



JUDICIARY OF
ENGLAND AND WALES

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INNER TEMPLE READER'S LECTURE SERIES

LEGAL ACADEMICS: FORGOTTEN PLAYERS OR INTERLOPERS?

12 NOVEMBER 2012

The overarching title of this year's lecture series is "*Academics and practitioners, friends or foes*". Some of my best friends are legal practitioners. I, on the other hand, only had very small walk-on, and often non-speaking, parts in legal practice. But I was a legal academic for 31 years, and have been a judge for nine and a half years. So, all those months ago when Master Reader asked me to give one of his lectures, the relationship between legal academics and judges seemed a good topic.

When I settled down to prepare this lecture, I discovered that, since I left the academic world, this topic has been much explored. The contributions include books and articles, including two articles by Lord Rodger of Earlsferry, whose early death deprived the Supreme Court of an extraordinary talent. Additionally, this summer the new President of our Supreme Court gave a lecture entitled *Judges and Professors: Ships Passing in the Night?*¹

* A Justice of the High Court, Queen's Bench Division. A lecture given at the Inner Temple on 12 November 2012. Adapted from a contribution to a volume of essays in memory of Lord Rodger of Earlsferry.

¹ <http://www.judiciary.gov.uk/media/speeches/2012/mr-speech-hamburg-lecture-09072012>

This evening I want to do two things. The first is to sketch out the terms of engagement and the limits of academic contribution. I then want to pick up two threads in some of the recent contributions. The first is that both citation and the absence of citation may be less significant than some believe. The second is the suggestion that what we have seen in the last thirty years may be a passing phase and that the gap between academic lawyers and the bench may widen in the future to the detriment of both.

TERMS OF ENGAGEMENT AND LIMITS

In civil law systems the writings of jurists are recognised to be sources of law. In a common law system, legal writing is not a source of law. Indeed, until the 1960s the general convention, described as “better read when dead” precluded even the citation of living authors. It did so whether the author was a judge, an academic or a practitioner. It did so however distinguished he or she was. In the first twenty years after the Second World War the judiciary and practising lawyers generally saw the function of academic lawyers as parasitic on the work of the judges and not of assistance in “grappling” with new or undecided questions. But, over the last 50 years, our judges, particularly appellate judges, have become more open to and about the use of scholarly writing in their decision-making. The rule that the writing of academic lawyers is not a source of law has been maintained. But there has been increasing recognition of the influence of academic lawyers in the development of the common law and our understanding of statutory law. In certain areas this influence has been significant.

The topic of influence is one which does not lend itself to the bullet-point, black and white one-line analyses which are currently so fashionable. Lord Goff said that, the legislature apart, the

common law is “a mosaic, and a mosaic which is kaleidoscopic in the sense that it is in a constant state of change in minute particulars”. Is the role of the academic lawyer in such a system that of a “player”? If it is, what are the terms of engagement? Studies of influence in a particular area such as Professor Stanton’s analysis of 104 House of Lords tort decisions between 1990 and 2009² or the influence of a particular scholar, such as Professor Duxbury’s study of Sir Frederick Pollock,³ are of particular value. Lord Rodger’s experience was unique. He was both a former legal academic with deep understanding of the nature of the academic enterprise and continued scholarly interests. He was also a person who served first at the pinnacle of legal practice and then in both the House of Lords and the Supreme Court. He acknowledged, and I believe generally welcomed, the enhanced role of academic lawyers in the development of doctrine. But he was not an uncritical friend.

Lord Rodger’s first (1994) article, entitled *Savigny in the Strand*⁴ was prompted by reflections about various statements by Lord Goff in the 1980s. In his Maccabean lecture, “In Search of Principle”,⁵ Lord Goff stated that, although the work of judge and jurist is different, it is complementary, and “today it is the fusion of their work which begets the tough adaptable system which is called the common law”.⁶ Three years later he felt able to state that “it is difficult to overestimate the influence of the jurist in England today ...” Lord Goff saw the best of textbooks, such as Benjamin on Sale and Dicey and Morris (now Dicey, Morris and Collins) on the Conflict of Laws, as fulfilling the function of the codes that exist in civil law jurisdictions. He stated that “the ground has been cut from the feet of the Benthamite movement for

² Stanton Ch 11 in Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (2010)

³ *Frederick Pollock and the English Juristic Tradition* (2004). See also Duxbury’s *Jurists and Judges: An Essay on Influence* (2001)

⁴ 1993/95) 28-30 *Irish Jurist* 1, the first John Kelly Memorial Lecture, delivered on 16 November 1994.

⁵ (1983) 69 *Proc. Brit Acad.* 169, 186 at 171

⁶ “Judge, Jurist and Legislature”, Oxford Child & Co Lecture, May 1986, (1987) 2 *Denning LJ* 79 at 92

codification in this country by the growth in stature of the English jurist”.⁷ Six months later, in *The Spiliada*, the rhetoric was loftier. He described jurists as “pilgrims with [judges] on the endless road to unattainable perfection”.⁸

These statements unequivocally characterised academic lawyers as “players”, rather than as observers, and certainly not as interlopers. But Lord Goff also unequivocally (and correctly) considered that in the development of legal principle the dominant power should be that of the judge exercising a professional reaction to individual fact situations. This was because academic theories were not necessarily drawn sufficiently widely or flexibly to accommodate unforeseen and unforeseeable contingencies. They were also not sufficiently rooted in practical experience. It also appears reasonably clear that according greater importance to books and articles was part of a possibly Canute-like strategy by Lord Goff to see off the ever-increasing incursions of statute and subordinate legislation and thus to preserve the role of the judges in developing the law. He preferred books and articles to codes. He did so because propositions in them “may be changed without legislation” and “judges are at liberty to depart from them, if persuaded that it is right to do so”.

In *Savigny in the Strand*, Lord Rodger, deploying a characteristic blend of wit and nuanced teasing, perhaps in order to warn about academic hubris as a result of what Lord Goff had said, made serious points about the limits of academic contributions to the shaping of the common law in the courts. He was prescient about the need for a warning. Four years later, his and my friend, Professor Peter Birks, in his FA Mann lecture, appeared to treat the writing of jurists as a source

⁷ *Ibid.* at 91

⁸ [1987] AC 460, 488.

of law. Birks stated that the “common law is to be found in the library and the law library is nowadays not written only by its judges but also by its jurists”.⁹

So what are these limits? One, which I do not address, was Lord Rodger’s scepticism about what could be learned from civil law systems and comparative law scholarship. He considered assistance from comparative law is limited to providing only broad guidance about the development of a field of law because to do more requires investigation of the detail of the material from the foreign system and its capacity to be applied within the different framework of our own system.¹⁰

The second limit is that, since the devil tends to be in the detail, it is not obvious that academic work which focussed on principles and abstract formulations would materially assist practitioners in advising on individual cases. Moreover, and of more relevance to the position of judges, Lord Rodger considered that there was no rational basis for believing that important principles of law could always be fashioned in that way.¹¹ His example was Lord Wilberforce’s generalised two-stage test in *Anns v Merton LBC*,¹² and the departure from *Anns* only thirteen years later.¹³

It should, however, be recognised that sometimes it is academics who point out the dangers of general principles. It was Sir William Wade who identified the dangers of the procedural

⁹ (1998) 18 LS 397, 399

¹⁰ (1993/95) 28-30 *Irish Jurist* 17-19 and 29(1) U QLJ at 39. His examples were *White v Jones* [1995] 2 AC 207 and *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32. In the latter it was the judges who raised the question of assistance from Continental legal systems with counsel and provided copies of translations of a number of continental decisions.

