

**The University of Hong Kong  
Faculty of Law**

**Seminar**

**55 YEARS IN THE LAW**

**The Rt Hon The Lord Walker of Gestingthorpe  
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I was called to the bar in 1960. At that time I was in the British army, doing basic training for the two years' service which was then compulsory for young men. My time in the army was, as I can recognise with hindsight, a valuable experience, but it meant that it was not until 1962 that I had finished pupillage and started in practice at the Chancery bar.

I began to specialise in trust law, including the taxation of trusts. It was a time of major changes in British tax law, with capital gains tax and a separate corporation tax introduced in 1965, followed by capital transfer tax, which replaced estate duty in 1975. These new taxes had some attractions for those who were starting at the bar, just because they were so new. No one had any experience of them, so there was a level playing field for all, regardless of seniority.

Later my practice became even more specialised, with an emphasis on the special exemptions available to the owners of stately homes and valuable paintings who were prepared to open them to public access, as the price of exemption from death duties. I also advised on overseas trusts established in tax havens such as Jersey, Bermuda and the Cayman Islands. I hasten to add that I would not advise any young barrister to specialise as early, or as intensively, as I did. It left big gaps in my knowledge, and practical experience, of so many other important fields of law, and I have had a great deal of catching up to do during my twenty years as a judge.

Apart from tax cases, I did not often appear in the English court in contentious trust cases. But I should mention the *Mettoy* case, as it was the beginning of a saga which continued for over 20 years, and I saw the end of the saga as well. *Mettoy* was a small company with a successful business manufacturing small toy cars and other motor vehicles – they were called matchbox toys. It had a pension fund held in trust, and the fund had a comfortable surplus. Unfortunately the company made an ill-advised attempt to diversify into personal computers, and was close to insolvency. At that juncture the trustees of the pension scheme, all senior employees of the company, were asked to approve major changes in the rules of the scheme. These changes affected the destination of any surplus if the scheme had to be wound up, as was bound to occur if the company went into liquidation, as it did shortly afterwards. Yet the changes were never properly explained to the trustees, who simply did what they

were told. They did not give this important issue the sort of careful and well-informed attention that is expected of trustees.

*Mettoy* was the beginning of a line of cases in which trustees who had made an ill-advised decision – often in connection with tax avoidance – came to court and asked for their decision to be treated as if it had never been made. The so-called rule in *Hastings-Bass* was, as Park J said in one case, being turned into a sort of “Get out of jail free” card for trustees who had made a mistake. The true, much more limited nature of the rule was made clear in the judgment of the Supreme Court of the UK in *Pitt v Holt*, which was the very last case on which I sat before my retirement in 2013. I gave a talk on the *Hastings-Bass* saga at this University last year.

After I had taken silk in 1982 I did begin to be instructed in overseas litigation – never in Hong Kong, but in Singapore, Bermuda and above all the Cayman Islands. None of these cases was about avoiding British tax. The usual reason for a very rich man to set up a Cayman trust was in order to be able to control the destination of his fortune, after his death, in a way that was not possible under the law of his domicile (which might be Greek law, or sharia). The typical scenario was that during his lifetime everything would continue as before – the settlement was in effect invisible, with the trustees always complying with the settlor’s wishes – but on his death battle would commence. But I must not spend too long on reminiscences of these trips to Cayman, interesting though they were.

I am not showing any false modesty in saying that I was very surprised to be summoned by the Lord Chancellor and offered appointment as a High Court Judge. This was in 1992. I had, as I have explained, a very specialised practice, and I appeared as often overseas as I did in England. But I had no hesitation in accepting the offer (I think the Lord Chancellor was a bit surprised that I did not say that I would have to talk to my wife, or my accountant). It is a decision that I have never regretted. Much as I enjoyed my years at the bar, I have enjoyed my time as a judge even more.

It certainly was a big change. In England in the early 1990’s the property market had collapsed, and banks were calling in loans which, with reasonable prudence, they should never have made. Instead of advising dukes and earls about their palaces and their old masters I was hearing bankruptcy appeals, usually by litigants in person as they could not afford lawyers. The appeals were almost always hopeless, because although the banks had often agreed too readily to lend too much on an over-optimistic business plan, it was impossible to say that they had owed their customers any fiduciary duty. All you could do was to let the appellants know that they had done their best in a business venture (such as a shop or pub or small hotel) which was probably doomed from the start.

There was plenty of corporate insolvency also, and some very big business failures, including Robert Maxwell’s business empire. There were some tax cases,

and plenty of landlord and tenant cases, including the increasingly important topic of leasehold enfranchisement. And I had my first introduction to the strange world of intellectual property. The head of the Chancery Division, who has since become Lord Scott of Foscote, rang me up and said that he was appointing me to the Patents Court (which is, like the Companies Court, part of the Chancery Division).

