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THE LIFE OF THE LAW: THE LOGIC OF EXPERIENCE

LIONEL COHEN LECTURE 2010

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(1) Introduction

1. It is a great pleasure and honour to have been asked to give this year's Lionel Cohen lecture. It is an enormous honour for anyone in the law to become a member of a group, which started more than fifty years, and includes Lord Denning, Lord Hoffmann, Lord Lane, Lord Lester, Lord Woolf, Lord Collins, Baroness Hale as well as Professor Jolowicz, Professor Birks, Michael Zander, and Basil Markesinis - and of course, Lord Pannick, a persuasive advocate and remarkable lawyer. It makes me feel both proud and humble to be joining such a distinguished list.

2. So to this evening's lecture[1]. Perhaps because of my involvement with one or two cases involving alleged torture or mistreatment of those suspected of involvement with terrorism, I was asked to speak about such topics. It was very tempting – the issues to which torture and terrorism give rise are as fascinating legally and intellectually as they are important politically and morally. But I decided that it would be inappropriate to do so. Judges should be very wary about discussing their recent decisions, and they should rarely, if ever, publicly express, or even appear to express, political views. That is especially true when it comes to highly sensitive topics such as terrorism and torture. Further, although we in the United Kingdom have our problems with terrorist attacks, and our issues over allegations of torture, such problems and issues are even more numerous and far-reaching here, and it seemed to me that it would be rather impertinent even to appear to be telling lawyers and Judges in this country what they should do or not do.

3. So I decided to adopt a more historic, if less immediately exciting, perspective, and talk about "The life of the law: the logic of experience". Some might say there is no logic in experience. Sometimes in court, as an advocate or as a judge, in the midst of submissions you can be left with the thought that the logic of a point has somehow got lost along the way to its articulation. A slightly more worrying experience for you if you're the advocate making the submission, than the judge listening. When I was preparing this talk, I added

[1] And I should acknowledge the assistance I received from John Sorabji in preparing this lecture.

"Thankfully, from my perspective I don't have to make submissions anymore", but I should not have tempted fate: when reading out my dissenting judgment last Thursday in the British Airways strike appeal, I felt exactly as if I was making submissions to try and persuade my colleagues of the wrongness of their views: I failed.

4. The title of my lecture, as you will know, comes from Oliver Wendell Holmes, US Supreme Court Justice and lion of the common law. At the outset of his lectures on the common law he famously remarked that,

   "*The life of the law has not been logic; it has been experience. The law embodies the story of a nation's development...it cannot be dealt with as if it contained the axioms and corollaries of a book of mathematics . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.*"[2]

5. Justice Holmes emphatically did not take the view that the law advanced by logic and dry learning alone. Not for him was the life of the law one as dry and austere as the "*purest crystal*"[3] of, for instance, the pristine, logical realm of the early Wittgenstein's philosophy of language. Nor was the law for Holmes what it was for medieval common law lawyers and judges, who, it has been said, "*living in an age of scholasticism and legal maxims, made the law an end, and sought to make the law logically and mathematically a thing in itself.*"[4]

6. For Holmes, the law's life did not develop with the certainty of strict logic, or with the precision of a mathematical theory or of analytical philosophy. For him it was more mutable and more practical. But, while it was therefore less perfect, it was always striving for perfection. There is an obvious tension between the demands of perfection and those of experience, but, at least in Holmes's view, if there was an irresolvable conflict between the two, experience should win out. His view of the law was also more human, or at least more practical, more earthy, than that of the medieval lawyers.

7. For Holmes, the law was, as the later Wittgenstein said, more akin to, "*an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight regular streets and uniform houses.*"[5] A city ancient in its origins and in some of what survived, but whose old forgotten byways and dead-ends could be suddenly transformed into broad tree-lined avenues and boulevards.

