JUDGES AND TEACHERS

By R. F. V. Heuston*

In this article Professor Heuston reminisces on the distinctive functions of the judge and of the teacher of law. Each has a contribution to make and each is dependent on the other to a greater extent than either may be prepared to admit.

My qualifications for writing an article on this topic are that I started to teach law at Oxford thirty years ago almost to the day in company with one whose name is not unknown in this context—Zelman Cowen. I have been a member of the English and the Irish Bar for almost the same length of time and have practised (very briefly) both in London and in Dublin. For about six years I was a Lay Magistrate (Justice of the Peace) in Hampshire during the time when I was a Professor of Law at Southampton University. I have met officially or on terms of friendship a large number of judges during these thirty years, in particular when I was a member of the Lord Chancellor's Law Reform Committee in England and a part-time member of the Law Reform Commission in Ireland.

Judges and practitioners have always had a somewhat uneasy relationship with each other. Nearly fifty years ago Lord Tomlin noticed the fact in a small piece of verse which ran:

> For the Dons are so hard on the Judges
> and the Judges so rude to the Dons.

As judges start life as practitioners, the problem is really an aspect of the relationship between practitioners and the teachers. Each has a stereotyped image of the other which the passage of years or the impact of reality does little to diminish. How does the practitioner see the teacher? The answer is, not entirely favourably. When I was last in Australia in 1956, I was taken to the High Court, which was then sitting in Melbourne, by P. D. Phillips Q.C., then a leading practitioner who also did some part-time teaching at the Law School. He brought me into the second row from the Bar and when I indicated some doubt whether I was entitled to be there, P. D. Phillips, with a scorching glance at the Bench on which Sir Owen Dixon was seated, said: "Professors can sit anywhere in this Court". Somehow I do not think he meant the title of Professor in a complimentary way. Equally, it is noticeable that at the Bar in London those academic colleagues who are entitled to practise are careful to drop their academic titles—nothing, apparently, puts off a client so much as the titles "Professor" or "Doctor" painted over the door of one's chambers. I think the

* Regius Professor of Laws, Trinity College, University of Dublin.

position may be otherwise in International Law—I notice that Professor Daniel O'Connell uses his academic title without embarrassment when appearing before International Tribunals.

The stereotyped picture or caricature to which I referred is perhaps best summarised in a contribution which appeared in the Journal of the Society of Public Teachers of Law some fifteen years ago. It is anonymous but from internal style and other evidence it is not difficult to conclude that the author was the person who now holds judicial office in the Chancery Division. He wrote:

> The acquisition of the [academic manner] is vital, but unhappily it is more easily recognised than described. Physical appearance has something to do with it—shoulders should be rounded, the complexion muddy and the hair be-dandruffed, but beards are no longer *de rigueur* and in the immortal words of Queen's Regulations "whiskers if worn should be of reasonable dimensions" (though preferably unkempt). Dress is even more important. The approved costume consists of baggy slacks, a corduroy smoking jacket and a bow tie. Spectacles (preferably pince-nez but never a monocle) are of course essential. No hat need be worn, but if it is it should be dusty and with a wide uneven brim. . . . Avoid all display of emotion; you must be interested in unworldly ideas not in people or human problems, and feelings, if vented at all, must be directed only at theoretical propositions of no practical importance. Never laugh. It is permissible to allow yourself a tired smile at some shaft of dry academic wit (particularly if delivered by yourself) but in general you should face the world (or rather turn your back on it) with an abstracted frown.[1]

As with most such unfair portraits, there is nevertheless in it a sufficiently large grain of truth to make one wince on reading it.

But the teacher may also have a distorted view of the judge. In 1950, Professor L. C. B. Gower wrote:

> No professor as such has ever been "elevated" to the High Court Bench, no judge has ever "descended" from the Bench to a professional chair, and nothing is more nauseating than the patronising air of mock humility usually affected by one of His Majesty's judges when addressing an academic gathering.[2]

Professor Gower went on to say that if this statement indicates a certain inferiority complex on his part, then he would confess to it. Incidentally, it is still generally true in the United Kingdom that no professor has been elevated to the High Court Bench though several of the present members (Goff, Slade) have had teaching experience in their youth. The Supreme Court of Canada however does contain two members who were elevated directly or indirectly from their professorial

---

[1] "How to Become a Jurist" (1962) Journal of the Society of Public Teachers of Law 129, 130-131.

