Lord Toulson at the London Common Law and Commercial Bar Association

International Influence on the Common Law

11 November 2014

Introduction

1. I would like to begin with two stories.

2. The first goes as follows: just over 1400 years ago, St Augustine arrived on the coast of England at the behest of Pope Gregory the Great. When St Augustine wrote a letter asking why there existed different customs in different churches, Pope Gregory gave the following response:

> "For things should not be loved for the sake of places, but places for the sake of good things. Therefore select from each of the Churches whatever things are devout, religious, and right; and when you have bound them, as it were, into a Sheaf, let the minds of the English grow accustomed to it."

3. The second is a different kind of story. Two fish are swimming along in the ocean when they pass an older fish swimming the other way. The older fish says, "Morning, how's the water?" The two fish swim on silently and after a while one says to the other, "What is 'water'?"

4. I hope that my reason for telling these stories will become clear by the end of this talk. I want to consider how international influence is capable of both benefitting and impeding the development of the common law.

5. I will start by drawing attention to the valuable developments that have been made to our common law as a result of looking to foreign authority. I will then consider how this rich source of jurisprudence, together with our own domestic common law, is at risk of being

neglected in the sometimes disproportionate amount of attention given to Strasbourg jurisprudence. I will conclude with some thoughts for the future.

Influences from abroad

6. There are, undoubtedly, distinguished jurists who believe that the law of other nations should have no part in their own legal system. Justice Scalia of the US Supreme Court is well known for his views on this subject, encapsulated in his observation that his Court "*should not impose foreign moods, fads, or fashions on Americans*." He made the comment in his dissenting judgment in the notorious case of *Lawrence v Texas*, in which two adult consenting males were convicted of an offence under Texas law for consensual sexual activity in the privacy of the apartment occupied by one of them.[1] The majority struck down the statute as unconstitutional. Many other American judges do not share Justice Scalia's antipathy towards considering the law of other countries. Nor do the courts in the United Kingdom.

7. Lord Goff in a lecture delivered in 1986 stated his view on the subject:

> "And if, as I believe we can, we add to co-operation between judge and jurist a greater readiness to *learn* from the legal systems of other countries, not only in the common law world, but also in the civil law countries, then the common law may be about to embark upon the most fruitful period of development in its long, eventful, history."[2] (emphasis added)

8. Lord Goff practised what he preached.

[1] *Lawrence et al v Texas* 539 US 558 (2003), 598, citing *Foster v Florida* 537 US 990 (2002), Thomas J.
[2] Lord Goff, "Judge, jurist and legislature" (1987) 2 Denning LJ 79, 94.

9. In *White v Jones*[3], the issue was whether a duty of care was owed to the intended beneficiary under a will by testator's solicitor, who had negligently failed to put the testator's intention into effect. In an older case, *Ross v Caunters*[4], Sir Robert Megarry VC in the Chancery Division had decided that such a duty should exist. A majority of the House of Lords in *White v Jones* agreed. In coming to this conclusion, Lord Goff referred to the positions in New Zealand, Australia, Canada, the USA, Germany, France and the Court of Appeal of Amsterdam.[5]

10. Lord Goff's judgments in *Henderson v Merrett Syndicates Ltd*[6] and *Kleinwort Benson Ltd v Lincoln City Council*[7] provide other examples.

11. While Lord Goff was a particularly strong advocate of the value of comparative legal studies, he was not idiosyncratic in this regard, as more recent examples demonstrate.

12. In *Fairchild v Glenhaven Funeral Services Ltd*[8], employees had each been exposed to substantial amounts of asbestos dust by several employers and had subsequently developed mesothelioma. The problem was that, as the mesothelioma could have been triggered by a single asbestos fibre, the claimants could not prove, on the balance of probabilities, exactly which employer had caused their mesothelioma. The issue was whether the usual "but for" test of causation should be modified in the special circumstances of this case. The House of Lords held that it should; all that had to be shown was that the defendant employers had materially increased the risk of contracting the disease. The House was referred extensively to foreign authority by Sir Sydney Kentridge QC and Brian Langstaff QC, as he then was.

[3] [1995] 2 AC 207.
[4] [1980] Ch 297.
[5] [1995] 2 AC 255-256, 262-266.
[6] [1995] 2 AC 145.
[7] [1999] 2 AC 349.
[8] [2002] UKHL 22, [2003] 1 AC 32.

13. All five Law Lords referred to foreign authority in their judgments with Lord Bingham acknowledging that his conclusion was "*fortified by the wider jurisprudence*".[9] From [25]-[32] of the judgment, he referred to the German Civil Code, the Greek Civil Code, the Austrian Civil Code, the Netherlands Civil Code, the French Cour de Cassation, the Spanish Hunting Act 1970, the Supreme Court of California, the Supreme Court of Canada, the Norwegian Court, the High Court of Australia, the Court of Appeal of New South Wales, the Supreme Court of the Netherlands as well as to the position in Italy, South Africa and Switzerland.