¹¹ (1993/95) 28-30 *Irish Jurist* at 15-16.

¹² [1978] AC 718

¹³ *Murphy v Brentwood DC* [1991] 1 AC 398

dichotomy between ‘public’ and ‘private’ law proceedings articulated in 1983 by Lord Diplock in his single speech in *O’Reilly v Mackman*.¹⁴ Wade expressed his doubts and the need for flexibility to Lord Diplock five days after the decision.¹⁵ He later wrote to Lord Woolf that, while Lord Diplock ‘had a genius for getting down to the bedrock’, his desire to restate the law in his own terms, notwithstanding its brilliance, had left ‘a legacy of rigid statements which [seemed to Wade] to contain the seeds of much future trouble’.¹⁶ And cases such as *Spring v Guardian Assurance*, *Henderson v Merritt* and *White v Jones*, show that judges can also be attracted to “the elusive principle”.

THE MOVE FROM “BETTER READ WHEN DEAD”

There were three main reasons for the old relationship where academic work was largely ignored and the approach to citation of both academics and practitioners was that it is “better read when dead”.¹⁷ The first was the late development of academic law in England and Wales, the smallness of the academic legal community until the post Robbins expansion of universities in the 1960s,¹⁸ its concentration on teaching rather than writing, and the descriptive nature of much of that writing. The second was that the majority of the profession, particularly the bar and hence the judiciary, had not studied law at university, were not familiar with the work of academics, and relied on books written by practitioners.¹⁹ The third reason is, in a sense, the flip side of the first

¹⁴ [1983] 2 AC 237.

¹⁵ 30 November 1982. See Beatson, (2008) 150 Proc Brit Ac. 287, reproduced in *Wade & Forsyth’s Administrative Law* (10th ed), Appendix 5, hereafter *Beatson Wade Memoir*.

¹⁶ HWRW to Lord Woolf, 22 February 1986.

¹⁷ The phrase is used by Reid, “The Third Branch of the Profession” in MacQueen ed, *Scots Law into the 21st Century* (1996), at 46-7 and by Duxbury, *Jurists and Judges* (2001), 78.

¹⁸ Bridge, (1975) 91 LQR 488, 493 stated this led to “the true beginning of an English academic legal tradition”. For the position in Scotland, see Reid, n 17 above.

¹⁹ So, between its first edition in 1826 and its eighteenth edition in 1930, the authors and general editors of *Chitty on Contracts* were practitioners. The original author, Joseph Chitty, is said to have had a huge junior practice but never took silk and wrote many other books, including treatises on Bills of Exchange and the Legal Prerogatives of the Crown. Other notable practitioner authors were Nathaniel Lindley (Partnership); Sir George (later Lord Justice) Farwell (Powers) Edward Sugden (later Lord Chancellor) (Powers),

two. Although a few individuals had some influence, in general until the mid-1960s British academic lawyers lacked status and prestige both with practitioners and judges and with academics in other disciplines.²⁰

Many of those who came after the giants of the late nineteenth century, Sir William Anson, A.V. Dicey, Sir Henry Maine, and Sir Frederick Pollock, “saw their role as rationalising the words of the judges rather than guiding them”.²¹ Arthur Goodhart was a notable exception. He followed a twenty year stint as Professor of Jurisprudence at Oxford, with twelve years as Master of University College. He was editor of the *Law Quarterly Review* for forty-five years, between 1926 and 1971, and remained “editor in chief” until 1975. He exercised his editorship with the clear aim of guiding the judges, notably on the question of the correct test for remoteness of damages in tort. His campaign against the decision in *Re Polemis*²² that a negligent defendant was answerable for the physical consequences which resulted directly from his negligent conduct, even if they were quite unforeseeable was waged from 1928 in a dozen notes and articles. Victory was achieved in 1961 in *The Wagon Mound (No 2)*.²³

As to how scholars in other disciplines regarded academic lawyers, one commentator stated the predominant view was that they “are not really academics”. They are “appendage[s] to the university world”.²⁴ In 1929 Harold Laski of the LSE had stated “the whole system of teaching law here is thoroughly bad; the lack of any recognition for the barristers who become professors

²⁰ Stevens, *Law and Politics*, n 34 above, 194-5; Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (2003) hereafter “Bradney, *Conversations etc*”

²¹ Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800 – 1976*, (1978) 194.

²² [1921] 3 KB 360

²³ [1967] 1 AC 388.

²⁴ Becher, *Academic Tribes and Territories* (1989) 30, cited in Bradney, *Conversations etc*, 5. Bradney also cites AL Rouse’s waspish observation (*All Souls In My Time* (1993) 18) about elections to Prize Fellowships at All Souls College, Oxford in the 1920s “that some allowance was made for the fact that the law candidates were more specialised, and less likely to come up to the standards of others on the general papers” and that it was “somewhat easier to get elected as a lawyer”. But, since those lawyers elected were generally heading for the bar and practice, it has, at most, only an indirect bearing on the position and status of academic lawyers.

of law means that outside one or two posts like the Vinerian professorship [in Oxford] the law teachers are a very inferior set of people who mainly teach because they cannot make a success of the bar”.²⁵

As to the perception of the judiciary and practising lawyers, the then Mr Justice Devlin in 1958 stated that the function of legal academics was essentially as that of “the critic of the finer points of play”²⁶ rather than as a contributor. It is not clear whether the profession and judiciary thought little of the intellectual ability of academic lawyers, or whether much of their work was not of much use in addressing unanswered questions because of its narrow scope. But for the first sixty years of the twentieth century academic writing was, with a small number of notable exceptions, regarded as, at best, a guide to the current state of the authorities, rather than a contribution to the development of the common law.²⁷ Moreover, judges did not generally welcome criticism. Famously, in 1950 the editor of the MLR was summoned by one or more of the judges sitting in the House of Lords to answer complaints about an article by the future Professor Gower.²⁸

The two harshest assessments of academics by judges I have seen come from opposite ends of the judicial spectrum. The first was by a Scottish sheriff-substitute, a full-time judge of the lower courts. In 1950 Mr C. de B Murray opined that “[t]he gradations of intellectual ability are infinite, and no one in his sober senses would say that a professor of law has the ability of a Master of the Rolls, or a Lord Chief Justice”.²⁹ I somehow doubt that the writer would have accepted that a professor of law had the ability of even a mere pusine judge. Perhaps because of their place in

²⁵ *The Holmes-Laski Letters* (internet edition, accessed 20 September 2012)

http://archive.org/stream/holmeslaskilette017767mbp/ho_lmeslaskilette017767mbp_djvu.txt..

