



MASTER OF
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WHERE THE COMMON LAW FEARS TO TREAD

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Between at least the early part of the 20th century and about 1990, it had been generally understood that there was no right of recovery in restitution of money paid pursuant to an ultra vires demand by a public authority. This state of the law was overturned by the House of Lords in the great case of *Woolwich Building Society v Inland Revenue Commissioners* [1992] 3 WLR 366. One argument advanced against the recognition of such a principle was that to do so would overstep the boundary that we traditionally set for ourselves, separating the legitimate development of the law from legislation. As to this objection, Lord Goff said:

“I feel bound however to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number of leading cases in your Lordships’ House would never have been decided the way they were. For example, the minority view would have prevailed in *Donoghue v Stevenson* [1932] AC 562; our modern law of judicial review would have never developed from its old, ineffectual, origins; and *Mareva* injunctions would never have seen the light of day. Much seems to depend upon the circumstances of the particular case.”

Lord Goff recognised the force of the objection and, in particular, the argument that some limits (in addition to the usual 6 year time-bar) had to be set to such claims and that the selection of such limits, being essentially a matter of policy, was one which the legislature alone was equipped to make. But in the end, Lord Goff did not accept that it was persuasive enough to deter him from recognising, in law, the force of the justice underlying the claim. He gave a number of reasons. These included that the opportunity to change the law would never come again; however compelling the principle of justice might be, it would never be sufficient to persuade a government to propose its legislative recognition by Parliament; now was an almost ideal moment to recognise the principle because a Law Commission Consultation Paper was under active consideration; and there was an immediate opportunity for the authorities concerned to reformulate, in collaboration with the Law Commission, the appropriate limits of recovery on a coherent system of principles suitable for modern society.

For these and other reasons, Lord Goff was not prepared to leave it to Parliament to change the law. As he said, the boundary between the legitimate development of the law and legislation is difficult to find and much depends on all the circumstances of the particular

case. “All the circumstances of the particular case” is the traditional refuge of the judge who is unable to articulate a principle and wishes to retain maximum flexibility. It has its place in some contexts, but it is not a promising beginning to a lecture whose author is looking for clues as to where this boundary may be found. In the course of this lecture, I shall consider what principles (if any) can be stated as to where the boundary ought to be and see what we can glean from some of the cases.

Over hundreds of years, the common law has been developed by judges. But the power of the judges to develop the law has always been subject to limits. In *National Westminster Bank v Spectrum Plus* [2005] 2 AC 680 at para 32, Lord Nicholls said:

“The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary. Had the judges not discharged this responsibility, the common law would be the same now as it was in the reign of King Henry II. It is because of this that the common law is a living instrument of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live”

As always, Lord Nicholls expressed himself with consummate elegance. But there is no real clue here as to the limits of legitimate development of the common law by the judges. On the whole, the judges seek to identify and distil from precedents the principles already inherent in the common law. As Parke J put it in *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546:

“Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.”

Even this early statement recognises that the common law does not require precedent to be followed where it is plainly unreasonable and inconvenient to do so. Most judges are supporters of the “never say never” school of thought. But some are bolder than others. That fact of human nature alone explains why some are more likely to leave change to Parliament than others. Indeed, *Woolwich* illustrates this well. Lord Keith dissented, wagging his finger at his colleagues and saying that what was proposed amounted to “a very far reaching exercise of judicial legislation” and that the rule that money paid under a mistake of law was not recoverable was “too deeply embedded in English jurisprudence to be uprooted judicially”. He made the particular point that “formulation of the precise grounds upon which overpayments of tax ought to be recoverable and of any exceptions to the right of recovery, may involve nice considerations of policy which are properly the province of

Parliament and are not suitable for consideration by the courts". Lord Jauncey agreed with him.

