

Reflections on the ICLR Top Fifteen Cases: A talk to commemorate the ICLR's 150th Anniversary

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1. Earlier this year, the Incorporated Council of Law Reporting conducted a survey among its subscribers to identify the most important fifteen cases decided during the course of its 150 years of existence. And I am honoured to have been asked to talk about those cases this evening.

The ICLR's 150th anniversary

2. But let me begin by congratulating the ICLR on its 150th birthday, and celebrating its contribution to the rule of law. It is appropriate that the Council is sharing its significant anniversary with Magna Carta's significant anniversary. Whatever view one takes of its significance in the 13th century, the Great Charter is currently seen across the world as being the most significant landmark in the history of the rule of law. And for many centuries law reporting has played a vital part in establishing and maintaining the rule of law. That is particularly true in common law jurisdictions, where judicial decisions are part of the law of the land, and play an important role in developing the law. And it is an essential ingredient of the rule of law that the law is as publicly available, and as easy to understand, as possible.

3. Law reporters are the unsung heroes and heroines of the common law. The role of judges and legal practitioners in developing the law has been taken for granted for centuries. And while, at least in this country, the role of legal academics has only become fully recognised relatively recently, the contribution of the law reporters is not always properly appreciated.

4. Selecting important cases, preparing a headnote, ensuring judgments are accurate, identifying the facts, history and cases cited, and summarising the arguments precisely, all require expertise, intelligence, care and effort. And, the moment one stops to think about it, one realises how great an influence law reporting must have on the development of the law. In the past, unless they were reported, judgments were hard to know about or to find, so the selection and other tasks carried out by the law reporters plainly played a vital part in the perception and development of the law.

5. Even now, with the electronic reproduction and consequent easy and immediate access to so many judicial decisions, law reporting plays a vital role. The very fact that so many cases are available electronically means that selecting and reporting the really important decisions is as vital as it ever was, as are the other law reporting functions. In the legal world, just as in most other fields, a significant present day problem is information overload, whereas the corresponding problem for most of the Council's 150 years of existence has been information scarcity.

6. The ICLR was conceived by a group of lawyers, most notably Sir Nathaniel Lindley QC, who wrote a paper in 1863 explaining the need for a professional body of law reporters who regularly produced law reports, which achieved a consistent and high standard and were respected and relied on by the legal profession and the judiciary. Throughout the preceding four centuries (indeed, since the fourteenth century), law reporting had been a hit and miss affair, with lawyers of varying competence choosing to report cases on an ad hoc basis, and doing so with varying reliability. They included Espinasse, who, according to Pollock CB, "heard one half of the case and reported the other"¹, Keble whose reports Willes CJ said "seldom enlighten anything"², Siderfin, whose reports were, said by Dolben J to be "fit to be burned"³, Taunton,

¹ According to Denning LJ in *Warren v Keen* [1954] 1 QB 15, 21

² In *Huggins v Bambridge* (1740) Willes 241, 245

³ *R v Lee* (1691) 1 Show KB 251, 252

who was described by Parke B as “an apocryphal authority”⁴, and Barnardiston, who Lord Lyndhurst LC said “was accustomed to slumber over his note-books and the wags in the rear took the opportunity of scribbling nonsense in it”⁵.

7. By contrast, since 1865, as a result of the founding of the ICLR, we have been very fortunate to have the benefit of outstanding law reporting. It was Lord Bingham who said that the best law reporting is “a work of scholarship”, and he went on to refer to “the amazingly high standards of accuracy” of the Weekly and Full Law Reports. Just as the fact that we take the rule of law for granted in the UK is a compliment to our society, so is the fact that we take first class law reporting for granted a compliment to law reporters. And I would like to pay a personal tribute to the individual law reporters who have covered my judgments throughout my judicial career. It might be invidious to name them today, but I have fond and grateful memories of the discussions we have had (gossip as well as law), and the contributions they have made – and, of course, it continues.

8. In his 1863 paper, Lindley identified the four criteria for reporting a case, and those criteria are still *a propos*. He suggested that a case should only be reported if it introduced a new principle, modified an existing principle, settled a disputed or uncertain issue, or was “particularly instructive”. Each of the fifteen decisions passes these requirements with flying colours, but if they had not been reported, we could not be confident that all of them would have come to the attention of the legal world, and would enjoy had the significance which they achieved.

The fifteen most important cases: preliminary

⁴ 23 LJ Ex 179, 180

⁵ According to J W Wallace *The Reporters* (4th ed 1882) pp 424-425

9. And it is an impressive list; set out in the order in which they were decided, they are as follows:

Rylands v Fletcher (1866) LR 3 HL 330 (“*Rylands*”)
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (“*Carlill*”)
Salomon v A Salomon & Co [1897] AC 22 (“*Salomon*”)
Donoghue v Stevenson [1932] AC 562 (“*Donoghue*”)
Woolmington v Director of Public Prosecutions [1935] AC 462 (“*Woolmington*”)
Liversidge v Anderson [1942] AC 206 (“*Liversidge*”)
Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 (“*High Trees*”)
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 (“*Wednesbury*”)
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (“*Anisminic*”)
Caparo Industries plc v Dickman [1990] 2 AC 605 (“*Caparo*”)
R v R [1992] 1 AC 599
Pepper v Hart [1993] AC 593 (“*Pepper*”)
In re A (Children) (Conjoined Twins: Surgical Separation) [2001] Fam 147 (“*Conjoined Twins*”)
A v Secretary of State for the Home Department [2005] 2 AC 68 (“*A v Home Secretary*”)
Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 (“*Chartbrook*”).