8. In this lecture I want to consider a couple of the common law's little streets, its old and new houses and its development through the many centuries since its birth as what has been described as a mere "*by-product of an administrative triumph, the way in which the government of England came to be centralised and specialised during the centuries after the (Norman) Conquest.*"[6] In particular, I want to discuss how a 19th century cul-de-sac

[2] Holmes, *The Common Law*, *Lecture I, Early Forms of Liability* at [1]; cf Coke, *Institutes of the Laws of England*, in The Selected Writings and Speeches of Sir Edward Coke Vol. II (Liberty Fund, 2003) at 702.
[3] As Wittgenstein would later describe his own early work in *Philosophical Investigations*, (Blackwell) (1989) at $97.
[4] Albertsworth, *The Theory of Pleadings in Code States*, (10) California Law Review (1921) 221 at 221.
[5] Wittgenstein, *ibid* at $19.
[6] Milsom, *Historical Foundations of the Common Law*, (Butterworths, 2nd ed.) (1981) at 11.

became a broad 20th century boulevard, and how an old house became an entirely new borough, although perhaps not one with straight and regular streets. I shall end by considering briefly the lessons which legal academics, judges, and lawyers, the legal town planners, architects, and builders, can learn for the future.

(2) From a frayed rope to a decaying snail

9. My story of the 19th century cul-de-sac starts with the Court of Appeal decision in *Heaven v Pender*.[7] Mr Heaven was a ship painter. He was employed by the less celestially, indeed somewhat colourlessly, named Mr Gray. Mr Gray was a master painter, who had contracted with a ship owner to paint his ship whilst it was in Mr Pender's dock. While Mr Heaven hung suspended over the ship's side one day, painting its hull, one of the ropes supporting him gave way. He fell into the dock, and was injured as a consequence. The offending rope had been supplied by Mr Pender and there was evidence that it was somewhat burnt and that "*reasonable care had not been taken by the defendant [Mr Pender] as to [its] state and condition at [the] time*."[8] Mr Heaven issued proceedings to recover damages for injuries sustained as a consequence of what he said was Mr Pender's negligence.

10. The claim succeeded before the County Court Judge, and damages in an agreed sum of £20 were awarded. Mr Pender appealed. That appeal succeeded in the High Court. It was then Mr Heaven's turn to appeal. That appeal was heard by what can safely be described as a powerful Court of Appeal – Sir Baliol Brett MR, Lord Justice Bowen, and Lord Justice Cotton. The appeal succeeded and Mr Heaven went away a happy man with his damages, no doubt blissfully unaware that he had set a large judicial ball rolling. While agreeing in the result, the three members of the court did not agree in the reasons for allowing his appeal.

11. Sir Baliol gave the first judgment. After a review of a series of unnamed decisions, which he described as "recognised cases", he enunciated a general principle, one based on as he put it "*the logic of inductive reasoning*"[9]; reasoning that he could, of course, only have seen as arising through previous judicial decisions in earlier cases. Those earlier cases in turn arose out of circumstances, mostly accidents, which occurred in the context of the industrial and commercial revolution, which really got underway and then burgeoned in Britain during the 19th century, when it famously became the workshop of the world. Sir Baliol's general principle, which will sound familiar, no doubt sought to take that into account, when he said:

    "*The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.*"[10]

12. Bowen and Cotton LJJ were unconvinced. Cotton LJ, in a judgment with which Bowen LJ concurred, unequivocally rejected Brett's general principle: for them there was no general duty of care in negligence. Cotton LJ did so because, as he put it, it was unnecessary to lay down such a principle; not least because there were "*many cases in which (it) was impliedly*

[7] (1882 – 83) L.R. 11 Q.B.D. 503
[8] The headnote of the report in *Heaven v Pender* (1882 – 83) L.R. 11 Q.B.D 503
[9] (1882 – 83) L.R. 11 Q.B.D 503 at 509.
[10] *Ibid* at 509.

negatived."[11] The upshot of this was that the road to what would one day be called general duty of care in negligence was in 1882 marked off as a dead end. This was perhaps in part because Sir Baliol Brett as Master of the Rolls was unlike one of my other, and later, predecessors: Lord Denning is supposed to have said to his two colleagues who disagreed with him on a case that they were both entitled to dissent. But Sir Baliol no doubt accepted that the effect of the decision in *Heaven* was that there was no such broad principle as he had suggested.

13. Matters would have rested there if the law were a mathematical theorem. But the growth of manufacturing, cafes and bottled ginger beer opened this jurisprudential dead-end into one of the widest and most magnificent avenues of the law. As all English law students know, and perhaps as many Israeli law students know, the basic facts of *Donoghue v Stevenson*[12] were simple. A young woman in a cafe in Paisley, Glasgow drank a bottle of ginger beer bought for her by a friend. The bottle contained – or at least was said to contain, given that the facts where never subject to judicial determination – the decaying remnants of a snail. The remnants were discovered only after most of the drink had been drunk. Shock and gastro-enteritis were said to have followed.

