

Dissenting judgments - self indulgence or self sacrifice?

The Birkenhead Lecture

Lord Kerr of Tonaghmore

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On 3 November 1992 a young boy called Declan O’Byrne was vaccinated with a HIB vaccine. In proceedings issued on his behalf on 2 November 2000 he alleged that the vaccine was defective and that it had caused damage to his brain. Those proceedings had been issued against Aventis Pasteur MSD Ltd, a UK company. It was alleged that that company had produced the vaccine. It had not. The actual producer was its French parent company, Aventis Pasteur SA.

Council Directive 85/374/EEC (the “product liability directive”) was a measure introduced in order to harmonise the legislative provisions of member states of the EU dealing with liability of producers for defects in their products which caused damage to those to whom they had been supplied. Article 10 of the Directive provided for a limitation period of three years from the date on which the claimant became aware, or should reasonably have

become aware, of the damage suffered as a result of using the product. But article 11 contained an additional, “long-stop” period which required member states to include in their legislation a provision that rights conferred on an injured person by the Directive would be extinguished ten years after the producer had put into circulation the product which caused the damage, unless the injured person had in the meantime instituted proceedings against the producer. So in order to avoid the effect of article 11 Declan O’Byrne would have had to issue proceedings against the real producer within ten years of the date when the product had been put on the market.

In the event he issued proceedings against the actual producer, the French company, on 16 October 2002 and applied to have that company substituted as a defendant. The defence claimed that, although he had been vaccinated less than 10 years before, the vaccine had been put into circulation well before that. It was submitted that the claim was barred by the long stop provision in article 11, therefore.

The United Kingdom had given effect to the Directive by the Consumer Protection Act 1987. I don't need to say anything more about that Act beyond observing that it allowed rules of court to be made that would permit the substitution of a party if the new party replaced another whose name had been given in the original action by mistake. Declan O'Byrne's lawyers argued that the UK company had been named by mistake and that the rules made under the 1987 Act permitted the French company to be substituted even though the ten year period had elapsed. The company argued that this could not be allowed because it would undermine the effectiveness of the long stop limitation provision.

The application to have the claim dismissed because it was statute barred gave rise to a reference to the Court of Justice of the European Union. This audience will be well aware that where there is a doubt as to the application of a particular aspect of European law, a national court is obliged to refer the matter to the Court of Justice of the European Union. In its preliminary ruling the Court of Justice said that the product liability directive did not determine the procedural mechanisms to be applied when a victim

brings an action for liability for defective products and makes an error as to the identity of the producer. It was therefore, as a rule, for national procedural law to determine the conditions in accordance with which one party may be substituted for another in such an action. On the basis of this ruling the action proceeded in the UK against the French company. A decision in favour of the claimant was given by the trial judge. That judgment was unanimously upheld by the Court of Appeal. The matter was then appealed to the House of Lords. Before the appellate committee, the company sought another reference to the Court of Justice. It was pointed out that in its first preliminary ruling, the court had added a rider to its statement about national procedural law. It was to the effect that national courts must have regard “to the personal scope of the Directive”.

Four out of five members of the appellate committee were untroubled by this somewhat Delphic statement. They considered that the statement in the ECJ’s ruling that it was for national procedural rules to determine when a party might be substituted was plain enough to allow the claimant to take advantage of the

rules made under the 1987 Act. They did not consider that another ruling was necessary. The matter was “*acte clair*”, in other words, so clear as not to admit of any other possible meaning. One member of the panel did not feel the same sense of certitude. Lord Rodger of Earlsferry, while envying the certainty of Lord Hoffmann (with whom the other members of the panel agreed), said that he was unable to share it. He felt that there was a real possibility that the Court of Justice was expressing the view that, while procedural matters were for the domestic court, it had to ensure that the personal scope of the Directive, as determined by art 3, was respected. The long stop provision might be undermined if the procedural rule were to have the effect that the others thought it should have. Alone and in disagreement with not only his colleagues in the House of Lords but also of the three members of the Court of Appeal and the trial judge, Lord Rodger’s steadfast dissent led to a further reference to the Court of Justice. There the doubt that he had expressed proved to be well-founded. When, after the second reference, the case was returned to the Supreme Court, Lord Rodger had the satisfaction of delivering the judgment of the court, allowing the company’s appeal and holding

that Article 11 precluded national legislation being applied in a way which permitted a producer to be sued after the expiry of the ten year limitation period.

The utter vindication of a dissent in such a prompt and resounding way is not merely rare and exceptional. So far as I am aware it is unique. One must pause, therefore, before trying to burden this example with too many conclusions as to when one should dissent. But it does seem to me that, despite its uniqueness, it has much to say on the recurring themes on the propriety of dissenting and the justification for publishing dissenting judgments.

