



MICHAEL JOHN MUSTILL

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## 1931–2015

MICHAEL MUSTILL WAS ONE OF THE finest lawyers of his generation, as Queen's Counsel at the Commercial Bar, as a judge of the Queen's Bench Division, as a Lord Justice of Appeal and finally as a Law Lord, a member of the Judicial Committee of the House of Lords. He was ennobled as Lord Mustill of Pateley Bridge. Unlike some other life peers he did not take his title from the place where he had simply acquired a second home. He took it from the name of the town in Yorkshire where his mother had grown up, and where he died, having spent all the time he could there towards the end of his life.

Michael Mustill was a Yorkshireman, and was proud of it, although only those who knew him well were particularly aware of it. He was born on 10 May 1931 in Leeds in the West Riding of Yorkshire, and died in Pateley Bridge on 24 April 2015. Pateley Bridge had been the home of his mother Marion Summersgill Mustill (née Harrison) and of her parents and grandparents since at least as far back as the 1850s, and Mustill inherited Sandholme Cottage from his parents. Many of his mother's relations still live in and around Pateley Bridge. Mustill's great-great-grandfather, Alfred Mustill, was a smallholder in Cambridgeshire who moved to Yorkshire before 1875. By 1881 he was a police constable in Goldsborough. He had three sons. The two younger sons, Joseph (b. 1872) and Alfred (b. 1875), made a living in Boroughbridge as manufacturers of mineral water. The oldest, Clement Michael (1871–1944), went to Geneva as a young man, where he learnt the hotel trade. He was a head waiter for much of his life. He suffered an accident in his later years which left him unemployed, although he lived until the age of 73.

Mustill's father, also called Clement Mustill (1903–93), was the son of the head waiter. He trained as an engineer and worked his way up from adversity to become the managing director of Jackson Boilers in Leeds. He was the chairman of the Leeds Northeast Conservative Association which chose Keith Joseph as its candidate for the constituency, overcoming some resistance to the choice of a Jewish politician. Sir Keith was heard once to say that Clement Mustill would have been the MP if he had come from a less humble background: the truth was that Clement could not afford to sit in Parliament.

Michael's mother Marion was quite as impressive as his father. Her father ran a grocery: he was highly esteemed and loved locally, a pillar of the community and musical. Like Clement, Marion Mustill was a lifelong Conservative, and she served for many years as a councillor in Leeds. She was an accomplished pianist (as in a lesser way was Mustill himself) and an associate of Trinity College, London.

Between them, with the help of scholarships, Mustill's parents managed to educate him at private boarding schools, first at the Wells School, Ilkley, from the age of eight (1939), at Stancliffe Hall, Derby, from the age of eleven (1942) then at Oundle School from thirteen to eighteen (1944–9). Oundle was not an upper-class school: it was mainly the place for the gifted sons of well-to-do merchants, although its reputation was such that H. G. Wells, Siegfried Sassoon and Robert Graves also sent sons there. The standard of teaching was very high: in chemistry, for example, he once wrote home that his class had manufactured polonium, well known nowadays as a lethally radioactive substance. At Oundle he took part in every activity which was on offer. He discovered a talent for shooting and tennis, and he conducted the house orchestra, having learnt to play both the cello and the piano. Several essays have survived from his time at Oundle, one on the subject of death, and another on a text from the Book of Daniel which led him to reflect on the appalling consequences of the atomic bombing of Hiroshima and Nagasaki. The essays are remarkably mature for a teenager, and the ideas that he had formed at that time matured in later life into his more profound thoughts on such subjects as mentally disordered offenders and the termination of the lives of patients in a vegetative state.

After leaving Oundle School, he spent two years of National Service with the Royal Artillery between 1949 and 1951. He had a reputation for being clumsy and ill-dressed as a soldier, but in spite of this, to his surprise, he was commissioned second lieutenant and became ADC to a general, who greatly enjoyed Michael's company and had a high regard for

him. William ‘Rusty’ Park, Professor of Law at Boston University, has an anecdote from this time:

During one of Michael’s visits to Boston we took in a baseball game together. The Red Sox, our local team, were playing their sworn rivals, the New York Yankees. Michael revealed that during his army service he sometimes narrated baseball games for American troops stationed in England. Then with frightening precision he imitated noises for a host of plays: the whoosh of an infield fly ball before being caught by the second baseman; the thud of a slow runner tagged while trying to slide into third; and the smack of a home run hit by a right-handed batter on its way to clearing the left-field wall at Fenway Park. Enough to cause envy in the best radio sound effects.

