

whilst in judicial office. The best known was the investigation which he carried out into the so-called Profumo affair concerning a suggestion of sexual misconduct of a Minister compromising security. Denning's efficiency was demonstrated by the fact that he completed that inquiry under great public attention in less than three months. His capacity to undertake official inquiries whilst continuing to perform judicial work, including on circuit, was, as described by Lord Nolan, truly astonishing. Lord Nolan paid particular tribute to Denning's skill in delivering "revolutionary *ex tempore* judgments", such as that which he delivered in the *High Trees* case [1947] 1 KB 130 which provided the foundation of the modern law of promissory estoppel.

Lord Nolan, who himself lately chaired the Committee on Standards in Public Life acknowledged the risks of the appointment of judges to carry out such inquiries. However, he defended the procedure as necessary in the United Kingdom to settle high public controversies and to lay to rest bitter conflicts to the general acceptance of the public.

It was in this session that questions were asked concerning Australian practice and law. Justice Gummow of the High Court of Australia, one of two Justices of the High Court of Australia attending the symposium, described the limits imposed on the federal judiciary by the Australian Constitution. He referred to the recent decision of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1. For the present, in the United Kingdom, Lord Denning's estimate in *What Next in the Law* (1982) p 330 seems to have been generally accepted by most participants: "Someone must be trusted. Let it be the judges."

Professor Andrew Phang of the Faculty of Law of the National University of Singapore considered "The Natural Law Foundations of Lord Denning's Thought and Work". By analysis of Denning's judicial opinions and extra-judicial writing, Professor Phang concluded that Denning evinced a natural law approach "which is premised in no uncertain terms upon a religious foundation, to be more precise, on a Christian foundation". He quoted Lord Denning's talk on the BBC in 1943: "Why I Believe in God". In this he said: "... Law is only the application, however imperfectly, of truth and justice in our everyday affairs". Justice, he de-

scribed in a later address to the Medico Legal Society, was "what the right-thinking members of the community believe to be fair."

Professor Phang detected the "resonances of Christian principles" in Denning's equation of the law of estoppel to what the ordinary person would require of promises or assurances given to his neighbour.

In this, Professor Phang suggested, Denning built on Lord Atkin's famous dictum enunciated in *Donoghue v Stevenson* [1932] AC 562 at 580. Just as earlier speakers in the symposium had demonstrated, by reference to statistics that the description of Lord Denning as the "great dissenter" was not born out by an analysis of his actual decisions over the long period of his judicial service, so Andrew Phang was at pains to rebut the suggestion that Denning was "a maverick". On the contrary, he described him as entirely consistent: never wavering from the conviction that English law was motivated by a spirit of justice guided, ultimately, by a supernatural force.

Needless to say this paper, presented by an overseas lawyer, provoked much discussion both within and after the session. The risks to the orderly development of the law of such a personal motivation on the part of a senior judge, affecting legal development, were mentioned by Professor PBH Birks, Regius Professor of Civil Law at Oxford University, in a commentary.

Other speakers referred to the need for Britain, like any modern society, to respond to the diversity of faiths and values of its contemporary population. It would have been useful to have had views presented like those collected by Ian Holloway in his extended book review of Iris Freeman's *Lord Denning: A Life* (1994) 13 *Uni Tasmania L Rev* 194. Critical views but yet full of appreciation and affection.

In the evening following the symposium the Law Students Society of Buckingham University held a dinner for the participants. The address at the dinner was given by Sir Richard Scott, Vice Chancellor. Like many earlier speakers, he recounted personal tales illustrating the human kindness of Lord Denning to all people with whom he came in contact: high and low.

Michael Kirby, Justice of the High Court of Australia, attended the University of Buckingham Symposium. His article "Lord Denning and Judicial Activism" will be published in a future issue of Buckingham's Denning Law Journal

Oliver of University
back up the analysis of
about the basis and
modern expansion of
administrative ac-
sought to express
values which Lord
in his decisions on
She ascribed his
effective remedies
ing out of an ap-
personals have legit-
their own autonomy,
basis and security"
protection, where

Under Sloss chaired
to Lord Denning's
law. It is not al-
that for some time,
sent to the Court of
Denning sat as a
Division of the En-

Freeman, Fellow of All
Lord University, re-
an interesting
participation in
of the procedures
This invited the
backguard" from the
Division (Lord Merri-
Denning had gone
and undermined his
excessive self-con-
irritating to his
his conviction that
answers.

