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THE EVER-DEVELOPING COMMON LAW

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(1) Introduction

1. It is a real pleasure to give this year's Toulson Memorial Lecture and here in Surrey, where I grew up. I first met Roger in 1988 when I joined 2 Crown Office Row, now 4 New Square, as a pupil. Roger had become a QC two years earlier. We were then in chambers together for a very happy eight years, until he went on to the High Court Bench. Roger led chambers in the early 90s with vision and ambition, taking over from the wonderful John Lloyd, and together with other eminent practitioners, including his great friends Rupert Jackson and John Powell. What had been a Western Circuit general set practising in crime and common law became increasingly commercial, high-profile and successful on the wider stage. Books came flying out: Jackson and Powell on Professional Negligence; Toulson and Phipps on Confidentiality (now in its 4th edition), to name but a few. Four New Square's current position as one of the leading commercial sets in the country owes Roger a great debt. He was also a shining example of professional kindness and collegiality. I was lucky enough to receive my red bag - a gift given by a silk to their junior for excellent service - from him. And the chambers' parties that he and Lady Toulson - Lizzy - generously hosted in their beautiful house at Billhurst Farm, not very far from here, were the highlights of the Chambers year.

2. Lord Burrows noted, giving this lecture in 2024, that Roger, Lord Toulson was, perhaps above all else, '*a true master of the common law*'.[1] He keenly understood what Sir John Laws rightly described as its endless creativity.[2] Its pragmatism

[1] Lord Burrows, *Precedent and Overruling in the UK Supreme Court*, (Lord Toulson Memorial Lecture 2024), at 1, which is available at: https://supremecourt.uk/uploads/speech_burrows_240320_4b3048c778.pdf.

[2] Sir John Laws, *The Common Law Constitution*, (CUP, 2014) at 7.

leavened, yet not overborne, by principle. And its humility. Very often, this means that our law looks like a city that has, over centuries, evolved in the absence of planning laws, of conscious design. In this it differs from philosophy and science. In one significant way though, law mirrors these great subjects. It is sometimes said that reading great works of philosophy or of science, is like holding a conversation with the greatest minds of the past. The law is no different. As Lord Toulson understood it, and I cannot but agree, above all else the common law is a conversation between judges and lawyers, and an ever-ongoing conversation at that. It is that which gives it its character: its broad and ancient avenues, twisty side streets, abandoned warehouses haunted by the ghosts of the forms of action, and its new builds - as we might imagine, for example, the law of unjust enrichment to be.

3. In today's lecture I want to focus on examples of that common law conversation; more precisely, several examples of Roger's part – his continuing part – in it.

(2) Clarity and Certainty

4. My starting point is clarity and certainty in the common law. Two judgments from 2015 come to illustrate this. First, *Cavendish Square Holdings BV v Talal El Makdessi* and *Parking Eye v Beavis* (2015)[3], two joined appeals. The first, *Cavendish*, involved an agreement into which Cavendish had entered into with Makdessi, under which Cavendish would buy a controlling stake in an advertising and marketing group's holding company. The agreement contained restrictive covenants, the breach of which by Makdessi would render him ineligible to receive the two final instalments of the price paid by Cavendish for the company. The covenants were breached. The issue before the Supreme Court was whether the covenants amounted to contractual penalty clauses and were consequently unenforceable at common law. The second appeal, *ParkingEye* also concerned alleged penalty charges. The question in that case was whether a parking charge of £85 charged for overstaying a two-hour parking time limit in a car park was also

[3] *Cavendish Square Holdings BV v Talal El Makdessi* [2015] UKSC 67; [2016] AC 1172.

a penalty charge, and hence again unenforceable at common law. The Supreme Court in both cases held that they were not penalties.