²⁶ See e.g. Devlin (1958) 4 JSPTL 206

²⁷ Patterson, *The Law Lords* (1982) 10 stated that not a single Law Lord told him that he wrote with academics in mind.

²⁸ See below

²⁹ C de B Murray, 1950 SLT 1, at 2, cited by Reid, n17 above, 47. His professional career is recorded in Stephen P Walker, *The Faculty of Advocates 1800-1986* (1987) 136.

the judicial hierarchy, at that time sheriff-substitutes were a particularly touchy breed. I am sure they are not now.

It was, however, a sheriff-substitute who, in 1971, subjected an article by a young academic who had not yet qualified to practise law, but nevertheless criticised another sheriff-substitute, to “sneering abuse”.³⁰ In 2010 the author of the article stated that this gave him “a mauvais quart d’heure, but no more than that because the criticism was plainly wrong and it only came from a sheriff-substitute”.³¹ It was easy for the author, one Alan Rodger, to say this because by then he was a Supreme Court judge.

The second assessment is recent. It is from the apex of the Australian judicial pyramid. It is that of Justice Heydon of the High Court of Australia, a former academic who taught me as well as Master Reader. His assessment is less harsh than that of the sheriff-substitute because there is no suggestion of intellectual inferiority. Furthermore, the assessment is not of the entire profession but only of an unidentified part of it. He stated:

“It may be the case that some modern academic lawyers are not well positioned to complain of incoherence and obscurity in case law. That is because in many of their activities they are not concerned with attempting to expound the law as a coherent and clear system – even though that is a valuable endeavour which many academic lawyers have traditionally carried out and still do. Rather they are concerned to fillet the law, to deride the attempts of judges to expound it, and

³⁰ Rodger 29(1) U of Q LJ at 33. The “abuse” was in *Mercantile Credit Co Ltd. v Townsley* (1971) SLT (Sh Ct) 37, 39; the offending article was Rodger (1970) SLT (News) 33

³¹ *Ibid*

even to try to explode it. The function of some academic lawyers lies almost exclusively in defaming judges.”³²

REASONS FOR THE CHANGE IN ATTITUDE

But what led to the change? The thin edge of the wedge may have been the acceptance that academic writings could be relied on to show whether a rule of law, however erroneous, had been generally accepted by the profession.³³ A more substantial reason is that in the years following the Second World War, an increasing proportion of those who went to the bar had read law at university.³⁴ Some, including the future Lord Cross and Lord Diplock, considered this was not a good thing.³⁵ But whether or not studying law at university is a good thing, practitioners who have done so are more likely to be familiar with the academic literature, and might be more inclined to deploy it in their written and oral submissions. Thirdly, after 1972, appellate judges in particular needed to become more familiar with those continental jurists whose views were influential in matters of European Community Law. After 2000, international trade lawyers needed to become familiar with the views of M. Jennard, Professor Schlosser and Mr Read on jurisdiction and enforcement of judgments. They needed to become familiar with the academics who influenced the jurisprudence of the Strasbourg Human Rights Court.

³² “Threats to Judicial Independence: The enemy within” (based on lectures given in Oxford, Cambridge and London in January 2012). This passage is in a section which states that there is strong pressure for single majority judgments *inter alia* from academic lawyers, although no academic is cited for this position, and curiously Munday ((2002) 61 CLJ 612), the only academic cited who deals with the issue, is against single and composite judgments.

³³ See e.g. *Henty v Wrey* (1882) 21 Ch. D 332, at 348 (Sir George Jessel MR).

³⁴ Rodger, (1993/95) 28-30 *Irish Jurist* 1, 6-7, (2010) 29 U. of Q.L.J. 29 at 30.

³⁵ See Diplock LJ (1966-67) 9 JSPTL (NS) 193, and, notwithstanding the fact that his brother Rupert was a distinguished legal academic) the future Lord Cross of Chelsea: Radcliffe & Cross, *The English Legal System* 4th ed., 420. For a recent expression of this view, see Lord Sumption, July 2012 *Counsel* magazine.

Moreover, a number of English judges had been legal academics before either going into practice or, in recent years, directly onto the bench.³⁶

The reasons given to justify the earlier convention against citation of the work of living authors have long been discredited.³⁷ I only refer to three. The first is that academic views were not formed on the anvil of adversarial argument. In the words of Megarry J, echoed recently by Munby LJ, that was a “purifying ordeal”.³⁸ Note the almost religious fervour! Those who took this view considered that academics who had not been subjected to this ordeal were exposed to the perils of yielding to preconceptions. This reason assumes two things. The first is that it is not possible to subject academic views to a “purifying ordeal” by questioning the advocates.³⁹ The second is that judges are immune to the sin of yielding to preconceptions. On the second, I observe only that it is something on which the testimony of an advocate might be more interesting than that of a judge (whether or not the judge is a former academic).

The “anvil of adversarial argument” reason also reflects a view of the academic as a solitary and isolated scholar. This may have been a reasonable perspective once, but it is no longer. It takes no account of the vigour of debate between academics and, in recent years between academics,

³⁶ In *Savigny in the Strand* and his U of Q. LJ article Lord Rodger referred to Lord Goff, Lord Hoffmann, Lady Hale and Buxton LJ, in England, and to Lord Coulsfield, Lord Gill and Sir David Edward in Scotland. In England there have been others, including Maurice Kay, Hooper and Elias LJ, Wilkie and Cranston JJ, and myself.

³⁷ See Duxbury, *Jurists and Judges*; Nicholls, (1950) 28 Can. B. Rev. 422; Lord Neuberger’s Hamburg lecture.

³⁸ *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch. 9, at 16 and *Commerzbank AG v Price Jones* [2003] EWCA Civ 1663 at [48]. As Lord Neuberger has pointed out, Megarry J was not deprecating the citing of books and articles, but reacting to counsel’s citation to him of his own work, a passage from *Megarry & Wade’s The Law of Real Property*. My approach to those who wished to rely on the 28th edition of *Anson’s Law of Contract* was that they should rely on another book or the cases on which the book relies, rather than the book itself. This is because relying on a book written by the judge may be perceived as putting their opponents at a forensic disadvantage. Where the citation supports a general uncontroversial proposition another textbook can be used, and where the proposition is controversial it will in any event be necessary to examine the cases relied on.

