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THE ART OF JUDGING
IN THE
COMMON LAW TRADITION

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THE ART OF JUDGING IN THE COMMON LAW TRADITION[1]

I did not come to debate whether judges should have a law-making role. Some say they should, some not. The fact is they do. As Lord Radcliffe said, "No-one really doubts that the common law develops . . . in response to the developments of the society in which it rules . . ."[2] Even to assert the fact is bold. Some think we should not admit to it. The same Lord Radcliffe said "Personally, I think that judges will serve the public interest better if they keep quiet about their legislative function."[3] This is what I call the tradition of hypocrisy, and I have come to attack it. I am going to talk about the role of a common law judge both in expanding the common law itself and in incorporating statute law into the common law.

Three factors limit the role of judges in expanding the common law. Two are self-imposed: the tradition of precedent and the tradition of restraint; the third is an almost omnipresent legislature, grinding out hundreds of pages of new laws every year either itself or by those to whom it delegates its power.

I will deal with each in turn. First, the tradition of precedent. In most cases some rule of law does govern and should be applied. The first art of judging is to acknowledge that in 90 per cent of the cases all that is asked of the judge is that he or she find the facts, find the governing rule, and apply it. The first art, then, is not to make a sow's ear from a silk purse. Most cases do not require a pedantic analysis of the previous 100 cases. They require only that the judge find and state the governing rule, and state which precedent, binding or persuasive, is relied upon.

The art of judging involves a refusal, generally, to change a rule. Common law judges should be humble in the face of tradition. After all, the claim to law-making of the common law judge rests on respect for tradition, by which I mean the accumulated experience to be found in decided cases. If judges do not respect that tradition, we do not respect our office.

Of course, a second constraint keeps the <u>trial</u> judge from changing the law. Our hierarchical judicial structure assumes that the requirements of an orderly judicial system dictate that one cannot have different rules in different courtrooms. Trial judges tempted to be adventuresome or defiant should consider the situation their colleagues on the trial bench face when confronted by adventure or defiance. Do they

join in your defiance, or defy you? The idea of judicial comity commands that a judge first consult all judges of co-ordinate jurisdiction before changing the law that they also must then apply. This is what the Queen's Bench judges used to do in England before a Court of Appeal was established. I think that, in matters of practice and procedure, there is much to be said for it. In other matters, I suspect it would be wiser to leave the issue for the Appeal Court.

Let us now turn to the hard cases: the 10 per cent where no settled governing rule emerges from the cases. The adventure in legislation begins for a judge when no precedent and no legislation applies. What does a judge do? She makes a rule and decides the case. In the tradition of Lord Radcliffe, however, she would pretend only to have discovered it!

The art of judging involves knowing when you are merely finding a rule and when you are making one. The tradition of restraint is not a tradition of hypocrisy or stupidity.

The tradition of restraint, or incrementalism, says that a judge should merely extend an existing rule ever so slightly from the case previously decided. It does not require a denial that the "increment" is a new rule. The incrementalist does not really protest my analysis; rather, he chooses to

emphasize the minimal nature of the modification and praise it for the fact that it has an ever-so-slight effect on the law. An incrementalist is somebody who believes that the common law does and should expand slowly if relentlessly.

The incrementalist approach does teach us one good thing: look for governing rules, for the ratio decidendi, not editorial comment. Only if we fail in that task do we next look for a wider statement, a more general rule, principle, precept, doctrine - whatever - which has been distilled from the case law and which might decide the case at bar. But we should show restraint in that generalization process. Dean Pound, in 1940, said:

> A good deal of complaint grows out of too much inclination to generalize in a hurry, and too much inclination on the part of text writers to lay down something on the basis of a particular case as a universal proposition. It gets into the encyclopedias, gets reported in the reports, and before you know it, you have something that is a hasty feeling, or groping for a principle masquerading as an established principle in the law.(4)

He adds:

> It takes a long process . . . to justify you in being certain that you have hold of something so general, so universal, so capable of dealing with questions of that type that you can say here is an

authoritative starting point for legal reasoning in all analogous cases.

Nevertheless, the process of rationalization or generalization, which is usually called extracting general principles, is necessary. The process has now largely become formalized and institutionalized in the U.S.A. by the Restatements. These texts are prepared by a mix of academic and practising lawyers and fairly can be said to represent conventional wisdom about needed modification in the law just in the way encouraged by Pound. They now are regularly accepted by courts, and effectively lead to change in the law. The Law Reform Commission and the Commissioners on Uniformity and like bodies have not to date performed a like function in Canada, which is a great pity. Even the C.I.A.J. worries about seeming to formalize or institutionalize law reform.

The incrementalist approach is also influenced by ideas about democracy, about how those chosen by the people only have the moral right to legislate. Curiously, those chosen by the people are dead keen most of the time to pass the buck to judges. The Charter is one example. Many other exist. Another example of that is The Matrimonial Property Act of Alberta, which in s. 7(3), directs the court to distribute property in a manner which is "just and equitable". Clearly this invites the development of judge-made law.(5)

I did not come to expound a theory of democracy which accounts for the common law. I did come to make the point that the idea of the common law requires a modification of the idea of electoral democracy. And to note that the common law pre-dated democracy in England and has managed to survive it.

