerke* has I hope put paid for good to the idea that reports of Parliamentary debates in *Hansard* can be used as an aid to construction, but it has spoken with an uncertain voice on the question whether the report of a Committee can be used for this purpose. If there is even the possibility that courts will look at matters outside the statute, lawyers will be compelled to do the same when asked to advise: this will inevitably cause delay, increase the expense of obtaining advice, and probably render the advice less confident.

On the question of interpretation of U.K. statutes, the law to the best of my belief remains as stated by the House of Lords in *Magor & St. Mellons RDC* v. *Newport Cpn.* (1952) AC 187: "In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or orders, either by the language used or by necessary implication, the courts should of course carry these intentions out, but it is not the function of any judge to fill in what he conceives to be the gap in an Act of Parliament. If he does so, he is usurping the function of the legislature." (Lord Morton of Henryton). The House of Lords expressly disapproved the contrary principle which Denning LJ had laid down in *Seaford Court Estates* v. *Asher* (1949) 2 KB 481, 498–9, and unless and until the House of Lords decides to depart from the rule laid down in *Magor & St. Mellons* no U.K. court is free to follow Lord Denning's line.

I know that on the continent of Europe there is a tradition which gives to the court a freer role in attributing to the legislature intentions which the legislature has not expressed.

I believe that it would be wrong for our courts to be given by Parliament similar powers. Certainly, in the face of the authorities, they could not without impropriety arrogate such powers to themselves.

A tradition of this kind is productive of litigation, and it transfers legislative power away from the representative and responsible institutions into the hands of Judges who are neither.

Lord Justice Scarman says: "I would expect to see the E.E.C.'s principles of legislation and statutory interpretation and its conception of an activist court whose role is to strengthen and fulfil the purpose of the statute law replace the traditional attitudes of English judges and lawyers to statute law and the current complex style of statutory drafting."

I hope that Lord Justice Scarman's prediction will not prove correct. If it does, the law will become less certain, and less able to achieve the desiderata of which Lord Hailsham and Lord Diplock spoke.

3. The European Court

Lord Justice Scarman (p. 25) describes the European court as "a new style court whose approach to its task has the strong activist element that one finds in the French Conseil d'Etat."

Under the Treaty of Rome (Art 164) the duty of the court is to ensure that the law is observed in the interpretation and implementation of the Treaty.

The jurisdiction of the court is consensual, and does not extend beyond that which the member states have agreed by the Treaty to confer on it. Any extension of the Treaty beyond its actual terms can equally only be consensual, and would require unanimity among the states. In carrying out its duty, the court itself must therefore observe the law, which means the Treaty and the various instruments made in accordance with the Treaty.

Any attempt by the court to go beyond the strict terms of the Treaties would be a dangerous defiance of those principles. The court is not subject to the checks and balances which the Treaty has imposed on the other organs of the Community in order to safeguard the interests of the member states. One would expect to find that the court would stick rigidly to the letter of the Treaty and instruments made under it and would not seek to extend and develop Community law by judicial legislation, or to impose on member states things that they did not in terms accept by acceding to the Treaty. What however does one find? The court apparently takes pride in being an activist court. It has again and again gone beyond the strict terms of the Treaties. The court does not follow the English tradition of exact interpretation of written documents. The actual words used are often subordinated to the court's notion of the purpose which they were intended to serve. To the extent that words are interpreted as meaning not precisely what they say, but what the court thinks they should mean in the light of the general economy and spirit of the Community treaties, those who make the law, in particular the member states, lose control of what the laws actually achieve.

This seems to me to be a deplorable development. So far from encouraging our courts to follow this practice, I believe that good Europeans should inveigh against such practice in and out of season. Well might the member states say of some of the judgements of the court "non haec in foedera veni".

I turn now to our own courts, and give a number of examples where the courts make the task of giving legal advice more difficult.

