MACCABAEAN LECTURE IN JURISPRUDENCE

THE LAW AND THE REASONABLE MAN

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MY subject is law and the reasonable man—the reasonable layman who is not a lawyer. What does he think of the law and how does or should the law use his ideas? So first who is our reasonable man? Is he the man whose thought and conduct are governed by pure reason, or is he the rather superior man in the street—the man we hope to find in the jury box? Today he is certainly the latter but we must not dismiss the former too summarily.

The man in the street today would find much that is strange in the ideas of his ancestors of the times of the old poor law or of the wars of religion, and he does find much that is strange in the ideas of some of his cousins abroad. On the whole I think that differences between the man in the street and the man of reason have increased. The egg-head is regarded with amused tolerance and the highbrow is defined as a man with more brains than sense. But I will say this for the English: they have always obstinately preferred practice to theory. Their national motto ought to be—an ounce of fact is worth a ton of theory. For myself I would not quite accept that proportion but I do not quarrel with the sentiment. And that sentiment goes far to explain differences between the English and the Civil Law.

But however much we may prefer the English approach we must admit that the traditional methods of our lawyers have not produced perfection, and we must not lose sight of the man of reason. The roots of the law lie deep in the pre-scientific age when it was thought that ratiocination could discover the secrets of the universe. Then even the most practical minded had to acknowledge the supremacy of pure reason and the lawyer set out to derive his law from the Divine law, the law of Nature and the *Jus Gentium*.

In the second century A.D. Gaius said at the beginning of his *Institutes*: 'The rules constituted by natural reason for all are observed by all nations alike and are called *jus gentium*'

(ed. Poste, p. 1). And I came across a passage from Gierke's *Political Theories of the Middle Ages*: 'Medieval schoolmen had hazarded the saying, usually referred to Grotius, that there would be a law of Nature, discoverable by human reason and absolutely binding, even if there were no God or the Deity were unreasonable or unrighteous' (p. 174). Then there came a change. Bacon's view was: 'as for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars which give little light because they are so high' (*Advancement of Learning*, i. 266). And it may be worth spending a few minutes to see how the problem of reconciling reason with practice appeared to another great man who stood on the watershed between the old and the new.

James Dalrymple, first Viscount Stair, was born in 1619. Educated at Glasgow University, he did a couple of years military service and then returned to Glasgow to occupy the Chair of Philosophy for five years. Then in 1648 he was admitted to the Scots Bar and was soon marked out for preferment. Rather unwillingly he became a judge during the Commonwealth, but that did not prevent his appointment as a Lord of Session on the reconstitution of the Court of Session in 1660. In 1671 he became Lord President, but the political troubles caused him to flee to Holland in 1682. In 1688 he returned with William of Orange and resumed his position as Lord President, which he held until his death in 1695. Even in the present century a professional career can seldom have been so much disturbed.

Stair was the greatest of the Scottish Institutional writers. His *Institutions of the Law of Scotland* were first published in 1681 and revised by him in 1693. In the first twenty pages or so he set out the prevailing ideas of general jurisprudence. I quote from Professor More's edition of 1832. He began by saying (*Inst.* 1.1.1): 'Law is the dictate of reason, determining every rational being to that which is congruous and convenient for the nature and condition thereof'. Then (*Inst.* 1.1.15):

> If the law of nature and of reason were equally known to all men, or the dispensers thereof could be found so knowing and so just as men would and ought to have full confidence and quietness in their sentences, it would not only be a folly but a fault to admit of any other law.

And there is a great deal more that today we would think had little to do with the law: but all this apparently irrelevant inquiry did lead him to conclusions far in advance of his time.

I hope you will pardon a rather long quotation because it goes far to explain the fact that his work put the law of Scotland on so rational a basis that it inspired the development of the next hundred years and is still authoritative. I quote (*Inst.* 1. 1. 17):

> Before we come to the common principles of law this question would be resolved, whether law may or should be handled as a rational discipline, having principles from which its conclusions may be deduced. Most lawyers are for the negative part, esteeming law, especially the positive and proper laws of any nation, incapable of such a deduction, as being dependant upon the will and pleasure of law-givers, and introduced for utility's sake, and so frequently alterable, that they cannot be drawn from prior common principles, and keep the artificial method of rational disciplines: and therefore they rest satisfied with any order whereby the particular heads and titles may be found. . . . There is little to be found among the Commentaries and treatises upon the civil law arguing from any known principles of right: but all their debate is a congestion of the contexts of the law: which exceedingly nauseates delicate engines, therein finding much more work for the memory than judgment in taking up and retaining the law-giver's will rather than searching into his reason. Yet there are not wanting of late of the learnedest lawyers who have thought it both feasible and fit that the law should be formed into a rational discipline and have much regretted that it hath not been effectuated, yea scarce attempted, by any . . .