But over the centuries, the law has developed incrementally in response to changing social and economic conditions and changing moral values. From time to time, the law has taken a big step forward. More usually, the steps are small and barely noticed. *Woolwich* is an example of a big step taken in the field of substantive law. The fact that the House was split 3:2 on the issue of whether it was proper for the courts to make the change suggests that this was a case near the boundary to which Lord Goff referred. And indeed it was. There were powerful arguments for saying that the proposed change should be left to Parliament. Of these the most important was that, as even Lord Goff recognised, there had to be limits to the right to recovery. He said that legislative bounds could be set to the common law principle and he plainly envisaged that they would be.

An important principle is that the common law should not be developed where the courts are not equipped to decide whether the development is in the interests of justice or to define the parameters of the development. I shall return to this later. But where the court feels that it is equipped to develop the law, sometimes radically, it can and in my view it should be willing to do so. As Lord Goff said, *Donoghue v Stevenson* is a good example of this. Another good example is *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 3 WLR 101. In that case, Lord Reid said that, apart altogether from authority, the law should treat negligent words differently from negligent acts. The law ought so far as possible to reflect the standards of the reasonable man and that is what *Donoghue v Stevenson* set out to do. Lord Reid then identified the relevant differences between acts and words and said that there was "good sense" behind the then existing law that in general an innocent but negligent misrepresentation gave no cause of action. Something more was required than mere misstatement. As is well known, building on what Lord Haldane said in earlier cases, he said that what was required was a relationship where it was plain that the person seeking information or advice was trusting the other to exercise such a degree of care as to the circumstances required and where the other knew or ought to have known that the inquirer was relying on him. So here the law (the embodiment of the reasonable man) was being developed in these terms. This is a classic example of the law being developed incrementally. The courts were well equipped to make such a development. The development was a reflection of the standards of the reasonable man, no more and no less. The courts are at least as well able to state what the standards of the reasonable man are as Parliament. This is an example of what Lord Reid referred to as "lawyer's law" in *Pettitt v Pettitt* [1970] AC 777, 794-5 where he said:

"Whatever views may have prevailed in the last century, I think that it is now widely recognised that it is proper for the courts in appropriate cases to develop or adapt existing rules of the common law to meet new conditions. I say in appropriate cases because I think we ought to recognise a difference between cases where we are dealing with 'lawyer's law' and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers. On such matters it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of Parliament."

In his essay *The Judge as Lawmaker: an English Perspective* in *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thoroton* (1997), Lord Bingham identified a number of situations in which most judges would shrink from making new law. These were (i) where reasonable and right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law; (ii) where, although a rule of law is seen to be defective, its amendment calls for a detailed legislative code, with qualifications, exceptions and safeguards which cannot feasibly be introduced by judicial decisions, not least because wise and effective reform of the law calls for research and consultation of a kind which no court of law is fitted to undertake; (iii) where the question involves an issue of current social policy on which there is no consensus within the community; (iv) where an issue is the subject of current legislative activity; and (v) where the issue arises in a field far removed from ordinary judicial experience. I doubt whether the first, third and fourth of these is controversial or that there will often be disagreement about their application. But situations (ii) and (v), which are closely related, are more problematic and it is on these that I would like to concentrate.

Before I consider these further, I need to say something about the limitations of our judicial law-making system. This is discussed in detail by Justice Heydon in his excellent LQR article *Limits to the powers of ultimate appellate courts* (1996). As he says, our legal system prizes answers to problems thrashed out in adversary argument. But the process of adversary argument is not directed to abstract inquiries, but to providing answers which it is necessary to give to live questions having a direct impact on the interests of the parties in the particular case. In my experience, advocates faithfully respect their duty to assist the court by bringing to its attention all relevant authorities of which they are aware, including those which are unhelpful their client's case. But the adversary nature of the process inevitably shapes the way in which submissions are made. The principal goal of the advocate is to win the case. Any interest the advocate may have in helping the court to develop the law is bound to be subordinate to that primary objective. Even if he wishes to do so, the advocate in our adversary system is unlikely to be well placed to draw to the court's attention the wider ramifications of a possible development of the law. It is true that interveners give valuable assistance by providing a broader view. But they appear in a small number of cases (mainly in the Supreme Court) and they tend to represent a particular group of interests or a particular viewpoint and to adopt something of an adversarial position even though they do not make submissions on the facts. Good adversarial argument is an effective way of solving most disputes. But where what is at issue is whether and, if so, how to develop the law, this may not be as effective as, say, a thorough examination of the problem by the Law Commission.