4. House of Lords Departing from its Earlier Judgements

Until 1966, a practitioner was able to advise with complete confidence that a decision of the House of Lords represented the law, and could not

be departed from by any court in the land, including the House of Lords itself; Parliament alone could alter the law, and Parliament hardly ever legislates retrospectively. How could there be any doubt about this? Lord Campbell's words in *Beamish* v. *Beamish* 9 HLC 274, 338 had been regarded as authoritative since 1861: "The rule of law which your Lordships lay down as the ground of your judgement . . . must be taken for law till altered by an Act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships. The law laid down as your ratio decidendi, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding on your Lordships, the House would be arrogating to itself the right of altering the Law, and legislating by its own separate authority". That is a pronouncement which, like the dogma of papal infallibility, is in principle irrevocable, since infallibility attaches to the dogma itself. I believe that the decision of the House of Lords in 1966 claiming for themselves the freedom to depart from precedent was unconstitutional, and that it has been and will continue to be productive of uncertainty and inconvenience. Lord Halsbury in *London Street Tramways* v. *L.C.C.* (1898) AC 375, 380 spoke of the "disastrous inconvenience of having each question subject to being reargued and the dealings of men rendered doubtful by reason of different decisions." How prescient, on that occasion, Lord Halsbury was. Look at the case of *Jones* v. *Secretary of State for Social Services* (1972) AC 944; (1972) 1 AER 145.

A decision on exactly the same point had been reached between what were, in effect, though not in form, the same parties 5 years earlier in *Dowling's* case which I argued (unsuccessfully) for the defendant. How did their Lordships decide when the matter was relitigated in *Jones'* case:

Lords Reid, Morris and Pearson	Dowling was right. Even if it was wrong it ought to be followed.
Lords Dilhorne, Wilberforce & Diplock	Dowling was wrong and ought to be reversed.
Lord Simon of Glaisdale	Dowling was wrong, but it should not be reversed.

The report of the case covers fifty-four pages in the All England Reports, a great part of it devoted to the question whether or not the House of Lords should depart from its previous decision. Practitioners cannot forecast when the House of Lords will excercise the freedom that it claims. The chance that it will do so is a temptation to relitigate questions which under the previous regime would have been regarded as settled. Lord Simon of Glaisdale in *Jones'* case drew attention to the hardship which might result

in cases decided between the earlier and the later decision of the Lords and repeated his warnings in his dissenting speech in *Miliangos* v. *George Frank (Textiles) Ltd.* (1975) 3 AER 801. The time-consuming and costly process of litigation is not an efficient method of reforming the law. The judiciary (as Lord Simon said) are at a disadvantage in assessing the potential repercussions of any decision, and increasingly so in a complex modern industrial society. If there are recognised defects in the law, it is far better to use the machinery of the Law Commission and Parliament (including the private members Bill). There is the perennial problem of Parliamentary time, but I hope that the inquiry into the practice and procedure of Parliament which was announced in the Queen's speech may come up with a simpler and speedier way of giving effect to Law Commission reports on what is called lawyers law.

Far from applauding the enterprise of the courts in overturning established rules, as in the recent cases of *Miliangos* v. *George Frank (Textiles) Limited* in the House of Lords and *The Philippine Admiral* in the Privy Council, I believe that it would be better for all concerned if the courts merely drew attention to what they believe to be a defect in the law as established by long standing decisions and acted on over a long period, and left it to the executive and to Parliament to change the law if they agree that it requires change.

Reform of the law by way of litigation is also inefficient in that it is subject to the chance occurrence of cases. "As ever the law operates only when set in motion by litigants with the necessary means and determination." (Scarman, p. 51). It is said that Professor Goodhart almost sang a *Nunc Dimittis* when at last, in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* (1961) AC 388, an opportunity arose for a court to reconsider the rule in *Re Polemis and Furness Withy & Co.* (1921) 3 KB 560.

5. Reluctance of some Lower Courts to Abide by Precedent

I need do no more in this connection than to refer once again to *Cassell* v. *Broome;* to what the House of Lords said in *Miliangos* about the Court of Appeal's decision in *Schorsch Meier* v. *Hennin* (1975) QB 416; (1975) 1 AER 152; and to the series of cases in the Court of Appeal (*Hubbard* v. *Pitt* (1975) 3 AER 1; *Fellowes* v. *Fisher* (1975) 2 AER 829; *Kwik Lok Cpn.* v. *WEW Engineers Ltd.*) in which the decision of the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.* (1975) 1 AER 504 has been discussed. There is a danger that a court which seeks all the time to improve the law will bring the law not only into disarray, but into disrepute.