After his National Service he went on to St John’s College, Cambridge (1951–4) to read mathematics, supported by an open scholarship and a state scholarship. But he realised that although he had been taught to a very high standard in mathematics, he was not so exceptionally gifted as to warrant spending three years studying it, and on the advice of his tutors he decided to read law. He was awarded the George Long Prize for Jurisprudence and, by St John’s College, a McMahon Law Studentship to help with his studies for the Bar. However, his degree was not as good as had been expected, no doubt because, as he said in later life, he found the study of the law as an undergraduate subject pretty dull. But he read and attended lectures prodigiously outside the law, and made many friends, including actors and writers, who stayed with him for life. After the great earthquake in the Ionian Isles in 1953 he went alone and at his own expense to Kefalonia, supported later by charitable funds raised by his mother. For this he was thanked for his services by the Greek government. From this experience he derived great affection for Greece and for Greeks. Later as counsel he had many Greek shipowners as clients, most of whom had neither the wealth nor the sophistication of an Onassis or a Niarchos—but he got on well with all of them.

After his graduation he spent time working for Slaughter & May, a leading firm of solicitors in the City. This gave him an insight into the life of a working solicitor which stood him in good stead in his time as a barrister and as a judge. At the Bar he worked well in a team with solicitors, and as a judge he was more understanding than many others in his position of the pressures under which solicitors conduct litigation.

He was called to the Bar by Gray’s Inn in 1955 and in the autumn of that year he became the pupil of Michael Kerr at 3 Essex Court Chambers (later Sir Michael Kerr, a Lord Justice of Appeal), who became a lifelong friend. Michael Kerr was at that time an overworked but highly paid

junior barrister. He was the son of the renowned German writer and critic Alfred Kerr, and the sister of Judith Kerr, the author of *The Tiger Who Came to Tea* and *Hitler Stole My Pink Rabbit*. The Kerr family fled from Berlin in 1933, first to Switzerland, then to Paris and finally to England, where Michael Kerr attended a public school and then, for a year, Clare College, Cambridge. He was interned for a time in the Isle of Man in 1940, but ended the war in the RAF, still classified as an enemy alien, but speaking fluent German, French and English. The head of the chambers was Alan Mocatta QC (later Mocatta J.) and among the other members were Eustace Roskill (later Lord Roskill), John Megaw (later Lord Justice Megaw), John Donaldson (later Lord Donaldson, Master of the Rolls) and Robert (Bob) McCrindle, who ranked high among the most talented advocates of his time. Anthony Lloyd (later Lord Lloyd) joined soon afterwards and was for years afterwards Mustill's constant opponent in the law courts, and eventually a colleague in the House of Lords.

Mustill was taken on as a tenant at the end of his pupillage and despite the shortage of work at the Commercial Bar at that time was soon busy attending cases in the Commercial Court and in the Court of Appeal. Michael Mustill was pupil master to a whole generation of barristers, among whom was Nicholas Phillips who later became Master of the Rolls and President of the Supreme Court and whose sister Caroline became Mustill's second wife.

From the outset Mustill's method as a lawyer was, if not unique, at the very best level of his contemporaries. The conventional view of the common law at the time was that it was the best system of law that could be imagined, because it was based on decisions on individual cases as they came before the courts and was therefore not based—as were other systems of law and particularly the systems of civil law which prevail in Europe and elsewhere—on speculative reasoning about hypothetical cases. The classic statement of this point of view was that of Oliver Wendell Holmes that 'The life of the law has not been logic; it has been experience.' For Mustill this was a strength but also a shortcoming. The strength lay in the focus on the practical issues in the case before the court, and the experience that the court could, with the help of counsel, bring to bear on them. But Mustill had a profound view that the legal decision of practical questions could not be divorced from a systematic and logical analysis of the underlying legal principles. In his view, the weakness in the common law lay in the fact that systematic development of principles of law depended on the chance that cases arose which enabled the court to deal with them. In contrast, systems of law based on civil or Roman law

were able to absorb more readily ideas based on principle, independently of the facts of actual cases, because it depended principally on the work of legal scholars, not on the decision of judges. Mustill felt this to be a serious limitation on the development of the common law. It was never enough for him to decide a case. He needed to know where the decision would lead in other cases, and why.

He never started by assuming that the answer to any particular problem was to argue from the propositions decided by the reported cases. His instinct was always to treat the question he was attempting to answer as part of a wider set of questions, to which an answer could only be found by resorting to norms other than those derived from the legal precedents. Sometimes these were legal norms of more general application which underlay or sometimes contradicted those which were derived from the decided cases. There was also to him a basic principle that rules should be consistent unless the doctrine of precedent dictated otherwise—and, as one can see from the reasoning in some of his judgments, consistency meant not only consistency between decided cases on the point in question but also consistency between the logic of decisions in different but related fields of law. He was, for example, much troubled by the fact, which so far as is known he never had the opportunity to articulate in any reported case, that administrative law had different principles from arbitration law, and gave rise to different results in similar cases.

