Denning: Helmsman of the Common Law?

by E. G. Hall, B.A., LL.B., H.D.E., Solicitor

This article, in the nature of an extended review, has been prompted by the publication of Lord Denning's two recent books, "The Discipline of Law," and "The Due Process of Law." Despite the pretentious title of this article, no hypothesis is being advanced. No one school of thought is being represented. The ideas expressed are personal views on a name familiar to a generation of Irish law students, a Judge who has exerted considerable persuasive influence in this country, as in other countries which share the common law tradition, and a man who last January celebrated his 81st birthday.

Apex of judicial pyramid

Lord Wright, in 'Legal Essays and Addresses' wrote that "a good judge is one who is the master and not the slave of cases". Alfred Thompson Baron Denning of Whitechurch, Master of the Rolls, personifies that maxim. Lord Denning's two recent books and his judgments are testimonies to it.

Lord Denning was born the son of a village draper in 1899. He took a first class honours degree in Mathematics at Oxford. A few months later, he took a First in Law. In March 1944, he was appointed to the Bench and assigned to the Divorce Division. He was the youngest High Court judge (save for Lord Hodson) for 150 years. He disliked divorce work. Eighteen months later he was transferred to King's Bench Division, which he liked. He spent four years in the High Court before he was promoted to the Court of Appeal. In 1957, he reached the apex of the judicial pyramid — the House of Lords. He stepped down in 1962 — a voluntary demotion from what has been described as “the well-paid, secure, respected and relaxed life of a Law Lord” to the busy, dynamic and influential post of Master of the Rolls in the Court of Appeal.

It was a voluntary demotion virtually without precedent. Did he prefer the power he could exercise in the Court of Appeal to the glory of being a Law Lord? Denning explains it thus:

"(In the Lords) I was too often in a minority. In the Lords it is no good to dissent. In the Court of Appeal it is some good".

On the question of dissenting judgments, Denning asserts that his dissent in the Court of Appeal probably paved the way for the Lords dissenting from previous precedents and establishing principles about liability for negligent statements, Cardiller v Crane, Christmas & Coal; ministerial discretion, Padfield v Minister of Agriculture, Fisheries and Food; Crown privilege, Conway v Rimmer; a case considered by the Supreme Court in Murphy v Lord Mayor of Dublin and the Minister for Local Government, in regard to discovery of documents and executive privilege.

Judicial Innovator

Lord Denning has been described as a judicial innovator. In this context, we must remember that the Master runs the civil side of the Court of Appeal. Most of the 'interesting' cases heard on the civil side of the Courts of England come to the Court of Appeal. This has presented Denning with opportunities for judicial innovation. He invented the concept of the deserted wife's equity — only, as he says himself, to be eventually blown to "smitherens" by the House of Lords in National Provincial Bank v Ainsworth. As one wit put it, Denning had been endeavouring to ensure that the words "All my worldly goods I thee endow" became no empty phrase. Then, there was the wife's share in the matrimonial home — even though the house stood in the husband's name alone (Rimmer v Rimmer) and, most famous of all, the 'High Trees' case; the development of estoppel — the principle as Denning describes it:

"of justice and equity ... when a man by his words or conduct, has led another to believe that he may safely act on the faith of them — and the other does act on them — he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so".

'High Trees'

Undoubtedly, Denning will be remembered for the 'seminal' decision in the 'High Trees' case. Denning, looking back on the years since the 'High Trees' case, the principles then stated and the extensions of them, maintains that:

"the effect has been to do away with the doctrine of consideration in all but a handful of cases ... I do not recall any case in which it has arisen or been discussed. It has been replaced by the better precept: 'My word is my bond', irrespective of whether there is consideration to support it. Once a man gives a promise or assurance to his neighbours — on which the neighbour relies — he should not be allowed to go back on it".

Denning's views have obviously changed since he observed in Combe v Combe:

"Seeing that the principle (in 'High Trees') never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge."
The "High Trees" case was considered by Kenny J., in Cullen v Cullen\(^1\) when he stated:

"It seems to be that the principle stated by Denning J. in Central London Property Trust Ltd. v High Trees House Ltd.\(^{12}\) and affirmed by the same Judge when he was a Lord Justice of Appeal in Lyle — Meier v Lewis & Co. (Westminster) Ltd.\(^{13}\) applies to this aspect of the case . . . . If I had jurisdiction to make an order I would do so, but I do not think I have".\(^{14}\)

A way out of the problem was however found by Kenny J., in Section 52 of the Registration of Title Act 1891. Kenny J., in the High Court, in the case of Revenue Commissioners v Moroney\(^15\) further applied the doctrine of promissory estoppel and found support for his conclusion in the "revival" of the doctrine by Denning J. (as he then was) in 'High Trees'. In this context, Wylie in his book, 'Irish Land Law',\(^16\) offers an interesting observation on the development of equity in the Irish Courts. He states that most of the instances (in the development of equity) have occurred in England and have rarely been followed in Ireland.