A fundamental change in the law, such as the removal of the ban on contingency fees (which in *Wallersteiner* v. *Moir* (No. 2) (1975) QB 373;

(1975) 1 AER 849 one member of the Court of Appeal was ready to sanction) should be introduced, if at all, only after a lengthy period of discussion and examination of the consequences, rather than as a result of a single 'hard case'.

6. Contracts

Parties should be able to discover, before they enter into a contract, what their rights and liabilities under it will be. There must always of course be uncertainty as to how a contract will turn out, because events may take an unexpected course. But the law should so far as possible reduce the element of uncertainty, by making it possible for legal advisers to advise with confidence what the effect of particular provisions will be, and to provide for particular eventualities. I should deplore therefore, a legal situation where this was rendered in principle impossible, and the effect of particular contractual provisions depended on events occurring after the inception of the contract. It should for instance be possible to say, at the time of the contract, whether or not certain conduct will amount to a repudiation of the contract which the other party is entitled to accept, and whether or not certain events are or are not within an exception clause.

The question should always be "what did the parties to the contract intend, or what compulsory incidents did the law at the date of the contract impose?" I should deplore any development of the law which entitled the court to determine contractual rights and obligations on the basis of what the court considers to be reasonable in the light of the circumstances as they exist at the time the case is heard. There is a constant temptation for Judges to try to bring the contract which the parties have made into line with the contract which the court thinks they should have made. I have heard a Judge say (in an idle moment, and perhaps not meaning it entirely seriously): "I always make up my mind first which side I think ought to win, and then I try to find a way of bringing about that result . . . you can do wonders with implied terms." I hope that no Judge ever in fact acts in that way. It would be the reverse of justice. Judges have no sixth sense. It is for them to find the facts and determine the law quite rigorously, and apply their findings without regard to their own feelings or sympathies, or to the consequences (convenient or inconvenient) of their decision. So far as implied terms are concerned no Judge should ever forget the wise words of Scrutton LJ, the greatest common lawyer of the 20th Century, and equalled in the 19th only by Blackburne, in *Comptoir Commercial Anversois and Power Son & Co.* (1920) 1 KB 868. "The court . . . ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party if he had thought about the matter would not have made the contract unless the term was included; it must be such a necessary term that both parties must have

intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted". I should regard it as deplorable if there were to be substituted for that established, authoritative and time-honoured rule the formula suggested by Lord Denning in *Greaves* v. *Baynham Meikle* (1975) 3 AER 99, 103 namely that, whether or not the implication is necessary, the courts should imply a term such as the court thinks is just and reasonable in the circumstances. Since writing those words I have read the report of *Liverpool C.C.* v. *Irwin* (1975) 3 AER 658, and I take comfort from the judgement of Roskill LJ, a Judge trained as I was in the strict discipline of the commercial law, which follows exactly the line which I have been taking.

The legislature has unfortunately at least once been encouraged by the Law Reform Committee to fall into error in this respect. The Misrepresentation Act 1967 by Section 3 enacts that provisions excluding liability "shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case." No lawyer could at the time of the contract advise his client whether or not such an exclusion clause will be effective. This cannot be right.

A cautionary tale as to the effect of provisions giving wide discretion to courts in relation to contracts is to be found in the German Civil Code. Article 242 provides that contracts are to be performed in good faith: "Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rucksicht auf die Verkehrsfitte es erfordern." This clause has been remarkable, even in Germany, for the amount of litigation it has given rise to. The standard commentary on the BGB, Staudinger, has one volume of 1553 pages, almost the size of the White Book, devoted to this one Article.