[2] Gower, "English Legal Training" (1950) 13 Modern Law Review 137, 198.

chairs—Chief Justice Laskin and Mr Justice Beetz. The allegation that academics are remote or unworldly runs through many of the practitioners' statements. In 1941, Lord Chancellor Simon said, in reply to a House of Commons Select Committee which inquired about judicial appointments: "I do not want to see the judicial Bench filled with people who are no doubt terrifically learned but are living in complete seclusion and have no contact with the world".

By contrast, practitioners often seem to the academic to be obsessed with the details of conflicts of fact in the law courts. It is these details which are the basis of so many of those highly personalised facetious anecdotes which are so entrancingly funny when told in after-dinner speeches at legal gatherings and so exceedingly boring to everybody else. H. G. Wells (not a teacher but an academic if ever there was one) once described legal conversation as consisting mainly of "[T]hose classical anecdotes of crushing cross-examinations, blighting snubs, and scandalous miscarriages of justice so dear to the forensic mind".[3]

One must emphasise again that the practitioner is interested in, perhaps obsessed by, questions of fact. The late Lord Kilmuir once said that the first reaction of a lawyer on hearing of a proposition is: "How can that be proved?". That goes very far but the difference between the practitioner and the academic on this subject runs deep. It perhaps explains why practitioners often have a vivid, perhaps photographic, power of recalling their past triumphs or disasters in the form of litigation and tend to forget the reported judgment itself in the Law Reports. Almost the only retired practitioner I heard of who did not recall his famous cases is the one who appears in the forgotten short story by Anatole France entitled "The Procurator of Judea". An earnest young enquirer, what would now be called a researcher, tracks down the retired judge and questions him about his famous trial—*the* famous trial. Puzzled, the retired judge shakes his head, turns the unfamiliar name over in his mind but replies decisively: "Jesus—Jesus Christ—Jesus of Nazareth? No, I have never heard of that name".

But this obsession of practitioners with questions of fact is of great importance to the teacher who is apt to forget that the ascertainment and correct disposition of disputed questions of fact is the basic task of the judge. Judges as different as Sir Owen Dixon and Lord Denning, whose primacy as pure jurists is in their different ways also unquestioned, have each asserted this. Sir Owen referred to a General who had served under Field Marshal Lord Kitchener and who had replied to criticism of him [Kitchener] by saying that "he excelled in making correct decisions instantly in a crisis on which all might depend, not in arguing them out with lawyers who had taken to politics".[4] I have heard Mr Justice Walsh of the Irish Supreme Court, whose eminence

[3] Wells, *The New Machiavelli* (Atlantic ed. 1925) 396.
[4] Dixon, *Jesting Pilate* (1965) 2.

as a jurist is also unquestioned by even the most doubting academic, assert that "A judge is paid to decide". The moral force of the judge is a factor which every practitioner must consider. In a passage which has been little noticed, Blackstone observed that two months of each year were devoted to deciding questions of fact, but twenty days were enough to settle all points of law.[5] Nobody today could speak with such peculiar precision and authority, but there is no reason to suppose that the balance would be very different. It is significant that public discontent with the legal process has been over the possibility of failures of justice at the trial level rather than with the logic or social utility or morality of the legal rules applied by the judge. What has really and rightly disturbed the ordinary citizen is the thought that innocent men may have been wrongly convicted; he is less worried by the scope of the action for loss of services or the differences between the torts of conversion and detinue. There is now, at any rate in the United Kingdom, a flourishing light industry devoted to questioning the results of criminal trials almost as soon as the jury has brought in the verdict. I do not wish to take up any further time with this particular problem but to emphasise again that, in my view, the importance of the judgment to the public rests in its decisiveness or in its disposition of a disputed issue rather than in its intrinsic juristic merits. Until the decision of the judge has been obtained, the estate cannot be wound up, the legatees or the creditors cannot be paid, the property cannot be sold, the mortgage to the bank paid off. To the ordinary citizen these are matters of great importance and the academic is not being as helpful or as observant as he ought to be in failing to notice these facts—with the exception of Professor Twining, whose IVR paper refers to the judge who wishes to find out why the academics squabbled interminably over what gratuitous advice to give him about cases which hardly ever arise, while remaining silent about his daily routine of finding facts and disposing of offenders.