I said to him, “Vice-Chancellor, I must tell you that I do not have a single O-level in Physics, Chemistry or Biology,” to which he replied, “You will find it intellectually interesting,” and put the phone down. It was indeed intellectually interesting, and I do not think that basic science as taught in the 1950’s would have helped all that much with biochemistry as it has developed in the age of DNA. To jump forward a bit, when I was in the House of Lords we had a patent appeal called *Kirin-Amgen* about the synthesis of erythropoietin, a substance secreted by the human body (but only in very small volumes) that can be used to treat anaemia. At a directions hearing the parties said that they wanted four working weeks for the hearing, because “that is how long it will take to explain the science to the judges”. Lord Hoffmann was having none of that, and said that we would arrange to get ourselves instructed – as we did at four three-hour seminars held once a week in the month before the hearing. They were conducted by the Professor of Biochemistry at Oxford University, who did a brilliant job with this unusual class of students. As it happens we told him one thing he did not know about erythropoietin, which is its notoriety in illegally enhancing the performance of Tour de France cyclists.

In 1997 I was appointed to the Court of Appeal. It was a compliment to be promoted after only three years, but (although, as I have said, I have no regrets about becoming a judge) I do have some regret that I had only three years of running my own court in my own way, and hearing live evidence that needed to be evaluated. Since then it has all been appellate work, sitting with two colleagues in the Court of Appeal or four, six or even eight in the House of Lords or the Supreme Court. And appellate work is essentially the somewhat arid task of being repeatedly told why the court below got it wrong. As an Australian judge once said, appellate courts are there to wait in the hills until the battle is over, and then come on to the battlefield and shoot the wounded.

The Court of Appeal brought me to a wide range of issues that were new to me, the most important of these being public law, and in particular judicial review of official decision-making. It was a particularly interesting time as Parliament was considering the Bill which became the Human Rights Act 1998, which came into force in October 2000. It would be hard to overstate the importance of this Act, or the effect which it has had on the British legal system. That is in some ways surprising, since the Act merely enacted as part of British law international obligations by which the UK had been bound since the coming into force of the European Convention on Human Rights and Freedoms in 1955 – and British government lawyers had played a large part in the drafting of that Convention. But the effect of the 1998 Act has been very far-reaching, affecting law and administration in the fields of immigration, race

relations, penal policy, social housing, employment, education, mental health, and much more besides. It has also led to the rapid development, as a matter of private law as well as public law, of a new cause of action for invasion of privacy, a remedy which has already been used by the super-model Naomi Campbell and by several well-known footballers who had been playing away from home, and is at present being relied on by many other celebrities in civil actions arising out of our recent phone-hacking scandals.

I sat on many very interesting cases in the Court of Appeal. Many cases are interesting for their facts, as well as the legal problems that they raise. There was the *Factortame* case, which first brought home to the British the fact that we had, by joining the European Union, given up parliamentary sovereignty. The European Court of Justice at Luxembourg ruled that part of our Merchant Shipping Act 1978 was contrary to European law, by discriminating against Spanish fishermen who chose to sail out of ports in South Wales. The fishermen claimed compensation in the British court. There were many rounds of this litigation. The phase I sat on (*Factortame No.5*) was concerned with whether the British government had committed a “grave and manifest” breach of EU law, and in defending itself the government gave an unusual amount of disclosure about high-level discussions between government lawyers – to no avail, as we held that compensation must be paid.

Then there was the case of *Porter v Magill*, in which Lady Shirley Porter, the leader of the Westminster City Council, was challenged by the District Auditor for having skewed the Council’s housing policies in the hope of electoral advantage. She and her close associates had adopted a policy, but only in wards that were marginal in political terms, of ousting long-term tenants to let in new tenants considered more likely to vote Conservative. It was an extraordinary episode which was not fully documented because of shredded documents. I was surprised to find that my two senior colleagues were in favour of allowing Dame Shirley’s appeal, and I wrote a very long dissenting judgment, which took me most of my summer vacation to write. I cannot refrain from telling you that the District Auditor’s further appeal was allowed unanimously by the House of Lords.

The last Court of Appeal case I will mention was the appeal reported as *Re A (Children) (Conjoined Twins: Surgical Separation)*. It attracted world-wide attention at the time, when surgeons at a Manchester hospital had the dilemma of whether to operate on twin baby girls who were joined at their torsos. They had only one functioning cardiovascular system between them. If the surgeons operated, one was sure to die on the operating table; and if they did not operate both were sure to die in a few weeks, as the one set of functioning heart and lungs could not support both sisters for long. The case raised difficult questions of possible criminal liability, and the technical but important legal issue of when a civil court can properly give what is in effect an advance ruling on criminal law.