³⁹ In “*The Achilles*” [2009] 1 AC 61, Lord Hoffmann and Lord Walker ([11] and [79]), who relied on articles not cited in argument, appear not to have shared this view. But see n77 below.

practitioners and judges.⁴⁰ Private international law is an area with a long history of particularly vigorous debates.⁴¹ There have been debates in journals and at seminars and conferences between proponents of different approaches to the treatment of unjust enrichment and restitution,⁴² and the extent to which the Human Rights Act has a “horizontal effect”.⁴³ Where these debates have been published, although judges cannot question the proponents as they can the advocates, it is possible for them to evaluate the cogency of the respective arguments. After all, even advocates (with or without the assistance of the judge) may not expose all the weaknesses of their opponents’ submissions.

Another bad reason given for caution about citing the writing of living academics is that they may change their views. But as Professor Reid has observed, “an ill-considered opinion does not become more persuasive merely because the author dies without having had time to see sense and recant, while the second thoughts of an elderly professor are not necessarily better than his first thoughts as a youthful lecturer”.

Secondly, judges can handle changes of view, whether, as is usual, they are nuanced and partial, or whether they are fundamental. Professor Birks’s belief that constant refinement and re-education was the way to the truth, described by a colleague as almost Maoist, could be uncomfortable for those who had followed him, sometimes up a difficult path to an intellectually interesting position, only to see him descend and climb a different, but equally difficult, route.

⁴⁰ See the Oxford Norton Rose colloquia between 1991 and 2010 and the resulting publications on topics such as “Commercial aspects of trusts and fiduciary duties”, “Cross-Border Security and Insolvency” and “Contract Terms” and the activities of the Cambridge Centre for Public Law in the late 1990s

⁴¹ Dicey & Morris advocated the dual domicile doctrine. Formerly Cheshire advocated the intended matrimonial home. But see for example, Cheshire & North’s *Private International Law* (11th ed 1987) 574 ff.

⁴² See the 2004 symposium on Peter Birks’s dramatic reconceptualization of the law of restitution in his *Unjust Enrichment* (2nd ed): published in (2004) 12 RLR 260-290, and the debate as to whether proprietary restitution is based on reversing unjust enrichment or vindication of property rights. See generally Burrows, *The Law of Restitution* (3rd ed) Ch. 2 and 181 ff. for discussion of the competing theories and approaches.

⁴³ This debate is not confined to academics: see Buxton (2000) 117 LQR 34. The literature and the range of views is identified by Beylveled & Patterson (2002) 118 LQR 623 and Clayton & Tomlinson, *Human Rights* (2nd ed.) 5.92 n 299. See also Donnelly, *Delegation of Governmental Power to Private Parties*, (2007) 245 ff..

But when he abandoned his earlier view as to the basis of claims in unjust enrichment in favour of a civil law approach, Lord Walker, in *Deutsche Morgan Grenfell Group plc v IRC* stated that while his “tentative inclination [was] to welcome any tendency of the English law of unjust enrichment to align itself more closely with Scottish law, and so to civilian roots”, “it is of the nature of the common law to develop slowly, and attempts at dramatic simplification may turn out to have been premature and indeed mistaken”.⁴⁴

Thirdly, as Lord Neuberger has noted, judges and even a court of final appeal can also change their minds. Ours has even been known to do so as a result of criticism by a living academic lawyer. The most striking modern example is *R v Shivpuri* in 1986. The House of Lords overruled its 1985 decision on attempting the impossible in *Anderton v Ryan*⁴⁵. It did so largely because of what has been described as “blistering criticism” and an “onslaught” by Professor Glanville Williams.⁴⁶

The third reason, dismissed as hopeless by Lord Neuberger is that “living authors might write with the express desire to influence the outcome of a case”. The fact that an article or note is written with an eye to influencing the court is neither here nor there.⁴⁷ It is the court’s role to assess the merits of arguments. Since doctrinal scholars are generally concerned that the development of doctrine be rational and principled, and it is the courts who have the responsibility to develop the common law, a desire to influence is quite understandable.

Professor Sir John Smith accorded particular importance to his role as the commentary writer to

⁴⁴ *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 at [156] and [158].

⁴⁵ [1985] AC 560

⁴⁶ [1986] CLJ 33. See *R v Shivpuri* [1987] AC 1 at [23] *per* Lord Bridge, who also gave the leading speech in *Anderton v Ryan*.

⁴⁷ See Duxbury (2000) 116 LQR 474; *Jurists and Judges*, 84 ff.

the cases section of the Criminal Law Review because “the Review’s message gets through...” to the profession and the judges.⁴⁸

Notable examples of articles or notes written with such an intention include the sustained attack on the rule in *Re Polemis* I have mentioned and much of the writing of Sir William Wade and Tony Weir. They both wrote rapier-like criticisms of Court of Appeal decisions in the Law Quarterly Review and the Cambridge Law Journal with the express desire of influencing the outcome of cases pending in the House of Lords.⁴⁹ The intention of other academics is unknown, but the influence can be manifest. So, Professor Stanton considers that the modern law of private nuisance has been based on the model set out in Professor Newark’s 1949 LQR article.⁵⁰

There are plenty of recent examples. Professor Sir Roy Goode’s extended note⁵¹ on the Court of Appeal’s 2010 decision in *Perpetual Trustee v BNY Corporate Trustee Services Ltd*⁵² on the anti-deprivation rule in insolvency law was directed to a pending appeal. It was timed to appear shortly before the hearing in the Supreme Court. Sir Roy considered that a distinction made in the authorities between determinable interests and interests forfeitable on bankruptcy was little short of a disgrace to our jurisprudence, but was too deeply embedded to be dislodged otherwise than by legislation. Lord Collins, giving the lead judgment of the Supreme Court, adopted this

⁴⁸ (1981) 1 LS 119, 120-121

⁴⁹ In the case of Wade, see nn68, 70 and see *M v Home Office* [1994] 1 AC 377. In the case of Weir, the fact that he published his very critical note of the Court of Appeal’s decision in *Morris v Ford Motor Co* [1973] QB 792 privately when the CLJ was unable to publish it (see Bell [2012] CLJ 1) suggests a desire to influence a possible appeal. In *Spring v Guardian Assurance* [1995] 2 AC 296, 334, 349 Weir’s note “The Case of the Careless Referee” [1993] CLJ 376 was one of those relied on by the majority. Between 1990 and 2009 Weir was cited in tort cases in the House of Lords on 20 occasions, ranking highly in the list compiled by Stanton, in Lee ed, *From House of Lords etc*, 226.