It has been suggested by a colleague at a recent conference that one should only dissent whenever one felt it absolutely necessary to do so. Well, perhaps, but what are the circumstances which impel the conviction that the dissent is absolutely required? Should the possible future utility of a dissent encourage, or should the apparent futility of dissent deter an expression of disagreement with the majority? And should the circumstance that the dissent is to be expressed in a final court of appeal make a difference?

Chief Justice Stone in a letter to Columbia University in 1928 said:

“A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error in which the dissenting judge believes the court to have been betrayed.”

In an essay on dissenting judgments, written in honour of Lord Rodger, Lord Brown of Eaton-under-Heywood suggested that this went a little too far and I agree with him. For my part, the brooding spirit of the law has not pervaded my thoughts when contemplating a possible dissent. I am afraid that far more prosaic considerations are in play.

Justification for dissenting judgments has been expressed in a wide variety of ways. It has been suggested, for instance, by John Alder of Newcastle Law School, in a 2000 article published in the Oxford Journal of Legal Studies under the title, ‘Dissents in Courts of Last Resort: Tragic Choices’, that a democratic society does not embody a permanent and internally consistent set of values.

Society, he suggests, attempts to accommodate disagreement between incommensurable values. Dissenting judgments serve the function of drawing public attention to those incommensurable values and keeping alive choices for the future, Alder claims.

Well, again maybe, but a little too high-flown for me, I'm afraid.

And I tend to doubt that a judge contemplating dissent is actuated by a burning need to keep the public informed of non-comparable ideals or standards. But where I think Alder is on surer ground is in his suggestion that in final appellate courts, dissents concern incommensurables because the highest tribunal is more likely to have to deal with competing issues of justice or policy.

It is necessary, I think, to understand that what motivates – or should motivate – a judge in deciding whether to dissent is a distinct, though interrelated, question from the subject of justification for the publication of dissenting judgments. Likewise, a clear-sighted distinction requires to be made between the reasons for dissenting and its possible effect. In many commentaries all these aspects have been conflated. And, in fairness, they do tend to overlap and blend into each other but I want to suggest that

what prompts a judge to contemplate dissent is not normally (nor should it be) his anticipation of the effect that his dissent will have or his estimate as to whether publication of his dissenting judgment can be justified.

Traditionally, of course, dissent was discouraged because it was thought to create uncertainty. This argument was deployed with especial force in relation to decisions of courts of final appeal. In Louis Blom-Cooper and Gavin Drewry's 1972 work, *Final Appeal: A Study of the House of Lords in its Judicial Capacity*, the authors described dissent in a court of final appeal as "the most apparently poignant judicial tragedy in a legal system founded upon the dramatic conventions of certainty and unanimity". Well, if that is so, I am obliged to acknowledge that I have participated in – indeed been responsible for – rather too many poignant judicial tragedies. My only defence (and it is, I admit, a pretty feeble one) is that I could not help myself and I was quite unaware that I was creating such pathos.

In *Pollock v Farmers Loan and Trust Co.*, a decision of the American Supreme Court in 1895, Justice White (ironically in a dissenting judgment) said that “[the] only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusion of courts of last resort”. In similar vein, Chief Justice Taft and Justice Brandeis regarded dissent as unacceptably weakening the doctrine of *stare decisis*. Again, if true, a sad indictment of the performance of many judges, not least myself.

Some species of case were considered to be particularly unsuited to a proliferation of dissents. In 1987 Lord Griffiths in the case of *R v Howe* suggested that there should be a single composite speech in the House of Lords in criminal cases and Lord Diplock made the same suggestion in relation to statutory interpretation.

So, is there a case for saying that in courts of final appeal or in particular types of case, dissenting judgments should be actively discouraged? Does a dissent erode the confidence that might otherwise be placed in the judgment of a final court of appeal?

Well, it seems to me that the suggestion that a majority opinion is weakened by the existence of a dissent – and its corollary – that a judgment is invested with greater authority if it is unanimous may have been taken as a given in earlier generations but that suggestion is not one which should be now accepted uncritically. In contemporary experience, majority and dissenting judgments now engage directly with each other. Judgments of the Supreme Court, for instance, constantly cross refer. They examine lines of argument in each other's judgment and venture contrary views. In my firm opinion (and I would say this, of course) the existence of contrary views and their enunciation in dissenting judgments do *not* inevitably detract from the authority of the opinion of the majority. On the contrary, where the majority has been required to address and deal with challenges to their reasoning, their judgments should be the more cogent and compelling as a consequence. After all, arguments which underlie minority opinions do not disappear simply because they have not been expressed in dissenting judgments. Better, surely, to have those arguments plainly put and forthrightly countered than to allow

them to go unexpressed and unrefuted, ready to surface on the next opportune occasion.