Anyway, there is the problem that decisions in which one party, though present and opposing the other, is either unrepresented or badly represented can be precedents. The danger of reaching conclusions which are adverse to a badly represented loser is clear. Inequality of arms can lead to decisions which are bad for the losing party, but also bad for the development of the law. The attractions of the argument presented by an outstanding advocate may seduce the court into error which an effective opponent would have been able to expose.

There is a further danger inherent where judges decide a point on which they have not heard sufficient argument. Points can occur to a judge after the completion of oral argument. He may conduct his own research and find authorities to which reference was not made in the

oral argument or in the written submissions placed before the court. It is not usual for a court to acknowledge that the case has been decided on a point on which the parties were not heard. In *Smith v Smith* [1923] P 191 at 202, Scrutton LJ opened a judgment with the words "I...regret that counsel who argued this case would probably not recognise any part of the judgments as having any relation to the arguments they addressed to us". That is an engaging, but unusual admission. In *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 478, Lord Simon of Glaisdale said: "where a court does its own researches itself as it often will and sometimes must, it should proceed with special caution since it is thereby acting without the benefit of adversary argument". It is sometimes a difficult question for a court to decide whether to ask for further submissions on a point on which there has been no argument. If the point is relatively peripheral, there is no need. Certainly, natural justice does not require it. But where the point is important and, particularly where it is decisive, to deny the parties the opportunity to make submissions on it is not only to deny natural justice, but is also to throw away one of the advantages of the adversarial system as a means of propounding and developing the law.

After that detour into the strengths and weaknesses of the adversarial system for the development of our law, I need to return to the two situations on which I want to concentrate. In essence, they are situations in which judges have recognised the limitations on their ability to decide what the law should be. There is an analogy here with the so-called "deference" that judges show to the decisions of the Executive in public law proceedings. Much has been written on this subject. The generally held view is that judges tend not to uphold challenges to decisions of the Executive which fall within its (rather than the courts') constitutional or institutional competence. Thus certain decisions require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. But of perhaps greater relevance in the present context is the fact that the courts will also refuse to interfere with decisions of the Executive if they consider that they are institutionally incompetent to do so. In the case of *R v Cambridgeshire Health Authority ex p B* [1995] 1 WLR 898, the Court of Appeal was concerned with the allocation of resources by a health authority for medical treatment. The court said that difficult judgments had to be made as to how a limited budget would be best allocated: "that is not a judgment which a court can make" said Sir Thomas Bingham MR. But, no doubt, if the court had been provided with all the material which was before those who made the decision that was under challenge in that case, it would have been able to make a sensible decision, and no less rational and sensible than that made by the health authority. I do not think that the court was saying that the court *could not* make such a judgment. Clearly, it was not impossible for the court to do so, especially if it was provided with all the material that was available to the original decision-maker. But it was not the normal function of courts to make such judgments, and they were less well-equipped than health authorities to make them.

For similar reasons, the courts will in some circumstances say that they are less well equipped than Parliament to decide whether to develop the law in a certain direction. I have already referred to the distinction made by Lord Reid in *Pettit v Pettit*. In *Morgans v Launchbury* [1973] AC 127, the issue was whether a wife could be vicariously liable for the negligent driving of a person to whom she had given permission to drive her husband. Lord Denning in the Court of Appeal had sought to extend the liability of a car owner for the negligent driving of his car by others, because the car was the family car and the car owner was the person who had or ought to have had a motor insurance policy. The House of Lords