5. The law concerning penalty charges exemplifies the common law's lack of conscious design. As Lord Neuberger and Lord Sumption in the lead judgment described it,

> '*The penalty rule in England is an ancient, haphazardly constructed edifice which has not weathered well, and which in the opinion of some should simply be demolished, and in the opinion of others should be reconstructed and extended. For many years, the courts have struggled to apply standard tests formulated more than a century ago for relatively simple transactions to altogether more complex situations.*'[4]

It is a prime example of judges in conversation with those from the past. As they went on to say,

> '*The application of the rule is often adventitious. The test for distinguishing penal from other principles is unclear. As early as 1801, in Astley v Weldon (1801) 2 Bos & Pul 346, 350 Lord Eldon confessed himself, not for the first time, "much embarrassed in ascertaining the principle on which [the rule was] founded". Eighty years later, in Wallis v Smith (1882) 21 Ch D 243, 256, Sir George Jessel MR, not a judge noted for confessing ignorance, observed that "The ground of that doctrine I do not know". In 1966 Diplock LJ, not a judge given to recognising defeat, declared that he could "make no attempt, where so many others have failed, to rationalise this common law rule": Robophone Facilities Ltd v Blank [1966] 1 WLR 1428, 1446. The task is no easier today. But unless the rule is to be abolished or substantially extended, its application to any but the clearest cases requires some underlying principle to be identified.*'[5]

Lord Toulson agreed with the majority on the approach to be taken in identifying the principle, and with the disposal of the *Cavendish* appeal. He specifically endorsed what he described as Lord Hodge's succinct expression of the principle

[4] *Cavendish Square Holdings BV v Talal El Makdessi* [2015] UKSC 67; [2016] AC 1172 at [3].
[5] Ibid.

when Lord Hodge stated that '*the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract.*'[6]

6. Where the *ParkingEye* appeal was concerned, Lord Toulson took a different view. He dissented and had this to say,

> '*I disagree with the other members of the court in the parking case. Since I am a lone voice of dissent and the judgments are already exceedingly long, I will state my reasons briefly.*'[7]

Which he then did. If brevity is the Shakespearean soul of wit, it is equally so where the common law is concerned. I return to this in a moment. First, I want to contrast his approach in *Cavendish* and *Parking Eye* to the one that he took in another appeal from 2015: *Bunge SA v Nidera BV* (2015).[8]

7. The appeal in *Bunge SA* concerned the effect of a default clause in a standard form contract. The respondent had entered into a contract to buy 25,000 tonnes of grain from the appellant. The grain was Russian milling wheat – in case you are interested... The standard form contract was one commonly used for goods delivered from Central or Eastern Europe.[9] After the contract was entered into, Russia imposed an export embargo on wheat. Bunge SA, the seller, subsequently notified Nidera of the embargo and stated that the contract was cancelled further to a clause covering such circumstances. Nidera alleged that there was no right to cancel the contract and further treated Bunge SA as having repudiated the contract.[10] In determining the appeal the Supreme Court had to consider aspects of the common law approach to damages. Lord Sumption gave the leading judgment, with which Lord Toulson agreed. Lords Neuberger, Mance and Clarke agreed with them both.

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[6] Ibid at [293].
[7] Ibid at [295].
[8] *Bunge SA v Nidera BV* [2015]; [2015] 3 All ER 1082.
[9] Ibid at [1].
[10] Ibid at [5].

8. At the start of his judgment, Lord Toulson noted his agreement with Lord Sumption.[11] It might be thought then that - with the other members of the Court also agreeing with Lord Sumption - there would be no need for him to deliver his own, concurring judgment. Brevity is the soul of the law, remember. Here though, Roger went on to deliver a detailed judgment of his own addressing the same issues as Lord Sumption; issues on which they agreed.

9. Why the difference in Roger's approach in *Cavendish* and *Bunge SA*? The answer to that question was set out at the start of his judgment in *Bunge SA*: there was a need for a further detailed judgment because this was an issue on which the Supreme Court was disagreeing with the Court of Appeal, the High Court and the body that had created the standard form contract. It was also an area where the common law approach to compensatory damages had been subject to some detailed discussion in the light of the earlier House of Lords' decision in *The Golden Victory* [2007] 2 AC 353.[12] In other words, a detailed discussion was needed to help provide clarity and greater certainty in the law; detail that was unnecessary where the *Cavendish* judgment was concerned.