7. Donoghue v. Stevenson

It has for long been recognised that "public policy" is an unruly horse. It allows the Judge too wide a discretion, it tempts him to impose views of social policy which may be idiosyncratic or anachronistic and which are certainly unpredictable. But the same objections can be raised to some other very general statements of principle which can if applied literally produce wide changes in the law not within the contemplation of their author. Lord Atkin was a great jurist. I once possessed and wore his full-bottomed wig, and I always hoped that some residue of his learning might have remained adhering to it, and that some of it might have percolated through into my head. But even in his own day there were those who suspected his soundness as an exponent of the law. Lord Hailsham LC wrote of him in 1935: "Atkin, who is rather apt to take the opportunity of making the law as it ought to be, instead of administering it as it is is. I

am really rather anxious as to what may be formulated as the common law doctrine." (Heuston, Lives of the Lord Chancellors, at p. 531). The neighbourhood principle enunciated by Lord Atkin in *Donoghue* v. *Stevenson* seems to me to be another unruly horse, which judges should be very slow to mount. It used to be regarded as something which Counsel relied on as a last resort when he had not really got a case.

I cannot believe that it is to the general advantage that liability should be held to attach in any case which can be brought within Lord Atkin's general words. They seem to me to be particularly inappropriate to the actions of public officials performing statutory duties or exercising statutory powers. In *Dutton* v. *Bognor Regis Urban District Council* (1972) 1 QB 373: (1972) 1 AER 462 it was held that a council whose building inspector in the exercise of a duty imposed or power conferred by Parliament for public purposes inspected foundations negligently, should be liable in damages to a purchaser of the house. Parliament did not expressly create any such liability, nor do I believe that the public purpose for which building inspection was introduced necessarily (or even plausibly) includes financial relief for individuals. The use of Lord Atkin's words, spoken in relation to a very different kind of case, to give such relief seems to me to be the reverse of the way in which private and public rights should be adjusted. Whatever may have been the merits of the judicial development of the law of civil negligence in the 19th century, I do not believe that it remains in these days a suitable method of law reform. I hope that Lord Pearson and his colleagues will recommend a radical departure in personal injury cases from what Lord Wilberforce in *British Railways Board* v. *Herrington* (1972) AC 877; (1972) 1 AER 749, 769 called "our outdated law of fault liability", and that this will lead to a rethinking of the principle in other contexts.

Whilst on the subject of unruly horses, there is another steed, let out of its stable in 1947 in *Central London Property Trust* v. *High Trees House* (1947) KB 130; which I suspect may be developing signs of an unruly character. I base this suspicion on the recent case of *Moorgate Mercantile* v. *Twitchings* (1975) 3 AER 314 in which that particular horse galloped extremely hard, if it did not actually bolt.

8. The Assessment of Damages and the Settlement of Cases

The assessment of damages for personal injury cannot be a precise science. Some elements can be assessed with a degree of precision, but others are imponderable and conventional. It seems to me important that those elements which are capable of a degree of precision should be calculated as exactly as possible, with the use of all available relevant expert evidence; and that there should be as far as possible uniformity between the con-

ventional sums awarded as general damages for like injuries in different cases. The aim and object should be to enable as many claims as possible to be settled without recourse to the courts. To this end Judges should to the greatest extent possible use rational processes to arrive at their awards, and should disclose their reasoning and their calculation. Yet there has been reluctance among Judges to do this, and a preference for what I can only call the "hunch" method. Until comparatively recently there was opposition on the part of some judges to particularising the constituent items in an award of damages. (See *Watson* v. *Powles* (1968) 1 QB 596; (1967) 3 AER 721). The judiciary only came to follow a different policy when in effect compelled to do so by the change in the law relating to interest on damages brought about by the Administration of Justice Act 1969: See *Jefford* v. *Gee* (1970) 2 QB 130; (1970) 1 AER 1202. It is now recognised that "a careful breakdown and explicit calculation of each ingredient" is indispensable: see per Lord Wilberforce in *Parry* v. *Cleaver* (1970) AC 1; (1969) 1 AER 555, 582. There is still however a feeling that judges have some magical sixth sense which enables them to determine whether an award is fair, and to depart from the figure arrived at by calculation if this sixth sense tells them that it is not fair: see per Lord Denning in *Fletcher* v. *Autocar & Transporters* (1968) 2 QB 322; (1968) 1 AER 726. I prefer Salmon LJ's view in that case that "instinct is an uncertain guide and should play only a very small, if any, part in assessing financial loss". I believe that the methods used by judges in arriving at awards are still unnecessarily crude, and that more sophisticated arithmetic and greater reliance on actuarial evidence would give better results than plucking a "multiplier" out of the air.