As it is, the expression of dissent invites refutation, if not indeed condemnation, from the majority, as I know only too well. I do not expect my dissenting judgments to go unremarked by the majority. I know that, almost inevitably, and entirely properly, they will be subject to vigorous disagreement and, on occasions, painstaking dissection. That is as it should be. And if exposing a minority judgment to the critical onslaught of the majority involves a degree of self-sacrifice on the part of the dissenter, that is, in my view, a small price to pay for the transparency of the debate. More importantly, so far from detracting from the authority of the majority opinion, that opinion, in confronting and disposing of an opposite view, if it has been done convincingly, will be all the more commanding of acceptance as a result.

In the debate about the propriety of dissent, at the risk of being accused of heresy, I have to say that certainty or finality in the law is an overrated concept. Of its nature, law is an ever changing

process. It morphs, adapts and develops in response to previously unencountered arguments and unanticipated circumstances.

Certainty of legal outcome is in many fields, at most, a temporary phenomenon. Today's unalterable truth may become tomorrow's shibboleth. That dissent should be suppressed in order to advance the cause of legal finality seems to me a most dubious claim. Lord Atkin's remark in *Ras Behari Lal v King Emperor* (1933) that 'finality is a good thing, but justice is better' seems to me to be infinitely preferable to that of his near contemporary Justice Brandeis in 1927 in *Di Santo v Pennsylvania* that it is "usually more important that the law be settled than it be settled right". Better, I think, that if the law cannot be settled right, it be not settled at all.

But if a sceptical eye should be cast on some of the arguments against dissenting judgments, an equally critical reaction to some of the claims made in favour of dissent is warranted. It has been suggested that the knowledge that a dissent will be published helps to ensure that all members of the panel are treated equally, and that no point of view has been suppressed. In my experience, equality of treatment is not at all dependent on nor is it promoted

by the knowledge that a dissenting judgment will be published. Likewise, the statement that publication of the dissent strengthens public confidence in the judiciary is, at best, of doubtful validity. But perhaps the most frequently uttered claim in favour of dissenting judgments is that today's dissent might become tomorrow's majority or be adopted by the legislature. I cannot believe that it is this which moves judges to dissent or that it can be trumpeted as an objective justification for dissenting. No judge, however confident of the rightness of his or her dissent, can possibly predict what the effect of a dissenting judgment might be, or indeed if it will ever have any effect. Certainly a judge would be most unwise to proceed with a dissent in anticipation of ultimate and glorious vindication. The celebrated dissents of the past which have wrought a change, whether in the law or in public attitude, such as Denning LJ's dissenting judgment in *Candler v Crane, Christmas & Co* and Lord Atkin's in *Liversidge v Anderson* and even Lord Rodger's in the *O'Byrne* case are celebrated at least in part because of their rarity. Blom-Cooper and Drewry suggest that a dissent should be reserved for a 'really worthy cause' but they recognise that what is a worthy cause can often be known

only with hindsight. So I simply do not believe that judges dissent because they hope or believe that their judgment will come to be accepted as correct.

In my view, what should motivate a judge to express a dissent and, ultimately, the justification for a dissenting judgment, has not been better expressed than in Lord Brown's tribute to his great friend, that outstanding judge, Lord Rodger, when he said:

“... one must recognise that in the great majority of final appeals, a dissent will remain forever just that – a statement of a judge's disagreement with the conclusions of the majority, with no sensible prospect of it ever influencing the future development of the law. Does that, however, mean that a dissent in such circumstances would constitute, as some would say, no more than a futile gesture and that it should therefore be discouraged? I would suggest not. On the contrary, there are many occasions when, as I would contend, however plain it may be that a dissent will no more influence the future development of the law than the outcome of the particular appeal before the Court, a judge should nevertheless, assuming always that he is clear in his own mind that the majority's view is wrong, give a reasoned judgment saying so.”

What should impel a dissent is a judge's conviction that the majority have simply got it wrong or, and this is not necessarily the same thing, that what he is convinced should be the outcome of the case is right. It is, I believe, as prosaic and as straightforward as that.

Whether the dissent is justified and what effect it might have, are, as I have said, completely different questions. They are questions, moreover, to be asked at a different time from that when the judge is pondering whether he should dissent. They are to be answered by persons other than the judge and at a time when the effect, if any, of the dissenting judgment can be evaluated. When the judge is contemplating a dissent, the answers to these questions not only cannot be predicted, they should not form part of his or her consideration.

I am convinced that when Lord Rodger was moved to dissent in *O'Byrne's* case, he did not do so because he thought that public confidence in the judiciary would be thereby enhanced. I am

likewise convinced that he was not concerned as to whether the doubts that he had expressed would prove to be well-founded. It was enough that he had those doubts and that, despite the conviction of the majority, he could not dispel them. And I cannot believe that Lord Rodger dissented because he thought that this was, in the words of Blom-Cooper and Drewry, a “really worthy cause”. He dissented, I am sure, because he was convinced that the certainty of the majority was misplaced. And, of course, he was right. Right, as events proved, to have dissented, but, more importantly, right in his reasons for dissent.