As an advocate he was not a great orator. Quite the reverse. His style of argument as counsel was low key. The days of Marshall Hall and Norman Birkett were long past. He sought to persuade not by rhetoric but by the strength of his argument and the skill with which he handled the evidence. His voice was in the tenor range or perhaps upper baritone, but it was tinged, scarcely perceptibly, by a Yorkshire intonation, and a constant sense that he was on the point of saying something amusing. In private his wit and good humour burst forth the whole time, but in court, both as an advocate and as a judge, he maintained a purity of language and thought which was exemplary. He had the characteristic, which too few advocates have, of pausing before he answered a difficult question from the bench: this gave the impression, in his case quite correctly, that he wished to be sure of his answer before he gave it. He had a most disarming smile when he was challenged from the bench—the same smile that he gave to his friends in private. His prose style was not only beyond reproach, but maintained a freshness and fluidity which few lawyers in modern times have equalled. He often spoke of himself as a simple craftsman of language, but he was in truth supreme in his field and dedicated

this craft to the exposition of the law. In this he was pre-eminently successful, not only in the felicity of individual phrases, but in his ability to pace the development of an argument through its exposition in several themes, its development and recapitulation. The pace was sometimes slow, but it built up seamlessly from basic propositions to what was often a complex and far from basic result: his argument was clearly articulated, and in the end it led to conclusions which, so far as legal conclusions ever can be, were intellectually convincing. All of this he achieved without the slightest hint of rhetoric or bombast.

He taught his pupils that the first minute of an argument was the one that really counted: it was the moment at which you aroused the interest of the court in your case and told them why the merits were on your side. In his last years as a junior he often demonstrated to his pupils how to put this into effect before the Queen's Bench Masters, an overworked but admirable body of junior judges dealing with matters which did not need to be decided by the judge himself. In those days they had an appointment list after lunch for short applications in an area of the Law Courts known as the 'Bear Garden'. Many barristers made the mistake of sauntering in and assuming that the Masters would listen patiently and respectfully to their arguments, not realising that they had a huge workload and dreaded the *longueurs* of appearances by counsel. Not so Mustill. When his case was called on he would enter at the trot with his papers open in front of him, explaining why he was there and what he wanted before he had even passed through the door. By the time he had crossed the carpet and reached the Master's desk he had virtually completed his submissions. Many opponents were quite blown off course by his whirlwind attack.

He had a great ability to break down a legal problem by analysis of every possible permutation of circumstances, in contrast to the usual forensic method of the advocate, who typically concentrates on arguments to defeat those of the opposite side. This skill was not deployed in argument, but it served to anticipate contrary arguments and difficult questions from the bench. It was, however, very much a feature of his academic writing, which he regarded as a quest for the correct—or at least the best—answer to every foreseeable variation of the question at issue. For questions requiring multiple answers, he would often construct elaborate algorithms and spreadsheets. These rarely saw the light of day in any of his published work,<sup>1</sup> but they enabled him to be confident that he had

<sup>1</sup>The 1996 Goff Lecture, City University, Hong Kong, entitled 'Hong Kong 1996—too many laws?', *Asia Pacific Law Review* 6 (1998), 1–21, is a notable exception. It is illustrated by no fewer

covered the subject from every angle, and to seek out the general principles underlying a seemingly disorganised set of legal rules. Although the scaffolding was usually dismantled once the general principles had been established, the fact that it was the underpinning of the general principles gave consistency and coherence to what he wrote.

His most accomplished work of this kind was published as ‘Multi-party arbitrations: an agenda for law-makers’.<sup>2</sup> The problems of multi-party arbitrations were very much to the fore at that time and had been discussed at length by the Departmental Advisory Committee on Arbitration Law, of which he was the chairman. One of the weaknesses of arbitration, particularly at the international level, was its inability to harness together related disputes between different parties, operating under different national laws and under different contracts. The discussion of the problems to which this gave rise was not always well organised and the proposed solutions were correspondingly ineffective. Mustill’s paper set new ground rules for the discussion in a comprehensive and ordered framework, and asked the fundamental questions which needed to be answered. It was, frankly, a masterpiece. The shape of the whole subject had been set. But the answers have still to be found.

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The formal milestones of Mustill’s career after he was called to the Bar can be set out quite briefly before we turn to consider his contribution to the development and exposition of the law, which will be the subject of most of the remainder of this memoir. Other significant appointments and honours will be mentioned in their proper context.

He became a QC in 1968. In 1972, he was appointed Recorder of the Crown Court, a precursor to being made a High Court Judge of the Queen’s Bench Division in 1978. From 1981–4 he was Presiding Judge on the North Eastern Circuit and, from 1984–5, Judge in Charge of the Commercial Court. In 1985 he was appointed Lord Justice of Appeal and admitted to the Privy Council, and in 1992 was made Judge of the Appellate Committee of the House of Lords, and appointed Lord of Appeal in Ordinary.