I think we may claim to have made considerable progress in that direction in recent times, and it seems to me that our business as lawyers today is still to keep in mind the man of reason by preserving and developing a coherent body of legal principle, while at the same time going as far as we can to satisfy the modern pragmatic reasonable man. So let us see what he seems to want.

The layman—even the reasonable layman—generally expects too much of the law. He would like the law to be at once certain, speedy, and inexpensive in its operation, and yet also to produce decisions which fit in with his notions of fair play and justice. No doubt he would make allowances for occasional lapses which he knows are inevitable in any sphere of human activity. But beyond that he sees no reason why these objectives should not all be achieved. To my mind it is because he thinks that in too many cases these objectives are not being achieved today that the law has acquired, to use the current phrase, a somewhat tarnished public image. And I do not think that we lawyers are wholly blameless in letting that happen.

To begin with, the cases which go wrong are news and the cases which go right are not, and I am sure that the public do

not adequately realize the great merits of our system: they know little of the ways in which other systems of law work in other countries. And lawyers are too much inclined to leave the discussion of legal reform to theorists whose knowledge and appreciation of the practical difficulties does not always match their innate ability and ingenuity. Moreover, there is a trend in the present climate of opinion which emphasizes productivity: quantity is measurable but quality is not, and too many people are inclined to think that streamlining production must be a good thing, without stopping to consider what effect that may have on the quality of the finished article.

So we must, as lawyers, consider whether it is possible to achieve all these desirable objectives, or whether there is not some inherent mutual contradiction between them so that we must strike a balance and not press any one so far that it will seriously prejudice another.

The first thing which is not adequately realized is the vast preponderance of the time taken and the skill exercised in ascertaining the facts of a case over the time and skill needed to apply the law to those facts. Of course, there are quite a number of cases where the facts are simple and clear but the law is difficult or obscure. Sitting in the House of Lords I see a succession of such cases: legal argument goes on for days on end and then we may not be unanimous. But cases of that kind are a tiny fraction of 1 per cent of the cases which come before the courts. I am sure I do not exaggerate when I say that in the aggregate more than 90 per cent of the time of judges, counsel, and solicitors engaged in civil litigation is occupied in discovering or dealing with the facts and less than 10 per cent in dealing with the law. And in criminal cases it is comparatively seldom that any question of law ever arises for discussion. So we can assure our reasonable layman that reforms of the substantive law, however desirable in themselves, will do little to diminish the volume or the expense of civil litigation.

It would be beyond the scope of this lecture to consider how far it is practicable to change our methods of ascertaining the truth where the facts are in dispute. I will only say this. Even with our elaborate procedure I think we may assume that in many cases we fail to discover the truth. In civil litigation we go on balance of probabilities and in crime we give the benefit of the doubt to the accused so that very few innocent men are convicted but many guilty men are found not guilty. I have no doubt that many useful improvements could be made in our

procedure, but I have equally no doubt that any radical curtailment would seriously increase the chance of reaching a wrong decision. And we must also take account of another factor. Clients like to be represented by a well-known and successful advocate. Under our present system I think they are inclined to carry this desire too far. A good case can easily be lost by a bad advocate, but I do not think that a good advocate can win many cases which would have been lost by an advocate of only average ability. If, however, we were to make a radical simplification of our procedure, I would expect that a quick-witted, persuasive advocate would have many opportunities of making rings round a more pedestrian opponent and this certainly would not promote the interests of justice.

In the law as in other walks of life we get, by and large, what we are willing to pay for. We may sometimes think that we do not get full value for our money, but we do not often get a good article for a cut price. If we were to slash the costs of litigation I have little doubt that we should suffer for it. Hitherto we have maintained the old standards in a world of mass production, but standards do not maintain themselves automatically. So we must put to our reasonable layman, who in the end dictates policy in this democratic country, the question whether he wants to see our standards lowered in order to save time and money. Only experience can convince people how difficult it is to discover the truth. My own view is that at present we only fail in a rather small proportion of cases, but that that proportion could become alarmingly large if we tried short cuts.