10. I cannot resist giving a quasi-statistical breakdown, although I accept that the selection method and sample size render the analysis little more than anecdotal. We have one purely criminal case (*Woolmington*), one criminal case with family connections (*R v R*), one family case with criminal connections (*Conjoined Twins*), seven private law cases (*Rylands*, *Carlill*, *Salomon*, *Donoghue*, *High Trees*, *Caparo* and *Chartbrook*) and five public law cases (*Liversidge*, *Wednesbury*, *Anisminic*, *Pepper* and *A v Home Secretary*).

11. Of the seven private law cases, three are landmark cases in tort, two in negligence and one in nuisance, and two are important contract cases, one concerning the nature of a contract and the other contractual interpretation. Of the remaining two, one decided a fundamental point

of company law and the other is a famous case on estoppel. Two of the seven started in the Chancery Division, and the other five in the Queen's Bench Division.

12. The five public law cases are not just significant legally: they are of great constitutional relevance in that they raise important issues about the relationship between the judiciary and the other two branches of government. The perception that the proportion of public law cases has increased sharply over the past 150 years, and particularly in the past forty years, is supported by the fact that the earliest four cases were all private law cases. Against that, three of the five public law cases were decided in the thirty years between 1940 and 1970, and only two in the forty-five years thereafter.

13. Only one of the fifteen cases, *Donoghue*, is Scottish and none is Northern Irish. But as the population of Scotland and Northern Ireland are respectively less than ten and four per cent that of England and Wales, and no Scots or Northern Irish cases are reported by the ICLR unless they get to the House of Lords or Supreme Court, that is scarcely surprising. Despite nearly fifteen years since the Human Rights Act 1998 (HRA) came into force, there is only one human rights case, *A v Home Secretary*, and despite the UK having been in the EU for over forty years, there is no EU law case, but that may be because difficult cases on EU law must be referred to Luxembourg.

14. Of the fifteen cases, eleven were decisions of the House of Lords, three were decisions of the Court of Appeal (*Carlill*, *Wednesbury* and *Conjoined Twins*), and one of the High Court (*High Trees*). That seems reasonably in line with what one would expect: the top court should get the lion's share of important cases, but there are always some significant, indeed some very significant, cases which go no further than the Court of Appeal or even the High Court. There are no Supreme Court cases, despite our nearly six years of existence. I suppose we can console

ourselves with the thought that decisions take time to sink in, or maybe it is because the most effective decisions are those which appear obviously right.

15. It is fitting that Lindley LJ gets into the list, through his judgment in *Carlill*, given that he was the leading figure who founded the ICLR. Not unpredictably, the one High Court Judge in the role of honour is Denning J, which may appear to confirm what many see as his star status. But the star dims somewhat once one sees that there is no other decision to which he was party. Lord Reid and Lord Wilberforce, two other giants, only feature in one case (*Anisminic*), as does a more recent giant, Lord Bingham (*A v Home Secretary*). Even more remarkably, Lord Diplock, so dominant, some may say so overbearing, for 17 years, does not figure at all.

16. A number of Law Lords get two credits. They include Lord Macmillan (*Donoghue and Liversidge*), Lord Tomlin (*Donoghue and Woolmington*) and Lord Wright (*Woolmington and Liversidge*); Lord Bridge, Lord Ackner and Lord Oliver also get two credits (for *Caparo and Pepper*), as do Lord Keith and Lord Griffiths (for *R v R* and *Pepper*); more recently, two credits go to Baroness Hale, Lord Hope, Lord Hoffmann, and Lord Rodger for *A v Home Secretary* and *Chartbrook*. And, finally, Lord Atkin gets three credits (*Donoghue, Woolmington and Liversidge*); he shares the top spot in the role of honour with Lord Walker, albeit that he heard one of his cases (*Conjoined Twins*) as Robert Walker LJ, the other two being *A v Home Secretary* and *Chartbrook*.

17. I now turn to discuss the fifteen cases. I propose first to deal with the private law cases, then with the criminal and family cases, and finally with the public law cases.

The private law cases

18. The private law cases serve to establish the creativity, flexibility and vigour of the common law, by demonstrating how it was developed by judges to regulate relationships in the private sphere in a way which reflects the expectations and standards of society.

19. The first case in time is *Rylands*, which famously decided that, where a person keeps something on his land which is likely to do damage if it escapes, he is liable for any damage which is the natural consequence of its escape. In an article⁶ in the Law Quarterly Review, LQR, written shortly after it was decided, Sir Frederick Pollock described “[t]he Rule in *Rylands v. Fletcher*” as “consolidating the judgment of fact into an unbending rule of law”.

20. As that description shows, *Rylands* was treated as creating a new tort, and, as the supposed new tort was given the name of the case which created it, it is perhaps unsurprising that the decision was very well known to law students and practitioners alike.

21. But almost since it was decided, and particularly over the past thirty years, the significance of *Rylands* has been fading. In a number of 19th and early 20th century decisions, it was held to be subject to what the leading textbook on tort, *Clerk and Lindsell*, calls “a large number of exceptions”⁷. In 1985, it was authoritatively held never to have been part of the law of Scotland by the House of Lords, in a speech in which the supposed rule was described as “a heresy that ought to be extirpated”⁸. Twenty years ago, the High Court of Australia held that the claim in *Rylands* was properly classified as a claim in negligence⁹. In England and Wales, the effect of two decisions of the Law Lords appears to be that *Rylands* did not give rise to a new tort or a claim in negligence, but was simply an extension of the law of nuisance in cases of isolated

⁶ 2 LQR 52

⁷ *Clerk & Lindsell on Torts* (21st edition, 2014), para 20-45

⁸ *RHM Bakeries v Strathclyde Regional Council* 1985 SLT 214, 217

⁹ *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42

escape¹⁰. In these circumstances, some may think that *Rylands's* appearance is attributable to its past familiarity rather than its present importance.

