Denning: Bold Spirit of the Law

Justice Kirby Collection

Date: 19 March 1999
Author: The Hon Justice Michael Kirby AC CMG Justice of the High Court of Australia
Type: Newspaper Article
Citation: The Australian Financial Review

Michael Kirby*

The first time I met Lord Denning was in 1962. He addressed a dinner of young lawyers and law students held in Sydney. Everyone there idolised him. Instead of the austere vision of the judicial role espoused by most judges (including our own great Chief Justice Dixon) Denning asserted that the judge must find the just result. He claimed that he would search the case books, high and low, until he found the precedent or the principle that would achieve justice. Not for him "strict and complete legalism".

I thrust in front of Denning a large black and white photograph of himself. He signed it. It has accompanied me at every stage of my professional journey. His cherubic face still looks down on me, benignly, a reminder of the duty to strive for justice and never to be indifferent to it.

Alfred Thompson Denning was born in 1899 in the village of Whitchurch in England. He was the son of a draper. Two of his brothers were killed in the First War. Tom was too young to go to war. He won scholarships and First Class Honours degrees in mathematics and jurisprudence. Called to the English Bar in 1923, he soon rose to the top. He was appointed a judge in 1944, elevated to the English Court of Appeal in 1948 and then to the House of Lords in 1957. He used to say that the House of Lords was like heaven. Everyone wanted to get there, but not too soon.

Denning stepped down from the House of Lords in 1962 to assume the central seat in the Court of Appeal as Master of the Rolls. This is where he had the most influence. He remained in the position until July 1982. Then at the age of 83, he retired in the midst of a storm of controversy. This followed a few ill-chosen words in a book *What Next in the Law?* They concerned the suitability for jury service of English citizens of West Indian or other ethnic origin. Denning apologised. But the time had come for him to go.

Most young lawyers admired not only his open-minded attitude to the revision of old precedents superseded by changed social conditions. They also loved his writing style. He was the master of the full-stop. Short sentences. The prose of an evangelist. He began one famous judgment: "It was bluebell time in Kent". Another *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 started: "'It is, it is a glorious thing, to be a pirate king', said W S Gilbert. But he was speaking of ship pirates. Today we speak of film pirates. It is not a glorious thing to be, but it is a good thing to be in for making money". In the staid world of the English judiciary, you can imagine the impact that this man, his ideas and his skills of communication had on impressionable young minds.

From the public's point of view, Denning's fame could probably be traced to the inquiry into

the Profumo affair which he chaired. Typically enough, he completed this (sitting in court whenever he could) within less than six months. It packed a political punch which was increased because of the vividness of his writing style.

Denning was not just a clever communicator with an eye for headlines. He was also a highly gifted legal technician. In a revolutionary judgment, delivered off the cuff in 1947, he provided the foundation for the modern law of promissory estoppel. This holds people to non-contractual promises where others have relied on them to their detriment. His fertile mind invented the *Mareva* injunction - a procedural innovation to prevent a litigant from divesting itself of the funds to defeat its opponent's chances of recovery. His decisions upholding the rights of wives to better protection in the property of a failed marriage were in many ways ahead of their time. There are not many areas of the law which were not touched by his fertile mind, his imagination and his lucid pen.

Of course, time eventually overtook him. Some of his values became disharmonious with English society, as it changed. All too often, he saw trade unions as nothing but bullying law breakers. He castigated unmarried mothers for their "immoral" conduct. He thought that homosexuals should still be punished, although "discreetly". And his views on fellow citizens of different ethnic origin ultimately forced his retirement.

Denning kept in touch with judges and lawyers throughout the English-speaking world. His personal kindness to students and ordinary individuals won him devoted followers. Just before his death on 5 March 1999 a conference of judges and scholars was called together in England to celebrate his contribution to the common law. Justice Gummow and I attended from the High Court of Australia. The conference took place on Denning's 100th birthday, 23 January 1999. It acknowledged his mighty contribution to the judiciary, which he once said was made up of two types: "bold spirits" and "timorous souls". A contributor from Singapore analysed his contribution in terms of Denning's value system as an old-fashioned Anglican Christian with an English affinity for the underdog and legal gifts to ensure that right would prevail. Many were the words of praise for his legal inventiveness. In fact, the only real criticism at the conference was the suggestion that some of his idiosyncratic views had been overtaken by time. And that judicial law would be chaos if every judge felt free to search for and apply his or her own notion of justice. Ultimately, law must rule. But Denning taught that law must change to suit fast moving times. It is ironic that ultimately he himself fell victim to the speed of change in England and the world.

Denning was heavy laden with honours. He made mistakes. What will endure? I think it will be the reminder to every judge that each new generation must re-examine old precedents. And every judge must remember that the judicial oath binds him or her to strive for justice according to law. According to law, which must be adapted and developed by the judges themselves. But with a sense of justice for the individual as the abiding moral force of the judicial vocation.

Denning: Bold Spirit of the Law

Justice Kirby Collection