From the start of his judicial career, as a part-time Recorder, Mustill came into contact with the criminal law, a field in which he had played virtually no part as counsel. He sat in criminal cases, both as a High Court Judge in trials before juries and as a member of the Court of Criminal

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than eight diagrams showing the relationship between the various topics under discussion, and is characteristic of Michael’s habitual methodical approach when tackling a complex subject.

<sup>2</sup> *Arbitration International*, 7 (1991), 393–402.



Appeal and, as we shall see, when he reached the House of Lords he turned his mind to some of the more perplexing issues in that field. He was particularly pleased to be appointed Presiding Judge on the North Eastern Circuit, which included his home town, Pateley Bridge. It was during his time on the North Eastern Circuit that he tried at Newcastle five conjoined cases concerning the liability of shipyards for industrial deafness suffered by men who worked in the yards.<sup>3</sup> The trial lasted four weeks and resulted in a judgment of nearly fifty pages. It demonstrated what those who had seen his work as counsel already knew, that he was completely at home with complex technical evidence, and particularly skilful at summarising and evaluating it. The judgment was not appealed, and formed the basis for settlement of a large number of other cases which turned on similar facts.

The number of reported judgments given by Mustill during his judicial career runs to over 800, and there must be hundreds more unreported judgments. The most widely used online database for law reports has 209 cases in the House of Lords, 74 in the Privy Council, 582 in the Court of Appeal and 78 in the High Court (where fewer cases are reported). They cover a wide range of subjects, grouped by the database into twenty-four separate (but to some extent overlapping) categories. There are over fifty reported cases in the categories Crime (227), Commercial (102), Contract (93), Finance (68), Land (94), Public Law (89) and Transport (54). This breadth of decision is not in itself unique but it does show the great variety of cases in which a long-serving judge can be called upon to demonstrate his ability as a lawyer. It is notable in Mustill's case how very few of his decisions in the lower courts were overruled or disapproved.

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If asked to identify Mustill's greatest contribution to the law outside the Bench most lawyers, certainly those who work in the field of commercial disputes, would point to his comprehensive account of the law of arbitration, published originally in 1982 by Butterworths under the title *The Law and Practice of Commercial Arbitration in England and Wales*, with the short title *Commercial Arbitration*.

This was published before the explosive growth in international commercial arbitration which has taken place in the last thirty years or so. It was based on Mustill's great experience in appearing as counsel in arbitra-

<sup>3</sup> *Thompson v Smiths Shiprepairers (North Shields) Ltd.* [1984] Q.B. 405.

tions, most of which were domestic, in the sense that they took place in London, although they covered among other things shipping, insurance and commodity disputes, and therefore frequently involved parties from abroad. There was already a substantial amount of international arbitration, particularly arbitrations under the Rules of the International Court of Arbitration of the International Chamber of Commerce based in Paris, where Mustill also appeared as a silk in some of the heavier cases.

The only textbook which had been kept up to date when Mustill started work on the book was a reasonably workmanlike analysis of the reported cases, but it was by no means complete or accurate and contained little discussion of matters of principle, particularly if there were few or no reported cases to form the foundation of such a discussion. Mustill therefore resolved to write a book which was founded on his own comprehensive re-reading of the reported cases, which went beyond the reported decisions in discussing important and fundamental matters of principle, and at the same time gave guidance to the participants in arbitrations on matters of practice, which were rarely mentioned in the decided cases but in which he had a wealth of valuable experience. It is not possible to pinpoint exactly when he started work on the project but it was probably around the time that he took silk in 1967. Almost from the start until publication of the first edition in 1982, he had a commitment from Butterworths to publish it, which they loyally and patiently stood by through the many years of gestation. Eventually it became common knowledge that the book had been in preparation for some fifteen years, during which time Mustill was known to be writing it in the relaxing surroundings of the Ardèche, but that it had still not been forthcoming. This led to Mustill's then wife suggesting that the following quotation from Anthony Trollope's novel *Ralph the Heir* should appear in the introductory pages, as it did:

Nevertheless, let us hope that the change of air may tend to future diligence and that the magnum opus may yet be achieved. We have heard of editions of Aristophanes, of Polybius, of the Iliad, of Ovid, which have ever been forthcoming under the hands of notable scholars, who have grown grey amidst the renewed promises which have been given. And some of these works have come forth, belying the prophecies of incredulous friends.

Mustill's main resource when writing the book was a complete collection of the Lloyd's List Reports, which has since 1919 published law reports of interest to the maritime and insurance communities, but which had not been systematically noted up in the current textbooks. In his spare time he read through these and noted them up from start to finish, and during the long vacation would often load up his car with as many of the volumes as

he could manage and take them away with him, usually to France, latterly to the Ardèche where he spent much of his free time.