"This is not necessarily to be taken to mean that Irish Judges have taken a different view from their English brethren; the fact is, that in most instances, cases have not arisen in Ireland putting the matter at issue".\(^17\)

**Matrimonial Law**

Denning cites the developments in the area of matrimonial law as examples of how the judges have evolved new principles to meet the new situation. After the Lords' rejection of the concept of the deserted wife's equity,\(^18\) he applied the concept of the trust to give the wife a share in the family home. Denning describes the use of the trust concept as "one of the most fruitful trees in the orchard of English law". The trust concept was adopted and applied by him in Falconer v Falconer.\(^19\)

The same trust concept was applied by Kenny J. in Conway v Conway\(^20\) in the case of a wife making payments towards the purchase of a house or the repayment of mortgage instalments when the house is in the sole name of the husband. In Conway's case, Kenny J. held that the husband became a trustee for the wife of a share in the house and the size of it depended on the amount of the contributions which she had made towards the purchase or the repayment of the mortgage.

Denning played a vital part in the recent important decision of the House of Lords in the conjoined cases of Williams & Glyn's Bank Ltd, v Boland and Williams & Glyn's Bank Ltd, v Brown.\(^21\) Denning held in the Court of Appeal that a wife who contributed to the purchase of a house, but who was not registered as a joint owner, had an equitable interest which affected the legal estate and that anyone lending on the security of the matrimonial home ought to realise that a wife might have a share in it. The House of Lords affirmed the decision of the Court of Appeal as it affected the wives and held, in the circumstances of the cases, that the wives had an 'overriding interest' binding on a mortgage.

**Judicial Law maker**

Denning rejoiced in the role of law maker. Most judges rarely stress their law making powers. It has been said that their creativity is hidden behind a "screen of analogy or precedent". In the context of "judicial creativity", one is reminded of Austin's observation when deriding the theory that Natural Law was always part of English Law. He called it:\(^22\)

"the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing I suppose from eternity, and merely declared from time to time by the judges".

Denning was of the opinion that judges do make laws. In A.G. v Butterworth,\(^23\) on contempt of court and the question of a witness obtaining redress in a civil court for damages if he had been damaged by victimisation or intimidation, Denning said:

"It may be that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better".

Denning was at his most "alarmingly" inventive in the case of Dustin v Bognor Regis Urban District Council.\(^24\) Denning described the case as "one of the most important of modern times". Builders in Bognor Regis built a house on a "rubbish tip", but the house had no proper foundation. It was too thin. The Council's surveyor
inspected and passed the house. The first buyer bought it in ignorance and sold it to Mrs. Sadie Dutton. While Mrs. Dutton had the house, cracks in the walls and ceilings appeared.

Counsel for the Council submitted that the Inspector owed no duty to a purchaser of the house; that a professional man such as the Inspector owed no duty to one who did not employ him but only took the benefit of his work, that the Inspector was in a like position; that even if the Inspector was under a duty of care, he owed that duty only to those who he knew would rely on this advice — and who did rely on it; that in any case the duty ought to be limited to those immediately concerned and not to purchaser after purchaser and, finally, that the liability of the Council would in any case be limited to those who suffered bodily harm and did not extend to those who only suffered economic loss.

The Court of Appeal held for Mrs. Dutton — but the case is significant in Denning’s extension of the doctrine of negligence and the concept of the legal duty to take care. Denning said:

"The time has come when in cases of new import, we should decide them according to the reason of the thing. In previous times when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: was the defendant under any duty to the Plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth".

The Council did not appeal to the House of Lords. Later, the House did consider the Dutton case in *Arms v Merton Borough Council*²³ and approved it subject to one or two qualifications. Does this case illustrate Denning as a judge at his best — look at the merits and see how the law can yield the right results? In this context, it is interesting to note the observation of Mr. Donal Barrington, S.C., as he then was, writing in the *Irish Jurist* 1974 with reference to *Byrne v Ireland*:²⁴

"...it is arguable that because the (Supreme) Court felt that Miss Byrne had a moral right to compensation from the State, it invented a remedy to give her relief".

**Powerful Imagery**

The narrative form adopted by Denning in his judgments and in his books is terse and full of evocative imagery. On the interpretation of contracts, in the case of *British Movie Rental v London and District Cinemas Ltd.*,²⁵ Denning stated:

"We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that 'qui haeret in litera, haeret in cortice', which, being interpreted means; 'He who clings to the letter, clings to the dry and barren shell and misses the truth and substance of the matter'... ".

When the case reached the Lords, Viscount Simon was critical of Denning's judgment but wrote a letter afterwards to "soften the blow".

**Reminiscences**

Denning's narrative and engaging style is further illustrated by the personal reminiscences and anecdotes in his books. In "The Due Process of Law", writing of contempt of court, Denning cites an example from his own experience.