It might be conceded that decisiveness is not one of the academic merits. There are few academic disputes or controversies which cannot wait for a few days or perhaps even weeks or months for their resolution; by contrast, there are many professions or trades in the world in which decisions have to be taken within the week, within the day or perhaps even within the hour. Yet there is one academic area in which immediate and important decisions are often required and it is, surprisingly enough, an area which has had very little attention paid to it, at any rate in England. I refer simply to the decisions required in the examining process. Unless it be assumed, as some sociologists do, that no student should ever fail an examination, the task of grading the candidates is one of great annual importance and difficulty. The difficulty also increases annually because of the increas-

[5] *Blackstone's Commentaries on the Law of England*, Vol. 3, 330.

ing number of students. In my experience, most examiners are extremely conscientious but also extremely unwilling to have their decisions queried by their colleagues or questioned by any appellate process. Yet why should academics claim a right in relation to judicial decisions which they do not permit others to exercise in relation to their own decisions? There is indeed much about our examining procedures which deserves review. By this I do not mean that decisions are inherently wrong or questionable in any way—in my experience very great care and trouble is taken by the majority of one's colleagues. But I throw out for consideration some questions. Are we really right in requiring students to use pen and ink in the era of the typewriter? Are we really right in limiting ourselves to marks within the band of 35 to 75? How often does one see a mark below 35% or above 75%? I am of course referring to the old-fashioned written examination which is still the backbone of the system in England, although there have been experiments with continuous assessment (which has proved to be by no means as attractive as students themselves once thought) and with other varieties of self-assessment.

This is certainly an area in which academics are superior to practitioners despite the doubts just expressed. Examining is something which the academic really does know about simply because he has to do it so often. The practitioner, and still more the judge, increasingly remote from his student days, is often surprisingly unrealistic about how much students can be expected to remember or to reproduce in examination. Recently the Law Schools in the Irish Republic had lengthy negotiations with the governing body of the Barristers profession, the Benchers of the King's Inns (whose motto is, surprisingly, that of the Barons at Merton in 1236—Nolumus Mutare). The Benchers insisted at first that there should be twelve compulsory subjects. When it was pointed out to them that the Ormrod Committee in England has been content with six, and that their views had been unanimously adopted by twenty-three English Law Schools and the two professions, their reluctant reply was to reduce the number to ten. From this they refused to move in any way even though it was pointed out to them that this inevitably meant a two year course for non-law graduates as no student, however brilliant a graduate he or she might have been in some other subject, could possibly master ten subjects in one year. The reply of the benchers was in effect "So be it".

Let me turn back to the problem of the different way in which the practitioner and the academic view the reported case.

The retired judge often forgets his judgments—a feature which is apt to annoy and irritate the academic who is accustomed to cite and comment upon the leading cases to successive waves of students. A former Oxford colleague of mine who met Mr Justice Horridge was very much upset when the Judge in a cheerful tone confessed that all

recollection of *Phillips* v. *Brooks*,[6] that leading case on mistake in the law of contract, had passed from his mind. To some extent this forgetfulness as to issues which seem important to the academic can be explained by the practitioner's ability to divide his mind up into different parts. This characteristic of the legal mind is best expressed in a comment which Winston Churchill once made on Asquith.

