

# Lord Denning and the Contemporary Scene

## Editorial Note:

*Baron Alfred Thompson Denning was born in 1899, one of six children to two humble country folk, who were far from wealthy. His parents were sober, hardworking and religious and the family was raised accordingly. His father was a draper in Whitchurch, Hampshire. It was a closeknit and exceptional family, as can be seen from the fact that of the six children one is now Lord Denning, another is Lieutenant-General Sir Reginald Denning and a third Vice-Admiral Sir Norman Denning. Three from one family of humble origin who have risen to lead their country in three different fields, particularly in an England then ridden by class distinction.*

*Educated in a grammar school Lord Denning served two years in France with the Royal Engineers. He took first class honours in Mathematics at Oxford University in 1920 and then began teaching at Winchester, one of England's leading public schools. He soon discovered, however, that his vocation was not in the field of teaching and he returned to Oxford to gain first class honours in law and became a prize student at the Inns of Court in London. He was called to the Bar in 1923. He had a very successful private practice, taking silk in 1938 as a King's Counsel. He was appointed to the High Court Bench in 1944 at the comparatively early age of 45 and given a knighthood. Despite his youthfulness, it was not long before he was further elevated and made a Lord Justice of Appeal in 1948, and nine years later a Lord of Appeal in Ordinary in the House of Lords, the highest court in the land, which automatically gave him a life peerage. Denning's time in the House of Lords was during a period when the judicial side of the House was very much dominated by a conservative element. As one Law Lord in nine, Denning had little opportunity of making his more radical views about law bear fruit and it was soon obvious that he was chafing to do more towards a positive contribution to the common law. His opportunity came in 1962 when there was a vacancy in the office of the Master of the Rolls, which carries with it the Chairmanship of the Court of Appeal. Although this was in fact a step down from Britain's highest court, Denning courageously and eagerly sought and obtained it, with the result that for the past 14 years he has been able to make some very real contributions to the common law in the Court of Appeal which is, in effect, the highest court reached by a large majority of cases.*

The contemporary scene in Great Britain is unthinkable without Lord Denning of Whitchurch, Master of the Rolls. He is undoubtedly one of the great judges of the century. Future centuries will remember him as

one of the makers of the common law. Legal historians will say of him what Holdsworth says about Lord Mansfield: "He succeeded in infusing a new spirit into the common law, substantive and adjective, the influence of which was felt outside his own court."<sup>1</sup>

## LAW AND JUSTICE

The judge on the Bench is faced from time to time with the age-old conflict between law and justice. The way in which he solves this conflict depends on the view — often sub-conscious — which he has formed of the function of his judicial office. If he takes the view that the certainty of law as an established order of society must prevail, he may on occasion feel barred from doing justice because he will feel constrained to apply the law as it is and will hopefully leave it to the legislator to change it and to do justice in later cases. Another judge will use the law as an instrument of doing justice in the case before him. He will not shrink from being unorthodox and an innovator if he believes that justice so demands. Within the limits of his judicial office and without wishing to usurp the function of the legislator, he will not be afraid to make law. He is alive to the fact that justice is not a constant concept but that its meaning changes with the kaleidoscopic changes in a living society. A judge who considers this to be the essence of the judicial office must have a clear vision of the contemporary meaning of justice. He must not accept the concept of justice as preached by avant-gardists or reactionaries. He must be a man of the people. Such is Lord Denning's idea of justice. He looks at law as an instrument of doing justice, doing justice now in the case before him, justice which is founded on what the majority of right-thinking people regard as a fair solution, justice which the common people understand and which gives them confidence that those occupying the judgment seat do not live in a different world of ideas from their own and understand their hopes and anxieties.

The belief that law is an instrument of doing instant justice, is the explanation of Lord Denning's often misunderstood radicalism. His approach is teleological. He thinks of the result before he considers the legal reasoning on which it has to be founded. If the result to which established legal doctrine leads is obviously unfair or out of touch with what ordinary people would expect to be the law, he will examine first principles in order to ascertain whether they really compel an unjust solution and often this method will enable him to arrive at an answer which is more adequate to modern needs. This is not the approach of a radical. On the contrary, it is the approach of a traditionalist who is a confirmed upholder of the traditional values of the common law and

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1 William Holdsworth, *Some Makers of English Law*, Cambridge University Press, 1966, Paperback, p. 162.

who believes that it should play the same role of keeping a balance between the various conflicting interests in modern society as it played in the days when it came into existence and was developed by the great judges of the past.

Lord Denning possesses three qualities which make it possible for him to carry out his mission of a modern, forward-looking judge. The first is his understanding of the social changes which have taken place in modern society. The second is his erudition and technical legal skill. And the third is moral courage and boldness founded on deep Christian belief and not afraid of being the voice in the wilderness.

