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LORD DENNING AND THE JUDICIAL ROLE

Francis Bennion*

Part I

Introduction

This article is written in tribute to the late Lord Denning, whom I had the privilege to know as a senior colleague and friend over many years. My knowledge of him began when I was an Oxford undergraduate just after the war and became a friend of his stepdaughter, who was also an Oxford undergraduate at the time.

My first article in a scholarly journal, published over fifty years ago, was about Lord Denning.[1] I wrote it when I was the law tutor at St Edmund Hall Oxford. With the brashness of youth I attacked Denning's attempt to modify the common law doctrine of consideration in contract judicially by building on principles of estoppel laid down in the famous *High Trees* case.[2] I begin this tribute by setting out the final words of that article, because it seems appropriate to make them the starting point of my own personal assessment of Lord Denning's contribution to our jurisprudence-

> 'To administer justice it is necessary to administer law and it may be said with all respect that those who, from motives of compassion, show a want of consideration for principles of high and long-standing authority - either by choosing to ignore them or by formulating unreal distinctions - do only disservice to the true cause of justice. To usurp the function of the legislature in the name of a developing jurisprudence is surely to destroy the reality of the common law, to make its doctrines undependable and to leave those whom it should serve bereft in costly uncertainty.'

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Harsh words from a young man who considered certainty an important element of law and believed alterations should be made by Parliament rather than the judiciary. It will not surprise you that shortly afterwards I became a parliamentary draftsman.

Certainty of Law

There have been many voices over the years attacking Lord Denning's view that judges should not shrink from correcting what they see as defects in the law without waiting for Parliament to do it. Some of these critics have themselves been judges. When Lord Denning said of an ill-drawn Act that the judiciary should 'fill up the gaps and make sense of the enactment'[3] Viscount Simonds said on

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[1] 'Want of Consideration' (1953) *M.L.R.* 441.

[2] Central London Property Trust v. High Trees House [1947] K.B. 130.

[3] *Magor and St Mellons R.D.C. v. Newport Corpn.* [1950] 2 All ER 1226 at 1236.

appeal, in words that have become famous, that this 'appears to me to be a naked usurpation of the legislative function under a thin disguise of interpretation'.[4] In a comprehensive denunciation of the Denning ethos, Lord Hailsham of St. Marylebone said twenty years later–

> '. . . litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.'[5]

Lord Denning commented sardonically on this passage in his book *The Discipline of Law*.[6]

However the fact is that over the past thirty years or so , whether one likes it or not, Lord Denning's view of the creative function of the judiciary has become more and more influential and effective. I will select a few examples.

It was once thought that a court called upon to construe an Act which had been passed to give effect to a treaty ought not to allow reference to the treaty; indeed the House of Lords so held.[7] Lord Denning thought the better rule in this area, as in others, is that the court should arrive at an *informed* interpretation. In one case, blithely ignoring the House of Lords ruling, he said that an Act passed to give effect to an international convention should be construed in conformity with the convention, and that he had confirmed that this was being done by looking at the convention in question. He added: 'I think we are entitled to look at it, because it is an instrument which is binding in international law; and we ought to interpret our statutes so as to be in conformity with international law.'[8] Few nowadays would disagree with that sentiment, yet its effect is that judges may strain the literal meaning of an enactment to make it conform to the treaty.

This is just one example of the use of legislative history in statutory interpretation, with which, under the Denning influence, the courts have become much more free. No legal limitation was ever placed on the court's freedom to read in private any materials it thought fit, whether for the purposes of a particular case before it or in order to acquire information about current affairs generally. Long before *Pepper v. Hart*[9] Lord Hailsham L.C. said in Parliament: 'I always look at *Hansard*, I always look at the Blue Books, I always look at everything I can in order to see what is meant . . . The idea that [the Law Lords] do not read these things is quite rubbish.'[10] From the bench Lord Denning assented. 'Having sat there for five years, I would only say: "I entirely agree and have nothing to add".'[11]

However it used to be different when it came to argument in court. Even Lord Denning said, when invited to look at a committee report on which an Act had been based: 'But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it.'[12] In another pre-*Pepper v. Hart* judgment Lord Denning said: 'In most of the cases in the courts, it

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[4] *Magor and St Mellons R.D.C. v. Newport Corpn.* [1952] AC 189 at 190.
[5] *Cassell & Co. Ltd. v. Broome* [1972] AC 1027 at 1054.
[6] Pages 312-313.
[7] See *Ellerman Lines Ltd. v. Murray* [1931] A.C. 126.
[8] *Salomon v. Customs and Excise Comrs.* [1967] 2 QB 116 at 141.
[9] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.
[10] (1981) H.L. Deb. (5th series) col. 1346.
[11] *Hadmor Productions Ltd. v. Hamilton* [1983] 1 AC 191 at 201.
[12] *Letang v. Cooper* [1965] 1 Q.B. 232 at 240. Cf. *Katikiro of Buganda v. A.-G.* [1961] 1 W.L.R. 119, where the Judicial Committee of the Privy Council refused to 'look at' a white paper, but added that in any case it failed to establish the contention for which it was sought to be cited!