Now I can turn to what I believe to be the central question of practical jurisprudence, and again I want to look at it from the point of view of the reasonable layman. That question is, how far can we reconcile certainty in the law with the achievement of justice in each particular case? And there I think we must treat different branches of the law in different ways. A man owns some property: he wants to know just what he can do with it and what he cannot. If he is to get a definite answer from his lawyer there must be a pretty rigid body of law from which his lawyer can extract the answer. And in the immense diversity of modern society that body of law must be extensive and diversified if it is to yield a definite answer in somewhat unusual cases. That is why I distrust codification, and prefer the method of the common law. Unless the lawyer is entitled and able to go behind the code and see how its principles have been applied in decided cases, I believe that there would be

numerous cases where he could not predict with any certainty what a court would do if the matter came before it. It is a delusion that codification will bring about any substantial saving. A competent counsel can find the relevant cases very quickly, and it would be folly to encourage people to rely on a code if they did not know the background.

The unreasonable layman seems to think that the law ought to be capable of simple statement so that he can understand or comprehend it. Perhaps the best question to put to him would be whether that means that he thinks that the years of education which it takes to make a lawyer would be unnecessary in a better world: you simply make the young man study the handbook and pass an examination on its contents and he is qualified. Indeed in the present world of Do It Yourself I am not sure that some people do not imagine that if they had the handbook they could solve their own problems. The selfish thing for the lawyer to do would be to encourage that idea, for the harvest from that would be immense. But if we are trying to promote justice we ought to tell him to go to his lawyer far sooner than he generally does. We are beginning to believe the doctors who tell us that our health would be better if we went to them sooner. But it will take the lawyer some time to get the bulk of laymen to apply that idea to the law.

Under our present system I believe that in the vast majority of cases the solicitor can give a definite answer as to the law and if he cannot, counsel can. I am speaking of the common law. When you bring in a statute the matter is much more difficult unless a cognate question under it has already been decided by the court. And when you come to statutes which devolve decisions, say as to planning, on some tribunal or authority, prediction of the result may be immensely difficult. But leaving such cases aside, I believe that our property law has gone about as far as is humanly possible to achieve certainty.

Perhaps it has gone too far because our layman knows that there are matters which he thinks are highly relevant if justice is to be done, but his lawyer will tell him that the law regards them as quite irrelevant. To my mind it is the function of those who shape legal principles to keep in mind that difficulty. I suppose that almost every doctrine of the common law was invented by some judge at some period of history, and when he invented it he thought it was plain common sense—as indeed it generally was originally. But with the passage of time more technically minded judges have forgotten its origin and

developed it in a way that can easily cause injustice. In so far as we appellate judges can get the thing back on the rails let us do so; if it has gone too far we must pin our hopes on Parliament. But I do not think that we would really serve the interests of the layman, the consumer or customer, if we made any substantial sacrifice of certainty in trying to reach a greater measure of justice in hard cases by letting in factors which at present we regard as irrelevant.

When we come to contract, the picture is rather different. During the last century, under the influence of *laissez-faire*, the 'dismal science' of political economy, and the gaunt figure of the economic man, lawyers were reflecting public opinion in emphasizing the supreme importance of the sanctity of contract. Perhaps that view gained additional respectability from Sir Henry Maine's demonstration that 'the movement of the progressive societies has hitherto been a movement from status to contract' (*Ancient Law*, chap. v). And it had the advantage that once you discovered what the contract meant there was certainty. Apart from the rather rare cases where you could prove fraud, innocent misrepresentation (if relevant), duress, or what the law would accept as mistake, the parties were absolutely bound by their contract. It was no defence that one party was in such a dominant position that the other had really no choice but to accept the terms which were offered to him, however unconscionable they might be.

Often the first difficulty in dealing with a contract is to discover what it means. It would generally be no good asking what the parties intended because probably neither of them gave a thought to the point on which they are now in dispute. So for the sake of certainty we do not allow inquiry into their intentions even in the few cases where such an inquiry might further the interests of justice. We go by what they have said. In the matter of construction of written documents there has been some relaxation of the so-called rules of construction, and of the old tendency to hold that certain words or phrases have acquired one particular legal meaning. But still we must take the document as a whole with such limited extrinsic evidence as the law allows and do our best to make sense of it. And I doubt whether it might not do more harm than good if we went much further: to let in wider inquiry might in the long run cause more injustice than it would cure and it would almost certainly increase litigation.