⁵⁰ Stanton in Lee ed, *From House of Lords etc*, at 216. Newark’s article is (1949) 65 LQR 480. Stanton notes that between 1999 and 2009 it was only cited on eight occasions by the House of Lords. That may, however, reflect the fact that by 1999 its approach was embedded in decisions of the courts.

⁵¹ (2011) 127 LQR 1.

⁵² [2010] Ch. 347. The issue concerned the validity of “flip clauses” in swaps transactions which shift priority originally given to the swap counterparty to the holders of credit-linked notes.

view.⁵³ Even so, Sir Roy had the last word -- observing that the Supreme Court's decision made a number of assumptions about the scope of the rule.

Although the desire to influence is generally irrelevant, it is important for a court to know whether a book, note or article has been written by a commentator with a "pure" interest in the legal point even if it is a "passionate" interest, or by someone with a partisan axe to grind. For example, there are groups of personal injuries lawyers primarily associated with claimants and other groups primarily associated with defendants and their insurers. Academics may be active members of such a group, or have been engaged as consultants by a party to litigation. A law journal article may in fact be work originally commissioned by one of the parties or by an interest group.

The court knows where the advocates are coming from, and who instructed them.⁵⁴ Absent disclosure, it will not know whether academic writing was commissioned with the litigation in view. I am unaware of this having happened in this country but it has in the United States. In the late 1970s and early 1980s a question arose as to the right to jury trial in complex civil litigation. The answer in part depended on the practice in England and Wales in 1791. In that year the Seventh Amendment to the United States Constitution, providing that the right to trial by jury shall be "preserved", was ratified. Some litigants commissioned articles which were published in university law reviews. One, commissioned by IBM, was by Lord Devlin. Another, commissioned by Zenith Radio Corp, was by Professor Morris Arnold of the University of

⁵³ *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 at [87] – [88], referring to Goode (2011) 127 LQR 1, 8. In a further note ((2012) 128 LQR 171) Goode noted that the Supreme Court's decision made a number of assumptions about the scope of the anti-deprivation rule.

⁵⁴ A court will also know where academics have been enlisted as members of the legal team, for example the participation of Professor Jolowicz QC and Professor Markesinis as counsel in *White v Jones*.

Pennsylvania.⁵⁵ It was, however, clearly stated at the beginning of the articles that they had been commissioned by parties to litigation.

THE SIGNIFICANCE OF CITATION OR ITS ABSENCE

Citation by a court or its absence is not necessarily indicative of influence or its absence.⁵⁶ From the point of view of the academic, positive citation is good for morale. I well remember the feeling when, as a twenty-eight year old, I was told that my first article, had been cited in a decision of the Commercial Court.⁵⁷ I had argued that the cases which appeared to hold that non-physical duress could not affect the validity of a contract were in fact examples of settlements or compromises and there was no such rule. This was accepted by Kerr J. However, what you see in a judgment can be misleading. Citation may exaggerate the influence of academic writing which may not have played a major part in the decision. A textbook may be cited to provide a contextual or historical background,⁵⁸ where it is “the easiest way to support some general uncontroversial proposition”,⁵⁹ or where the academic work confirms a view which the judge held. In his 2010 article, Lord Rodger referred to two occasions in the House of Lords where citations to articles were inserted only after a draft judgment had been completed and circulated to other judges. He gives no explanation for such *ex post facto* citations but observes that they cannot indicate influence.⁶⁰ The articles may simply have been discovered at a late stage. They may have been inserted because they confirmed a view held by the judge, to display learning, or to acknowledge that someone else had previously made the point.

⁵⁵ Devlin, (1980) 80 Col. L. Rev. 43; Arnold (1980) 128 U of Penn. L Rev. 829. See also Lempert (1981) 80 Mich. L. Rev. 68; Devlin (1983) 81 Mich L.R. 1571. The debate continued for over a decade: see Edwards,(1992) 91 Mich. L. Rev. 34 and the 1993 Michigan Symposium: 1993 Mich. L. Rev..

⁵⁶ Duxbury, *Jurists and Judges*, 8-22.

⁵⁷ Kerr J in *The Siboen* [1976] 1 Lloyd’s Rep. 293, the first English case to recognise that non-physical duress could affect the validity of a contract, accepted the reasoning in [1974] CLJ 97.

⁵⁸ Stanton, in Lee ed, *From House of Lords etc*, 209.

⁵⁹ Rodger 29(1) U Q LJ 30-31

⁶⁰ 29(1) U of Q LJ at 31.

In the case of my article, I believe the decisive influence was that the argument was put before the court by Mr Robert Goff QC. The 1966 first edition of Goff and Jones, *The Law of Restitution*, described the distinction between physical and non-physical duress as “difficult to support”, and the supposed rule as “dogmatic”, and “in direct conflict with the modern view of duress”. My contribution was the settlement/compromise explanation of the older cases, and digging up a number of Australian cases which were relatively unknown in this country and had not been cited in *The Law of Restitution*. But I suspect that what was most important was that the article enabled Robert Goff to rely on something other than his own book.

As to failure to cite academic work, this is sometimes unfortunate and even discourteous. I give two examples of where it was unfortunate. The view that it was conceptually impossible for a bank to take a charge over its own customer's credit balance was first expressed in 1982 by Sir Roy Goode.⁶¹ In 1986 Millett J in *Re Charge Card Services Ltd*⁶² stated it was the law. He used substantially the same language as Sir Roy, but did not cite him, apparently on the ground that counsel had not referred to Sir Roy's book.

Secondly, in 1993 in *Woolwich Equitable BS v IRC* the majority of the Court of Appeal departed from the previous, long accepted understanding of the law and recognised a right to the restitution of taxes paid when not due. It substantially adopted the reasoning of Peter Birks in an essay published in 1990 which had been cited to the court.⁶³ But neither only Ralph Gibson LJ's

⁶¹ *Legal Problems of Credit and Security* (1st ed) 86 *et seq*

⁶² [1986] 3 All E.R. 289, at 308

⁶³ *Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights*, in Finn ed., *Essays on Restitution* (1990), 164-205.

dissenting judgment referred to it.⁶⁴ While imitation may be the most sincere form of flattery, this was unfortunate. Things were put right in the House of Lords where Lord Goff generously acknowledged the impact of Birks's essay.⁶⁵

But sometimes it is perfectly understandable. Academic material either put before judges or which, in Longmore LJ's words, is read "as part of their ordinary judicial activity",⁶⁶ may serve only as "an essential and much appreciated part of the background reading"⁶⁷ rather than a step in the reasoning of the decision itself. In such cases it is generally not necessary or appropriate to cite the work.