> With Asquith, either the Court was open or it was shut. If it was open, his whole attention was focussed on the case; if it was shut, there was no use knocking at the door. . . . The habit, formed in the life of a busy lawyer, persisted. The case was settled and put aside; judgment was formed, was delivered, and did not require review. The next case would be called in its turn and at the proper hour.[7]

I notice that in his preface to Professor Christopher Weeramantry's most interesting recent book, Lord Denning has made a similar point:

> Most of us lawyers have no time to sit and think upon these things. We deal with one case after another. Sufficient for the day is to decide the case in hand. Let others do the moralising and the soothsaying.[8]

The highly personalised structure of the English and of the Australasian judgment arouses the interest and curiosity of the rest of the legal world. Nowhere else is there such a peculiarly relaxed discursive and persuasive style of writing judgments—certainly not on the continent of Europe, and differences between the English and the continental styles in this matter have been emphasised as the professions have become familiar with the work of the European Court at Luxembourg. In a fascinating volume entitled "The Styles of Appellate Judicial Opinions" the author, Dr J. S. Wetter, has compared Swedish, French and German judgments with those of English judges and concluded: "None of these exhibit the absence of a restrictive format, the wide leeways of personalised discourse, and the insistence on individual form and content which are the vivid normal features of English judgments". I think every word of that might be applied to judgments in Australia, particularly to those in the era when Sir Owen Dixon was Chief Justice of the High Court.

In a sense it is very unreasonable to expect judges to explain their own judgments. As a former Chief Justice of New Jersey once said: "We write opinions, we don't explain them". It is very sensible of the Americans to do what the English and the Australians do not do—to distinguish between the opinion and the judgment. To many people, as we have already seen, what is significant about the judgment is its decisiveness, its authority to other people to act in a certain way. The

---

[6] [1919] 2 K.B. 243.
[7] Churchill, *Great Contemporaries* (1937) 140-141.
[8] Weeramantry, *The Law in Crisis* (1975) X.

lay client and the practising lawyer want the judge to listen and to decide—but above all, to be clear and definite. On the other hand, the academic wants the judge to tell and to legislate. The law student on entering practice is apt to be astonished at the respect paid to the decision of the puisne judge or even the opinion of the silk or the leading junior. Such an opinion of course always enjoys peculiar authority in the Chancery division; much of real property law is simply the practice of conveyancers and has not been expounded or explained in judgments. But elsewhere a judgment of a puisne judge or even an opinion by a leading silk constitutes a standard, a guide and a licence for action to a host of minor functions, functionaries in the legal profession or the civil service or local government for whom justice, rightly, is justice according to law.

The point is illustrated by the career of Sir John, later Lord Simon. Simon carried in his head a more beautifully adjusted piece of machinery than any other English lawyer since Francis Bacon. His judgments as Lord Chancellor are in the front rank. But he lacked the power of rapid decision and when he was foreign secretary during the early 1930s when Hitler was rising to power, this was disastrous. Simon in his youth had obtained a first class at Oxford and had gained a fellowship at All Souls; his mind was in many ways academic or scholarly, though he would certainly not have regarded those epithets as complimentary. But he was like an academic in the sense that he did not like to decide or make up his mind until he had read all the materials. But on the major issues of foreign policy the Foreign Office had files going back to the Congress of Vienna in 1815; and so while the Secretary of State was reading the documents, his ambassadors and civil servants waited for the licence to act and the country slid towards Munich.

I would like to suggest that the common law judge in writing his judgment is really exercising the art of advocacy raised to a higher power. No doubt there are a number of reasons why a judge writes his opinions. A legitimate pride in his own craftsmanship and an unthinking acceptance of professional tradition are certainly two of them. But primarily he is seeking to persuade of the correctness of his decision not the parties, not the legal profession at large, certainly not the readers of the *Law Quarterly Review*, but the legal advisers of the parties in the litigation before him. A lifetime spent as an advocate cannot be forgotten when a man ascends the Bench. It is this which makes an English judgment so readable. Nobody who knows our Law Reports would wish to exchange that discursive relaxed style for the grey impersonal prose of a French law report—product of a judge who has spent his career as a civil servant.