Then comes the question whether in the interests of justice

we ought to modify the existing principle that it is only in severely limited classes of cases that the court can step in and prevent one party from enforcing a contract on the ground that in making the contract that party took unjust advantage of the other. We no longer believe in *laissez-faire* as a political principle and we now see that the economic man of the older political economy was a psychological monster. Nowadays we do a great deal—some may even think too much—to protect the underdog. But the law has been slow to move in that direction.

There have been a few cases where statute has denied freedom of contract, e.g. to money lenders, and some statutes forbid contracting out of their provision. And the common law is rather hesitant about restraint of trade, and *turpis causa*. But as yet there is no generally accepted principle. Yet we must soon tackle the problem of standard printed conditions. The big man may be able to insist on making his own bargain but the small man cannot—he must take it or leave it. And I have no ready-made solution to offer you. Can we in the next few years devise a principle or method whereby unfair contracts can be modified without at the same time opening the flood-gates for litigation?

We should first have to get rid of the principle that a court cannot remake a contract. It can declare a contract a nullity or rescind it, but I do not call to mind any other case than a contract in restraint of trade where the common law has struck out one part of a contract leaving the rest standing and still less any cases where it has altered a contractual term. And the explanation of the anomalous case of restraint of trade is, I think, that it grew up in the seventeenth and early eighteenth centuries before the classical political economists had made their impact on the thinking of the whole educated community, including the judges. The real question is—how far can we go in the interests of justice without undermining the confidence of honest men in the security of their contracts? Because rogues will be ready to take advantage of any relaxation to harm honest men by vexatiously alleging that a perfectly fair contract was unfair and ought not to be enforced.

I shall say nothing about personal or family law because we can be sure that amendments of the law of husband and wife or parent and child will be made on social or political grounds and there is little that the lawyer can do to influence them.

So now I come to the law of tort. There judges have been more free to develop the law and on the whole I think they have done it well. It is only fair to add that they have had an easier task because it is not so necessary here that the law should be certain in the sense that the result of a case should be predictable. A man who owns property or proposes to acquire it, and a man who has made a contract or proposes to make one is entitled to know his rights. The law would be defective unless he could be assured by his lawyers of his position in 99 per cent of cases without going to court. That is on the assumption that he has not put his hand to some obscure or ambiguous document—for no system of law can be expected to make it possible to say with any certainty what is the true meaning of an ambiguous document. We can only attack that problem by teaching both the layman and the lawyer to shun jargon and speak English. But you can't speak English unless you know what you want to say.

When we are dealing with property and contract it seems right that we should accept some degree of possible injustice in order to achieve a fairly high degree of certainty. But is that right when we come to tort? Today most torts arise from negligence, which I must deal with separately, but there are still many torts which are caused by deliberate conduct. A man knows quite well that what he intends to do may injure his neighbour: he may even intend such injury. Would the law be defective if his lawyer could not tell with the same degree of certainty just how far he can go without having to pay damages? One hears many complaints about the law of libel: it is not perfect and some of the complaints are justified. But would our reasonable layman feel much sympathy for the newspaper which cannot get very definite advice whether something which it wishes to publish would be actionable? And need we as lawyers be more sympathetic? I think that the layman wants invasion of privacy to be a tort. Need we oppose him because it might be hard to say whether a particular invasion had overstepped the line?

Again take the case of using our property in a way which will cause injury to one's neighbour. Some kinds of use are lawful, others are not. But suppose I use my property in a lawful way not for my own benefit or for any justifiable purpose but solely in order to injure my neighbour. The layman would probably think, and justice would seem to require, that the malicious motive should make a difference. But the law says no. In the

famous case of *Allen* v. *Flood*, [1898] A.C. 1 there was a sharp division of opinion. Lord Watson, in the majority, said:

> In my opinion it is alike consistent with reason and common sense that where the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognisance of its motive.

The law is not wholly consistent in that, particularly where two or more people agree to do an act. But is the principle right? If we think that letting in proof of such motive as relevant would open the door to vexatious litigation against honest men, then policy would require us to support the principle. But otherwise there seems to me to be room for some fundamental rethinking about this as a principle of jurisprudence.