### LORD DENNING and the COMMON PEOPLE

How sensitive Lord Denning's antennae are to what the ordinary man thinks, may be illustrated by two examples, both extra-judicial. In his famous book *Freedom Under the Law*, published in 1949, he gave expression to the idea of social justice, as contrasted with the nineteenth century concept of formal justice according to which it was sufficient that the rich man and the poor were equal before the law and which ignored the stark reality of economic bargaining power. Lord Denning said:-<sup>2</sup>

"But just as the property owners were entitled to prefer their own interest to public good, so also anyone who had a bargaining lever was able to exploit it for his own benefit. It was all done under the name of 'freedom of contract'. However hard were the terms of any contract, the judges enforced it. They said 'you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract'.<sup>3</sup> Oh, what abuses were not covered by this catchword 'freedom of contract'".

But *Freedom Under the Law* has also another message. In modern society the state has enlarged its functions. Government departments, in the age of dirigisme, wield wide powers which of necessity restrict individual freedom and, though well-intentioned, may cause harm and distress to the citizen. In Lord Denning's view, in modern society the function of the courts is to protect the individual against abuse of executive power. The scales must be kept even not only between man and man but also between the citizen and the state. Lord Denning observed:-<sup>4</sup>

"...the new tribunals administer the law as much as other courts of the land. Their task of doing justice as between the subject and the administrative branches of government is just as important as the task of doing justice between man and

<sup>2</sup> *Freedom Under the Law*, 1949, 69

<sup>3</sup> *Printing and Numerical Registering Co. V. Sampson* (1875) L R 19 Eq 462, 465, per Jessel MR

<sup>4</sup> *Freedom Under the Law*, 1949, 96

man. All alike, tribunals and courts, are concerned with maintaining the rule of law without which there is no freedom for any of us. We must see to it that the stream of British freedom — which has been kept clear by the decisions of the judges — does not perish in the bogs of departmental decisions.”

It took the legislator nine years to give effect to Lord Denning’s message by passing the Tribunals and Inquiries Act 1958,<sup>5</sup> and although this Act at least established the rule of law in proceedings before the tribunals,<sup>6</sup> it did not do so as completely as Lord Denning had suggested; he would have preferred a superior Court able to review the decisions of the tribunals and thus to build up a body of administrative law in this country. The legislator needed even longer to devise a remedy, albeit a weak and insufficient one, to investigate alleged abuse of administrative discretion; the institution of ombudsman was introduced only by the parliamentary Commissioner Act, 1967, eighteen years after the publication of *Freedom Under the Law*.

The second measure which indicates Lord Denning’s awareness of popular sentiment was his Report of the Profumo affair, presented to Parliament in September, 1963.<sup>7</sup> Profumo, a minister of the Crown, had an affair with a girl called Christine Keeler. She had lived with an utterly immoral man, Stephen Ward, who admired the Soviet regime and was friendly with an Assistant Russian Naval Attache, Captain Eugene Ivanov. Profumo denied any impropriety with Christine Keeler in an interview with other ministers and in a statement in the House of Commons. Later the truth came out and a public scandal ensued. Criminal proceedings were instituted against Stephen Ward and he was convicted on a charge of living on the earnings of prostitution; he committed suicide. There was considerable public disquiet, voiced in the press, for two reasons. First, as Profumo was Secretary of State for War, it was feared that the security of the realm might have been endangered, and secondly the trial of Ward cast a shadow on the impartial administration of justice in England, as some people regarded it as an attempt at diverting attention from the major figures involved in the scandal to a minor criminal. In this delicate situation the then Prime Minister, Mr. Harold Macmillan, asked Lord Denning to report. The terms of reference of the inquiry were drawn narrowly. They concerned the operation of the Security Service and the adequacy of their co-operation with the police and the question whether national security had been endangered. Lord Denning, sensing the public disquiet, interpreted his terms of reference widely:<sup>8</sup>

“While the public interest demands that the facts should be ascertained as completely as possible, there is a yet higher public interest to be considered,

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5 For which is now substituted the Tribunals and Inquiries Act, 1971.

6 Viscount Kilmuir, “The State, the Citizen and the Law” in (1957) J.B.L. 233.

7 Cmnd 2152

8 Profumo Report, para 9

namely the interest of justice to the individual which overrides all other. At any rate, speaking as a Judge, I put justice first.”

In a painstaking report he absolved the police and the Security Service of fault but laid the responsibility squarely where it rested in truth, namely on the prime Minister and his colleagues:-<sup>9</sup>

“...the fact remains that the conduct of Mr. Profumo was such as to create, amongst an influential section of the people, a *reasonable belief* that he had committed adultery with *such* a woman in *such* circumstances as the case discloses. It was the responsibility of the Prime Minister and his colleagues, and of them only, to deal with the situation and they did not succeed in doing so.”