And so I propose to you this evening what is my firm view. It is that, on the whole, judges dissent for what might be regarded by some as the seemingly banal reason that they have decided that their view is right or that the conclusions that their colleagues have reached are wrong. Banal or prosaic that reason may be but it is one that is founded squarely on sound principle. As Lord Brown has said, if a judge is “clear in his own mind that the majority’s view is wrong”, he should give a reasoned judgment saying so.

If this is the foundation on which dissent is based, one would perhaps have expected that the incidence of dissent would be high, for, after all, it is not difficult to find disagreement between judges on virtually every subject! In fact, in the United Kingdom the percentage of cases that elicit a dissent is, relatively speaking, quite low. In a recent posting on the UKSC blog, Chris Hanretty, of the University of East Anglia, has recorded that in the first three years of its existence the average percentage of unanimous judgments in the Supreme Court was 75%. This is rather lower than was found in a similar period for the House of Lords. But Hanretty suggests – and in this I think he is right – that these figures do not necessarily point to a trend of increasing dissension.

In the graph that accompanied the blog, spikes of dissent and consensus can be seen. Thus, in the Easter term of 2011 the number of unanimous judgments was as little as 50%, but in the Easter term of the previous year it was over 85%, in Michaelmas 2010 it was almost 90% and in Trinity 2012 it was over 90%. I am no statistician but it seems to me that such swings are more likely

to reflect the controversial nature of the cases rather than any more marked inclination on the part of the justices to dissent.

Even the most frequent dissenters during that period – Lord Rodger who dissented in 10 out of 63 cases and I who dissented in 13 out of 86 – could hardly qualify for the soubriquet that has been applied by one unkind colleague of “the Great Dissenter”. Lord Rodger’s batting average was 15.9% and mine scarcely 15%.

These percentages are of as nothing compared to the Supreme Court of America. They are even significantly lower than the Supreme Court of Canada or the High Court of Australia.

Why should this be so? Well, I am very far from sure that I have the answer to that question. But I hazard that it has something to do with the way in which we conduct cases. The degree of preparation for both lawyer and judge in appeals to the Supreme Court means that many of the issues are refined and laid bare even before battle is joined on the hearing of the appeal. Almost invariably, those issues have been subjected to meticulous scrutiny

and highly proficient adjudication in various courts before they arrive in the Supreme Court. The manner in which cases are conducted in our court, with not only continuous forensic testing of advocates' arguments by the Bench, but also, a frequent feature of our appeals, intra-justice jousting all conduce to the elimination of reasons to disagree and the exposure of bases on which to agree. Finally, the discipline of deliberations immediately after the hearing, where every justice is not only entitled to give his or her view but is *required* to provide it and to support it with reasons. This critical phase in every case gives us the opportunity to sway or be swayed by rehearsal of the arguments and even, perchance, a new perspective on the appeal that has somehow eluded counsel. No system is perfect but ours, with the continued value that it places on the oral tradition, is, in my entirely biased view, about as good as it can be and it is, I am sure, at least partly responsible for the still small number of dissents.

Certainly the statistics should not be taken as betokening any lessening of the strength of individual opinion within the court.

My colleagues, as you would expect them to be and as they should

be, are individuals with decisively firm views but also, I am happy to say, thrillingly open minds.

Disagreement in the Supreme Court is expressed forthrightly but examples of astringency in the language of dissent are mercifully difficult to find. We have managed to avoid the naked hostility that is manifest in some of the opinions of the justices in the US Supreme Court. For startling instances of vituperative exchanges between justices of that court, I refer those interested to Lord Brown's essay on Lord Rodger. Our disagreements are never ad hominem and do not affect the warm, cordial relations that exist between us all.

Ladies and gentlemen, the opportunity to dissent may not be the ultimate jewel in the Crown of British justice but it is certainly a gem to be treasured. The fact that a judge is constrained by no more than his or her conscience in deciding how he should adjudicate is as fundamental to the health of our system of justice as it is possible to imagine. The great dissents in British legal history speak loudly of the independence of our judiciary and, in

consequence, inspire the confidence that the public place in the administration of justice in this country. The opportunity to dissent has never been more important than it is today. Since the coming into force of the Human Rights Act decisions that judges must make in many cases are far less likely than in times past to be determined by their view of black letter law. Resolution of competing policy arguments or even moral choices is far more frequently the staple of judicial decision than previously. Judges must confront human right claims of fundamental importance; often vital societal issues are at stake. That they should feel entirely uninhibited by anything more than their conscience and their conviction of what is the right and just legal outcome is assuredly the glory of our system of law. If on nothing else we can surely all be unanimous that the need for the right to disagree is one that brooks no dissent.