14. Similarly, Lord Rodger looked at the issue through the lens of Roman law before considering the Commonwealth and European positions.[10] That these comparisons were of real value for Lord Rodger became evident when he stated, at [168], that:

> "At the very least, the cross-check with these systems suggests that it is not necessarily the hallmark of a civilised and sophisticated legal system that it treats cases where strict proof of causation is impossible in exactly the same way as cases where such proof is possible."

15. As a Scottish judge it was particularly natural for Lord Rodger to refer to Roman law, and over the years the House of Lords and the Supreme Court have gained considerably from the presence of Scottish judges brought up in a different legal tradition.

16. Recently the Supreme Court has decided two cases about equitable remedies. In *FHR European Ventures LLP v Cedar Capital Partners LLC*[11] the issue was whether an agent who receives a bribe or secret commission holds it on trust for the principal. The court held that he does. In so ruling it departed from a decision of the House of Lords in 1862 and overruled a number of later decisions of the Court of Appeal. Those authorities had not

[9] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [34].
[10] *Ibid*, [157] – [168].
[11] [2014] UKSC 45, [2014] 3 WLR 535.

been followed in the rest of the common law world. Commenting on this in his judgment, Lord Neuberger spoke of the desirability of common law jurisdictions learning from one another and leaning in favour of harmonising the development of the common law round the world.

17. In *AIB Group (UK) Plc v Mark Redler and Co*[12] the claimant bank agreed to make a loan of £3.3m on the security of a first charge over the borrowers' home, which was valued at £4.25m. The defendant solicitors were retained to act for both the bank and the borrowers. It was a condition of the loan that all existing charges must be redeemed on or before completion. The bank transferred the funds to the solicitors on trust for the purpose of executing the transaction. There was a prior charge over the property in favour of Barclays Bank as security for the amount owed to it by the borrowers on two accounts totalling £1.5m. As a result of a careless misunderstanding, the solicitors paid Barclays the amount which they believed was the redemption figure for the Barclays charge but which in fact related only to one of the accounts. The amount due on the second account was £300k, but instead of paying that sum to Barclays the solicitors paid it to the borrowers with the rest of the money advanced by AIB. So the security obtained by AIB ranked second to the Barclays charge. The borrowers defaulted and the property was sold for £1.2m, of which AIB received a little under £900k.

18. AIB sued the solicitors for negligence, breach of contract and breach of trust. The damages for breach of contract or negligence came to around £275,000, representing the loss suffered by the bank by comparison with its position if it had obtained a first charge over the property as it should have done. But AIB claimed that in equity it was entitled to have the trust fund reconstituted, and that the amount of the solicitors' liability was around

[12] [2014] UKSC 58.

£2.5m, representing its entire net loss from entering into the transaction. AIB's claim was rejected by the trial judge, the Court of Appeal and the Supreme Court.

19. The Supreme Court re-examined and followed the decision of the House of Lords in *Target Holdings Ltd v Redferns*[13], which had been criticised by some distinguished writers including Sir Peter Millett. Lord Reed analysed the case law of Canada, Australia, New Zealand and Hong Kong. He concluded that despite some differences, there appeared to be a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of compensation for breach of trust was that described by McLachlin J in *Canson Enterprises Ltd v Boughton & Co*[14], which had been endorsed by Lord Browne-Wilkinson in *Target Holdings*.

20. The court has still to give judgment in the tragic case of *Michael v Chief Constable of South Wales Police*, in which it has been asked to reconsider the line of authorities on claims against the police beginning with *Hill v Chief Constable of South Yorkshire*. The parties made detailed reference in their written and oral submissions to the case law in many other common law jurisdictions.

21. On a wider level, some of the legal concepts and types of relief which we regard as features of the common law have their roots in other jurisdictions or at least owe something to the example of other jurisdictions.

22. One example is the doctrine of frustration. This doctrine, as it currently operates, was established in the seminal case of *Taylor v Caldwell*[15] decided in 1863. Use of a music hall, the subject matter of the contract, was no longer possible following the hall's destruction by

[13] [1996] AC 421.
[14] (1991) 85 DLR (4th) 129.
[15] (1863) 3 B & S 826.

fire. The issue was which party should bear the consequent loss of such an unforeseen event.

23. In coming to his conclusion – that the owner of the hall was not liable to the user – a significant part of Blackburn J's reasoning was based on the position in the Civil law and the works of Pothier, a French jurist. This led Blackburn J to state that:

> "Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded."