There is also a grey area. Sir William Wade's note on the 1974 decision of the Court of Appeal in the *Hoffmann-La-Roche* case was only discovered by Lord Wilberforce after the hearing of the appeal in the House of Lords but before judgment was written. Lord Wilberforce wrote to Sir William. He stated that the discovery of the note plunged him into "some consternation". He said that his own opinion corresponded exactly with the note to such an extent that "I will certainly be charged with pillaging your ideas". He acknowledged with gratitude the influence of Wade's writing and teaching over the years. He said that "has clearly produced this community of outlook". But he also put "on record that on this particular matter my piece was my own work in an immediate sense".⁶⁸

⁶⁴ [1993] AC 70, at 132

⁶⁵ *Ibid* at 166-167. He also acknowledged Professor Cornish's earlier Sultan Azlan Shah Law Lecture (1987) J. Mal. & Comp. L. 41

⁶⁶ *Re OT Computers Ltd (In Administration)* [2004] Ch 317 at [43] *per* Longmore LJ.

⁶⁷ (2010) 29(1) U of Q LJ at 31.

⁶⁸ Letter dated 10 June 1974, see Beatson, *Wade Memoir*. Wade's note was (1974) 99 LQR 154. Four years later, Lord Wilberforce reaffirmed the existence of the non-citation convention: (1978) 30 *Rev Int. Dr. Comparé* 90, 95.

Let no one say that academics cannot be generous. Sir William replied saying there was no one with whom he would be more honoured to be in agreement. He was particularly gratified because ‘it is only rarely that one can detect any connection between academic work and concrete decisions ... – even though in this case the parallel lines did not actually meet.’” The two men may have agreed, but their views did not prevail. Lord Wilberforce’s speech was a dissent, and it did not refer to Sir William Wade’s note. Sir William wrote a note on the decision of the House of Lords, circumspectly observing only that there was “much to be said for Lord Wilberforce’s view”.⁶⁹

In 2008, in *“The Achilles”*, Lord Hoffmann and Lord Walker took a different and more relaxed approach to the citation of academic work discovered after the hearing.⁷⁰ Lord Walker stated he had written almost half his speech when Lord Hoffmann drew his attention to the articles. I shall return to this. Their Lordships may have been over-relaxed.

In *Hunter v Canary Wharf* Lord Goff stated⁷¹ that, while he consulted the relevant academic authorities, he only referred to those which were of assistance. It may be because of judges like Lord Goff, and because he overlooked academics like Sir William Wade, that Lord Rodger was able to say that “judges are, of course, much nicer people than academics” and do not like to criticise them.⁷² On some occasions the reason for judicial silence is the convention reflected in the Judicial Code of Conduct, that “a judge should refrain from answering any criticism of a

⁶⁹ (1974) 99 LQR 436, 439.

⁷⁰ [2009] 1 AC 61 at [11] and [79]. Lord Walker stated he had written almost half his speech when Lord Hoffmann drew his attention to the articles. See also *Jones v Kernott* [2011] UKSC 53 at [2] *per* Lord Walker and Baroness Hale. But for difficulties with the approach in *“The Achilles”* see further below.

⁷¹ [1997] AC 655, 694

⁷² (2010) 29(1) U of Q LJ at 33

judgment or decision”.⁷³ That probably has a spillover effect even where the criticism is of another judge.

Moreover, not all judges who disagree with the academic material put before them remain silent although, as one would expect, in judgments they generally express their disagreement in moderate terms and more courteously than some academics.⁷⁴ There are, however, examples of sharper rebukes in extra-judicial statements. One is the passage I have quoted from Justice Heydon’s lecture. Another is Sir Stephen Sedley’s firm response to Professor Griffith’s 2001 article in the LQR. Professor Griffith said that Sir Stephen’s writings on constitutional law showed that his “political philosophy “is based on liberal individualism which sees the state as ‘the natural enemy.’” Those of us who know Sir Stephen’s writings may have raised an eyebrow at this. Sir Stephen’s response stated that Professor Griffith attributed to him “a view which happens to be the contrary of that which I hold”. He went on to explain why. He stated:

“I am sorry that Professor Griffith, in his concern to insist on the centrality of the executive in the British Constitution (an issue entirely deserving of debate, and on which my views are not settled), denounces someone who has paid him the compliment of describing his writings as the spectre at the feast of judicial supremacy, and whose published essays share many of his concerns.”

⁷³ paragraph 8.1.1. See also Lord Woolf, HL Deb, 21 May 2003 col. 882; Lord Judge, Lionel Cohen lecture, “The judiciary and the media” delivered in Jerusalem on 28 March 2011.

⁷⁴ See for example *Wang* [2005] 2 Cr App R 8 at [15] – [16] *per* Lord Bingham (answering a point made by Glanville Williams in *The Proof of Guilt*, 3rd ed (1963), 262 about perverse jury verdicts); *Thorner v Major* [2009] 1 WLR 776 at [31] *per* Lord Walker (stating that, contrary to the views of McFarlane & Robertson, [2008] LMCLQ 449 and Sir Terence Etherton’s observations to the 2009 Chancery Bar Association’s Conference, *Cobbe v Yeoman’s Row Management Ltd* did not extinguish or severely curtail the doctrine of proprietary estoppel); *Blue Sky One Ltd v Mahan Air*. [2010] EWHC 631 (Comm) at [157] and [181] (about Briggs’s response in (2000) 71 BYIL 465-468 to Millett J’s statement in *Macmillan Inc v Bishopsgate* [1995] 1 WLR 978 that *renvoi* was “largely discredited”). See also, albeit of a dead author, Lord Wilberforce in *Johnson v Agnew* [1980] AC 367, 395-396

Professor Griffith seems to have taken against the judges of this Inn. He had earlier attacked another Inner Temple judge in an article in the MLR in 2000 “The Brave New World of Sir John Laws”. But Master Laws is saving his reply, I suspect, for a footnote in the definitive work on philosophy, public law, and Greece (or Greece, philosophy and public law) his friends expect he will produce one day. It was certainly not in his Eldon lecture last week.

There are also a number of good reasons for caution by courts in their use of academic work. First, while in the exercise of a judge’s function it may be necessary to expound the law, a judgment is deciding a particular dispute rather than providing a general statement of the law. Lord Macmillan stated in *Read v. J. Lyons* that “your Lordships are not called on to rationalise the law of England”.⁷⁵ Secondly, in a common law system, judgments should provide lower courts with clarity as to what has been decided and practitioners with the ability to advise their clients. Care has to be taken that the treatment of academic work considered does not detract from that. Moreover, “not the least important of the consumers of judgments are ... the parties themselves”. They will as Lord Rodger stated, want to see something that appears to embody the judge’s own views as a result of listening to the arguments rather than “views which he or she has taken, second-hand and pre-packaged, from some academic author.”⁷⁶

This is a particularly strong consideration in the case of a book or article which was not cited at the hearing. I have referred to *The Achilles*.⁷⁷ In that case a number of articles on remoteness of damage in contract which had not been cited were relied on by Lord Hoffmann and Lord Walker. I understand that the parties were not given the opportunity to make submissions about the articles. The decision has not attracted universal praise. The current edition of *Anson’s Law of*

⁷⁵ [1947] AC 156, 175.