14. Ms Donoghue couldn't sue in contract. She hadn't bought the ginger beer. So she issued proceedings in tort against the manufacturer. The Court of Session in Edinburgh held, consistently with the majority position in *Heaven v Pender* (although given the separation between the English and Scottish judicial systems the authority would only have been persuasive), that there was no general principle which imposed a duty of care on manufacturers absent a contractual relationship. Lord Atkin, in the majority, in the Lords famously thought otherwise. Notwithstanding the fact that he concluded that Sir Baliol Brett MR's general principle was "*demonstrably too wide*", it was such that "*if properly limited*" it was "*capable of affording a valuable practical guide.*"[13] From this point, as Lord Phillips of Worth Matravers described it in his 2003 Atkin lecture, "*the cornerstone of our law of negligence*" was laid. It was a cornerstone which set out the general duty of care, which as Atkin put it, appeared to him "*to be the doctrine of Heaven v Pender, as laid down by Lord Esher (then Brett MR) when it is limited by the notion of proximity introduced by Lord Esher himself and A.L. Smith LJ in Le Lievre v Gould.*"[14]

15. So, almost 50 years after Brett MR's attempt to open a boulevard had been blocked, the House of Lords swept that blockage aside with the assuredness and purpose that Baron Haussmann took to the redevelopment of Paris in the mid-19th century. It did so through Lord Atkin consciously reflecting on the nature of society; a society, in which, as he pointed out, manufacturers of a whole host of products know they will be used by those who do not purchase them. In the light of that point, Lord Atkin said, in terms echoing Justice Holmes' view of the common law's development, that he could not suppose that "*its principles (were) so remote from the ordinary needs of civilized society and the ordinary claims upon its members as to deny a legal remedy where there is so obviously a social wrong.*"[15]

16. Lord Atkin was right: the law may be many things and it may have many qualities, but one thing it cannot afford ever to become is so remote, so isolated from the life of the nation that

[11] *Ibid* at 516.
[12] Or more accurately, *M'Alister (Donoghue) v Stevenson* [1932] AC 562
[13] *M'Alister (Donoghue) v Stevenson* [1932] AC 562 at 580.
[14] *Ibid* at 581.
[15] *Ibid* at 583.

it fails to do justice. The birth of a general duty of care in England in the 1930s was a legal innovation whose time had come. The consumerist revolution was already under way to a sufficient extent for the existing limitations on the legal scope of the duty of care to be out of date, and it was up to the common law to remove, or at least to substantially broaden them. The logical constraints of the existing law, of *stare decisis*, had to yield to the experience of the world outside the courtroom.

17. And the common law has in incremental steps been building since, in this area through a number of cases on the ambit of the duty of care. This is just one example of a much broader picture. It is an example of growth within a field of law. To develop Wittgenstein's city analogy further, it is an example of the city of law redeveloping an ancient borough. Planning permission for the redevelopment was refused in the 1880s by the majority of the Court of Appeal, but it was granted in the 1930s by the majority of the House of Lords. But ancient boroughs have not just been redeveloped; entire new boroughs have been built in green fields, that is, new areas and principles of law have been developed and recognised. It is to one of those new areas, one which again shows the limits of logic in the law, that I now turn: the rebirth of restitution.

(3) From Money Had and Received to Unjust Enrichment

18. Lord Mansfield, Chief Justice for part of the latter half of the 18th century, was one of the giants of English legal history. He was a judge, like Holmes and Atkin, for whom law was not a matter of arid, sterile logic. For him too, it was a living thing which evolved as the story of the nation developed. He was a Holmes man *avant la lettre*, and, while I am in francophonic vein, *par excellence*. As he put it in *Barwell v Brooks*[16], assessing the question whether a married woman could be sued for debt on her own contract,

    "*The general principle of law is against her liability. But quicquid agant homines [whatever men have done] is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind. Hence, centuries ago, exceptions have been engrafted upon this rule, as in the case of abjuration, &c. The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law*."

    For Mansfield, as for Holmes and Atkin, the city of law was one which evolved over time, adapting itself to the spirit of the age and societal developments.