I would add that there would be a great improvement in the uniformity of awards if there was an official publication, covering all awards, based on material which the judge in every case would be required to provide. *Kemp and Kemp* on Damages is an invaluable book, but its coverage cannot hope to be complete.

9. Imprecise Criteria Imposed by Decisions of Courts

I have emphasized the importance to the citizen of being able to obtain reasonably certain advice as to his rights and liabilities without having to go to the courts. In no context is this more important than the criminal law. I deplore therefore the existence of statutory or non-statutory offences whose content is obscure, and which can be widened or narrowed according to changing winds of fashion or opinion.

The recent decision in *D.P.P.* v. *Withers* (1974) 3 AER 984 has brought about a welcome reduction in this category, but it cannot be said that the speeches in *Kamara* v. *D.P.P.* (1973) 2 AER 984 constitute clear guidance

as to the circumstances in which concerted action will be held to constitute the criminal offence of conspiracy to commit civil trespass.

The law of conspiracy cries out for legislative interference, and I hope that the continued efforts of the Law Commission and Parliament will do something at any rate to reduce the present uncertainty of the law.

It is probably too much to hope that the law of obscenity will be rationalised. On the current test of tendency to corrupt or deprave the outcome of trials for obscenity seems to be almost a lottery. While it may have seemed possible in the high noon of Victorian certainty to enforce a moral code in sexual matters, it is anachronistic to seek to do so in an age where there is a healthy difference of views and of standards about what is permissible in the sexual field. The law as laid down in *Shaw* v. *D.P.P.* (1962) 2 AC 220 and *Knuller* (*Publishing, Printing and Promotions*) v. *D.P.P.* (1973) AC 435; (1972) 2 AER 898 seems to me objectionable, not only on the grounds of its imprecision, but also because the restraints which it imposes do not seem to me to be the sort which in sexual matters a mature society should seek to impose.

The modern obscenities are cruelty and violence. I am generally opposed to censorship on moral grounds, but if it is to be exercised at all it should be violence and cruelty which are treated as obscene, and sex only when associated with violence and cruelty. There was a stronger case for banning "Straw Dogs" or "The Clockwork Orange" than the "Last Tango in Paris"!

Conclusion

I have strayed somewhat from my point. The dragon which I have sought to attack in this lecture is not Mrs. Grundy. But the law relating to obscenity is one example of a failure to observe the principle (which I stated at the outset) that there are limits to the area in which the law and lawyers can operate successfully. The enforcement of sexual morality is outside those limits.

Of course there are contexts in which Judges and courts have to operate as pastors or social welfare agents, e.g. some aspects of sentencing, custody cases in the Family Division, much of the work of the juvenile courts. My observations do not touch them. I have been concerned with the specifically judicial task of determining the facts of cases and the law applicable to those facts.

It would be disastrous if judges were to carry over to the performance of these tasks the attitude of mind appropriate to the social welfare role.

The message which I have been preaching is not particularly original. I remember hearing Lord Devlin say much the same at the Law Society's Conference in 1966. All that I have done is to articulate my profound dislike of "well-meaning sloppiness of thought", to quote Lord Justice

Scrutton again. Parliament and the Judges should always have in mind the citizens who have to direct their affairs in the light of the law which they create or declare, and the lawyers who have to advise on it. It is a paradox that, while success in commerce, finance and industry depends on the taking of risks, those engaged in those activities constantly endeavour to limit the area and extent of risk by insurance, reinsurance, confirmed letters of credit, matching or covering of bargains and of risks, by hedging and laying off, the taking of security by guarantees, performance bonds, etc. The law should not be so drafted or so administered as to constitute an additional hazard, whose vagaries are impossible to predict and against which it is impossible to insure.