22. By contrast, no part of the reasoning in the next case, *Carlill*, has been doubted in any subsequent case. It is probably the best known decision of a common law court on the law of contract. That is due, I think, to the name of the case, the facts which gave rise to it, and, above all, because the judgments support a number of basic propositions of contract, so that it is often the first case a law student is taught.

23. At the height of the 1891 flu epidemic, Frederick Roe, trading as the Carbolic Smoke Ball Company, marketed the eponymous smoke ball for sale at 5 shillings (ie 25p), on the basis that he would pay £100 “reward” to any buyer who contracted flu when regularly using it. The contraption consisted of a hollow rubber ball containing carbolic acid, which was inhaled through a tube attached to the ball.

24. Louisa Carlill bought the smoke ball and caught flu, and, no doubt encouraged by her solicitor husband, she claimed the £100. The Court of Appeal, comprising Lindley, AL Smith and Bowen LJ, upheld the decision of Hawkins J¹¹, who had allowed the claim. The Court of Appeal considered that all the essential ingredients of a contract were present. There was an offer which was not too vague, an acceptance by purchasing the smokeball even though it was not verbally communicated, consideration consisting of the “inconvenience” of using the smokeball and increasing the company’s sales, and an intention to create legal relations, in that the offer was not what Bowen LJ called “mere puff”. That was not I think intended to be a facetious reference to the smokeball.

¹⁰ *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, 306 and *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, paras 9 and 52

¹¹ [1892] 2 QB 484

25. The Court of Appeal's reasoning was recognised from the start by the LQR as being "of general interest and importance to students of the law of contract"¹². The case is also of some interest to medical historians as it "demonstrates the growing popularity of inhalation as a treatment"¹³. It might also be of some interest to the marketing world, as, not a whit deterred, Mr Roe proceeded to advertise his product, not only relying on the judgment to show that he really was putting his money where his mouth was, but actually increasing the "reward" to £200.

26. Mr Roe was not only clever at marketing. Having originally sold the smoke ball on his own account, albeit in the name of an unlimited company, the marketing after the decision of the Court of Appeal was by a new company that he had formed, The Carbolic Smoke Ball Company Limited. He was three years ahead of the law, because in the 1896 decision in *Salomon*, the House of Lords authoritatively decided that a limited company had a separate legal personality from its shareholders or subscribers, who could not therefore be rendered liable for its debts or other liabilities. Contrary to the view of the Court of Appeal, they said that there was nothing wrong in an individual incorporating his business simply to take advantage of limited liability. (Just as well for Mr Roe, as The Carbolic Smoke Ball Company Limited went into insolvent liquidation).

27. The LQR¹⁴ suggested that there was nothing "startling" in the decision of the House in *Salomon*, which seems a little curious as it reversed the Court of Appeal¹⁵, and the first instance Judge. The LQR also suggested that the decision "would have been impossible thirty or even twenty years ago", which also is somewhat surprising, as the reasoning rested on the wording of the Companies Act 1862, passed 35 years earlier.

¹² (1894) 34 LQR 102

¹³ M Jackson, *Asthma: The Biography* (2009), Chap III

¹⁴ (1897) XLIX LQR 6

¹⁵ [1895] 2 Ch 323

28. The decision in *Salomon* is important and, like *Carlill*, it has stood the test of time. There have, however, been subsequent cases where the courts have been prepared to “pierce the veil of incorporation”, an expression which means to “disregard the separate personality of the company”¹⁶ Those cases were considered in two decisions of the Supreme Court in 2013¹⁷, in which the judgments reveal a degree of variation as to when the court can properly pierce the veil, as opposed to finding liability in a shareholder or subscriber on more orthodox grounds. But the clear message is that *Salomon* is good law, and it will require an exceptional case before the court would even consider piercing the veil.

29. *Carlill* reminded lawyers of the need for consideration in order to found a contract. It was the absence of consideration which led to perhaps the most famous *obiter* passage in any judgment in the past 150 years. In January 1940, the owner of what was to become the most famous block of flats in English law, High Trees House, agreed to accept rent at half the contractual rate from a tenant, because the Second World War had reduced occupancy rates substantially. After the War ended, the block became fully occupied, and the landlord demanded rent at the full rate and in his 1946 *High Trees* decision Denning J agreed that he should have it. His historic observations were devoted to explaining why the landlord would have failed to recover rent at the full rate during wartime, if the landlord had asked for it, which he had not. There is no enforceable contract in English law where a creditor agrees to accept a lower sum than that to which he is entitled to in law; that is because of the absence of consideration¹⁸. However, relying on some previous overlooked authorities¹⁹, Denning J said that, as the landlord had made a promise (to accept rent at half the contractual rate) and the tenant had reasonably

¹⁶ *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, para 16

¹⁷ *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337 and *Prest*

¹⁸ *Pinnel's case* (1602) 5 Co Rep 117a, *Jorden v. Money* (1854) 5 HLC 185, *Foakes v Beer* (1884) 9 App Cas 605, *Couldery v Barltrum* (1881) 19 Ch D 394, 399 per Sir George Jessel MR (who “ridiculed” the rule – per Lord Denning MR in *D & C Builders v Rees* [1966] 2 QB 617)

¹⁹ Most importantly, *Hughes v. Metropolitan Railway Co* (1877) 2 App Cas 439

and foreseeably acted on it (by not vacating the flat) the landlord was estopped from claiming the full rent, at least until he gave reasonable notice of his intention to do so.

30. *High Trees* was greeted by the LQR²⁰ as demonstrating that “the common law is still capable of development, apart from changes made by legislation”. However, a much less sanguine view was taken six months later²¹, when a note on *High Trees* said rather sniffily that “most of the judgment of Denning J and certainly all that is of any real interest in it, was obiter”, so that the case “seems scarcely reportable, much less epoch-making.” But ten pages later in another, more enthusiastic, note, *High Trees* was described as “important, not only within its particular context, but also for its potentialities in other branches of the law”.