19. For today's purposes, Mansfield's most famous contribution to the law's development was probably in his reasoning and decision in the case of *Moses v Macferlan*[17]. It is probably the single most discussed of Lord Mansfield's decisions and it was, as a recent commentator has pointed out, the decision that the peerless Peter Birks returned to more than he did to almost any other decided case.[18]

20. A Mr Jacob made out four promissory notes, each for 30 shillings, to Mr Moses. Mr Moses then endorsed those notes over to Mr Macferlan. So, both Mr Moses and Mr Jacob were liable for the money to Mr Macferlan. Mr Macferlan agreed in writing however not to sue Mr Moses, but Mr Macferlan was not a man of his word. He sued Mr Moses in the Court of

[16] (1784) 3 Doug. 371 at 373, 99 E.R. 702
[17] (1760) 2 Burr 1005, 97 E.R. 676
[18] Swain, *Moses v Macferlan (1860)* in *Landmark Cases in the Law of Restitution*, (Mitchell & Mitchell, ed.,) (Hart) (2006) at 19.

Conscience; a small claims court which dealt with trade debts. The Court of Conscience, applying its rules, refused to accept the written agreement as evidence, and ordered Mr Moses to pay Mr Macferlan, which he did. But he then brought an action in the Court of King's Bench, one of the common law courts, to recover the money he had paid to Mr Macferlan. The basis of the claim was the form of action for money had and received, and it was not an appeal from, or even a claim for a review of, the original decision. It was an entirely fresh claim

21. Mr Moses's action succeeded. Lord Mansfield thought that the Court of Conscience's original decision was correct in law, but he also thought that it would simply be unjust for Mr Moses not to recover his money. The Court of Conscience had decided the original case on the strict, legal technicalities, according to its rules of evidence, albeit without considering what anyone would otherwise think was highly relevant evidence. And then Mansfield, in a common law court, applied one of its forms of action, for money had and received, to put right the unjust consequence of the other court's strict adherence to law.

22. There is an irony here. Lord Mansfield's decision resulted in a common law court playing a role as against the Court of Conscience which was the same as the role of the Court of Chancery, through its development of the rules of equity, played in mitigating the rigours of the Common Law Courts. The Court of Chancery had evolved its equity jurisdiction, as Lord Redesdale LC described it, to ensure that "*strict adherence to those principles and forms [of purity in the administration of the common law] did not become intolerable.*"[19] Or as Lambarde more pithily put it, the "*. . . Court of Equitie . . . doth . . . cancell and shut up the rigour of the generall law.*"[20] That was exactly what Mansfield did; except that it was a Court of Common Law cancelling and shutting up the rigour of the Court of Conscience rather than a Court of Chancery cancelling and shutting up the rigour of the common law. The irony is all the greater in that the Court of Chancery ultimately based its equity jurisdiction to intrude on the Common Law Courts on the ground (as the very name equity suggests) of conscience, and it was the so-called Court of Conscience which was too technical even for the Common Law Courts

23. The point can be taken a little further, because, in a passage, which has generated an enormous amount of discussion, Lord Mansfield specifically referred to equity as the basis of his decision; he said this,

> "*If the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contactu' as the Roman law expresses it) . . .*
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> *This kind of equitable action, to recover money back, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which ex aequo et bono, the defendant ought to refund . . .*
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> *The gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money.*"[21]

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[19] Redesdale, *A Treatise on Pleadings in suits in the Court of Chancery by English Bill*, (5th edition, ed. Smith) (Stevens & Norton) (1847) at 6 – 7.
[20] Cited in Tudsbery *Equity and the Common Law*, (1913) 29 Law Quarterly Review 154 at 159.
[21] *Moses v Macferlan* (1760) 2 Burr 1005, 97 E.R. 676 at 678 – 680.

24. There has been much academic and judicial discussion as to exactly what Lord Mansfield meant by his references to money had and received being an equitable action and Roman law.[22] Some consider that, in those references, Lord Mansfield was simply referring to the flexibility of the nature of the action for money had and received. The exact nature of his remarks is a dispute that will probably never be settled; although it seems to me that, in his references to equity that Mansfield may have been attempting to develop a common law equitable process, to import some equity into the common law. This view of his intention derives some support from the explanation he gave concerning the nature of the action for money had and received some 14 years after *Moses.* In *Clarke v Shee,*[23] he described the action as

    "*. . .[a] liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject matter of it, the plaintiff may well support this action.*"[24]