10. More broadly, what can we take from these contrasting approaches? The answer lies in something that other great common lawyer of the last fifty years, Lord Bingham, said in *The Rule of Law*. In that book he identified key elements of the rule of law, the first of which was that the law '*must be accessible and so far as possible intelligible, clear and predictable.*'[13] It must be each of these things if individuals, businesses, government are to know the law well so that they can order their affairs, buy property, exercise their rights, give effect to the obligations, and act within the law provided by Parliament and the common law. Law that is inaccessible, obscurantist or unpredictable in its application of effect can secure none of these things. It simply cannot provide the sure foundation on which a healthy, prosperous society can develop and thrive.[14]

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[11] Ibid at [37].

[12] Ibid at [37].

[13] Lord Bingham, *The Rule of Law*, (Penguin, 2011) at 37.

[14] On which also see Lord Reed in R *(UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869 at [68]-[73].

11. Where the courts are concerned, it is an imperative that they play their proper role in ensuring that the law, (and particularly the common law as it creates, develops and refines substantive rights and obligations,) is itself accessible, intelligible, clear and predictable. If it is, the courts can best give effect to what I have described previously as civil justice's three purposes: the prevention of disputes arising through providing clear guidance on the law and its application through judgments; the promotion of consensual settlement, through enabling parties to disputes and their lawyers to more effectively assess the strengths and weaknesses of their respective claims and defences; and, correct adjudication through the Court of Appeal and Supreme Court providing guidance on the proper interpretation and application of the law to themselves and lower courts.[15]

12. By avoiding the needless accretion of unnecessary words in *Cavendish*, Lord Toulson showed us how to pursue brevity in the proper pursuit of clarity and simplicity. By explaining the law in *Bunge SA* he, with Lord Sumption, provided the necessary clarity and guidance that the common law had previously lacked where the specific issue before the court was concerned. In both cases, albeit by taking different approaches, Roger helped provide a clearer roadmap through the city of the common law.

(3) Principled Creativity

13. All good things come in threes. The common law should not just exhibit clarity and certainty, it should also demonstrate principled creativity. The reason for this was summarised aptly in a speech delivered by Lord Toulson in 2015. In considering fundamental rights and the common law he observed that

> '*the common law has never been a finished article, and it cannot be while society itself continues to change. It can be untidy, but that is a reflection of the complexity of life. Benjamin Cardozo wrote that the tide ebbs and flows and the sands of error crumble. The tide can also cause sandbanks. But the common*

[15] Lady Carr CJ, Speech to Civil Justice Council National Forum 2023, at 3-4, which is available at: https://www.judiciary.uk/wp-content/uploads/2023/11/20231120-CJC-National-Forum-LCJ-Speech-as-delivered.pdf.

law has served us well in its capacity to develop fundamental principles. It retains that capacity. It is no time for a funeral oration.'[16]

In this, he was perhaps echoing his conclusion in *Kennedy v Charity Commission* (2014) - that the introduction of the Human Rights Act 1998 was not intended to turn common law into an ossuary.[17] Given the early case law on the 1998 Act, (which went out of its way to stress the point that, notwithstanding the Act, the starting point for rights-based questions remained the common law), that ought to have been clear.[18] That starting point, as the common law can and does, may itself continue to develop.