31. The past seventy years have, I think, borne out the views of the more enthusiastic commentator. Thanks to *High Trees*, promissory estoppel, indeed estoppel generally, has been much more frequently raised in legal argument, discussed in judgments, and been the basis of judicial decisions. To say that Lord Denning invented promissory estoppel is to put it too high, but, as Denning J, he rediscovered and publicised it in *High Trees*, and as Denning LJ he developed it in *Combe v Combe*²².

32. As *High Trees* are to estoppel and as a smoke ball is to contract so is a snail in a ginger beer bottle to negligence. I refer of course to the famous claim brought by Mrs Donoghue, who claimed to have suffered from gastroenteritis as a result of drinking ginger beer, and contended that this was caused by the manufacturer, Mr Stephenson, negligently letting a snail get into the ginger beer, where it had partially decomposed by the time she drank the ginger beer. On the

²⁰ (1947) 63 LQR 19

²¹ *Ibid.*, 278

²² *Combe v Combe* [1951] 2 KB 215

assumption that the facts were as she alleged, the Inner House rejected the claim²³ on the ground that product manufacturers owed consumers a duty of care only if they were in a contractual relationship. In doing so, they followed an earlier decision²⁴ involving a different ginger beer manufacturer (AG Barr & Co Ltd) and a different partially decomposed animal (a mouse).

33. By a bare majority of 3-2, the House of Lords took a different view. Lord Atkin gave the leading judgment, saying that he did not think “a more important problem has occupied your Lordships in your judicial capacity”, and famously going on to state you “must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour” and then (with a deft change of pronouns) defined neighbours as “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”. Accordingly, he said, manufacturers of “articles of common household use” owed a duty of care to consumers. Lords Thankerton and Macmillan agreed, although Lord Macmillan did not go as far as Lord Atkin in identifying the applicable principle. Lords Buckmaster and Tomlin disagreed, essentially on the ground that the majority view would involve an unjustifiably radical change in the law, and would risk opening the floodgates to a multitude of claims, to allow the appeal.

34. Incidentally, it is often said²⁵ that there was a subsequent hearing at which it was held that there had in fact been no snail in the bottle, but the truth is that the claim was settled by Mrs Donoghue with Mr Stevenson’s executors²⁶.

²³ Not reported

²⁴ *Mullen v AG Barr & Co Ltd* 1929 SC 461

²⁵ Eg by Mackinnon LJ (see next footnote) and Jenkins LJ (see *Adler v Dickson* [1954] 1 WLR 1482)

²⁶ M Chapman, *The Snail and the Ginger Beer* (2010).

35. Unsurprisingly, *Donoghue* was greeted as a significant case at the time. As the LQR said, “[t]he House of Lords itself has proclaimed” the importance of the decision²⁷. The editor went on to thank “the Scots Lords of Appeal for overriding the scruples of English colleagues who could not emancipate themselves from the pressure of a supposed current of authority in English Courts”. He also suggested that, while “Lord Buckmaster and Lord Tomlin are the last men one would have suspected of timidity”, “[p]arts of their opinions read as if they had forgotten that they were judging in a Court of last resort.”

36. However, the full importance of Lord Atkin’s speech only became clear over thirty years later as a result of two further landmark decisions of the House of Lords. First, in 1965, the duty of care described by Lord Atkin was extended to apply to negligent misstatements in *Hedley Byrne*²⁸. Five years later, in *Home Office v Dorset Yacht Co*²⁹, Lord Reid described *Donoghue* as “a milestone”, and said that “Lord Atkin’s speech should be regarded as a statement of principle [which] ought to apply unless there is some justification ... for its exclusion”.

37. As often happens, the pendulum then swung too far the other way. Having been too restrictive before *Donoghue*, the scope of duty of care not merely developed as I have just described, but became too expansive. This was principally as a result of the 1977 decision of the House of Lords in *Anns v Merton*³⁰, whose effect was to create a risk of “liability in an indeterminate amount for an indeterminate time to an indeterminate class”³¹, to quote from the great US judge Cardozo J. Indeed, that quotation is to be found in the leading speech of Lord Bridge in the 1990 decision of *Caparo*, the next case to be considered, which represents the current end-point of the chain of cases which started with *Donoghue*.

²⁷ (1933) 49 LQR

²⁸ *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465

²⁹ [1970] AC 1004

³⁰ *Anns v London Borough of Merton* [1978] AC 728

³¹ *Ultramares Corp v Touche* (1931) 174 NE 441, per Cardozo C.J

38. The House of Lords in *Caparo* identified a three-part test which has to be satisfied if a negligence claim is to succeed, namely (a) damage must be reasonably foreseeable as a result of the defendant's conduct, (b) the parties must be in a relationship of proximity or neighbourhood, and (c) it must be fair, just and reasonable to impose liability on the defendant. As a result, reversing the Court of Appeal, the House held that accountants did not owe a duty of care to the actual or potential shareholders when carrying out a statutory audit of a company's accounts, as the purpose of the audit was to enable shareholders, as a class, to decide how to vote at general meetings.

39. The last of the seven private law cases is *Chartbrook*, a case dealing with the meaning of commercial contracts, where the leading speech was given by Lord Hoffmann, whose contributions in many fields of law, including contract law, was outstanding. The decision had three strands, and each strand has had its critics.

40. The first strand was confirmation of a principle supported by what Lord Hoffmann called "a long and consistent line of authority, the binding force of which has frequently been acknowledged"³², namely that evidence of pre-contractual negotiations cannot be taken into account by a court when construing a contract. There is obvious force in the counter-argument that, there is no logical reason why evidence of negotiations should be inadmissible³³. However, if evidence of negotiations was admitted, lawyers would be far more tentative in their advice, legal proceedings would often take far longer and cost far more³⁴, and many experienced lawyers suspect that the resultant evidence would rarely affect the outcome.