25. Two points can be made here. First, echoing what he said in *Moses*, Mansfield explicitly drew the comparison with, or even incorporation of, equity explicitly in the later case. The common law action is 'in nature' akin to a bill in equity. It is, in other words perhaps, an example of the common law appropriating an action which previously was thought to have lain within equity's exclusive jurisdiction i.e., that element of equity's jurisdiction which encompassed substantive legal rights (rather than its complementary and auxiliary jurisdictions). The action was, perhaps, a common law equitable right or as US Supreme Court Justice Sutherland put it in *Myers v Hurley Company*[25], it was,

    "*. . . an action, though brought at law, [which] is in its nature a substitute for a suit in equity; and it is to be determined by the application of equitable principles. In other words, the rights of the parties are to be determined as they would be upon a bill in equity. The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience is not entitled to recover in whole or in part.*[26]"

26. The second point arises from Lord Mansfield's reference to conscience. In both *Moses* and *Clarke* he made the point that it would be contrary to conscience for the defendant to retain the money had and received. He was not the last to do so. As Peter Birks pointed out, Baron Rolfe in the Court of Exchequer concluded in the case of *Kelly v Solari* in 1841 that,

    "*. . . it seems to me, that wherever (money) is paid under a mistake of fact, and the party would have not have paid it if the fact had been known to him it cannot be otherwise than unconscientious to retain it.*[27]"

    Rolfe B would have been well-versed in equity as, until that year, the Court of Exchequer was not only a superior common law court, but was the only one which was also a court of equity. As Professor Birks explained it, Baron Rolfe was relying on unconscionability to make the point that in the circumstances it would have been wrong for the defendant to retain the

[22] For a detailed discussion see Gummow J's numinous judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 517
[23] (1774) 1 Cowp. 197, 98 E.R. 1040.
[24] *Ibid* at 1042 – 43.
[25] 273 US 18 (1927).
[26] *Ibid* at 24.
[27] (1841) 9 M & W 54, 152 E.R. 24 at 27.

benefit.[28] Indeed as Cardozo J described the action in the US Supreme Court, it was one which required claimants to show that it would "*give offense to equity and good conscience if (the defendant were) permitted to retain it.*"[29]

27. Unconscionability was not, in the 18th and 19th centuries, generally the basis upon which common law rights were seen to arise. Indeed, as I have explained, it was because of the absence of any role for conscience that Chancery Courts sprang into the picture. As Spence put it in 1846, while equity was founded on "*Honesty, Equity, and Conscience. The latter, as a principle of decision was unknown to the common law, - (as) it was of clerical introduction*."[30] Conscience may have been unknown to the common law but it was the very essence of equity. Equity was a jurisdiction based in the very idea that its judges, that is to say the Lord Chancellor and later the Master of the Rolls, had to decide cases "*according to conscience. . .*"[31] As Lord Ellesmere LC described it, its jurisdiction existed to "*correct men's conscience for frauds, breaches of trust, wrongs and oppressions of what nature soever they be. . .*".[32] Or, as the great reforming Lord Chancellor and the one who did so much to systematise equity and transform the concept of conscience from a moral one to a legal and civil one, Lord Nottingham LC put it, a "*court of conscience shall never . . . confirm an award against conscience*".[33] A point, as true in its early and middle period as it was in the 19th Century when the Chancery Commissioners restated in 1852 the fact that "*[a] Court of Equity acts on the conscience of the party. . .*".[34]

28. Conscience then was the very essence of equity. Given Lord Mansfield's references to it in both *Moses* and *Shee*, and Rolfe B's reference to it in *Kelly*, it seems to me that, when taken with the references to equity and bills in equity, what was happening at this time was that a serious effort was being made to build a through-road between what were perhaps the two greatest urban districts of English law – common law and equity. The attempt was being made, and it was not the only such attempt Mansfield would make – he also attempted to import the discovery process from equity into the common law[35] – but it was not entirely successful. Hamstrung by the common law forms of action, Mansfield's attempt to import a little piece of equity into the common law was interpreted as a form of implied contract. As Lord Haldane LC would put it in the House of Lords in *Sinclair v Brougham* in 1914,

    "*the common law of England really (for which he properly meant 'only') . . . recognises actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising quasi ex contractu (as Mansfield put it in Moses) it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law.*"[36]