14. Fundamental rights are not the only area where Lord Toulson properly considered the common law to retain its capacity to engage in principled development. He did not suggest that it might engage in the particularly bold creativity of Lord Denning MR in the latter stages of his remarkable judicial career - when he fashioned what were then known as Mareva injunctions and Anton Pillar orders from the cloth of Victorian authority.[19] Rather, Lord Toulson took a typically more nuanced approach, and one that fits perhaps more closely with the incrementalism of the common law. As he made clear in *Michael v Chief Constable of South Wales Police* (2015),[20] when discussing the development of the law of negligence – an aspect of our law that is almost entirely judge-made – the common law's creativity should be of the considered kind. He put it this way:

'*The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation*

[16] Lord Toulson, *Fundamental Rights and the Common Law*, (2015) at 14, which is available at: https://supremecourt.uk/uploads/speech_151010_90c91c0cc7.pdf.

[17] Kennedy v Charity Commission [2014] UKSC 20; [2015] AC 455 at [133].

[18] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [2], [23] and [30]. For a more recent, post-Toulson example see, for instance, *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2025] UKSC 15; [2025] 2 WLR 815.

[19] *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509; *Anton Piller KG v Manufacturing Processes* [1976] Ch 55.

[20] *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2; [2015] 1 AC 1732.

is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account.'[21]

He would go on to reject the introduction of a new principle concerning liability at common law. The established common law method did not justify it. Principle applied in a principled way precluded the law's development on that occasion.[22]

15. Given this, it is interesting to consider what approach he may have taken to the issue raised in *R (Prudential plc) v Special Commissioner of Income Tax*, which the Supreme Court decided in 2013.[23] In that case the issue was whether legal professional privilege should be extended to apply to accountants who give legal advice. It is currently, and has historically been, limited in its application to privileged communications between lawyers and their clients and, where litigation privilege is concerned, between lawyers and certain third parties. The privilege, a human right, arises at common law.[24] The appellants argued that, as a common law creation, the court could extend the privilege to apply to non-lawyers.[25] Lord Neuberger, in his judgment, rejected the appellants' arguments. While they had logic on their side, the law – the common law – was not necessarily logical. On the contrary, it was based on experience. It was, in other words, pragmatic and practical. Lord Sumption, dissenting, took a different view. In his judgment, not only was there no principled reason not to extend the privilege to non-lawyers, that it was confined to lawyers was no more than an accident of history and an irrational one at that.[26] Principle should, it might be said, trump pragmaticism born of experience.

16. The decision was ultimately decided 5-2; Lord Clarke was the other dissenting voice. He took the view, with which I think Lord Toulson might well have agreed, that, as a creature of the common law, 'it should be capable of redefinition to cater for changed conditions' and, where principle calls for a change, then that should

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[21] Ibid at [121].

[22] Ibid at [117]-[137].

[23] *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1; [2013] 2 AC 185.

[24] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563 [7]-[9].

[25] *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1; [2013] 2 AC 185 at [25] and following.

[26] Ibid at [115] and following.

follow. He would go on to say, again in a way that I think that Lord Toulson would have agreed with, that if Parliament concluded that for policy reasons, perhaps pragmatic or experienced-based ones, limits had to be placed on the privilege, then it could do so.[27] In other words, principled development could and should occur, and if the court were to go astray in doing so, then the ultimate safety valve lies in the hands of Parliament.

17. Lord Toulson was appointed to the Supreme Court in April 2013, some three months after judgment was given in *Prudential*. We can never know what difference his approach to the common law might have made; what he might have added to the conversation. He may have thought the appellants' approach too radical a step, inconsistent with the common law's incrementalism. On the other hand, he may have agreed with Lords Sumption and Clarke that the common law in this area should develop on a principled basis. Whichever approach he might have taken, the one thing I think we can be sure of is that he would have brought his acute sense that the common law can and should continue to develop to reflects the needs of modern life.