The common law and its respect for tradition is sometimes disparaged as rule from the grave. The difficulty I have with that is that we are as much ruled by dead legislators as we are by dead judges. Worse, old legislation does not fade away. Judges have worked out ways to deal with outdated precedent; we have much more difficulty dealing with outdated legislation.

In any event, and notwithstanding the tradition of restraint, the process of generalization is inevitable and endless. The precept, or principle, or doctrine can be refined more and more to have wider and wider application. See, for example, this statement by Lord Wilberforce in Anns after a review of the cases after Donaghue v. Stevenson:

> . . . the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to

> exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity of neighbourhood such that, in a reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. (6)

It could fairly be said that this new general precept encompasses the entire law of torts and perhaps also the law of contracts! In passing, note this incrementalist reponse by Lord Keith in a later case:

> There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. (7)

Let us assume that a trial judge cannot find a brilliant academic analysis which offers a broader and convincing precept which decides the case. What does the judge do? Frankly, a little hard work and thinking. Knowledge of jurisprudence would help.

One of the great drawbacks of the tradition of hypocrisy is that it encourages a reluctance to acknowledge that a new rule is being made, and a reluctance therefore to face up to the issues involved. Oliver Wendell Holmes, Jr. in "The Common Law" in 1888 described these rules as "the unconscious result of instinctive preferences and inarticulate convictions". Karl Llewellyn adds that "Unconscious creativeness . . . (permits) . . . little men or pig-headed men or overly impatient men . . . (to be creative)"(8)

If you are content to be in that category, now is a good time for you to take a coffee break. To those who remain, I urge that a judge must have some sense of direction in order to decide in which direction a rule will be expanded.

I do not entirely agree with Dean Pound. It seems to me that, from time to time, the law has bogged down in a plethora of meandering rules of limited application. It has become complex, has gaps in it, or has become hard to understand and hard to justify. At that moment somebody offers the solution that Alexander did for the Gordian knot. Must it always be the legislature? Even Llewellyn, who worried about democracy, said:

> The great jumps in creation . . . are not standard . . . but are emergency measures

> only permissible . . . only because limited to use in cases of need; and usable for rapidly adjusting situations.(9)

How far does the judge go and still respect democracy? Is the incrementalist always right? Will there never again be a Mansfield?

In reply, I encourage the study of jurisprudence both in the broad sense of what the law should be, and also in the narrow sense of the judicial process, i.e. what a judge should do, and not do. Julius Stone has analyzed and synthesized most thought in this area in a book called "The Province and Function of Law", and a careful reading will probably give the judge a great starting-point.

I can briefly offer you three tests to apply to your tentative new precept to see whether you are wandering too far. They were taught me by Judge Aldisert(10) as the "three C's": consequence, consistency and coherence. Briefly the first test involves considering the consequences of your new rule. Will it work? Will it create more harm than not? Will it function under our system of law? The next test is consistency. Does it contradict precedents? Can it be rationally reconciled to existing law? The third is coherence: can you articulate a principled justification for it which is consistent with our

beloved "instinctive preferences and inarticulate convictions"? (The importance of this last is to determine whether the rule is going to survive an appeal, I suppose.)

At this point, the incrementalist would add a fourth C: constraint. Is the precept expressed as narrowly as can be? It may be that you are not an incrementalist and that you will reply that the requirements of the first three tests sometimes demand that you make a rule which is broader than absolutely necessary for the case at bar. If you are right, history will thank you even though you broke the rules. If you are wrong, you will put a lot of people through needless work. If you are right or wrong, you will be criticized in certain circles.

I will now turn to the interpretation of statutes:

I am not here speaking about the interpretation of statutes which delegate legislative power to the Courts but rather of the case where the legislature makes a rule but the parties argue over what rule. Shall the judge make the rule or is that usurpation of the legislative role?

First, let us in a sentence dispose of the canons of construction. They are bafflegab and should be removed from the lexicon of any judge. If anybody would argue with me, let him argue with Karl Llewellyn's mocking summary, which I append.[11] His attack extends to several canons which still are seen in Canadian cases[12]

What is then the proper approach to interpretation? The late Elmer Driedger, in his estimable work[13] talks about the literal rule, the mischief rule and the golden rule. The literal rule is: give the words of the statue their plain meaning. The mischief rule directs you to look to the mischief the legislature sought to address. The golden rule is: follow Rule 1 first, but if the words are ambiguous or produce an absurdity follow Rule 2.