Perhaps it goes back to the days when lawyers found it difficult to inquire into the state of a man's mind. You all remember the quotation from Chief Justice Brian who said in 1477: 'It is common knowledge that the thought of man should not be tried for the Devil himself knoweth not the thought of man.' Or rather what he is alleged to have said is, 'Comen erudition est q l'entent d'un home ne sert trie, car le Diable n'ad conusance le l'entent de home' (Year Book, 17 Ed. IV. Pasch. 2). But I am not sure whether Norman French was still in daily use in court at that date. On the other hand, there is the more modern view of Lord Justice Bowen 'that the state of a man's mind is as much a fact as the state of his digestion' (*Edgington* v. *Fitzmaurice*, [1885] 29 Ch.D. 483). Perhaps we should ask our medical and psychologist friends which is the easier to diagnose.

Hitherto I have been dealing with branches of the law which do not directly take account of the views of the reasonable layman. Those views only influence the development of the law in so far as judges, when not too much hampered by authority, apply their own ideas, and those generally reflect the ordinary beliefs—or if you prefer it prejudices—of their generation. But now I must come to a department of the law—negligence—where the law openly professes to decide cases by reference to what a reasonable man would think or do in the circumstances. This is a comparatively modern and rather remarkable development. So it is worth spending a little time to see how it arose and whether it would be wise to extend it further.

It is now well established that the law of negligence is the same in England as in Scotland and I shall go to Scotland for the first part of the story because I am more familiar with it there. In far off days crime and delict were not clearly separated. When a man deliberately hurt his neighbour in his person or his

property he might have to pay compensation or he might be punished otherwise. Then, as things developed, His Majesty's Advocate undertook prosecution in what is now the High Court of Justiciary, and the injured man, or his family if he was slain, could seek reparation in the Court of Session. There was little trace of the idea that mere accidental damage gave a cause of action or that a man acted at his peril. But besides an action *ex delicto* there could be an action *quasi ex delicto*, which would cover gross negligence. The inspiration of the growth of the law seems to have been the *lex Aquilia*, and we did not have the doctrine of private nuisance.

Obligations *quasi ex delicto* are only dealt with very briefly by the older writers and there are few reported cases before the nineteenth century. Our earliest reported case, turning on what was no more than negligence, was in 1666 (*Hay* v. *Littlejohn*, M. 13974). Part of a house, manifestly ruinous, fell on a neighbour's house, and the possessor under a right in security was held liable in damages. And in 1685 (*Sibbald* v. *Rosyth*, M. 13976) where fire had spread from one house to another, the court were unwilling to regard the occupier as liable for his servant's negligence but appear to have regarded his own negligence as relevant. The fullest account of the early cases is to be found in Hume's Lectures (Stair Society, volume 15). Hume, a nephew of the philosopher, was Professor of Scots Law in Edinburgh University from 1786 to 1822. He made a practice of keeping notes of unreported cases and under the heading 'Obligations *quasi ex delicto*' refers to a number of such cases. He states the principle thus:

> In some instances a man is made liable, as a *quasi* delinquent, for the consequences of his own negligence or inadvertency, which, where it is prejudicial to others, the law considers as approaching to or savouring of a delinquency.

The main difficulty at that time seems to have arisen when a master was sued for his servants' negligence. The principle of vicarious liability had not yet been established and it would seem to have been necessary to find some fault in the master, either in not taking care to choose reliable servants or in failing to control his servants' conduct. But vicarious liability was not far away, and apart from this matter, there is no suggestion that a man could be liable in damages unless he was truly a 'quasi delinquent'. There was no sign of an objective test or of the appearance of the reasonable man.

For the next step I must go to England. Suppose a man does his best but a prudent or reasonable man would have done better and avoided harming his neighbour. That problem arose in 1837 (*Vaughan* v. *Menlove*, 3 Bing N.C. 468); a man imprudently stacked hay so that it was liable to heat. It went on fire and damaged his neighbour's property. He had acted bona fide to the best of his judgment, so he could hardly be called even a quasi delinquent. But in holding him liable in damages Chief Justice Tindal said:

> Instead of saying that the liability for negligence should be coextensive with the judgment of each individual—which would be as variable as the length of the foot of each individual—we ought rather to adhere to the rule which requires in all cases a regard to caution, such as a man of ordinary prudence would observe.