³² *Chartbrook* para 30

³³ See McLauchlan and Buxton referred to below, and also J O'Sullivan, *Say What You Mean and Mean What You Say* (2009) 68 CLJ 510

³⁴ *Chartbrook*, para 35

41. The second strand was that, when interpreting a contract, the court can correct a mistake without having to resort to the remedy of rectification, provided it is clear from the document and the admissible context that there was a mistake and what the correction ought to be, and “there is not ... a limit to the amount of red ink or verbal correction which the court is allowed”. In a characteristically trenchant CLJ article³⁵, Sir Richard Buxton suggested that, by going further than correcting clerical errors, Lord Hoffmann’s approach is inconsistent with both legal principle and prior authorities, and has “reduced” the “difference between construction and rectification ... almost to vanishing point”³⁶. In a recent case, which involved a husband and wife who had inadvertently executed each other’s wills, *Marley v Rawlins*³⁷, the Supreme Court considered this debate, but left it open for another day.

42. The third strand of the decision in *Chartbrook* was strictly speaking *obiter*. It concerned the requirement that, before the court could order rectification, it must be satisfied that the parties had had a common communicated understanding which differed from that apparently agreed in the contract. Lord Hoffmann said that the existence of such an understanding must be objectively assessed, and it did not matter that subjectively the parties had not reached accord. Professor McLauchlan challenged this in a brief article in the LQR³⁸. Following a decision of the Court of Appeal (to which I was a party)³⁹ which struggled with *Chartbrook* and raised the question whether Lord Hoffmann’s analysis was right, Professor McLauchlan returned to the fray in a longer article⁴⁰, which expanded on his concerns in terms of practicality as well as principle. Dr Davies⁴¹ considered that Lord Hoffmann’s approach confused common and unilateral mistake. In his article⁴², Sir Richard Buxton thought that the objective test was another

³⁵ R Buxton, “Construction” and Rectification After *Chartbrook*, (2010) 69 CLJ 253

³⁶ As expressed in *Lewison on the Interpretation of Contracts* (5th ed, 2011), para 9.03, fn 67

³⁷ [2015] AC 129, paras 38-41

³⁸ D McLauchlan, *Commonsense Principles of Interpretation and Rectification* (2010) 126 LQR 8

³⁹ *Daventry District Council v Daventry & District Housing Association* [2012] 1 WLR 1333

⁴⁰ D McLauchlan, *Refining Rectification*, (2014) 130 LQR 83

⁴¹ P Davies, *Rectifying the Course of Rectification* (2012) 75 MLR 412

⁴² R Buxton *op cit*

way in which the principles of rectification had been conflated into those of interpretation. This view is reinforced by the editors of Chitty⁴³, who say that Lord Hoffmann’s objective approach has to be “treated with caution”.

Criminal and family law cases

43. I turn now to three cases which highlight the common law at work in different ways. The first demonstrates the concern of the common that those accused of crimes are given a fair trial; the second shows the concomitant concern of the common law to protect victims of wrongdoing; and in the third case one sees the common law interacting with acute moral issues.

44. In *Woolmington*, the defendant had visited his estranged wife carrying a sawn-off shot gun and had shot her dead. At his trial for murder, his defence was that he had taken the gun with the intention of threatening to shoot himself if she did not take him back, but the gun had gone off by accident. The trial judge directed the jury that the case against Woolmington was so strong that the burden of proof was on him to show that the shooting was accidental. The jury convicted him, and he was sentenced to death. The Court of Appeal upheld the direction, which was supported by well-established precedent⁴⁴, and therefore the conviction and sentence both stood.

45. In its 1935 decision, the House of Lords unanimously thought otherwise. Viscount Sankey LC gave the only reasoned speech. It contains the famous statements that, subject to specific exceptions “[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt” and “the

⁴³ *Chitty on Contracts* (31st edition, 2012) para 5-119

⁴⁴ *Foster’s Crown Law* (1762) Folio edition, p255, *Stephen’s Digest of the Criminal Law* (8th ed, 1926) p 873, *R v Greenacre* 8 C&P 35

principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained". This is now taken for granted, and it is relevant to bear in mind how things have changed since 1935. Mr Woolmington was released the next day.

46. The Modern Law Review, MLR, greeted "the great case" as "establishing on a firm foundation the cardinal principle that every element of a criminal offence must be proved beyond a reasonable doubt by the prosecution"⁴⁵. I turn to the case which was concerned with protecting victims of crime rather than those accused of crime.

47. In *R v R*, the House of Lords reversed the common law rule which went back to time immemorial that a man who forced himself on his wife could not be guilty of rape. In taking that course in 1991, the Law Lords ensured that the UK joined a growing band of countries which criminalised marital rape. The courts of France⁴⁶ and Spain⁴⁷ took the same step in the early 1990s, and the Germans did so in 1997⁴⁸, but the Italian courts were ahead of them criminalising marital rape in 1976⁴⁹. While it is often difficult to decide whether to sacrifice certainty for progress, many people may think that the decision in *R v R* was relatively easy. In any event, in this country, with parliamentary supremacy, the courts can change the law secure in the knowledge that the legislature can reverse or fine-tune the change if it wishes. The decision also reminds us how perceptions change over time, and what appeared self-evidently right 300 years ago can seem to us today to be wholly unacceptable.

⁴⁵ (1949) MLR 285

⁴⁶ R Simon, *A comparative perspective on major social problems* (2001), p 2

⁴⁷ *Actual Jurid Aranzadi* (54): 1, 7. May 1992

⁴⁸ German Criminal Code

⁴⁹ http://www.quing.eu/files/results/cs_italy.pdf

48. If *R v R* was a case which involved criminal and family law aspects, and so did the next case, *Conjoined Twins*, albeit in very different circumstances, and on a very different basis.