The fact that the judgment is prepared for a tiny professional audience is significantly illustrated by a change of practice in the House of Lords in 1963. The visitor to the highest appellate tribunal

in the United Kingdom can no longer hear the reasons for judgment delivered openly. Instead the written opinions of the Law Lords are made available, free, to the legal advisers of the parties one hour before the House meets to consider the report of its appellate committee, and afterwards, for a fee, to the public. In one case Lord Justice Diplock even refused to read out a dissenting judgment which he had prepared on the ground that its sole function would be to give the defeated party ammunition for a further appeal.[9]

I suggested earlier some questions which academics might put to themselves about the nature of our examining procedure. Here are some questions for the judges. Are we really making the best use of the talents of able men in requiring them to spend laborious hours writing lengthy essays which will be read with profit by nobody outside the legal profession and by few within it? Does the intellectual and professional tyranny which the Bar exercises over the Bench really require the judge in his judgment to cite and distinguish every case cited by counsel? Anyone who thinks these questions worth an answer might reflect on the picture of the courts of common law in the fifteenth century given in the beautiful, illuminated manuscripts preserved in the Inner Temple, copies of which are on the walls of the Faculty Library. These show all the judges of each court of common law seated *in banco*, on the Bench, but without any desk in front of them. It is all very different from the modern judge seated on a chair behind a desk piled high with authorities. Yet the medieval judges produced one of the most subtle and intricate intellectual structures known to the world.

Having considered some of the misconceptions which the outside world has about judgments and their nature, it is time to turn to the converse issue of the misconceptions which judges have about academics. Putting it crudely, the work of an academic falls into three categories: teaching, examining and writing. I have already indicated my opinion that practitioners know little or nothing about examining and their views on this should not be given too much respect. As to teaching, in one sense the practitioner or the judge is or can be superior to the academic in the sense that he is professionally trained to produce an argument in a persuasive way. The practitioner called upon to give a lecture or hold a seminar does not make the elementary errors which so many law teachers still make—for example, addressing the audience with their hands in their pockets or over the back of their left shoulder while writing something on the blackboard. But even so the substance of lectures delivered by practitioners tends to be disappointing. Most people are familiar with the series of lectures known as the Holdsworth lectures, in which the University of Birmingham each year invites some eminent judge to give an address on some current topic. It is no

[9] *Hardwick Game Farm* v. *Suffolk Agricultural Association* [1966] 1 W.L.R. 287, 320.

disrespect to Birmingham University to say that on the whole the series is disappointing—for the simple reason that normally the person invited is so busy that he does not have time to prepare more than a few platitudes on some topic which is at the front of his mind. There are of course exceptions; one of the most remarkable is the lecture delivered to the British Academy by Sir Patrick Devlin in March 1959 on the nature of law and morality which gave rise to so much controversy during the next fifteen years. I was fortunate enough to hear the lecture and would like to record that both in substance and in style it was a model of what a lecture on a major academic occasion ought to be.

But the third area of academic work, research and writing, is one which is of particular interest to the judiciary because in many respects the task or function of the judge in producing a judgment is very like the task or function of the academic in writing a textbook. In some respects, the judge is more favoured than the academic in the sense that much of the research work has already been done for him by counsel or should have been done for him by counsel if they are good at their job. So that all the judge is required to do is to apply his mind to the materials produced for him in order to produce an intellectually satisfying result of the kind already indicated. In other respects the academic is more favoured than the judge. He does not have to work to a deadline and can, if he wishes, take time off in order to recuperate his energy. But basically each is attempting to produce system and coherence into a complex intellectual problem. There is, it is true, a rather curious controversy as to whether judges are entitled to do research on their own, which shows once more the scope there is for misunderstanding between us. Many barristers become angry if they know that a judge has founded his judgment in whole or in part on the material produced by his own research as distinct from those produced in court by counsel. From one point of view this is understandable; if the authority had been cited in court, counsel would have had an opportunity of dealing with it. So there is high judicial authority in England to support the proposition that: "[w]hatever virtue there may be in private judicial researches . . . they can have no place in interlocutory proceedings. . . .[10] On the other hand, the academic may feel that he will not have discharged his duty conscientiously unless he has satisfied himself as to the state of the law on the topic in all relevant jurisdictions.