Something of great juridical interest has happened. To say that a man is negligent means in ordinary English, and used to mean in law, that he has been careless or reckless—he has failed to act as he could and would have done if he had given the matter some thought and had had a proper regard for his neighbour. But here is a man who did what he thought was best and yet he is held to have been negligent. I think there are only two possible explanations. Either a legal fiction has been introduced—the man has been deemed to have had knowledge or qualities or thoughts or intentions which in fact he never had —or a subjective test has been turned into an objective test so that what the man knew, thought, or intended is no longer relevant.

During early stages of the development of a legal system legal fictions have been invaluable. I need only refer you to chapter 2 of Maine's *Ancient Law*. But in this day and age I dislike them intensely. Why should we tell lies when the truth will serve our purpose equally well if only we give a little care to the formulation of our principles. But we still hear the time-honoured falsehood that a man must have intended the natural consequences of his acts: I shall not repeat what I said about that in *Gollins* v. *Gollins*, [1964] A.C. 644 at p. 664.

It is now quite clear that the test whether a man's conduct was negligent in the legal sense is objective. Indeed that ought to have been clear for over a century because the accepted definition of negligence is that stated by Baron Alderson in 1856 (*Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 784). He said:

> Negligence is the omission to do something which a reasonable man,

guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Nothing could be clearer. What the man charged with negligence thought or intended, or what was the extent of his intelligence, skill, or capacity, is quite irrelevant. If he fails to act as a reasonable man in his shoes would have acted and that failure causes injury to his neighbour he must pay damages.

It is always more satisfactory if we can feel assured that the man we are condemning was in fact negligent in the ordinary sense. So why does the law adopt an objective test? I think there are two reasons. In the first place, it would complicate our inquiries and it would give opportunities to the plausible wrongdoer if we let in a defence that he was really doing his best. In criminal cases we must have regard to *mens rea*, to the real intention of the accused, but it is so seldom that in a civil case a man found liable on the objective test was really not negligent at all, that we do little injustice by enforcing the objective test. And if you look at the matter from the point of view of the person injured, it would be hard on him if he were deprived of a remedy because the man who caused the damage was sub-standard. In crime you are punishing the wrongdoer: in a civil case you are compensating the victim. You should not punish a man unless he had a guilty mind. I said something about that earlier this year in the recent case of *Warner* v. *Commissioner of Police*. But in a civil case you compensate the victim of legal negligence whether or not the negligent man was truly blameworthy. The loss must fall on someone and it is better that it should fall on the innocent defendant whose conduct was in law negligent than on the wholly innocent plaintiff.

But if we want an objective test why do we take the views of the reasonable man? On many topics the views of reasonable men are poles apart: I need only mention religion, politics, and art. When we come to how a man should behave towards his neighbour there are no such deep cleavages. But even so there is room for some difference of opinion: I have known one of my colleagues express the opinion—very politely of course—that the view of another noble and learned lord on such a matter was not reasonable. So for a long time judges tried hard to attain a greater degree of certainty by defining the circumstances in which a man owed a duty to his neighbour. But it did not work: the law became impossibly complicated and in too many cases it did not achieve justice. The first breakthrough was

achieved in *Donoghue* v. *Stevenson*, [1932] A.C. 562 where Lord Atkin was able to get rid of many of the old complications and say:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be—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.

That was a great step forward but there was still a long way to go: we still had the artificial distinction between invitees and licensees and too much rigidity in the duties of occupiers of property. The decision in *London Graving Dock* v. *Horton*, [1951] A.C. 737—a decision which I thought could have been avoided—brought matters to a head and, in accordance with the views of a strong Law Reform Committee, Parliament passed the Occupiers' Liability Act 1957 which put on occupiers the 'common duty of care', i.e. the duty to take such care as in all the circumstances of the case is reasonable. This did not affect the position of trespassers, but the corresponding Act for Scotland, passed in 1960, went further and brought in trespassers, though of course the fact that the pursuer was trespassing is a very relevant circumstance.

So now we have reached the position that in the great majority of cases where negligence is alleged you ask what was reasonable with regard to both the extent of the defendant's duty and the question whether he failed to comply with that duty. In other words, what would the reasonable man have done? Who then is 'the reasonable man' for this purpose? We could say that he is a paragon not subject to any of the normal failings of human nature but always exercising the highest degree of forethought, skill, and intelligence. But that would be far too high a standard. If I go on the highway, what do I in fact expect of the driver of the approaching car? If I enter another man's property what do I in fact expect that he will have done to make it safe? I would be very foolish to expect more than the ordinary degree of skill and care but I am entitled to expect that, and I am not required to make allowances because the car driver was tired or impatient, or because the occupier of the property was too busy or too poor to see to repairs. On the golf links Colonel Bogey not only never makes a mistake but he is a very good player. One might say that in law the reasonable man has all Colonel Bogey's steadiness but has a much larger handicap.