The effect of Lord Denning’s Report was electrifying. The public realized that there was no conspiracy to shield the members of the establishment. In a report of transparent frankness and honesty England’s most celebrated judge had absolved the innocent and blamed those who had been remiss, irrespective of their position in society. The shadow on the administration of justice in England was lifted. Public confidence in England’s judges was restored. This was Lord Denning’s greatest service to the administration of justice in England.

## LORD DENNING and the LAWYERS

Even his critics and enemies acknowledge Lord Denning’s learning and skill in handling legal techniques; they only object to the use to which he puts these qualities. Before we consider his legal method, a few words must be said about his ability to reduce the facts in issue to a simple narrative and to present them in prose rarely equalled in English literature. In this respect the opening of his judgment in *Beswick v. Beswick* has become famous:-<sup>10</sup>

“Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business.

In March 1962, old Peter Beswick and his wife were both over 70. He had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died. So they went to a solicitor, Mr. Ashcroft, who drew up an agreement for them. The business was to be transferred to the nephew: old Peter Beswick was to be employed in it as a consultant for the rest of his life at 6 pounds 10 shillings a week. After his death the nephew was to pay to his widow an annuity of 5 pounds per week, which was to come out of the business.... After the agreement was signed, the nephew took over the business and ran it. The old man seems to have found it difficult at first to adjust to the

<sup>9</sup> Profumo Report, para 286

<sup>10</sup> (1966) Ch. 538, 549.

new situation, but he settled down. The nephew paid him 6 pounds 10 shillings a week. But, as expected, he did not live long. He died on November 3, 1963, leaving his widow who is 74 years old and in failing health. The nephew paid her the first 5 pounds. But he then stopped paying her and has refused to pay her any more."

This statement of fact is followed by an erudite discourse on the position of contracts in favour of a third party — the widow — in English law. That discourse reveals Lord Denning's legal method. Starting with a decision of 1678<sup>11</sup> he goes through the cases in law and equity, then deals with statute law,<sup>12</sup> and eventually reaches his conclusion:-

"The general rule undoubtedly is that 'no third person can sue, or be sued, on a contract to which he is not a party': but at the bottom that is only a rule of procedure. It goes to the form of the remedy, not to the underlying right. Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or if he refuses to join, by adding him as a defendant."

Lord Denning thus held that the widow had a right of action against the nephew in her personal capacity. He founded himself mainly on the interpretation of section 56(1) of the Law of Property Act 1925. However, this view was not accepted by the House of Lords.<sup>13</sup> They likewise decided in favour of the widow but on the more restricted ground that she could enforce the contract as administratrix of old Peter Beswick, but not in her own right.

Another illustration of his legal technique is provided by Lord Denning's celebrated dissenting judgment in *Candler v. Crane Christmas & Co.*<sup>14</sup> Here his reasoning was upheld by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*<sup>15</sup> The case concerned the question whether accountants owed a duty of care in tort to a third party with which they were not in contract. Lord Denning, then a Lord Justice and not yet Master of the Rolls, starts with a case decided in 1801<sup>16</sup> and goes through the whole line of cases to Lord Atkin's judgment in *Donoghue v. Stevenson*<sup>17</sup> in 1932. He closely analyses a score of authorities, amongst them such important cases as *Le Lievre v. Gould*<sup>18</sup> and *Nocton v. Ashburton*,<sup>19</sup> refers in passing to Fitz-Herbert's *New Natura Brevium* (1534) and a judgment by Cardozo C.J. 20 and ends:-<sup>21</sup>

11 *Dutton v. Poole* (1678) 8 T Raym 302.

12 Law of Property Act 1925 s 56 (1)

13 (1968) A.C. 58.

14 (1951) 2 K.B. 164.

15 (1964) A.C. 465.

16 *Evans v. Bicknell* (1801) 6 Ves. Jr. 173.

17 (1932) A.C. 581.

18 (1893) 1 Q.B. 491.

19 (1914) A.C. 932.

20 In *Ultramares Corpn. v. Touche* (1911) 174 N.E. 441, 444

21 (1951) 2 K.B. 164, 184

"One final word: I think the law would fail to serve the best interest of the community if it should hold that accountants and auditors owe a duty to no one but their clients. Its influence would be most marked in cases where the client is a company or firm controlled by one man. It would encourage accountants to accept the information which the one man gives them without verifying it, and to prepare and present the accounts rather as a lawyer presents and prepares a case, putting the best appearance on the accounts they can without expressing their personal opinion of them."