He was a subscriber all his professional life to the *Revue de l'Arbitrage*, the leading French periodical in the field, which was a valuable source of French doctrine and jurisprudence. His practice was to summarise articles and law reports which he felt were of interest, and sometimes to photocopy them in their entirety. The results went into a series of what he called 'shoeboxes', which is what many of them were. They also contained scribbled notes written by Mustill to himself on topics which occurred to him from time to time: some of these were indecipherable even to Mustill himself. As time went on he relied on pupils and other young colleagues to conduct preliminary research and to go through the shoeboxes, categorising them by subject matter, and sometimes writing draft material for him to work into completed text. The last of these was the author of this memoir. But the fact is that the substance although not the shape of the first edition was substantially the work of Mustill himself. Although his co-author wrote more of the second edition and quite a large part of its later companion volume,<sup>4</sup> Mustill always proved able to contribute a large amount of material of the very highest quality—usually it must be said at the last minute—and in a state of some editorial disarray as had been the case with his manuscript of the first edition. *Commercial Arbitration* had many innovative features, and the discussion that follows covers only those topics which can truly be said to be innovative, rather than improvements in presentation and accuracy over other contemporary texts on the subject of arbitration.

Probably the most conspicuous innovation was that the book did not confine itself to propositions of law derived from the decided cases. That was not Mustill's way. He never hesitated to offer an opinion on questions to which the reported cases gave no answer, with such degree of hesitation or certainty as he thought fit. In this he was not unique. Other law books, particularly those written by academics, had taken the same line. What was unique about Mustill was that he not only dealt with speculative issues of law, but also with troublesome issues of practice. There is scarcely a page in the book which could not be used to illustrate this. A good example is his discussion of the practice of 'stopping counsel', well known to judges and advocates, but unnoticed in any other textbook. This is the

<sup>4</sup>M. J. Mustill and S. C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edn (London, 1989); M. J. Mustill and S. C. Boyd, *Commercial Arbitration. 2001 Companion Volume to the Second Edition* (London, 2001).

practice, common in the law courts, of telling counsel that he need make no further submissions when the court is in his favour and his opponent has already had the opportunity to put his case in full. The discussion in the text is a good example of what Mustill was able to contribute from his own experience as counsel and as a judge:

The practice of stopping counsel is a useful one, but it should only be used when the arbitrator's decision is in a party's favour. It should not be used as a way of cutting short a long winded argument when the arbitrator has decided against the party making the submission: to stop counsel in this situation and then to decide against him might well amount to misconduct. The best course in this situation is for the arbitrator to summarise in his own words the submission which is being made so as to understand that he has understood it, even if he does not necessarily agree with it: few advocates will go on repeating themselves once they are sure the point has been understood.<sup>5</sup>

The book abounds with practical observations of this kind, which is no doubt why for many years it was the standard textbook for those seeking admission to the Chartered Institute of Arbitrators.

The book contained many innovations in terms of the analysis and exposition of the law. The very first chapter, described as a 'Descriptive introduction', was a new idea of giving a bird's-eye view of the entire subject. It was a summary of the English law of arbitration, as described in more detail in the rest of the book. This was aimed not only at non-lawyers (of whom many were in those days, and still are, appointed as arbitrators in England) but also at foreign lawyers who increasingly were to become involved in arbitrations in London and in arbitrations abroad conducted under English arbitration law. The second chapter, headed 'What is an arbitration?', was an equally innovative idea, which dealt systematically with a subject that until then had received little attention. It was a topic which had been the subject of two quite recent decisions of the House of Lords, but the discussion went far beyond the relatively narrow issues involved in those decisions.

Chapter 3 contained a discussion of the laws governing an arbitration in which Mustill, probably for the first time, identified four separate laws which may potentially be involved in a case raising questions of the conflict of laws: (1) the proper law of the contract, which governs the substantive rights of the parties to the contract; (2) the proper law of the arbitration agreement, which governs the obligations of the parties to submit their disputes to arbitration and to abide by its outcome; (3) the

<sup>5</sup>Ibid., pp. 307–8.

curial law, which governs the procedure to be applied; and (4) the proper law of the reference, which is the contract law governing a particular reference under the arbitration agreement. This has now become the standard classification.

Chapter 12 discussed 'The residual jurisdiction of the court'. This was a subject of some complexity, and its boundaries had not been properly explored. Its importance to the work as a whole was in situations where the arbitration had broken down. Could or should the court take over the dispute in such a case? This was of relevance to later chapters, discussed below, which explored the possibility that the arbitration agreement might come to an end because of the doctrines of abandonment or frustration. Its significance in this context, it may safely be said, had not before been noticed.