But real life is not so simple as golf. There is too much room for differences of opinion as to what the reasonable man would do in a particular situation to make this a tolerable standard in branches of the law where laymen need to know their rights before they act. But no one goes to his lawyer to ask just how negligent he is entitled to be.

Not only is this reference to the reasonable man a good rough and ready standard but it has a further great advantage. Men's habits and views change with the lapse of time and this test enables the courts to give effect to such changes without any formal change in the law. A good example of the difficulties which arise where it is necessary to lay down a more definite rule can be seen in the history of the law of common employment. Once it had been established that an employer is vicariously liable to strangers for the negligence of his servants, the question arose whether the same rule should apply where the negligence of one of his servants causes injury to a fellow servant. We think now that every reasonable man would say of course it should. But go back to the early days and reasonable men thought quite differently. Both in England and in the United States this was thought quite unreasonable. It was only in Scotland that the courts took the more logical view that vicarious liability means what it says.

The earliest reasoned justification for this doctrine was the judgment of Chief Justice Shaw of Massachusetts in *Farwell* v. *Boston & Worcester Railroad* in 1842 (4 Metcalf 49 and quoted in full in 3 Macq. at p. 316). He said:

> The general rule, resulting from consideration as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly.

And later he said:

> . . . the loss was sustained by means of an ordinary casualty caused by the negligence of another servant of the company. Under these circumstances the loss must be deemed to be the result of a pure accident like those to which all men in all employments and at all times are more or less exposed.

And when the matter came before the House of Lords in 1858 (*Bartonhill Coal Co.* v. *Reid*, 3 Macq. 266; *id.* v. *M'Guire*, 3 Macq.

300) the ground of judgment was something very like *volenti non fit injuria*. Even that great reformer Lord Brougham concurred.

Yet within a generation there was a complete volte-face and judges were striving to limit the doctrine. I referred to the same swing of opinion in *I.C.I.* v. *Shatwell*, [1965] A.C. 656 at p. 671. For well over half a century no one had a good word to say for the doctrine. But it was not until 1948 (Law Reform (Personal Injuries) Act) that the doctrine was abolished by statute. The mills of law reform grind slowly.

Hitherto I have been dealing with the common law. But what of the immense body of statute law? We are a democracy and I would say that a large majority of the voters are, as individuals, reasonable men and women; and that has been so since I first began to take some part in politics about 1910. So in theory at least Acts of Parliament ought to have reflected the views of reasonable men when they were passed. But I think that Dicey was rather optimistic when he said (*Law and Opinion in England* (1905) at p. 7): 'The close and immediate connection then which in modern England exists between public opinion and legislation is a very peculiar and noteworthy fact to which we cannot easily find a parallel.' No doubt the connection is closer in this country than in many others, but where controversy on any question does not divide Members of Parliament on party lines there may be delays of many years before anything is done. And 'public opinion' is not necessarily the opinion of the majority of reasonable men; well-meaning enthusiasts can often get undue prominence for their peculiar views.

Judging by my own experience I would say that, while a good many people may disapprove of some modern legislation, there is not much that the reasonable man cannot tolerate. What I think he most dislikes is making something an offence when there is no prospect of catching more than a very small proportion of the offenders, especially where the punishment is imprisonment. Juries are mostly made up of reasonable men and women: they are not perfect but I do not think we can afford to be complacent if we find that with regard to some particular offence juries are tending to refuse to convict on clear evidence. That is almost certainly the fault of the law and not the fault of the juries. It means that reasonable men consider it unjust that the offender should suffer the penalty which they think would follow if he were convicted.

The law departs at its peril from the views of the reasonable man. He could not give a definition of what he means by justice

and neither can I. But that does not prevent him from saying that particular things are clearly unjust. We as lawyers and legislators can go far but we cannot afford to go so far that we offend his sense of justice. We may try to educate our masters, but we shall do incalculable harm if we try to override the views of the average reasonable man.