He was sitting as a Lord Justice of Appeal, at the time, in the Court of Appeal.

"It was a hot day. Counsel were talking a lot of hot air. A man got up with his stick and smashed the glass window. To let in some fresh air, I suppose. At any rate, we did not commit him for contempt of court. We sent him off to Bow Street to be dealt with for malicious damage".

In another example, illustrating that intimidation or victimisation of witnesses is a gross contempt of court (*A.G. v Butterworth*),²⁶ Denning recalls the Butterworth case for a particular reason — a reason which allows him to divert from his subject:

"It was argued for three days on Wednesday, Thursday and Friday 11, 12 and 13 July, 1962. It was the 'night of the long knives'. The Prime Minister, Mr. Harold Macmillan, dispensed with most of his Ministers, at a minute's notice; they included the Lord Chancellor, Lord Kilmuir. That left him very sore. Now one of the duties of the Master of the Rolls is that he has to swear in any new Lord Chancellor. One day I was warned that I would have to swear in a new Lord Chancellor. I was not told who he was. But during that morning, the Attorney-General, Sir Reginald Manningham-Buller (who was arguing the case himself), asked to be excused for an hour or two. We guessed the reason. He was to be the new Lord Chancellor. So on one day he was arguing before us as Attorney-General. The next day he was Lord Chancellor above us. We decided in his favour — but on the merits of his argument — not because he had become Lord Chancellor. Things like that make no impact on us. As in all these cases we do not delay, We prepared our judgments over the week-end and gave them on a Monday morning".

In the case,²⁷ Denning stated that there can be no greater contempt than to intimidate a witness before he gives evidence or to victimise him afterwards for having given it. Denning was also of the opinion that if the witness had been intimidated or victimised, he may well have redress in a Civil Court for damages. Denning admitted that there was no authority directly on the point but stated that there are many pointers to be found in the books in favour of the view he expressed.
Denning’s Critics

Denning has his critics. He is accused of so reconciling the words of statutes with their desirable meaning that he ignores rules of statutory interpretation and so damages the law. But central to his approach is ‘whenever there is a right, the law should give a remedy — “ubi ius ibi remedium”. In Magor and St. Mellons Rural District Council v Newport Corporation,29 Denning, L. J. (as he then was), said:

“... I have no patience with an ultra-legalistic interpretation which would deprive (the appellants) of their rights altogether ... We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis”.

The House of Lords rejected that proposition. Viscount Simonds sharply disapproved and dogmatically stated:

“It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation”.

In another context, Denning acknowledges that he received a “crushing rebuff” from the House of Lords. His efforts were described28 as a “one man crusade” to free the Court of Appeal from the shackles of stare decisis — the doctrine of precedent.

Denning is not against the doctrine of precedent. “I treat (the doctrine of precedent) as you would a path through the woods. You must follow certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it”.

In support of Denning’s plea, one is reminded of the observation of Walsh J., in State (Quinn) v Ryan.31

“The advantages of stare decisis are many and obvious so long as it is remembered that it is a policy and not a binding unalterable rule”.

Duty

Denning never flinched his duty. In June 1963 he was asked by the Prime Minister, Mr. Harold Macmillian to undertake an inquiry. The Secretary of State for War, The Rt. Hon. John Profumo, O.B.E., had resigned during the Whitsun recess. It was the start of the ‘Christine Keeler Affair’. Denning describes the atmosphere at the time:

“Rumours spread like wildfire. Not only about Mr. Profumo and the Russian Naval Attaché, but many other Ministers also. Their morale was shaken to the core. The security of the realm was said to be endangered. Nothing like it has been seen since Titus Oates spread his lies in 1678, when Macaulay tells us ‘The capital and the whole nation was mad with hatred and fear’. . . .”

The inquiry was not an easy task because of the political overtones. Although the inquiry report was praised in the House of Commons, it was later made clear that there never ought to be an inquiry like it again.

Thirst for Justice

Denning’s judgments have been part of the Irish Law student’s “tools of the trade” for the last quarter of a century. Writing in “The Times”,32 Sir Leslie Scarmann stated:

“The past 25 years will not be forgotten in our legal history. They are the age of legal aid, law reform and Lord Denning”.

A reviewer, in another context, recently wrote that some scholarly writings groan heavily on bookshelves. Denning’s books and his judgments — although scholarly — are not of that genre. Denning’s voice — his eloquence, his single-mindedness, his thirst for justice as expressed in his judgments, will grace our law reports for years to come. Finally, the question may be posed: Is Denning one of the great helmsmen of the Common Law?
The article "Denning: Helmsman of the Common Law?" was written by Dr Eamonn G Hall, Solicitor and Notary Public (www.ehall.ie; Email: info@ehall.ie; Tel: 087 322 9480) and reprinted from The Gazette of the Law Society of Ireland, vol. 74 (December 1980) pp 219-223 by kind permission.