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[28] Birks, *Unjust Enrichment*, (Clarendon, 2nd ed.) (2005) at 5 – 6.
[29] *Atlantic Coast Line Railroad Co v Florida* 295 US 301 (1935) at 309.
[30] Spence, *The Equitable Jurisdiction of the Court of Chancery* Vol. 1 (1846) (Stevens & Norton) at 339 & 409 – 413.
[31] Year Book 9 Edward IV, 14 No. 9 in Spence, *ibid* at at 375 and cf at 339, fn (b) & 407 – 408.
[32] *The Earl of Oxford's case* (1615) 1 Rep Ch 1, 6; 21 ER 485, 486.
[33] *Bulstrode v Baker* (1675) in Yale, Nottingham's Chancery Cases (Selden Society) (1961) Vol. 1 at 213; *Cook v Fountain* (1676) 3 Swanns 585, 36 ER 984.
[34] First Report of Her Majesty's Commissioners into the Process, Practice and System of Pleading in the Court of Chancery (HMSO) (1852) at 1.
[35] *Barry v Alexander* **(**1785) 1 Tidd 592, 4 Doug 16. His attempt was rejected by his successor Kenyon CJ in *The Mayor & City of Southampton v Graves* (1800) 3 TR 591 and *Threlfall v Webster* (1823) 1 Bing 162. His attempt would ultimately be vindicated by the Evidence Act 1851 s6; cf Fifoot, *Lord Mansfield*, (Oxford) (1936) at 183-197.
[36] [1914] AC 398 at 415.

29. For Lord Haldane LC it was not an equitable matter. The action was a subclass of contract. It was purely a legal, as opposed to an equitable, matter. The same point which had been forcefully expressed by Pollock CB many years before *Sinclair* made its way to the Lords, when he rejected Mansfield's and Rolfe's flirtation with equity in *Miller v Atlee*[37] during the course of argument.[38] As he rather dismissively put it, money had and received was "*a perfectly legal action, and no good can result from calling it an equitable one.*"

30. Pollock CB and Lord Haldane LC were not the only ones to take this view. It was one which gained widespread acceptance, and as a consequence effectively hobbled the development of restitution in English law, just as effectively as Bowen and Cotton LLJs' judgment in *Heaven* hobbled the development of negligence. For restitution as for negligence, the broad avenue of development started by a great Judge, Lord Mansfield, was killed off by a later series of judicial demolition orders.

31. An attempt to quash these demolition orders was made by Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* in 1943. Having made the point that the "*ghosts of the forms of action*" should not be allowed "*to affect actual legal rights*", he tried to move away from the idea that liability rested on an implied contract. For him, the essence of the action for money had and received was, as it was no doubt for Mansfield, to reverse an 'unjust enrichment.'; and the reference to 'unjust' can well, it seems to me, be taken to refer to an enrichment which it would be unconscionable for the defendant to retain. Lord Wright's attempt, as heroic as Lord Mansfield's before it, remained akin to Brett MR's decision in *Heaven*: a foreshadowing of the future rather than its realisation.

32. It was not until nearly another fifty years had passed that, in 1991, when the House of Lords decided the case of *Lipkin Gorman v Karpnale*, which Professor Burrows called "*the Donoghue v Stevenson of the law of restitution*"[39], that the realisation finally arrived. It was only at this point that English law could properly begin to join, as Goff and Jones had put it in 1966, "*mature systems of law*" which provided "*outside the fields of contract and civil wrongs (a third branch of the law of obligations concerned with) . . . the restoration of benefits on grounds of unjust enrichment.*"[40] It was only at this point that, as with the general duty of care in 1932, the cornerstone of a new branch of the law was firmly laid. Only then could a proper systematisation of the law of restitution begin.

33. Judges, lawyers and academics in England today are living through, debating and developing a new branch of law, a new borough of the city of law; one which has grown out of a number of much smaller, discrete actions. It is an aspect of the law which, unlike contract or tort, is, at least in my view based not so much on the common law but on equity and unconscionability[41]. This has perhaps not yet been universally appreciated; nor have its potential consequences been universally appreciated, although I realise that Professor Birks

[37] (1849) 13 Jur 431
[38] See Swain *ibid* for a discussion.
[39] Burrows, presentation given at Designated Civil Judges' Conference 2008 (Warwick).
[40] Goff & Jones, *The Law of Restitution*, (1st ed., 1966).
[41] Cf, Beatson & Virgo, *Contract, Unjust Enrichment and Unconscionability*, (202) 118 LQR 352, Swain, *ibid* at 36ff.

may well have stern words about such a suggestion. But perhaps that is what makes this area of law so fascinating.