Although law overlaps with religion and morality, it is very rare indeed for judges to be faced with a decision which throws up such fundamental and controversial moral and religious issues as *Conjoined Twins*. Two girls, Jodie and Mary, were born joined at the hip. If they were surgically separated, Mary would die at once, but Jodie would have a 94% chance of survival; if they were not separated, they would both almost certainly die in six months. The question was whether, despite their parents wishing nature to take its course, the court could or should authorise the surgery, even though it would result in Mary's death, and thus might well amount to murder.

49. To this very difficult question, the Court of Appeal said yes. All three members of the court accepted that the parents' wishes should count, but they did not prevail. The court invoked *R v Dudley and Stephens*⁵⁰ (the famous cannibalism-after-shipwreck murder case) and considered that, bearing in mind that the purpose of the operation was to save a life not to cause a death, the doctrine of necessity could be relied on. The operation was performed, and, as predicted, Mary died and Jodie survived. Bearing in mind the issues thrown up by this case, it has unsurprisingly been the subject of many articles, some strongly critical and some strongly supportive.

The public law cases

50. All five public law cases raise issues of constitutional importance, as I mentioned; four of them are directly concerned with the jurisdiction of the courts to inquire into the lawfulness of another arm of government, and shine a light on the development of the law in this area over the

⁵⁰ (1884) 14 QBD 273

past seventy-five years. The fifth case was concerned with a slightly different type of issue, and I shall take it first.

51. In *Pepper*, which was decided in 1992, the House of Lords decided to relax what he called “the exclusionary rule”, namely “the historic rule that the courts may not look at the Parliamentary history of legislation or Hansard for the purposes of construing such legislation”, to quote from the speech of Lord Browne-Wilkinson. This raised a constitutional issue, namely whether such a relaxation would infringe Parliamentary privilege, and a practical issue, namely whether it was desirable to relax the rule.

52. The practical argument for the exclusionary rule had been well expressed by Lord Reid in 1967⁵¹, namely that “it would add greatly to the time and expense involved in preparing cases [and, I would add, advising clients] involving the construction of a statute if counsel were expected to read all the debates in Hansard” and “in a very large proportion of cases, such a search ... would throw no light on the question”. Nonetheless, the House in *Pepper* relaxed the rule where the legislative words were “ambiguous, obscure” or “led to an absurdity”, provided that what was said in Parliament “clearly discloses the mischief aimed at”.

53. Although not mutually inconsistent, the refusal of the House in *Chartbrook* to reverse the “long and consistent line of authority” excluding pre-contractual negotiations when interpreting a contract suggests a rather different cast of mind from the earlier preparedness of the House in *Pepper* to relax “the historic” exclusionary rule. Indeed, the point did not escape Lord Hoffmann, who said in *Chartbrook* that the House’s “experience in the analogous case of resort to statements in Hansard under the rule in *Pepper* ... suggests that such evidence will be produced in any case

⁵¹ *Beswick v Beswick* [1968] AC 58,74

in which there is the remotest chance that it may be accepted and that even these cases will be only the tip of a mountain of discarded but expensive investigation”⁵².

54. The constitutional objection to the relaxation was based on article 9 of the Bill of Rights 1689, which was described by Lord Browne-Wilkinson as being “a provision of the highest importance”. It provides that “the freedom of speech and debates or proceedings in Parliament should not to be impeached or questioned in any court or place out of Parliament”. The House thought that there was nothing in that point in *Pepper*. However, in a more recent case⁵³, the Supreme Court expressed concern at the notion that, as a result of the jurisprudence of the Court of Justice of the EU in Luxembourg, UK courts might be expected to assess the quality of the debate in Parliament when determining the lawfulness of environmental legislation, as that would seem to fall foul of article 9. We left open the important constitutional question whether the European Communities Act 1972 overrode, or impliedly partially repealed, the Bill of Rights.

55. I now turn to the four cases which provide a fascinating vignette as to how the law of judicial review in its widest sense has developed over the second half of the ICLR’s life so far.

56. The 1941 case of *Liversidge* concerned regulation 18B of the Defence (General) Regulations 1939 empowered the Home Secretary to detain anyone who he had “reasonable cause” to believe had “hostile origins or associations”. In May 1940, the Home Secretary, Sir John Anderson, decided to exercise this power against one Jack Pertzweig, who used the alias of Robert Liversidge. The detention order stated that Sir John had “reasonable cause to believe [Mr] Liversidge to be a person of hostile associations” without stating why he held that belief. The majority of the House of Lords held that it was enough that the Home Secretary stated that

⁵² *Chartwell*, para 38

⁵³ *R (oao HS2 Action Alliance Ltd) v The Secretary of State for Transport* [2014] 1 WLR 324, paras 78-79 and 199-211

he had the requisite reasonable belief, and that the court could not enquire into the matter further. They accepted that this might not be the natural meaning of the Regulation, but they considered that such an interpretation reflected the will of Parliament.

57. Lord Atkin disagreed. He considered that by laying down a requirement of “reasonable cause”, the legislation had imposed an objective test for the exercise of an executive power which could be reviewed by a court. His speech is notable not just for its conclusion but also for its language. He “viewed with apprehension” the fact that his colleagues “when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive”; the Government’s arguments, he said, “might have been addressed acceptably to the Court of King’s Bench in the time of Charles I” ; and he suggested that there was “only one authority which might justify” the Home Secretary’s interpretation, namely, “‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean, neither more nor less’”⁵⁴. The Lord Chancellor (Viscount Simon) tried in vain to persuade Lord Atkin to tone it down. It is said that Lord Atkin’s judicial colleagues thereafter never had lunch with him.