Freeman, also of the
London traced Den-
the field of family
as a "moral funda-
core values, built
stant ethic". Yet de-
which sometimes be-
streak of 19th
Denning was con-
spending the rights
protection in respect
of a failed marriage. His
sum payments did
the nature of financial
able redistribution"

women. *Watchell v*
[1972] 1 All ER 72 at 94 was
in this regard as was
and resulting
in a married partner
relationship. See for ex-
[1972] 2 All ER

session, which was
of Hadley, Lord
a part in a num-
conducted by him

...and was (and is) widely recommended
 ...introduction to judicial method.
 ...1960 by another title in a similar vein *The*
 ...1981, he published his biographical and
 ...of the Denning, entitled *The Family Story*.
 ...general audience and again became a best-
 ...he published a book on law reform, called
 ...in a passage dealing with a defendant's
 ...he offended a number of black jurors in
 ...with legal action. He recognised that
 ...and apologised. The book was withdrawn
 ...at the end of the long vacation in that
 ...the book and his retirement formed
 ...book *The Closing Chapter* (1983). In 1984 he
 ...book for students, *Landmarks in the Law*.
 ...two equally happy marriages. He married
 ...by whom he had one son, Robert (Dr
 ...Denning), born in 1938. Mary died in 1941.
 ...daughter of John Elliott-Taylor, and
 ...died in 1992. Denning lived first at
 ...Sussex, and in 1963 bought *The Lawn*, the
 ...Whitchurch
 ...of England was formed from the classic writ-
 ...avidly at school, from his own upbringing
 ...during the Edwardian era and from his
 ...Oxford between 1917 and 1922. This
 ...in social affairs. Writing of his own part of
 ..."The farm workers get fewer and fewer.
 ...taken up by week-enders or commuters. New

housing estates are built. They are occupied by newcomers who go to work in the neighbouring new towns like Basingstoke and Andover. We old folk regret the change. It is not the place we knew".

But, except in areas where he felt that his idealised England was being challenged by outside intrusion, Denning was radical and innovative in his legal judgements—creating new remedies, protecting the weak against the strong and upholding the rights of the individual against central or local authority. He was also at the forefront of the creation of new rights to protect people or companies against the most modern forms of commercial wrongdoing. In this he displayed enormous courage, time and again taking on the "fainthearts" of the legal or political establishment. He had the satisfaction of knowing that at the end of his time on the appellate bench—a total of some 35 years; he left the law in much better condition than he found it and with the power of the judges to do right greatly increased through the doctrine of judicial review, which he did so much to develop.

As a teacher, he had the satisfaction of knowing that through the beauty and lucidity of his written judgments, through the many books that he wrote, and through the lecture tours that he made to universities in many part of the UK and Commonwealth, he had inspired and would continue to inspire generations of students of all races with an abiding love of the common law.

Neville Cusworth, Chairman and Chief Executive of Butterworths

• See also "Judicial activist and moral fundamentalist" by Michael Kirby at p 382

LETTERS

Like most family lawyers I speak to, I fear for the provision of services. Looking at the figures it is difficult to avoid the conclusion that family work, where the cost has remained relatively stable for several years, is being made to suffer because of increases in legal aid elsewhere. Children Panel solicitors, in particular, have worked hard for 15 years to produce a highly regarded legal system for protecting the interests of troubled children. Those of us with the experience to remember the previous system do not want to return to it.

As to Mr Mathews's response, I entirely agree that the threat to legal aid does not come from the Law Society. As I indicated in my original article (Family Practice, February 19, *NLJ*) I applaud the principles of their campaign. My concerns are for the fabric of family legal aid. My perception is that neither the legal profession nor the public

recognise the extent of the threat to the provision of legal advice for family matters. That is why I asked for the support of the Law Society and Bar Council in getting that message across. I am pleased to see that Michael Mathews agrees.

*Richard White
 White & Sherrin*

Sperm retrieval

Further to your recent article, ("Retrieving sperm from a dead patient, *NLJ*, February 19, 1999) it is perhaps worth refreshing our minds as to the legal provisions for the storage and use of human gametes (sperm and eggs).

The Human Fertilisation and Embryology Act 1990 does not prevent the storage or use of sperm posthumously if effective consent as required by Sch 3 of the Act has been given. Obviously when a consent form has not been completed at an HFEA-licensed clinic, retrospective enquiries will always be needed about the

circumstances surrounding the consent.

It is up to the clinic concerned to assure itself that the procedural requirements of the Act have been fulfilled. In the case in question, the HFEA's lawyers brought this to the clinic's attention. We understand that the clinic, having made enquiries of the patient's wife, was satisfied that the Act's requirements had been complied with in this case.