is undesirable for the Bar to cite Hansard or for the judges to read it. But in cases of extreme difficulty, I have often dared to do my own research. I have read Hansard just as if I had been present in the House during a debate on the Bill. And I am not the only one to do so.'[13]

Way back in 1971 Lord Denning had referred in court to Hansard in order, as he put it, to ascertain the mischief which the Betting, Gaming and Lotteries Act 1963 was intended to remedy. However he cited a speech by the Minister which went beyond the mischief and explained the remedy: 'My bill seeks to remedy this situation by strengthening the hands of local authorities to refuse permits [for gambling machines]'.[14] This was a vital quotation because the point at issue was whether quarter sessions had power on appeal to rehear the case and substitute their own view for that of the local authority.

In 1976 Lord Denning looked at Hansard to find out why cinematograph film exhibitions were excluded from the application of the Obscene Publications Act 1959 by the proviso to s. 1(3)(b). He said–

> 'I propose to look at Hansard to find out. I know we are not supposed to do this. But the Law Commission looked at Hansard: see their Report, paragraph 3.46, p. 88.[15] So did Lord Diplock in *Knuller's* case [1973] A.C. 435, 480. So I have looked at Hansard to refresh my memory.'

He went on to cite passages from Ministers' speeches in
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the Lords and Commons which explained the reason for the exclusion, which he found 'no longer valid today'.[16]

Later Lord Denning, after saying that 'the recent pronouncement by the House of Lords in *Davis v. Johnson* . . . [says] we ought to regard Hansard as a closed book to which we judges must not refer at all', proceeded to get round the prohibition by citing extracts from Hansard given in a textbook.[17] In a 1982 case he got round it by citing an affidavit by a government department which stated that ministers had given certain assurances during the passage of the relevant Bill through Parliament.[18] In the following year he reverted to direct reference in a judgment to a Hansard report of a speech by Lord Wedderburn made in proceedings on the bill for the Employment Act 1980.[19] On appeal Lord Diplock made a riposte which I will quote at length because it exemplifies a widespread judicial attitude to Lord Denning at that time.

> 'There is a series of rulings by this House, unbroken for a hundred years, and most recently affirmed emphatically and unanimously in *Davis v. Johnson* [1979] A.C. 264, that recourse to reports of proceedings in either House of Parliament during the passage of a Bill which upon the signification of the Royal Assent became the Act of Parliament that falls to be construed, is not permissible as an aid to its construction . . . The rule that recourse to Hansard is not permitted as an aid to the construction of an Act of Parliament is one which it is the duty of counsel to observe in the conduct of their clients' cases before any English court of justice. Counsel do observe that duty. They did so in the instant case; none of them made any attempt to refer to Hansard, nor were they given any intimation at the hearing of Lord Denning's intention to do so himself and, in view of the recent decision of this House in *Davis v. Johnson*, they

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[13] *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 at 201.
[14] *Sagnata Investments Ltd. v. Norwich Corpn.* [1971] 2 Q.B. 614 at 624.
[15] The report was *Criminal Law: Report on Conspiracy and Criminal Law Reform* (Law. Com. No. 76), 17 March 1976.

[16] *R. v. Greater London Council, ex parte Blackburn* [1976] 1 W.L.R. 550 at 556.
[17] *R. v. Local Comr. for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council* [1979] Q.B. 287 at 311-312.
[18] *R. v Secretary of State for the Environment, ex parte Norwich City Council* [1982] Q.B. 808 at 824.
[19] *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 at 204.

> were entitled to assume he would not do so. Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied on by the judge and to be given an opportunity of stating what his answer to it is. In the instant case counsel for Hamilton and Bould complained that Lord Denning MR had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill through the two Houses of Parliament; and that if he, as counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticise what Lord Wedderburn had said in his speech in the House of Lords, but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to Hansard.'[20]

An Australian commentator on this case remarked of Lord Denning: 'Such an eccentric view of the doctrine of precedent is, of course, completely unacceptable (especially to the House of Lords) and the practical effect in England of his determined push for change has been to see the door locked, barred and bolted in his face, and guarded by such weight of judicial authority as only Parliament would be able to overcome'.[21] How wrong he was! Under the Denning influence the House of Lords shortly afterwards reversed the exclusionary rule in the famous case of ***Pepper v. Hart***. Out of seven Law Lords in a specially-constituted court, only the Lord Chancellor, Lord Mackay of Clashfern, dissented.[22]

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[20] ***Hadmor Productions Ltd. v. Hamilton*** [1983] 1 A.C. 191 at 232-233.
[21] Donald Gifford, ***Statutory Interpretation*** (1990) p. 134.

[22] I immediately expressed agreement with his dissent in an article: 'Hansard - help or hindrance? A draftsman's view of ***Pepper v. Hart***', [1993] Statute Law Rev. 149.