58. Unsurprisingly, *Liversidge* was much discussed at the time. The LQR published a number of pieces agreeing with the majority. Sir William Holdsworth thought that the majority were “clearly right”⁵⁵ because the issue was not “justiciable” or “within the court’s legal competence”, as it was an “administrative or political issue”. Professor Goodhart agreed, even suggesting that Lord Atkin’s statement about the majority being “more executive-minded than the executive”, might amount to contempt of court, as it suggested that his four colleagues had “consciously or unconsciously, been influenced by their prejudices or political inclinations in reaching their

⁵⁴ Lewis Carroll, *Through the Looking Glass and What Alice Found There* (1871)

⁵⁵ (1942) 58 LQR 1

conclusions”. An article in the MLR took rather a different view, suggesting that “the limited check which Lord Atkin’s interpretation involves... would impose upon the Executive a reassertion of a principle for which a number of Englishmen in recent years have rather strangely lost enthusiasm”⁵⁶. A postscript to the MLR article revealed that Mr Liversidge had been released by July 1943.

59. Lord Atkin’s view has, of course, triumphed in the end. The decision of the majority was described as “very peculiar” by Lord Reid in 1964⁵⁷, and in 1979, Lord Diplock said in terms that “the time ha[d] come” for the Law Lords to acknowledge that the majority “were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right”⁵⁸.

60. Although it was wrongly decided and therefore not even an authority, let alone an important authority, *Liversidge* is rightly included in the list. Lord Atkin’s speech is up there with Lord Camden’s judgment in *Entick v Carrington*⁵⁹ to remind us all of the importance of the rule of law. And the wrongness of four eminent jurists, Viscount Maugham, and Lords Macmillan, Wright and Romer, reminds judges not to forget the rule of law in times of emergency. I leave the last word on *Liversidge* to Lord Atkin:

“In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and

⁵⁶ G Keeton *Liversidge v Anderson* (1941) 5 MLR 161, 172

⁵⁷ *Ridge v Baldwin* [1964] AC 40, 73

⁵⁸ *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952, 1011

⁵⁹ (1765) 19 St Tr 1029

any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”

61. The 1947 case of *Wednesbury* has given its name to a legal standard, namely “*Wednesbury* unreasonableness”. Lord Greene MR laid down the famous three grounds on which a court could legitimately interfere with a decision of the Executive, in that case a local authority. Those grounds were – (a) the authority took into account “matters which they ought not to take into account”, (b) the authority “neglected to take into account matters which they ought to take into account”, and (c) the decision was one which was “so unreasonable that no reasonable authority could ever have come to it”. These three grounds, sometimes with refinements, have been very frequently trotted out in public law judgments, arguments, textbooks and articles.

62. Somewhat extraordinarily to modern thinking, there is no mention of *Wednesbury* in the contemporary editions of the LQR or the CLJ. However, in an article in the MLR, entitled “The Limits of Judicial Review”, SA de Smith described the judgment as “a good example of the general trend of cases dealing with discretionary powers”, which showed that “[t]he courts show a marked disinclination to interfere with decisions of elected local authorities”. The article went on to refer to the Court of Appeal decision a year earlier in *Robinson*⁶⁰ (where the judgment was also given by Lord Greene), which held that, when deciding to make a slum clearance order, a minister was “at liberty to base his opinion on whatever material he thinks fit” - shades of the majority views in *Liversidge*.

63. Seventy years later, while we are still purporting to apply the tests laid down by Lord Greene in *Wednesbury*, I have little doubt that he would be astonished by how much more ready judges are to interfere in administrative decisions than they were in his time. Indeed, it may be

⁶⁰ *Robinson v Minister of Town and Country Planning* [1947] KB 702, 716

that *Wednesbury* is in danger of becoming history, if, as some argue or predict⁶¹, *Wednesbury* unreasonableness is replaced by disproportionality.

64. One effect of the HRA was to import into UK law the more structured “proportionality” test when considering the lawfulness of government decisions which restrict human rights. As was recently said in the *Kennedy* case in the Supreme Court⁶², “both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context”. However, “[t]he advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.”

65. With the passing of the conventional 1940s and 1950s, and the appearance of the more questioning 1960s, judges started to move away from the rather deferential or even emasculated attitude to judicial review exemplified by decisions such as *Liversidge* and *Robinson*. This became quite apparent as a result of a decision of the House of Lords in 1968. The decision in question was *Anisminic*. The Foreign Compensation Act 1950 provided for a Commission which would decide whether persons whose foreign property had been confiscated should be entitled to compensation. The Act specifically provided that any decision by the Commission to accept or reject a claim could not be challenged in a court. The House of Lords nonetheless held that they could quash the Commission's refusal to accept the appellant's claim, on the ground that, in making its decision, the Commission had made an error of law which went to its jurisdiction, and therefore a court could, indeed should, interfere.

⁶¹ See eg P Craig, *The Nature of Reasonableness* (2013) 66 CLP 131

⁶² *Kennedy v Charity Commissioners* [2015] 1 AC 455, para 54, and see *Pham v Home Secretary* [2015] 1WLR 1391, paras 96, 113 and 115

66. In reaching this conclusion, the House made it clear that the Commission could have made errors of law going to jurisdiction in a number of ways, eg by acting contrary to natural justice, by misconstruing the statutory provision from which it derives its jurisdiction, or by taking into account matters which it should not have taken into account and vice versa. In modern terms, the decision could be said to exemplify “the principle of legality” which was explained in a case in 1999⁶³ by Lord Hoffmann as follows. While “Parliament can legislate contrary to fundamental principles”, it “must squarely confront what it is doing and accept that political cost”, so that [f]undamental rights cannot be overridden by general or ambiguous words”, as “there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process”.