The final section of the book, entitled 'Problems and remedies', and forming more than a third of the whole work, discussed the powers of the courts to enforce arbitration agreements and in various other ways to support the arbitration, so to ensure that it is properly conducted, and to supplement the powers of the arbitrators where they are absent or defective. Previous works had not attempted to deal separately or comprehensively with these powers, preferring instead to treat them as incidental to the discussion of individual subjects, such as the duty of the arbitrator to act impartially and fairly, which *Commercial Arbitration* dealt with as separate topics already discussed in earlier parts of the book. Two developments of importance had taken place before the book was published. First, the Arbitration Act 1979 had done away with the much-criticised special case procedure, which was until then the main method of inviting the courts to decide questions of law arising out of an award. This was clumsy and expensive, and had latterly led to an avalanche of applications to the court. 'Problems and remedies' began with a history of the judicial control of arbitrations, itself a novelty, and a full discussion of the 1979 Act and how it had been applied in practice, together with a quite new discussion of the use of reasons for an award, and what they should contain. Second, there had been two recent decisions of the House of Lords relating to the problem of putting an end to arbitrations which had dragged on for years with little or no effort on the part of the claimant to bring them to a conclusion. The argument in the first case was that the arbitration agreement might come to an end by abandonment, or through the doctrine of repudiation, and in the second that it might be discharged by the doctrine of frustration. The use of contractual doctrines as a solution to a well-known practical difficulty undoubtedly was in large part the

result of ideas which he had formed and discussed with colleagues while he was still at the Bar. In the end the use of these doctrines turned out to lead to a dead end, but the two cases enabled the House of Lords to consider for the first time the extent to which an arbitration agreement could be analysed as if it were an ordinary contract.

As a coda to the work, there were two appendices on new subjects. The first was a compilation of cases on the issue of what was a question of fact or a question of law, or belonged to the category of 'mixed fact and law', which could only have been written by an author who, as Mustill had done, had read and noted up virtually every case on the law of arbitration decided in the previous seventy-five years. It remains a valuable resource for those who have to persuade a court to grant leave to appeal on a question of law, or to resist an application for leave. Second, he contributed a short account of the doctrine of 'Manifest Disregard' under United States law, derived wholly from cases decided in the USA. This has proved to be of less value, but it was incidental to the discussion in the body of the book of ways in which an award might conceivably be challenged by procedures other than by way of appeal. It strikingly illustrates Mustill's readiness and ability to think outside the confines of English law.

By the time of the second edition in 1989, to Mustill's great pleasure, the sales of the book overseas were as great as those in England. Largely because of this, his name was as familiar to overseas lawyers as it was to English ones. It has been said that he delivered addresses and took part in arbitration colloquia in some twenty countries. His influential monograph on multi-party arbitrations has already been mentioned, but it was his monograph 'The new *Lex Mercatoria*: the first twenty-five years' which perhaps had the greatest influence of all his published addresses on the theory of international arbitration law.<sup>6</sup>

In the twenty-five years leading up to the publication of this monograph in 1987 there had grown up among academic lawyers—mainly but not exclusively from civil law countries—the concept of a transnational and non-national body of law supposed to represent the law of commerce and of merchants (hence *lex mercatoria*). The main advantage of this body of law was said to be its independence from the particular rules of any one national system of law and its supposed origins in the usages of trade and commerce. Mustill dealt with the subject by posing a series of questions: What is the *lex mercatoria*?; What kind of law is it?; When does

<sup>6</sup>M. J. Mustill, 'The new *Lex Mercatoria*: the first twenty-five years', *Arbitration International*, 4 (1988), 86–119.

it apply?; Does it empower the arbitrator to decide in equity?; What is the relation between *lex mercatoria* and national law?; What are the sources of *lex mercatoria*?; What are its rules?; and How is it to be ascertained? Each question was answered methodically with compendious references to the published material, mainly in French. Finally he asked:

Does [the *lex mercatoria*] provide the businessman with a set of rules which is sufficiently accessible and certain to permit the efficient conduct of his transactions? Is the *lex* manifestly superior, in its content and methodology, to establish national systems of commercial law? If so, is its superiority so obvious that it can now be said to have imposed itself, whether by the very fact of its existence or by a notion of implied consent, on the international business community as a whole, and on all transactions in which it is not expressly excluded? In short, has the *lex mercatoria* stolen the international commercial scene, pushing national laws into the wings? In each case, the detached observer must, I believe, be driven to answer 'no'. More sympathetically, he might add '. . . or at least not yet'.<sup>7</sup>

Since this monograph was published, the *lex mercatoria*, although not without its adherents even now, has not prospered as a practical tool for resolving commercial disputes. The first edition of *Commercial Arbitration* was followed by a second in 1989 and a Companion Volume in 2001. They contained valuable new material on the theory of arbitration and on the underlying concepts of the Arbitration Act 1996.