If then the tasks or functions of the academic and the judge are so similar, what room exists for misunderstanding? The judicial attitude to academic writings can I think be summarised in the following way—the academic is too clever, too remote from the world or too irrelevant and unhelpful.

[10] *Goldsmith* v. *Sperrings Ltd* [1977] 1 W.L.R. 478, 508.

First, a word about cleverness. In England this is still often a term of abuse. It is not so long since the career of a promising Conservative Cabinet Minister almost came to an end when he was attacked by Lord Salisbury in the House of Lords on the ground that he was "too clever by half", and in more recent times something of the same idea appears to be behind the increasing criticisms passed on the conduct of Sir Harold Wilson. The academic by definition is a clever person; otherwise he would not, or should not, hold the position which he does. I think there is a certain tendency amongst academics to believe that judges are not as clever as they are. The academic here tends to be spoilt in the sense that it is very rarely in the course of the year that he really is put up against a wall intellectually. Let us be frank with ourselves. How many times in the course of the year does the ordinary teacher really feel that he is in waters which are out of his intellectual depth? I doubt if this occurs more than half a dozen times. It may occur more often in the case of the teacher who takes graduate seminars or classes, but in the nature of things the teacher of undergraduates, unless he ought never to have been appointed to his position, ought to be better informed and cleverer and quicker witted than the students who appear before him. Of course very occasionally one would be asked a question which reveals some penetration which one has not suspected but it is a rare occurrence. By contrast the practitioner has rivals who think themselves to be every bit as clever and as agile intellectually as he is—and clients will simply disappear unless they are pleased with the result of the litigation. The practitioner has to pit himself against his rivals; his career literally depends financially on persuading others that his rivals are wrong. No teacher's pay cheque at the end of the month is affected in the same way. Now I think this intellectual security which the academic enjoys has unfortunate results in the sense that he tends to assume that the practitioner or judge cannot possibly be as clever as he is. This may be a disastrous error to make.

I can perhaps make this point most clearly not by reference to any incident known to me in the legal world but by reference to one in the political world. Almost fifteen years ago, my Irish colleague, Dr Conor Cruise O'Brien was sent to the Congo as the authorised representative of the United Nations in order to attempt to restore order in that unhappy country. Dr Cruise O'Brien is a man of many parts who is also undoubtedly an academic and an intellectual, with a powerful, sharp and penetrating mind, the author of admired works of history and modern literature. In his memoirs of that expedition, in which he tried to analyse what had gone wrong, he referred to his meeting with the Swedish officer in charge of a vital contingent from that country to the United Nations force. Dr O'Brien at first thought that the officer in question was a person of little significance.

> When you meet someone who is much taller, handsomer, richer and more socially exalted than yourself, you are quite liable to assume, on insufficient evidence, that he is less intelligent. Colonel Waern . . . possessed all these superior attributes and I fell into this trap.[11]

Is the academic too remote from the world? It may be helpful to draw a distinction between the textbook and the casenote or article in a periodical because I believe that very different considerations apply to each category. So far as textbooks are concerned, one meets with little but respect on the part of the judiciary for the well-written textbook—and how much better textbooks are now than they were fifty or even thirty years ago. In some areas, especially conflict of laws, the subject has really been created by textbooks such as Dicey and Cheshire. As Lord Justice Atkin once said in relation to the law relating to damages, the topic awaits a scientific treatment which would only be forthcoming when there was a satisfactory textbook on the subject. It is true that, as Professor Luntz has noted, we now have some admirable textbooks but the position is still obscure—perhaps simply because of the inherent complexities of life in an era of continuous inflation. The textbook may be unhelpful to the judge in a different case but still he will concede that the author has been doing his best. As Lord McNair once wrote:

> Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or of contributing to a judgment, I have been struck by the different appearance that the rule of law may assume when it has been examined for the purpose of its application in practice to a set of ascertained facts. As stated in a textbook it may sound the quintessense of wisdom, but when you come to apply it many necessary qualifications or modifications are apt to arise in your mind.[12]

By contrast I think that the article or casenote is often the subject of legitimate judicial criticism on the grounds of over-refinement or subtlety or even plain rudeness. The number of articles which have had as permanent an effect as that of textbooks is very few—in torts, there is Goodhart on remoteness but not much else. I do not consider articles which are written for the benefit of the writer and not of the reader, as appears to be the case with many contributions to the more obscure American legal periodicals. There was an interesting example of over-subtlety in a recent article in the *Australian Law Journal*[13] which

---

[11] O'Brien, *To Katanga and Back* (1962) 75.