held that the driver was not the wife's agent in driving the car and that to hold the wife liable for the negligence of the driver would involve a substantial extension of the doctrine of vicarious liability which was a matter for the legislature and not the courts. Lord Wilberforce at p [1222A] said that he was willing to assume (although more evidence was needed to prove the point) that traditional concepts of vicarious liability may be inadequate to reflect the problems created by the growing numbers of cars on the roads, their increasing speed and the severity of the injuries they cause. He also accepted that some adaptation of the common law rules to meet these problems was capable of being made by the judges. Indeed, that is what had been done in the United States. But he concluded that this could not be done here. His reasons are interesting. First, he said that, assuming that it was desirable to fix liability in such cases on the owner, at least three different systems could be adopted: (i) the "matrimonial" car theory advocated by Lord Denning, ie that all purposes for which the car was used by either spouse were to be presumed to be matrimonial purposes; (ii) the "family" car theory, ie that any user by any member of the family was the owner's "business"; and (iii) any owner who permitted another to use his car should be liable by the fact of the permission, a theory adopted by statute in certain Australian states. Lord Wilberforce said that he did not know on what principle the House of Lords acting judicially could prefer one of these systems to the others or on what basis any one of them could be formulated with sufficient precision or its exceptions defined. The choice was one of social policy. The second reason he gave was that liability and insurance were so intermixed that for the judiciary to alter the basis of liability without adequate knowledge (which they did not have the means to obtain) as to the impact this might make on the insurance system would be dangerous and "irresponsible". Thirdly, to change the law might inflict great hardships on a number of people and at least would greatly affect their assumed legal rights.

Lord Pearson said at p 1228D: "these innovations, whether or not they may be desirable, are not suitable to be introduced by judicial decision. They raise difficult questions of policy, as well as involving the introduction of new legal principles rather than extension of some principle already recognised and operating. The questions of policy need consideration by the government and Parliament, using the resources at their command for making wide enquiries and gathering evidence and opinions as to the practical effects of the proposed innovations.

It is tempting to say that, since the doctrine of vicarious liability is a creature of the common law, it was for the judges to determine its metes and bounds. After all, the scope of vicarious liability has been subject to modification by the courts over time. As we have seen, Lord Wilberforce acknowledged that there was no objection in principle to the judges modifying the doctrine. But he was unwilling to countenance such a modification unless it was made on a rational and informed basis and without giving rise to undesirable unintended consequences. To do otherwise would be to take a leap into the dark and that would be irresponsible. My own view is that the second and third reasons given by Lord Wilberforce should not have been given much weight. If it was thought to be just to extend vicarious liability to car owners for loss caused by the negligent driving of their cars, then the court should not have been deflected from extending this judge-made doctrine by a concern as to how the insurance industry would react. And the concern about the effect on assumed legal rights should not have been a matter of great moment. That would be an argument against any common law extension of liability. If that were a powerful argument, it would have presented an insuperable obstacle to the removal by the courts of immunity from suit of advocates and expert witnesses.

But what about the choice of *how* to extend the doctrine of vicarious liability in this situation? On the one hand, it could be said that over the years the judges have shown far more innovative boldness than would have been required simply in order to choose one of the systems on offer. If the judges did not shrink from devising the doctrine of vicarious liability in the first place, why should they shrink from deciding on how far it should be extended? That is a legitimate question to ask. Why should the fact that there are various possible extensions mean that the courts should not choose the one that seems to them to be the most suitable?

A similar problem arose in the different context of listing people considered unsuitable to work with vulnerable adults under the Care Standards Act 2000: see *R (Wright) v Health Secretary* [2009] 1 AC 739. The Secretary of State had provisionally included the claimants' names in the list. In the Court of Appeal, we held by a majority that the denial of the rights to make representations before a name was so included was a breach of article 6 of the ECHR. We gave effect to section 3(1) of the HRA 1998 and interpreted the 2000 Act as requiring the Secretary of State to give a care worker an opportunity to make representations before being included in the list, unless such an opportunity would expose vulnerable adults to the risk of harm. The House of Lords was unable to accept this solution. They said that the problem could not be cured by offering some of the care workers an opportunity to make representations in advance, while denying that opportunity to other workers who may have been just as unfairly treated by their former employers. They held that no other solution could properly be adopted by way of the interpretative obligation in section 3(1) of the HRA. It was not for the House to rewrite the legislation. A delicate balance had to be struck and it was for Parliament to strike it.