24. Another example is the *Mareva* injunction, now known as a freezing order. In *Nippon Yusen Kaisha v Karageorgis* [16], the claimants sued the defendants for failure to pay charterparty hire. Before the case got to trial, the claimant feared that the defendants would move their assets out of the jurisdiction to avoid enforcement by English courts. As such, the claimants applied for an interim injunction to stop the defendants from removing any of their assets currently located in the jurisdiction outside. Lord Denning MR in the Court of Appeal stated that it had never been the practice of the English courts to do this, but that it would be "just and convenient" to grant such an injunction pursuant to section 45 of the Supreme Court of Judicature (Consolidation) Act 1925. He said:[17]

> "We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them…*We know, of course, that the practice on the continent of Europe is different*.
>
> It seems to me that the time has come when we should revise *our* practice."
>
> (emphasis added)

[16] [1975] 1 WLR 1093.
[17] Ibid, 1094-1095.

25. A third example is Lord Diplock's classification of contracts into synallagmatic (or bilateral) and unilateral contracts in the Court of Appeal. He drew the distinction first in the *Hongkong Fir Shipping* case[18] and then in the case of *United Dominions Trust.*[19] The distinction is one with which law students are now well familiar – for example, a classic exam question is "what is the remedy if a promisor, promising to pay the promisee £100 to enter and win a race, then reneges halfway through the race?" Lord Diplock explained in the *United Dominions Trust* case[20] that he took his expressions from the French Civil Code.[21]

26. The concept of proportionality which is such a familiar part of European jurisprudence but was once alien to the common lawyer now features quite often in common lawyers' arguments.

27. In short, there is a rich history of the common law borrowing ideas, answers and concepts from abroad.

The Common Law and the European Convention on Human Rights.

28. At this stage I would like to focus on certain aspects of the influence on our common law of the European Convention on Human Rights and its incorporation into the domestic law by the Human Rights Act, which imposes a statutory duty on the courts to "take into account" Strasbourg decisions.[22]

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[18] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 65 (CA).
[19] *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA).
[20] Ibid, 82.
[21] Articles 1102 and 1103.
[22] Section 2 of the Human Rights Act 1998:
"(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights…"

29. The introduction of the European Convention into domestic law by the Human Rights Act was intended, as has been repeated over the years, to bring rights home, but experience has taught that an automatic reliance on Strasbourg case law can tend to deflect us from an insightful and penetrating analysis of the common law that may be found in or derived from the tomes of English and foreign law reports and the writings of scholars.

30. In *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court*[23], the US Government successfully sought extradition of two individuals alleged to have been involved in the bribery of Nigerian officials. The issue before the Court of Appeal was whether the District Judge had power to allow the Guardian to inspect and take copies of documents which had been provided to the judge and referred to in argument but had not been read out. The courts below found that there was no power to allow such inspection.

31. The Guardian relied heavily on Article 10 ECHR and a large body of Strasbourg decisions which were not conclusive. The court found more helpful a survey by interveners of the case law from Canada, New Zealand, South Africa and the USA and a particularly valuable report of the New Zealand Law Commission. In a judgment with which the other members of the court agreed, I said:

> "I base my decision on the common law principles of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. Collectively they are strong persuasive authority. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. The development of the common law did not come to an end on the passing of the Human Rights Act. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere."

[23] [2012] EWCA 420, [2013] QB 618.

32. A similar thing occurred in *Kennedy v Information Commissioner*[24]. Mr Kennedy, a journalist from the Times, wanted to find out more about inquiries the Charity Commission had conducted into an appeal founded by Mr George Galloway MP. He requested, and was refused, disclosure of documentation from the Charity Commission under the Freedom of Information Act. Before the Supreme Court it was argued that the Act should be interpreted in a way which the majority of the court considered impossible in order to comply with article 10. However his appeal succeeded on a different basis. The majority reached its decision on the common law principles of open justice and did not consider it necessary for him to rely on article 10. The majority judgments were given by Lord Mance and myself, and we both emphasised the importance of the common law. After setting out my reasoning I added

> "The analysis set out above is based on common law principles and not on article 10, which in my view adds nothing to the common law in the present context. This is not surprising. What we now term human rights law and public law has developed through our common law over a long period of time. The process has quickened since the end of World War II in response to the growth of bureaucratic powers on the part of the state and the creation of multitudinous administrative agencies affecting many aspects of the citizen's daily life. The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary."

[24] [2014] UKSC 20, [2014] 2 WLR 808.