[12] McNair, *Collected Papers* 142.

[13] Robertshaw, "Characteristics of the Judicial Group and Their Relation to Decision-making" (1973) 47 A.L.J. 572.

suggested that the judges were an operational autonomous group with an elitist atmosphere who attempted to control the intake of their work with the available manpower. The attempt to hold an equilibrium between these two factors was described as homeostatic control. The writer suggested that the well-known decision in *Grant* v. *Australian Knitting Mills*[14] could be explained on the ground that there was a reduction in litigation during the depressed years of the early 1930s. My first reaction on reading this article was one of incredulity and I was delighted to find my disbelief supported by Mr Justice Blackburn who demolished the author in an entirely satisfactory way, pointing out that,

> any judicial dictum dealing with any subject which even remotely hints at the volume of possible litigation is evidence, whatever its context, that its author was moved by "homeostatic" considerations in coming to his decision on the case.[15]

I think one possible academic reply to this charge of over-refinement and subtlety is that very often today it is the courts which have caused the over-refinements without any assistance from anyone else. There are some areas of the law which have become more complex and more difficult in the last few years despite all the activities of the many Law Reform Commissions which are in operation. The medieval law of property used to be one of the most complex constructions of the human mind but the twentieth century rewriting of the law of contract and the criminal law has rivalled the law of property. Take two very simple illustrations from criminal law on which the English courts have reached conclusions which seem to be in defiance of common sense and the crude sense of justice possessed by the ordinary man. What is the criminal liability of a person who enters a restaurant, orders a meal and leaves without paying for it?[16] What is the criminal liability of a person who obtains a tankful of petrol for his motor car and leaves without paying the forecourt attendant?[17] I believe that the English decisions on each of those points are a discredit to the common law. Equally consider the difficulties which the doctrine of fundamental breach has encountered, almost entirely as the result of the reasoning of Lord Denning (and who can be cleverer than he?) in the *Harbutt's "Plasticine"* case.[18]

Or again consider the uncertainty and confusion which now exist almost everywhere in the common law world as a result of the clever judgment of Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*[19]

---

[14] [1936] A.C. 85.
[15] Blackburn, "Plain Words on the Judicial Process" (1974) 48 A.L.J. 229, 231.
[16] *Ray* v. *Sempers* [1974] A.C. 370.
[17] *Edwards* v. *Ddin* [1976] 1 W.L.R. 942.
[18] [1970] 1 Q.B. 447.
[19] [1975] A.C. 396.

on the burden of proof which has to be discharged by an applicant for an interim injunction.

Finally, is there anything of substance in the practitioner's charge that the academic is remote and unworldly? In essence this means that the academic is unfamiliar with the processes of litigation and so unable to comprehend the many reasons, good or bad, which may persuade the barrister to take or abandon a particular point. I believe that this is a fair criticism of many casenotes, a form of publication which, perhaps unfortunately, has become almost obligatory for young law teachers. It is a strong thing to criticise a judgment of an appellate tribunal without having had the benefit of the arguments of counsel, particularly if the critic has never had any personal experience in practice. Paradoxically enough, it is often the critic who has had no practical experience who is the most emphatic in his demands that judgments should be committed, ongoing, purposive or result-oriented, to employ some of the vibrant adjectives which the sociologist is accustomed to use.

My conclusion is not very original or exciting, but perhaps still worth stating: each profession has need of the other (though the judge does not need the teacher as much as the teacher needs the judge), but each also needs to make a more sustained effort to understand the other's functions and his difficulties in carrying them out.