I think that the answer to the question that I have posed is that the law should not be developed by the judges in an arbitrary way. In *Launchbury*, the court considered that it had no rational basis for choosing one solution in preference to another. It did not have the requisite institutional competence to make a choice. It was unable to consult interested parties such as insurers and lawyers and take into account their views as to the likely impact of the various options. It would no doubt do its conscientious best to arrive at what it considered to be the best solution, but it is probably not an overstatement to say that this would be a stab in the dark. For the reasons already mentioned, the adversarial system of advocacy is not well suited to assisting the court to arrive at the best solution in such circumstances, although the problem could be alleviated by suitably responsible interveners.

And yet there are other areas of the law where the judges have felt able to develop the law boldly unconstrained by research or evidence about the likely impact of the development. I shall confine myself to a consideration of the question of immunity from suit. Let us start with the question of the liability of advocates for negligence. For many years, advocates had blanket immunity for everything that they did in connection with litigation. As the House of Lords explained in *Rondel v Worsley* [1969] 1 AC 191, the immunity was based on the public policy grounds that the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently, and that actions for negligence against barristers would make retrying the original actions inevitable and so prolong litigation contrary to the public interest. In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, the immunity was limited (again on grounds of public policy) to what barristers did in court and to work which could fairly be said to affect the way that the case would be conducted if it came to a hearing. The court had a choice as to how far to go and it made that choice

without the benefit of research or consultation of those likely to be affected by the change. If it had applied the approach of Lord Wilberforce in *Launchbury*, the House might have said that all three of his reasons militated against modifying the immunity. Why limit the immunity to what was done in court? Why make that choice? Could it not be said that the impact of so limiting the immunity was uncertain and therefore dangerous and irresponsible? And could it not be said to be unfair on advocates who had acted on the basis of the law as it was previously understood to be to impose liabilities on them for what they did outside court? The immunity was finally swept away altogether in *Hall (Arthur JS) & Co v Simons* [2002] 1 AC 615, when it was decided that the policy grounds previously relied on were no longer sufficient to justify a departure from the general rule that where there was a wrong there should be a remedy.

Which brings me to the immunity accorded to expert witnesses. In *Jones v Kaney* [2011] 2 AC 398, the Supreme Court had to decide whether to abolish the rule that a witness could not be sued in negligence by his client. The justification for the immunity accorded to lay witnesses is long-standing and is based on policy considerations which are well understood. The immunity enjoyed by expert witnesses from liability to their clients had also been established, although it was a less well entrenched principle. The majority of the Supreme Court held that the immunity could no longer be justified, particularly in view of the abolition of the immunity of advocates. The immunity could no longer be justified in the public interest. They were not persuaded that, if experts were liable to be sued for breach of duty, they would be discouraged from providing their services at all; or that immunity was necessary to ensure that expert witnesses give full and frank evidence to the court; or that diligent expert witnesses would be harassed by vexatious claims for breach of duty; or that the removal of the immunity would engender a risk of multiplicity of suits. And all of this without the benefit of research as to the possible or likely results of removing the immunity.

The dissentients took a less adventurous line. Lord Hope said that the lack of a secure principled basis for removing the immunity from expert witnesses; the lack of a clear dividing line between what is to be affected by the removal and what is not; the uncertainties that this would cause; and the lack of reliable evidence to indicate what the effects might be, all suggested that the wiser course would be to leave matters as they stood. Lady Hale saw the proposed abolition of immunity as an exception to the general rule that witnesses enjoy immunity from suit. She asked rhetorically how far the exception should go. Did it cover all classes of litigation? In particular, how far beyond ordinary civil litigation did it go and did it cover all or only some of the witness's evidence? It was impossible to say what effect the removal of immunity would have, either on the care with which the experts give their evidence, or on their willingness to do so. It was not self-evident that the policy considerations in favour of introducing the exception to the general rule were so strong that the court should depart from previous authority to make it. It was "irresponsible" to make such a change on an experimental basis. This was a topic more suitable for consideration by the Law Commission and reform, if thought appropriate, by Parliament than by the court. It is interesting to see how the charge of irresponsibility recurs in this context. The majority were not exactly thrilled to be described as "irresponsible".