(4) Learning from others with curiosity and a sense of humility

18. Finally, I want to turn to curiosity and humility. The common law has always looked beyond the white cliffs of Dover for inspiration. Lord Mansfield, another of the great common law judges, is well-known for drawing on civilian law scholarship as he developed contract law, commercial law, and the law of insurance. He was well known for consulting Pufendorf, Grotius and Huber.[28] Equally and more recently, the importance of entering into a conversation with judges from other jurisdictions has been stressed by other renowned common lawyers. Lord Denning MR was known to draw the attention of counsel to what he called their duty to alert the court to relevant Commonwealth jurisprudence. Lord Bingham also was a keen

[27] Ibid at [147]-[148].
[28] N. Poser, *Lord Mansfield: Justice in the Age of Reason*, (McGill, 2014) at 228.

proponent of comparative European jurisprudence being cited to the House of Lords, better to inform its consideration of developments in English law.[29]

19. Lord Toulson was an equally strong advocate of the need for jurisprudential curiosity. This received its strongest expression in *R (Guardian News & Media Ltd) v City of Westminster Magistrates Court* (2012),[30] when he was in the Court of Appeal. The central issue in the case turned on the common law constitutional principle of open justice. He opened his judgment with as fine a statement of the principle and its importance as you will find; one that along the way incorporated an allusion to ancient Rome, by way of Juvenal's satires, and – closer to home – Jeremy Bentham. He said this,

> '*Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in Scott v Scott [1913] AC 417, 477:*
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> *"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."*'[31]

20. As Lord Toulson went on to note, this principle, established since the time of the Stuart Kings, had travelled widely across the common law world. He particularly drew upon jurisprudence from Canada and New Zealand in considering how to approach the application of the principle.[32] In doing so he had a gentle

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[29] See, for instance, *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 61; [2004] 2 AC 1 at [6].

[30] *R (Guardian News & Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420; [2013] QB 618.

[31] Ibid at [1]. See Juvenal, *Satire VI*, lines 347–348.

[32] *R (Guardian News & Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420; [2013] QB 618 at [54]-[67]

admonishment for the legal profession; one which echoed Lord Denning MR's approach. He said this,

> '*I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. Collectively they are strong persuasive authority. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. The development of the common law did not come to an end on the passing of the Human Rights Act. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere.*'[33]

21. Lord Denning MR may well have said that European law, following the UK's accession to the European Economic Community in 1972, was like an incoming tide,[34] but for Lord Toulson such developments, whether EU or ECHR related, were an excuse for becoming incurious about developments in the wider common law world. If the common law is to maintain its historic creativity, it should retain its historic curiosity. It should remain receptive to conversations with judges from across the world. The imbalance that he identified was one that risked the common law failing to develop and adapt as it most beneficially could.

22. This curiosity was not simply something that applied to jurisprudence from other countries. It also applied more widely. It should surprise no one that as a former Chair of the Law Commission, Lord Toulson took the view that it was not just Parliament that could learn from the Commission's work: the common law could do so also. In both *Les Laboratoires Servier v Apotex Ltd* (2014)[35] and *Jetivia SA v Bilta* (UK) Ltd (2015)[36] in the Supreme Court he averted to the fact that, in an appropriate future case, it may be necessary for the court to reconsider the approach to illegality and property transactions in the light of not only

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[33] Ibid at [88].

[34] *H. P. Bulmer Ltd and Another v J. Bollinger S.A.* [1974] Ch 401 at 419; *Shields v E Coomes (Holdings) Ltd* [1978] 1 WLR 1408 at 1416.

[35] *Les Laboratoires Servier v Apotex Ltd* [2014] UKSC 55; [2015] 1 AC 430 at [64].

[36] *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; [2016] AC 1 at [174].

commonwealth jurisprudence, not only in the light of academic commentary, but also in the light of work conducted by the Law Commission. In those cases, that issue was not directly before the court. No doubt following the approach outlined by Mummery LJ in *Housden v The Conservators of Wimbledon and Putney Commons* (2008), where he emphasised how the courts should avoid the '*unwise*' option of '*cluttering up the law reports with obiter dicta*'[37] by dealing with points that do not need to be decided, he declined to consider the issue in those two appeals.