⁷⁶ (2010) 29(1) U Q LJ 29, 32.

⁷⁷ [2009] 1 AC 61 at [79]. The articles are Kramer in *Comparative Remedies for Breach of Contract* (2005), eds Cohen & McKendrick, pp 249–286), Tettenborn (2007) 23 *Journal of Contract Law* 120–147) and Andrew Robertson (2008) 28 *Legal Studies* 172–196

Contract stated that it has “thrown the law on remoteness in contract into confusion” and rendered it less certain. But of far more importance, not least because I must declare an interest in Anson, are the critical views of many shipping lawyers. It would have been better for the Court to have heard what counsel had to say about the articles that Lord Hoffmann discovered.

Thirdly, there is concern about the increasing length and complexity of common law judgments.⁷⁸ There are many other reasons for this unfortunate development. One is the over-citation of cases and a cut and paste approach to legislation and earlier judgments. Another is defensive judgment writing, sometimes the product of appellate courts that a judge should “grapple” with a particular point, and the clear indication that more than a short paragraph was needed on what had been a side issue in the lower court. Length is undoubtedly also a factor which should be taken into account in considering whether to cite academic work. In *White v Jones* in the Court of Appeal Steyn LJ regretted that no commentary on *Ross v Caunters* had been put before the Court. He stated that in a difficult case it is helpful to consider academic comment.⁷⁹ The parties took the hint and a wealth of academic material from this and other countries was put before the House of Lords. Lord Goff’s speech cited extensively from that material. Lord Rodger stated there was “a quite extraordinary period of 9 months” between the hearing and the decision. I cannot say whether this was because of the academic work or because of disagreement. The last word must be Lord Mustill’s. He did not cite any of the academic work. He stated:

“Citation has been copious, and of great value. If I refer to none of the writings it is only because, as with the reported cases, the volume is too

⁷⁸ See e.g. Dame Mary Arden (2012) 128 LQR 515 (her estimate is based on her sample from the AC reports. It is of an almost threefold increase in 2001-2011 as compared with 1891-1901).

⁷⁹[1995] 2 AC 207, 235. Steyn LJ stated that “In a difficult case it is helpful to consider academic comment on the point. Often such writings examine the history of the problem, the framework into which a decision must fit, and countervailing policy considerations in greater depth than is usually possible in judgments prepared by judges who are faced with a remorseless treadmill of cases that cannot wait. And it is arguments that influence decisions rather than the reading of pages upon pages from judgments.”

large to permit accurate and economical exposition; and the selection of some in preference to others would be invidious.”⁸⁰

A PASSING PHASE?

Will the last forty years be seen to have been a passing phase, the high-watermark of the influence of academic lawyers, because the proportion of our most senior judges who have a law degree from a United Kingdom university will drop⁸¹ as the proportion of non-law graduates in the profession rises? The statistics in the Inner Temple’s *Guide to being a barrister* show that while a law degree remains the leading entry qualification to the bar, “it is significantly less so than in the past”. In 2004/5 33% of Inner Temple pupils graduated in non-law subjects; in 2012/13 it is 42%. Are there other indications of the way the wind is blowing? For those like me who welcome the influence of academic lawyers when appropriately deployed, there are several warning signals.

No-one has ever gone into academic life in this country for the money. But Lord Rodger pointed to difficulties in universities recruiting high quality staff in core areas of private law and retaining them because of the increasing gap in the earnings of university staff and those in commercial law firms and chambers. Compare United States law schools, where professors of law are paid substantially more than other academics. The result here has been that, in subjects with an international dimension, in the last 15 years many jobs have been filled by able graduates from abroad, often from a non-common law country. We should be proud that we are more open

⁸⁰ [1995] 2 AC 207, 292. He considered that the official law reports should record the doctrinal materials brought forth in argument, as well as the cases, because that would help to place in perspective the views in the judgments. See also his speech in *Pan Atlantic Insurance Ltd v Pine Top Ltd* [1995] 1 AC 501, 551

⁸¹ In 2009 11 of the 12 members of the Supreme Court had a law degree from a United Kingdom university: see Braun In Lee ed, *From House of Lords etc*, 249. On 12 November 2012, when there is one vacancy, 9 of the 11 members of the Court have a university law degree.

than law faculties in continental Europe to such recruitment. But Lord Rodger thought that such scholars were likely to be more interested in international, comparative and European law than private law, and less interested in the work of the English courts.⁸² It is also possible that without the fundamental grounding in the common law that is given to undergraduate in good law schools, such scholars, however excellent, will bring an inappropriate civilian spin to their treatment of common law doctrine. If these scholars have studied common law at a graduate level the risk may be significantly reduced. It should be remembered that the greatest contribution to English law by the émigré lawyers who came to this country before the Second World War came from those who re-trained in English law.⁸³

The third warning signal is that a smaller proportion of top academics are involved in doctrinal law. This signal chimes with the view of Judge Richard Posner as to the position in the United States. He has stated that, despite a strong trend for academics to become judges in the United States, the gap between academe and the judges is widening.⁸⁴ This he considered is in part because law schools received “a wave of refugees from fields such as economics and philosophy that are at once more competitive and less well remunerated than legal teaching”⁸⁵, and who are more interested in those subjects than law. The pay structure in British law schools means they have not received such refugees. But an increasing number of legal academics see their primary links with other parts of academe rather than with the profession. Some vigorously applaud the change.

⁸² (2010) 29(1) U of Q.L.J.13, 34

⁸³ See Beatson & Zimmermann, *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (2004), 89 & 103 (requalification). On particular sensitivity to the local context see *ibid* at 311-312 about Kahn-Freund in relation to voluntarism in collective bargaining and the difficulties of legal transplants, and *ibid* 103 and (1978) 94 LQR 512, (1979) 95 LQR 348 about Mann in relation to British constitutional law.

⁸⁴ (2010) 29(1) U of Q.L.J.13.

⁸⁵ *Ibid*, at 15

Professor Bradney, the chronicler of “the liberal law school in the 21st century”, for example, regards the principles Lord Goff was searching for in his Maccabean Lecture as “not exist[ing], or exist[ing] so rarely and so fleetingly as to not properly be thought of as being something that can be studied as the structure of English law”. He does not believe this “*necessarily*” “impugns[s] the integrity, dedication or intelligence of those who espouse this form of study”. He observes “that phrenology was once regarded as a legitimate form of inquiry and that the search for the Holy Grail proved to be fruitless”.⁸⁶ For Professor Bradney, doctrinal research “has very little relation to reality” and advances in legal scholarship have largely involved scholars distancing themselves from it.⁸⁷ Is this insightful intellectual comment, or condescending?