As one of the majority in this case, I accept that I may not be best qualified to express an objective view about it. But I remain unrepentant. I fail to see how it was "irresponsible" and off-limits to remove the immunity. This was classic "lawyer's law" territory. The immunity was a creature of the common law in the first place. Having given birth to this

child, it was the duty of the judges to decide whether it had outlived its useful life. Did the circumstances which were thought to have justified the immunity in the first place still exist? To apply the terminology of public law, it was for the judges to decide whether the court was institutionally competent to decide this question. Although there are obvious differences between the position of advocates and that of expert witnesses, there are striking similarities too. It seems to me that, as an institution, the court was as well equipped to decide whether to retain the immunity of expert witnesses as it had been to decide whether to retain the immunity of advocates. The court abolished advocates' immunity without the benefit of any survey or consultation of interested parties as to the likely effect of the abolition. It is difficult to see what value such a survey or consultation would have had even if it were placed before the court. Those who act as expert witnesses might well have said that, if the immunity were abolished, they would think twice before giving evidence. They might also have said that their fees would have to rise in order to pay for insurance premiums. But responses of this kind are hardly likely to have affected the court's decision. It should be noted that the question facing the court in *Jones v Kaney* was a simple yes/no question: should the immunity from suit of an expert witness to his own client be abolished? The court did not even have to grapple with the difficulty that arose in *Morgans v Launchbury* where a decision had to be made as to the *extent* of the abolition and where the House said that it was not able to decide *that* question. I should point out that the rise and stepped fall of the advocate's immunity shows that the court did not feel institutionally incompetent to make choices as to the *extent* of an immunity in that context.

So to return to the beginning, can we say with any degree of confidence where Lord Goff's boundary lies? The fact that the Supreme Court in *Jones v Kaney* was split on this issue shows how difficult it is to answer this question. In his recent lecture *Developing the Common Law: how far is too far?*, Lord Walker said that it was not easy to discern from the pronouncements of the House of Lords and the Supreme Court any clear policy as to what is, and what is not, off-limits for the development of the common law by a court of last resort. A lot seemed to depend on judicial intuition. But the cases suggested that it is common law rules which might be described as "lawyer's law"—such as witness immunity or mistake of law—that judges are most ready to develop. I agree with this assessment, but would add the development of the law of negligence as being another area of "lawyer's law".

As a statement of the general approach of the courts to this issue, as so often, I doubt whether it is possible to improve on Lord Bingham's masterly summary in the essay to which I referred earlier. I think the analogy with the test for what is often called "judicial deference" in the context of public law challenges may also be useful here. Just as a court will be reluctant to strike down a decision in an area into which it is institutionally ill-equipped to go; so too it will be reluctant to develop the law in an area in which it is institutionally ill-equipped to assess the implications of the development. The wisdom of the proposed development cannot be properly determined without research and consultation of a kind which, to use Lord Bingham's words, no court of law is fitted to undertake.

But there is surely another factor at work too, one to which Lord Bingham did not refer. That is judicial temperament. It is an inescapable fact that some judges are more conservative than others. Some are cautious and prefer to paddle in the warm and safe shallows of clear precedent. Others are more adventurous and are prepared to give it a go in the more treacherous waters of the open sea. Fortunately for them, the worst fate that they can suffer is to be overturned, unless they are in the Supreme Court. But history has shown

that the product of today's buccaneer sometimes becomes tomorrow's orthodoxy. That is what makes the law endlessly fascinating.

Thank you.

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