In 2002 I was appointed as a law lord, and I was one of the law lords who sat for the last time in the chamber of the House of Lords in July 2009, before our move to the new Supreme Court on the other side of Parliament Square. Opinions differ about this constitutional change, but I am firmly of the view that it was the right thing to do. We left behind a lot of history, but it is not right, in a mature democracy, for the final court of appeal to be, in theory, merely a committee of the upper house of the legislature. Now we are a Supreme Court of Justices who deliver judgments, not a committee of “noble and learned friends” who give opinions. The new court (which you should try to visit if you are in London) has facilities which are better for the justices, better for the lawyers, and (most important of all) better for the visiting public. The principle that justice should be administered in public was, I fear, ill served in the House of Lords.

During my time in the Lords and the Supreme Court the dominant theme was the tension between the needs of national security, in the post-9/11 world, and the need to preserve the rule of law. It is a problem that is still far from solved. The problem is exacerbated by the UK government’s compliance – even if it is reluctant compliance – with the ruling of the European Court of Human Rights that an alien may not be deported if there is a danger of that person being tortured or otherwise ill-treated in the country to which he is returned.

These public law dilemmas have been a major preoccupation for our top court. But there have also been some very interesting and difficult cases in private law. In Britain, as in other industrial countries, there is a serious social problem with workers in heavy industries, such as shipbuilding, developing asbestos-related diseases which have a very long period of latency. The fatal disease of mesothelioma, in particular, may take between 15 and 30 years to develop, after the inhalation of asbestos fibres, and the affected workman may be unable to prove which of several employers is responsible (moreover the employer may no longer exist, as British shipbuilding is in long-term decline). To meet this exceptional problem the House of Lords developed principles of causation in tort so as to avoid serious injustice. This development may not yet be complete.

The problem of latent diseases has led to progressive liberalisation of the law of limitation of actions, so that time begins to run in personal injury cases only when the claimant is, or ought reasonably to be, aware of his injury. There is also a general discretion to extend the period in special circumstances. This has been used in some claims for sexual abuse of children who were so traumatised by the experience that they failed to take any action even after attaining full age. The British public is painfully learning that sexual abuse of children is and has been far more prevalent than they supposed, both in families and in boarding schools, children’s homes and young offenders’ institutes.

Having specialised in tax at the bar, I have written many judgments, in cases at different levels, on artificial tax avoidance. You may feel that you discern some

element of “poacher turned gamekeeper”, and I cannot completely deny it. But I would say that I practised when tax avoidance had not lost all touch with reality, and tax rates were almost confiscatory: the top rate of tax on unearned income was 93%, and on earned income 83%, and the top rate of death duties was 80%. Now that these rates have halved, highly artificial, pre-packaged tax-avoidance schemes, sold for large fees to those who can afford them, are not good for society. They are unfair to workers whose tax is deducted at source. During my legal career the topic of tax avoidance has evolved in different stages. The great speech of Lord Wilberforce in the *Ramsay* case in 1981 made clear that the interpretation and application of tax statutes does not require courts to follow a blinkered, step-by-step approach to prearranged schemes. This was not new, though perhaps “Ne’er so well expressed”. Then the House of Lords rather lost its way and reinterpreted *Ramsay* as a rigid rule of doubtful constitutional propriety, rather than a general principle of statutory construction. But then a series of judgments, led by Lord Hoffmann and Lord Nicholls, put the law back on track. In the brilliant encapsulation by Justice Ribeiro in the *Arrowtown* case, the core of the doctrine is “the purposeful interpretation of statutes applied to the facts viewed realistically”.

There are many other topics which I could have mentioned – including company law, cross-border insolvency, international abduction of children, big-money divorces, and property rights in the homes of unmarried cohabitants. But I want to mention one last case, on limitation of actions, which in a way brings me back to the beginning. In 2012 we heard an appeal in a vast class action sometimes called the case of the *Atomic Veterans*. There were over a thousand claimants, all men of about my age or the widows of men who would have been about my age if they were still alive. The claims were for personal injuries such as leukemia, other cancers, and sterility. These injuries were said to have been caused by exposure to gamma radiation during the British nuclear tests on the mainland of Australia and then, in 1958, at Christmas Island. When I joined my service regiment, an artillery regiment, in 1960, I found that many of the officers and men had come to Germany after a posting at Christmas Island. When hearing the appeal I realised that if I had gone into the army before university, rather than afterwards, I might well have been an atomic veteran myself.

I have been very fortunate in my life in the law, and I have made many good friends in the law. I am doubly fortunate that my position as a Non-Permanent Judge of your Court of Final Appeal means that my life in the law is not yet over, and I am still making good friends in Hong Kong.