As a result of his work on arbitration law Mustill was awarded the degree of LLD (Doctor of Laws) by the University of Oxford. This was not an honorary degree. It was awarded for his important and original academic work in *Commercial Arbitration*, which he had been invited to submit for examination for the LLD. It is scarcely surprising that he was awarded this degree, given the quality of his work in *Commercial Arbitration*, and the fact that the material it contained was the equivalent of several theses or dissertations, perhaps four or five in all. He was also appointed an Honorary Fellow of St John's College, Cambridge, the Yorke Distinguished Visiting Fellow and Arthur Goodhart Visiting Professor of Legal Science, Cambridge, from 2003–4 and Honorary Professor of English Law at Birmingham University. He was Honorary President of the Chartered Institute of Arbitrators from 1994–7, a vice-president of the Court of Arbitration of the International Chamber of Commerce, and a President of the International Law Association. Mustill was elected a Fellow of the British Academy in 1996.

<sup>7</sup>Ibid., p. 117.

In 1985 Mustill was appointed by the UK government as chairman of the Interdepartmental Advisory Committee on Arbitration. Under Mustill and two later chairmen (Lord Steyn and Lord Saville) the work of the Committee eventually led to the drafting and enactment of the Arbitration Act 1996. The preparatory steps, which took place under Mustill's chairmanship, were to participate in the drafting of the UNCITRAL<sup>8</sup> Model Law on Arbitration, and to make recommendations as to whether the final draft should be adopted by the UK. The 'Response to the UNCITRAL Model Law', published in 1989,<sup>9</sup> recommended that there should be a new and improved Arbitration Act which should comprise a statement in statutory form of the more important principles of the English law of arbitration expressed in language which was sufficiently clear and free from technicalities to be readily comprehensible to the layman and which should so far as possible have the same structure and language as the Model Law. After a number of false starts this recommendation led to the Arbitration Act 1996.

Following his retirement from the Bench, Mustill was much in demand as an arbitrator in international commercial and investment disputes, but the principle that arbitration is confidential makes it impossible to discuss these cases.

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Apart from his work on arbitration, Mustill made contributions as a judge to many varied fields of law. This is however true of most judges who have served long periods on the Bench. But it has already been said that Mustill's special contribution was not in deciding cases as they happened to arise for decision, but as a systematic analyst of the law, in which his skill rarely had an opportunity to be invoked in his reported decisions, which had to focus on the case in hand, but in his published books and lectures. Out of the very many exceptions to this, two cases stand out, each of which illustrates Mustill's profound analysis of the relationship between law and ethics, or to put it in a structural framework, the relationship between the Courts and Parliament in matters of social policy.

<sup>8</sup>United Nations Commission on International Trade Law.

<sup>9</sup>Advisory Committee on Arbitration Law, *A New Arbitration Act? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law on International Commercial Arbitration* (London, 1989).



The first is the *Spanner* case,<sup>10</sup> which involved a prosecution under the criminal law of offences against the person of male sado-masochists who had consensually engaged in private in a series of the most revolting acts of perverted harm against one another. Mustill's dissenting judgment quashing the convictions was portrayed by the media, as it still is, as a defence of such practices. Nothing could be further from the truth. Mustill was careful not to express any personal view about the moral dimension of the case, although the tone of his judgment makes it clear that he was disgusted by the evidence. His opinion is encapsulated in the following extract from his judgment:

... since this prosecution has been widely noticed it must be emphasised that the issue before the House is not whether the appellants' conduct is morally right, but whether it is properly charged under the Act of 1861. When proposing that the conduct is not rightly so charged I do not invite your Lordships' House to endorse it as morally acceptable. Nor do I pronounce in favour of a libertarian doctrine specifically related to sexual matters. Nor in the least do I suggest that ethical pronouncements are meaningless, that there is no difference between right and wrong, that sadism is praiseworthy, or that new opinions on sexual morality are necessarily superior to the old, or anything else of the same kind. What I do say is that these are questions of private morality; that the standards by which they fall to be judged are not those of the criminal law; and that if these standards are to be upheld the individual must enforce them upon himself according to his own moral standards, or have them enforced against him by moral pressures exerted by whatever religious or other community to whose ethical ideals he responds.<sup>11</sup>

The second case is the decision of the House of Lords in the *Bland* case.<sup>12</sup> This concerned a young man who had been seriously injured in the Hillsborough disaster, where scores of people attending a football match had died or been injured in a catastrophic crush caused by a failure of crowd control. Bland had survived, but in a 'persistent vegetative state', incapable of any normal human function. The issue was whether the doctors could let him die, or as it was put 'kill him', by withdrawing life support in the form of food and water. Killing him might amount to murder or at least to manslaughter. The House of Lords decided that the principle of the sanctity of life would not be violated by withdrawing invasive life support to which he had not consented and which was of no

<sup>10</sup> *R v Brown* [1994] 1 AC 212, named the *Spanner* case after Operation *Spanner*, the investigation which led to it.

<sup>11</sup> *Ibid.*, p. 273.