The growth of socio-legal and other non-doctrinal scholarship, the “law and ...” movements,⁸⁸ will tend to distance some of the work of law schools from the interests engaging the courts at a practical level.⁸⁹ Some of you may be familiar with Routledge’s series on Law, Society and Popular Culture. One of the books in the series, *Cricket and the Law: The Man in White is Always Right*, grew out of a course offered at the University of Sydney law school. A review in the THES regarded it as setting “the benchmark for future legal studies of the playing of sport”. With chapters on “Lord Denning, Cricket, Law and the Meaning of Life” and “Dante, Cricket, Law and the Meaning of Life” or, for the more practically inclined, “Leg Before Wicket, Causation and the Rule of Law”, the attraction of this over, say, Smith and Hogan on Criminal Law or Anson on Contract is clear.

⁸⁶ Bradney, *Conversations etc*, 100

⁸⁷ Ibid 123 and 8-9 respectively

⁸⁸ Other movements include feminist legal studies, law and literature, and critical legal studies: see Bradney, *Conversations, etc* at 9-10.

⁸⁹ See also Posner, “The Decline of Law as an autonomous discipline” (1987) 100 Harv. L. Rev. 761

More seriously, the new forms of legal scholarship are undoubtedly important if done well. And there will be material which will be of great interest to practicing lawyers and judges. In an earlier lecture in this series, Professor Cheryl Thomas said⁹⁰ that judges may be assisted by socio-legal studies, because they expose myths about the legal system.⁹¹ Her example was myths concerning juries. This is undoubtedly valuable. But it is not a reason for undervaluing doctrinal research, and for seeking to distance academics from the work of the judges who remain an important primary source of law in a common law system. If academic lawyers or academic legal administrators have allowed the Research Assessment Exercise to do this, it is to be deeply regretted. It is as deplorable as distancing top medical academics from the work of the hospitals and the treatment of the sick.

Moreover, just as the limits of doctrinal scholarship should be recognised, so should the limits of socio-legal scholarship. In *Wells v Wells*,⁹² the House of Lords used the Law Commission's research, conducted by Professor Genn, in its re-calculation of the appropriate multipliers in personal injuries cases. But, save in exceptional circumstances, such research is unlikely to be used to inform individual decisions. This is because it is primarily of use to governmental policy makers and law reformers. Moreover, it may well be inappropriate to deploy such research and its analysis in court except in the way other opinion evidence is adduced, that is through expert evidence which can be tested. Judges are, by training and experience, equipped to assess the merits of doctrinal analysis. They are not trained or qualified to do so where the analysis is statistical, scientific, or based on some other discipline. They should not be let loose on such

⁹⁰ "Why Judges and Juries need some academics" (2012) *Inner Temple Yearbook* 124.

⁹¹ The myths stated to be exposed about juries in such research are: "mass avoidance", over-representation of the unemployed and retired, and under-representation of women, ethnic minorities and self-employed, racial bias, and that juries are responsible for the low conviction rate in rape.

⁹² [1999] 1 AC 345. Law Com. No. 225, *Personal Injury Compensation: How Much is Enough?* (1994).

material guided only by the advocates in the case. The advocates, after all, are also only mere lawyers.

Finally, is it significant that an increasing proportion of legal practitioners qualify after studying another subject at university, and have legal training which is unlikely to have been focussed on theory and the great debates in scholarly journals? It would be if those who come to law with a non-law university background rely only on the very practical approaches involved in the CPE and the vocational stage and do not make themselves familiar with the legal structure and principles upon which the practical issues on which they have to advise and argue in court are based.

In an adversarial system, it is the lawyers who appear in the courts who are the gate-keepers to the material that is put before courts. Advocates have to be alive to the underlying principles and where there is legitimate scope for legal development because that may help in putting a lay client's case more effectively. In many cases it will be possible to be utterly effective without reference to academic work. The trick is to be able to identify the few situations when academic input will assist. And to do that you have to have a general knowledge of the limits of doctrine, the range of debate, and the possible ways to help the court feel its way to developing the law in a difficult case.

I do not underestimate the difficulties practitioners, particularly those who work in the publicly funded world, face. They are being squeezed. The allurements of "Tesco Law", "pile it high and deliver it cheap", and "one size fits all" are thrust in their faces as antidotes to inadequate funding. The economic and regulatory pressures make it ever more difficult to maintain the standards of a learned profession. But, if our common law system is to survive in a more

complex, specialised but cash-strapped world, it is important that courts have all the assistance they can get. That includes assistance from the world of legal scholarship. Notwithstanding all the pressures on practitioners, part, albeit not the predominant part, of the responsibility for maintaining the link between academe and practice rests with them, whether or not they started out as law students.

CONCLUSION

Professor Stanton's analysis of the 104 tort decisions in the last decade of the House of Lords as a court enabled him to conclude that "there can be no doubt that critical and constructive scholarship has had a significant impact on the development of particular parts of the law of tort".⁹³ I believe, albeit without such a statistical analysis, that this is also true of many other areas of public and private law, and criminal law.⁹⁴ There are other areas, in particular welfare law, immigration law, and other subjects buffeted by ever changing statutory frameworks, where this is not so. There are also activities in the modern law school which are not concerned with legal doctrine, but are directed to policy making or are closer to the work of humanities faculties. But those are not sufficient reasons for the professions of legal scholar or jurist and judge to drift apart again.

Lord Rodger would have probably teased Professor Birks for his statement that, if research in law schools "is ever useless to judges and practising lawyers, we will come adrift from our

⁹³ In Lee ed, *From House of Lords etc*, 215

⁹⁴ See nn 44-45 above . See also *Hyam v DPP* [1975] AC 55, 70-71 (Impact of academic criticism of the *mens rea* for murder as stated in *DPP v Smith* [1961] AC 290) Professor John Spencer's monographs on the hearsay and bad character evidence provisions in the Criminal Justice Act 2005 have been cited with approval by the CACD in 15 cases since 2005.

foundations”⁹⁵ as being somewhat overstated. But overstated or not, there is much truth in it. Lord Devlin observed⁹⁶ in 1962 that, since we base our administration of justice on judges who are not necessarily selected for their erudition in the law, we have more need for the work of academic lawyers than they do in some other systems of law where academic lawyers are honoured and revered.

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⁹⁵ *Pressing Problems in the Law vol. 2: What are law schools for?* Preface. Cf Bradney, *Conversations etc*, 125 for hostility to this on the ground that “the law school ... is not a “House of Intellect for the Legal Profession”, it is simply a “House of Intellect”.

⁹⁶ *Samples of Law-Making* (1962) at 67. See also Megarry, *Judges and Judging* (1977) London, Child & Co Lecture (“judges, like other lawyers, vary in the depth of their affection for the law”).