67. In reaching this decision, the House of Lords reversed the Court of Appeal⁶⁴, where the leading judgment was given by Diplock LJ (the nearest he gets to inclusion in the role of honour). He began his judgment by describing it as “very long⁶⁵ and very tedious”⁶⁶, and, we can now add, very wrong.

68. The importance of the House of Lords’ decision in *Anisminic* was appreciated at the time. It was described in the LQR⁶⁷ as “a dramatic climax to five years litigation over a matter which an Act of Parliament expressly forbids to be questioned in any court of law”. The writer considered that it was “bound to rank as a major contribution to the series of cases which have invigorated administrative law in the last few years”. In the MLR, it was suggested that the effect of *Anisminic* was that “any error of law can be reckoned as jurisdictional”, and that this was

⁶³ *R v Home Secretary ex p Simms* [2000] 2 AC 115, 131

⁶⁴ [1968] 2 QB 862

⁶⁵ *Ibid.*, pp 886-912

⁶⁶ *Ibid.*, p 886

⁶⁷ (1969) 85 LQR 198

“actually required by principle”, as otherwise bodies whose “powers [are] defined by law [are] allow[ed] ... to break the law and yet remain within their jurisdiction”⁶⁸.

69. In the 35 years following *Anisminic*, judicial domestic judicial review really came into its own, and the HRA came into force. The 2004 case of *A v Home Secretary* was described in the LQR⁶⁹ as “the first significant judicial challenge under the [HRA] to executive and legislative action to circumvent Convention rights”. A panel of nine Law Lords led by Lord Bingham, who played such a vital part in the development of the law in the first decade of this century, decided two points. First, that the Home Secretary was entitled to conclude that, the threat from Al-Qaeda following 9/11, constituted a “public emergency threatening the life of the nation”, which justified derogating⁷⁰ from the right to liberty under the Human Rights Convention⁷¹. Secondly, that a statutory provision⁷² which entitled the Home Secretary to detain any foreign national whose presence in the UK he believed to be a threat to national security and who could not be deported, was inconsistent with the Convention as it was both a disproportionate and a discriminatory response to that emergency. Disproportionate because it was unacceptably draconian, and discriminatory because it only applied to non-nationals.

70. Prior to the HRA, it would have been unprecedented for a court to hold a provision in primary legislation unlawful, or to consider the lawfulness of any policy by reference to proportionality rather than the less demanding and less structured requirements of *Wednesbury* unreasonableness. Lord Bingham said⁷³ that while judges “are not elected [or] answerable to Parliament” and “Parliament, the executive and the courts have different functions”, “the

⁶⁸ B Gould, *Anisminic and Jurisdictional Review* [1970] Public Law 359, 361

⁶⁹ (2005) 121 LQR 359, 360

⁷⁰ Under article 15 of the European Convention on Human Rights

⁷¹ Article 5

⁷² Section 23 of the Anti-Terrorism, Crime and Security Act 2001

⁷³ *A v Home Secretary*, para 42

function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself⁷⁴.

71. This decision demonstrates and vindicates the importance of judges, and therefore of legal professionals, legal academics and law reporters, to the rule of law. The steadfast judicial adherence to the rule of law in *A v Home Secretary* during the so-called war on terror, provides a striking contrast with the more deferential judicial passivity in *Liversidge* during World War II. And to those who say that judges should not overrule Parliament, there is an easy answer. Our powers under in relation to human rights were conferred by Parliament itself in the HRA, and anyway we do not overrule Parliament, as it can ignore our declarations of incompatibility as it can vary or reverse the effect of any judicial decision we may make.

72. *A v Home Secretary* also had a ringing dissent from Lord Hoffmann on the issue of whether there was a public emergency, in which he observed, after quoting John Milton⁷⁴, that “the real threat to the life of the nation comes not from terrorism but from laws such as these”⁷⁵. Like that of Lord Atkin in *Liversidge*, Lord Hoffmann’s judgment reminds us of the truth of Cardozo J’s statement that “comparatively speaking at least, the dissenter is irresponsible. The spokesman of the court is cautious, fearful of the vivid word, the heightened phrase. ... Not so, however, the dissenter. ... [H]e is the gladiator making a last stand against the lions”⁷⁶. And, the dissenting judgment can be said to be the judicial embodiment of the fundamental right to freedom of expression.

⁷⁴ “Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours” – para 95

⁷⁵ *A v Home Secretary*, para 97

⁷⁶ *Selected Writings of Benjamin Nathan Cardozo* (1947) p 353

73. My freedom of expression is very much at risk of wrongly interfering with your freedom of movement and freedom of association, so I move on to some brief concluding comments.

Concluding comments

74. It would be nice, if a little showy, if I could end by identifying some unifying link between the fifteen cases. However, the fact that I cannot do so is consistent with the fact that the almost infinite variety of human experience is faithfully reflected, as it should be, in the courts. Lawyers, like most professionals and academics, are ultimately concerned with looking for patterns with a view to analysing the past and the present or predicting the future, but the truth is that the patterns are seldom there. The best we judges can normally hope for is to build up and draw on our experiences on a practical, pragmatic basis, which is as principled as the vagaries of humanity allows. After all, as Oliver Wendell Holmes said, “the life of the law [is] experience”⁷⁷; and, as the fifteen cases show, the experience of judges is rich and varied.

75. That richness and variety is attributable to a number of groups, and prominent among them are the law reporters. So I end by thanking and congratulating the Incorporated Council of Law Reporting for England and Wales for 150 years of consistent, faithful and intelligent law reporting, and by wishing them well for the next 150 years.

76. Thank you very much.

David Neuberger

Lincoln’s Inn, 6 October 2015

⁷⁷O W Holmes Jr, *The Common Law* (1881)