34. Be that as it may, what it does suggest to me is that, when it comes to restitution, English law is currently in one of those fertile phases, in which, as Lord Mansfield put it in *Barwell v Brooks*, is developing, where, as in the 1930s in relation to the law of negligence, in order to better "*adapt itself to the various situations of mankind*." It is perhaps doing so with a greater eye to legal conscionability than before. As Lord Denning said, sometime after he gave his Lionel Cohen lecture, "*equity is not past the age of child bearing*."[42]

(4) Conclusion: Legal Town Planning for the Future

35. *Heaven v Pender* and *Moses v Macferlan* are two examples of how the common law is able to adapt itself properly to changing times. They are exemplars of one the great strengths of the common law, namely its adaptability, but the long path from *Heaven* to *Donoghue*, and the even longer path from *Moses* to *Lipkin Gorman* also demonstrate the caution with which the common law approaches any such change. The incremental growth of precedent, the ability to articulate general principles from individual precedents and then to build again by increments is one of the surest ways to ensure that the law develops and adapts itself to society as society itself develops and changes. The common law's ability to regroup should be treasured, but, in a much faster changing world, it is harder to justify fifty years, let alone two centuries, to consider and digest implications of changes in society, before adapting to them. The law should never be precipitate, but nor should it ever lose touch with contemporary reality. Its strength should be in its ability to adapt to life's experience, and to do so neither too quickly nor too slowly.

36. But there should be another dimension to this strength, namely an ability to correct its errors when, as is almost inevitable, the law embraces the change too enthusiastically. I believe that English law does not come out too badly on this score. In *Anns v The London Borough of Merton*[43], the law of negligence extended itself too far from the principle which Lord Atkin articulated in *Donoghue*. This overextension was corrected fairly promptly, within ten years or so, in *Yuen Kun Yeu v A-G of Hong Kong*[44], *Murphy v Brentwood District Council*[45] and *Caparo v Dickman*[46]. The relative speed with which the over-extension was corrected bodes well, I think – and hope – so far as the future pace of change is concerned. More generally, the law's ability to correct decisions which in light of greater experience are shown no longer to be justified or necessary enables it to ensure that it does not ossify and thereby fail to secure justice for those whom it serves.

37. This adaptability, this mutability, has ensured that the law has, as Holmes put it, reflected the development of the nation. Equally, it has allowed the law properly to shape that development, just as it has been shaped by it. It has enabled it to rectify its mistakes, to develop along pathways it closed off from development the first time they were assayed. It has allowed it to do so though in a principled way. It may not, as Cardozo J put it "*work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively*"[47], but it does proceed by the application of principle.

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[42] *Eves v Eves* [1975] 1 WLR 1338 at 1341.
[43] [1978] AC 728.
[44] [1988] AC 175.
[45] [1991] 1 AC 398.
[46] [1990] 2 AC 605.
[47] Cardozo, *Nature of the Judicial Process* at 31 cited in *Cardozo* (Kaufman) (Harvard) (2000) at 206.

38. And here I must caution against unnecessary change. When I talk about the need for change, it must be understood that I am not supporting unnecessary change. On the contrary: it is an evil. It is important that the law adapts to life's experience when it should, but it is every bit as important that the law remains true to its fundamental principles and that it avoids unnecessary change. If it does not, its intellectual and moral authority and coherence are lost, and its rules become uncertain and confused so that people do not know where they stand in the eyes of the law. So, in order to be justified, any change must be required so as to reflect life's experience and should be effected within the framework of existing fundamental principles and structures.

39. I believe that the common law in England is well positioned to achieve such a process, and it is helped immeasurably in that connection by its ability to draw upon the experiences and developments in other common law jurisdictions, Canada, Australia, the United States, as well as those other jurisdictions, such as Israel, which incorporate aspects of the common law. Learning the lessons from other jurisdictions, from for instance the development of restitution in Australia and its treatment of equity (for a notable example, see the judgment of Gummow J in *Roxborough v Rothmans of Pall Mall Australia Limited*[48]), may enable the English common law better to hone the development of its common law. From a common core of buildings, a city may grow in many different directions, its streets and boroughs reflecting many different architectural styles and serving many different purposes. But each of those buildings, streets and boroughs serves to provide a home for those who live within the framework of just law. That it can develop through the application of logic and experience ensures that it can truly and properly adapt itself so that we can live within a true framework of justice.

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[48] [2001] HCA 68.