The HFEA's view is that if individuals wish to donate their gametes for posthumous use, the most effective way of ensuring that their wishes are complied with is for retrieval and storage to take place at a licensed centre which can then ensure that all of the requirements of the 1990 Act have been complied with prior to the patient falling into a condition in which he or she is unable to give effective consent.

*Ruth Deech
 Chairman of HFEA
 Paxton House,
 30 Artillery Lane,
 London E1 7LS*

Lord Denning sought

On March 5, one of the greatest judges in the common law world – Lord Denning – died at the age of 100. Michael Kirby assesses his impact.

The first time I met Lord Denning was in 1962. He addressed a dinner of young lawyers and law students held in Sydney. Everyone there

was struck by the austere vision of the judicial role espoused by most judges (including our own great Chief Justice Dixon). Denning asserted that the law must find the just result.

He claimed that he would search the case books, high and low, until he found the precedent or the principle that would achieve justice. Not for him the dogmatic and complete legalism.

I stood in front of Denning a large black and white photograph of himself. He signed it. It has accompanied me at every stage of my professional life. His cherubic face still looks down on me, a reminder of the duty to strive for justice and never to be indifferent to it.

Lord Thompson Denning was born in 1899 in the village of Whitchurch in England. He was the son of a draper. Two of his brothers were killed in the First World War.

Denning was too young to go to war. He won scholarships and first class honours degrees in mathematics and jurisprudence.

He was called to the English Bar in 1944, elevated to the English Court of Appeal in 1948 and then to the House of Lords in 1957. He used to say that the House of Lords was like heaven. Everyone wanted to get there, but not too soon.

Denning stepped down from the House of Lords in 1982 to assume the central seat in the Court of Appeal as Master of the Rolls. This is where he had the most influence. He remained in the position until 1989.

Then, at the age of 83, he retired in the midst of controversy. This followed a few ill-chosen words in his book, *What Next in the Law?* They concerned the eligibility for jury service of English citizens of West Indian or ethnic origin. Denning apologised. But the damage had come for him to go.

Most young lawyers admired not only his independent attitude to the revision of old precedents superseded by changed social conditions. They also loved his writing style. He was



High praise . . . Justice Michael Kirby.

the master of the full-stop. Short sentences. The prose of an evangelist.

He began one famous judgement: "It was bluebell time in Kent."

Another, *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, started: "It is a glorious thing to be a pirate king" said W. S. Gilbert. But he was speaking of ship pirates. Today we speak of film pirates. It is not a glorious thing to be, but it is a good thing to be in for making money."

In the staid world of the English judiciary, you can imagine the impact that this man, his ideals and his skills of communication had on impressionable young minds.

From the public's point of view, Denning's fame could probably be traced to the inquiry into the Profumo affair which he chaired. Typically enough, he completed this (sitting in court whenever he could) within less than six months.

It packed a political punch which was increased because of the vividness of his writing style.

Denning was not just a clever communicator with an eye for headlines. He was also a highly gifted legal technician.

ways to find the just result

...ment, delivered off
...provided the foundation
...of promissory estoppel.
...to non-contractual
...have relied on them
...his fertile mind invented
...a procedural
...a litigant from
...to defeat its
...of recovery.
...the rights of
...in the property of
...in many ways ahead
...in many areas of
...not touched by his fertile
...and his lucid pen.
...overtook him.
...became disharmonious
...as it changed. All too
...as nothing but
...mothers for
...He thought that
...will be punished.
...And his views of
...of different ethnic origin
...retirement.
...with judges and
...the English-speaking
...kindness to students
...and scholars won him
...death on March 5, a
...and scholars was
...in England to celebrate his
...common law. Justice
...headed from the High
...place on Denning's
...January 23. It
...contribution to
...once said was made
...and
...contributor from
...his contribution in
...value system as an



old-fashioned Anglican Christian with an English affinity for the underdog and legal gifts to ensure that right would prevail.

Many were the words of praise for his legal inventiveness. The only real criticism at the conference was the suggestion that some of his idiosyncratic views had been overtaken by time. Also, that judicial law would be chaos if every judge felt free to search for and apply his or her own notion of justice. Ultimately, law must rule.

But Denning taught that law must change to suit fast-moving times. It is ironic that ultimately he himself fell victim to the speed of change in England and the world.

Denning was heavy laden with honours. He made mistakes. What will endure?

I think it will be the reminder to every judge that each new generation must re-examine old precedents. And every judge must remember that the judicial oath binds him or her to strive for justice according to law. According to law, which must be adapted and developed by the judges themselves. But with a sense of justice for the individual as the abiding moral force of the judicial vocation.

■ *Michael Kirby is a judge of the High Court of Australia.*