33. I am certainly not advocating that the European Convention should be ignored in the development of the common law. The expansion of the action for breach of confidentiality to include a partial law of privacy is a striking example of the Convention leading to a change in the common law which had been widely regarded as defective. In *Kaye v Robertson*[25] a journalist wearing a white coat gained access without anyone's knowledge or permission to a room in a hospital where an actor was receiving was receiving treatment after a brain injury. Bingham LJ lamented the fact that the only way in which the court could award any damages was under the tort of trespass to property. All that has changed as a result of article 8 and its interpretation by Strasbourg in cases such as *Von Hannover v Germany*.[26] The action for breach of confidentiality has now been expanded to cover cases such as *Campbell v MGN Ltd*,[27] where photographs were published of Naomi Campbell leaving a meeting of Alcoholics Anonymous, and *Murray v Express Newspapers Plc*,[28] where photographs were published of JK Rowling and her husband pushing their son in a buggy while going about their ordinary daily life.

34. However, there is no simple, universally applicable answer to the question when the common law should be developed to absorb Convention rights, as Lord Bingham said in *Van Colle v Chief Constable of Hertfordshire*.[29]

35. Lady Justice Arden put it well in her 2009 Hailsham Lecture when she described the Convention as:[30]

> "a useful benchmark against which our common law can be tested, and against which it can be asked whether the rights of the parties are appropriately balanced."

[25] [1991] FSR 62.
[26] (2005) 40 EHRR 1.
[27] [2004] UKHL 22, [2004] 2 AC 457.
[28] [2009] Ch 481
[29] [208] UKHL 50, [2009] 1 AC 225, at [58].
[30] [2006] EWCA Civ 1085, [2007] 1 WLR 398, [214].

36. It is now generally recognised that in the early years after the Human Rights Act the courts went too far in regarding themselves as virtually bound to follow every Strasbourg decision. The Act requires the courts to "have regard" to such decisions, and that means exactly what it says. It does not require the courts to adhere slavishly to every Strasbourg decision even if after careful consideration they believe it to be wrong.

37. It is also important to remember the way in which the Strasbourg court operates. It will seldom directly contradict one of its earlier decisions but it does not have the same doctrine of precedent as in the common law. So it is not unusual to find a cluster of decisions, sometimes by different chambers, which employ the same phrases but which differ in outcome without the kind of analysis to which we are accustomed when reading judgments, particularly appellate judgments, in this country and other common law jurisdictions. When looking at Strasbourg decisions it is therefore an error to regard every decision as containing a binding ratio decidendi. One may look for that in vain. What must be examined is whether there is to be found in the Strasbourg case law an established jurisprudence on the relevant topic and what precisely it is. In this regard Grand Chamber decisions are likely to carry greater weight than decisions of individual chambers. If after careful consideration the UK court is unable to agree with some aspect of the Strasbourg jurisprudence, it is its duty to say so and to explain its reasoning. This is part of the ebb and flow of ideas between our courts and Strasbourg, in the hope that, as Benjamin Cardozo put it, in the ebb and flow of the tide "the sands of error crumble."

Conclusion

38. Aside from decisions of the Court of Justice of the European Union, which we are bound to follow, and decisions of the European Court of Human Rights, which we are bound to take into account, looking to the future one might ask when should foreign authority should play a significant part in our domestic judgments.

39. Writing extra-judicially Lord Bingham expressed the view that:[31]

> "…there are perhaps two situations in which foreign authority may exert a significant if not a decisive influence. One is where domestic authority points towards an answer that seems inappropriate or unjust. The other is where domestic authority appears to yield no clear answer."

40. Writing judicially, Lord Bingham remarked in *Fairchild v Glenhaven Funeral Services Ltd*[32]:

> "Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question."

41. I agree with those words but Lord Bingham was not seeking to identify comprehensively the extent to which we should have regard to foreign law. The starting point is to see how far our domestic law goes. If it is suggested that we have taken a wrong turn, as sometimes happens in any fallible human system, attention to foreign authorities may help us to judge whether we have gone wrong and, if so, to find the right path, as in the case of *FHR European Ventures*. More often courts are faced with the question whether the law needs further development or clarification. Here there may be great advantage in a wide search of foreign law. It is standard practice of the Law Commission to carry out comparative legal research, and law commission consultation papers and reports are

[31] Lord Bingham, *Widening Horizons – the influence of comparative law and international law on domestic law* (The Hamlyn Lectures) (2010), 8.
[32] [2002] UKHL 22, [2003] 1 AC 32 at [32].

themselves a valuable source for courts in the development of the common law. I refer here not only to law commissions within the UK, but elsewhere in the common law world. I suspect that practitioners hardly ever look to see whether there is any relevant publication by a foreign law commission, but the *Guardian News* case demonstrates their potential value.

42. I return to my two stories. The common law is our habitat. It is like the water in which we swim. We are not always as conscious as we should be of what is to be found in it. It has served us very well and continues to do so. Its methodology enables it to be shaped and developed to meet the needs of justice in a changing world, politically, economically, technologically or socially. In adapting it, the court's horizons should never be narrow. As Pope Gregory advised St Augustine, our attachment to places should not inhibit our search for good things.

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