<sup>12</sup> *Airedale NHS Trust v Bland* [1993] A.C. 789.

benefit to him. Mustill delivered a judgment which is masterly in describing the role and limits of the courts in deciding questions which have not only a legal but also an ethical and moral dimension. Following this decision he was appointed a member of the House of Lords Select Committee on Medical Ethics.

His interest in the moral and ethical side of the law was reflected in his maiden speech in the House of Lords, which was on the subject of mentally disturbed offenders. He had written an article in 1992 which was founded on the trouble he had felt in sentencing such offenders. When trying criminal cases, he had been notoriously cautious about imposing sentences of imprisonment, to the point of being regarded as a soft judge. He was particularly troubled by the sentencing of mentally disturbed offenders, and by the seriously inadequate treatment available to them in the penal system. He gave much time to organising, through the Mental Health Foundation, conferences of a kind never held before at which prison governors, senior members of the judiciary, social workers, probation officers, academics and psychiatrists could pool their experience towards finding ways to improve the system.

After his retirement Mustill had the ambition to write a book analysing the principles of the criminal law, but ill health and overwork prevented him from achieving this. This was a great loss to the criminal law. Mustill considered parts of the criminal law, particularly in the field of offences against the person, to be illogical and sometimes even incoherent. He was not alone in this, and the subject would have benefited greatly from Mustill's systematic and panoptic approach to fundamental questions of principle. His experience of the criminal law, by then very wide by any standard, was not greater than a good many other judges, but his intellectual capacity to make sense of it all was unrivalled.

Mustill was an editor for many years of *Scrutton on Charterparties and Bills of Lading*,<sup>13</sup> then one of the two standard works on shipping law, and of Arnould on *Marine Insurance*,<sup>14</sup> the leading work in its field. During his time at the Bar he was one of the leading practitioners in these fields, in which his experience and knowledge were second to none. A substantial number of his reported judicial decisions are in these two fields, particularly

<sup>13</sup> A. A. Mocatta, M. J. Mustill and S. C. Boyd, *Scrutton on Charterparties and Bills of Lading*, 17th edn (London, 1964), 18th edn (London, 1974), 19th edn (London, 1984).

<sup>14</sup> M. J. Mustill and J. C. B. Gilman, *Arnould's Law of Marine Insurance and Average* 17th edn (London, 2008).

from his time as judge of the Commercial Court, and as an appellate judge.<sup>15</sup>

For at least the last forty years of his life Mustill had an ambition to write an account of what he always called the case of ‘the second Kumar’, but is usually known as ‘the Bhawal case’. This was a case which ran for years in India and eventually came before the Judicial Committee of the Privy Council in London. A short account of this astonishing history is that Ramendra Narayan Roy, the second Kumar of Bhawal, the ruler of a huge estate in Bengal, had in his youth spent most of his time hunting, in festivities and with women, having several mistresses. By 1905 he had contracted syphilis. In 1909 he went to Darjeeling to seek treatment but was reported to have died there at the age of twenty-five and to have been cremated. Around 1920–1 a religious ascetic appeared in Dhaka covered in ashes, and gradually relatives and the local people became convinced that this was the second Kumar. He said he had lost his memory and had recovered in the jungle, where a guru had taken him into his care. In legal proceedings in India two judgments found that he was indeed the second Kumar, and the Privy Council upheld their decisions.<sup>16</sup> The case was a *cause célèbre* in Bangladesh, comparable to the case of the Tichborne Claimant in what is now England many years earlier, but with much more colourful detail and with far wider repercussions for the estate.<sup>17</sup>

In the end the book never appeared in print. The saddest thing about this was the discovery after his death of a box with all his research for the book he wanted to write. In the bottom of the box were all the photographs and documents he had had copied from the House of Lords library collection. He was convinced that he had lost his copies, and he had searched far and wide to locate the originals, which by then had been destroyed: but the copies were there all the time.

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<sup>15</sup> See for example *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, a leading case on the principles of material non-disclosure in insurance law.

<sup>16</sup> *Devi v Roy* [1946] AC 508. The report summarises the facts of the case and the decisions of the Indian courts.

<sup>17</sup> The claim to the Tichborne baronetcy captivated the public for several years in the 1860s and 1870s, and resulted in the claimant being sentenced to fourteen years’ hard labour for perjury. There is the briefest account of the trial of the claim itself in *Tichborne, Bart v Sir Piers Mostyn, Bart* (1872–3) L.R. 8 C.P. 29 but no official report of the trial itself.

Michael Mustill was married in 1960 to Beryl Davies: they separated in 1979 and divorced without children in 1983. After the separation he was introduced by her brother to Caroline Phillips, whom he married in 1984. Her brother is Lord Phillips of Worth Matravers, a former pupil of Mustill and the first President of the Supreme Court. Mustill is survived by his second wife and by his two sons of that marriage, Thomas and Oliver.

STEWART BOYD

*Essex Court Chambers*