Each of the rules has been criticized; each has its adherents. Historically, the mischief rule was first. In 1584 in Heydon's Case[14], the Court said that all statutes be interpreted by finding:

> The true reason of the remedy; and then the office of all the Judges is always to make sure construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the

> cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

This rule sufficed until the Age of Enlightenment, the age of Codes and of the idea of separation of powers. Typically, Montesquieu said that a judge is:

> . . . merely a mouth which enunciates the terms of the statute, a creature without will, who cannot weaken its validity and strictness.(15)

The idea of separation of powers is equated to that of democracy in the minds of many people, with the result that anything short of the Montesquieu view is suspect as undemocratic.

One impact of the Enlightment on English law, then, was the literal rule and its extreme variant, strict interpretation. The rule assumes that the plain meaning of the words can be found and applied and damn the consequences - the ultimate in democracy. An absurd example of this rule is offered by Julius Stone(16).

The literal, or "plain meaning" approach was born in respect for the legislative process but often disrupts that process. The common law has always prided itself for looking to

substance, not form. Why a different approach to statutes? Stone says that for them ". . . there is often at most only the respect (tempered with suspicion) of the well-bred native toward the stranger."[17] I cannot offer any more eloquent response to black-letter lawyers than that offered by Oliver Wendell Holmes, Jr.

> A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[18]

The golden rule, so-called, was coined by Baron Parke.[19] I am not at all sure that he intended to express a rule, but what he said was later seized upon.[20]. He said:

> It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.

My problem with the golden rule is that it puts non-contextual meaning over contextual. I say echoing the words of Holmes that the only valid meaning is the meaning in the context. The result is that the golden rule is, as often as not, applied backwards. First the judge determines the object of the enactment, from that what the words should mean, and then announces that this is the "plain" meaning.

The golden rule has similarly been criticized for its reference to absurdity as being itself logically absurd. The rule provides that the method of interpretation (literal or mischief) not be chosen until after a conclusion about what the law should mean and should not mean because this conclusion is a necessary preliminary to saying that a given meaning is absurd(21). As a result, the golden rule is often the mischief rule plus a dance.

The Supreme Court of Canada, in Cloutier(22) after a lengthy analysis decided that the literal rule and the golden rule had been abolished by legislative action. Most provinces and Canada had enacted in their Interpretation Acts something like this:

> Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent

> or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.(23)

As Pratte, J. says in Cloutier, the significance of those words in terms of the cases is to restore the mischief rule. So the legislatures have restored a rule which judges dropped as being insufficiently sensitive to the paramountcy of legislatures? Another example of judges being better democrats? Or is it that the literal rule failed because it claimed too much power for mere words, and legislatures became impatient not with usurpation but with confusion?

Cloutier merely repeats what that Court had said 65 years earlier when Anglin, J.(24)

> Only 'absolute intractability of the language used' can justify a construction which defeats what is clearly the main object of a statute . . . It would be contrary to sound construction to permit the use of a term not altogether apt to defeat the intention of the legislature, which must not be assumed to have foreseen every result that may accrue from the use of a particular word.

In R. v. Paul(25) the Supreme Court comes right back to the golden rule: it clings to one interpretation because the

others are "absurd".

My suggestion to you is this: go no further than the legislature went but also to go as far as legislature went. I assert this heresy: the three rules all are the same because all three require, whether it is acknowledged or not, a judgment about what the statute should say. I further suggest that the art of judging involves rising above the mindless repetition of debunked formulations and involves the consistent application of a meaningful rule. That rule must recognize that the judge has a useful role to play in our society to breathe life into legislation and make it work. Forget the golden rule for the reason offered by Stone:

> It is impossible to give absolute preference to the greater certainty of keeping close to the words, since to do this may involve too great a sacrifice of flexibility, harmony of purpose and insight, which may also be necessary for the doing of justice. An informed and unhurried legislator would have taken these also into account; and meaning imputed to his words should therefore also do this. . . . (26)

In my view, the "purposive" or teleological approach is the only one worthy of consideration. It inverts the golden rule, and says one looks first for the object of the legislation. I commend it because it most nearly accords to what judges really do, and is therefore relatively free of cant

and hypocrisy and is not really very revolutionary. For most statutes and rules most of the time, judges already know the object and might not articulate it. They tend rather to say that the meaning of the words is "plain" or "obvious". That this conclusion proceeds from an unarticulated premise is illustrated by the dismay of a judge who faces words in a totally unfamiliar context. Even though one meaning may be easily taken from the words, the judge will hesitate.

The purposive approach is sometimes criticized as permitting judges to cast a personalized gloss in the name of an "evident" object. This is possible. But the possibility of an unprincipled application of principles does not justify the abandonment of the commitment to principle. We have rules about the search for legislative purpose, but they are for another day.

The purposive rule, by which I mean that inversion of the golden rule which I would call the diamond rule, was succinctly stated by Anglin, J. I repeat: only absolute intractability of the language used can justify a construction which defeats what is clearly the main object of the statute. There follows a more elaborate statement of the same rule:

> In interpreting a statute a court should:
>
> 1. Decide what purpose ought to be attributed to the statute and to any

subordinate provision of it which may be involved; and then

2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either -

(a) a meaning they will not bear, or

(b) a meaning which would violate any established policy.(27)