The same legal technique of going back to first principles and following them through the whole line of authorities, from the first case where they are mentioned to the last, can be observed in many of his famous decisions, among them the still controversial *High Trees House case*<sup>22</sup> *Entores Ltd. v. Miles Far East Corporation*,<sup>23</sup> *Midland Silicones Ltd. v. Scruttons*<sup>24</sup> and *Dorset Yacht Co. Ltd. v. Home Office*.<sup>25</sup>

In the end, however, and on this Lord Denning is quite clear, despite historical erudition and legal learning, the issue is usually a question of justice or, as the lawyer likes to call it, public policy. And it is at this point that his understanding of the common people comes into its own. This sensitiveness to the needs of modern society makes him truly a great contemporary judge. A good illustration of this state of mind is provided by his decision in the *Dorset Yacht Co. Ltd.* case.<sup>25</sup> Ten Borstal boys who had criminal convictions for larceny and similar offences, were on a training exercise in Dorset under the supervision of prison officers, for whom the Home Office was responsible. Owing to the negligence of the officers seven of them escaped by night and did damage to a yacht which was lying at moorings in Poole Harbour. The owners of the yacht sued the Home Office. Lord Denning, after having considered the authorities, went right to the heart of the matter: "It is, I think, at bottom a matter of public policy which we, as judges, must resolve." He then considered the policy considerations in favour of open prisons:-<sup>26</sup>

"'Open' prisons are the order of the day. So is the parole system. The men are allowed their freedom as much as possible. It helps to fit them better for their return to society."

Much as he appreciated the value of the open prison system, Lord Denning and his brother judges held that the prison officers should be liable for negligence. Again a policy consideration prevailed with him:-

"And the reason I say this is because of the people who lived in the neighbourhood. When the authorities open a Borstal institution, those living

22. *Central London Property Trust v. High Trees House* (1947) K. B. 130.

23. (1955) 2 Q. B. 327.

24. (1962) A. C. 446.

25. (1969) 2 Q. B. 412.

26. At p. 426.

nearly are surely entitled to expect that reasonable care will be taken to protect them. Their confidence in the law would be undermined if the judges were to declare that the authorities owed no duty of care to them.”

## LORD DENNING AS DISSENTER

It is not surprising that his fundamental belief that contemporary society requires a contemporary law has compelled Lord Denning on occasion to disagree with his brother judges who take a more traditional view of the function of law. Great moral courage is required of a man who feels conscience bound to dissent. Dissent means a sense of isolation and one must believe in one's vision to accept this. Of his vision Lord Denning never had a doubt. He expressed his belief that the common law must rejuvenate itself and not fall behind times, in a passage in his dissenting judgment in *Candler v. Crane Christmas & Co.*<sup>27</sup>

“This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If one reads *Ashby v. White*<sup>28</sup>, *Pasley v. Freeman*<sup>29</sup> and *Donoghue v. Stevenson*<sup>30</sup> one finds that in each of them the judges were divided in opinion. On the one side there were timerous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.”

One of the dissenting judgments which must have caused Lord Denning more pain than any other, is his judgment in *Midland Silicones Ltd. v. Scruttons Ltd.*<sup>31</sup> which he delivered when he sat in the House of Lords. He disagreed with eight of his brother judges and with the Supreme Court of the United States<sup>32</sup> and the High Court of Australia.<sup>33</sup> And yet, as every commercial lawyer must admit, there is great force in his reasoning which ends with this peroration:-<sup>34</sup>

“For myself, however, I would not allow this gap to be driven in our commercial law. I would not give the ‘fundamental principle’ of the nineteenth century a free rein. It should not have unbridled scope to defeat the intentions of businessmen. I would stand by the proposition stated by Scrutton, L.J. and affirmed, as I believe, by this House 37 years ago.”

Indeed, twelve years later an attempt to fill the gap in our commercial law, to which Lord Denning referred in his dissenting judgment in-

27 (1951) 2 K.B. 164, 178.

28 (1703) 2 Ld. Raym. 938.

29 (1789) 3 Term. Reg. 51.

30 (1932) A.C. 562.

31 (1962) A.C. 446.

32 In *Robert C. Herd & Co. Inc. v. Krawill Machinery Corpn.* (1959) 359 U.S. 297.

33 In *Wilson v. Darling Island Stevedoring & Lighthouse Co. Ltd.* 95 C.L.R. 43

34 (1962) A.C. 446, 492.



*Midland Silicones*, was made by the majority of the Privy Council in the New Zealand case of *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd., The Eurymedon*.<sup>35</sup>

## CONCLUSION

It has been the good fortune of the common law that whenever it reached a milestone at the crossroads in its long march forward there stood a judge who directed it on the right way. When it was in danger of succumbing to the Roman Law, Bracton pointed the way. When it was in conflict with political autocracy, Coke guided it. When the customs of the merchants began to rival it, Mansfield took care of them. And when it was threatened by the social revolution which followed the second World War, Denning pointed the way into the future.

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35. (1974) 1 All E.R. 1015.

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