23. But in *Patel v Mirza* (2016),[38] he would grasp the nettle. In doing so, he was entering into a conversation that Lord Mansfield had started in 1775, and in which many judges and academics had had their say over the centuries, both here and across the world.[39] And, so of course had the Law Commission. Against that background, Lord Toulson noted how the High Court of Australia had concluded that, in some cases, law reform waits for no one. The issue could not await legislation[40]. And so Lord Toulson shifted the common law approach to what could be described as a more policy-based approach to illegality. He did so, however, wise to the point that I stressed earlier, that the common law's creativity is one that is exercised circumspectly; an approach that is all the more important when the Supreme Court was in the process of over-ruling and correcting a previous House of Lords decision.[41]

24. Underpinning this we can see another feature of the common law, one which explains why it can be said to resemble a city that has developed over time: its humility. The Supreme Court in *Patel* is one instance where the courts were called upon to correct a past misstep. The same approach can also be seen in the criminal arena. In *R v Jogee* (2018)[42] the Supreme Court had to consider whether the common law had taken a wrong turn when it developed the common law doctrine of secondary or accessorial liability for the carrying out of a criminal offence. In

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[37] *Housden v The Conservators of Wimbledon & Putney Commons* [2008] EWCA Civ 200; [2008] 1 WLR 1172 at [31].

[38] *Patel v Mirza* [2016] UKSC 42; [2017] AC 467.

[39] Ibid at [1].

[40] Ibid at [114] citing *Clayton v The Queen* (2006) 231 ALR 500 at [119].

[41] Ibid at [114].

[42] *R v Jogee* [2016] UKSC 8; [2016] 1 Cr App R 31.

2013, and again in the light of work carried out by the Law Commission, Lord Toulson had suggested that statutory reform may be called for in this area.[43]

25. Again, we see in *Jogee* the need to step in where Parliament has not done so, in order to correct the common law. As Lord Toulson put it, where the common law has been '*unduly widened by the courts, it is proper for the courts to correct the error*'.[44] Again, we see a degree of intellectual honesty for which all judges and lawyers should strive, married to a keen sense that the common law should be humble enough to acknowledge its mistakes and take steps to correct them. No judge is infallible. Not even those who have the final word. (And in fact no judge in our common law system has the final word: even final appeals can be reopened in exceptional circumstances and the Supreme Court can overrule its past decisions when necessary.) Of course, this may mean that the common law does not always develop long, straight avenues through the city of our law. It may create cul-de-sacs and may have to double back on itself occasionally. But we are better for that.

(5) Conclusion

26. In the approach that he took to the common law, which I have outlined tonight, I wonder if there is something to be learned from Lord Toulson's career. He had, of course, a brilliant mind, one honed with a classical education. At the Bar he did not start by specialising in any specific area, as is much more of the norm today. On the contrary, given the nature of practice in the early days at 2 Crown Office Row, he gained a wide range of experience across the breadth of the law. A general common law and criminal practice teaches many skills, but perhaps most of all perhaps it helped hone is deep-seated understanding and appreciation of the common law. That common law, common sense perspective is perhaps best expressed in his dissent in *PJS v News Group Newspapers Ltd* (2016),[45] where he

[43] Sir Roger Toulson, *Sir Michael Foster, Professor Williams and complicity in murder*, in D. Baker & J. Horder, *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams*, (CUP, 2013) at 246.

[44] *R v Jogee* [2016] UKSC 8; [2016] 1 Cr App R 31 at [85].

[45] *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] 1 AC 1081.

declined to join the majority and uphold an interim injunction on the basis that to do so was fruitless.

27. The case centred on the grant of anonymised injunctive relief that prohibited the publication of information about the private life a celebrity. Information was, however, already circulating widely and publicly. The injunction might then be said to have been an attempt to hold back a horse that was long bolted. In Roger's view, the sensible approach on the appeal was pragmatic and entirely grounded in practical common sense. As he put it, '*The court must live in the world as it is and not as it would like it to be.*'[46] If the common law is anything, it is practical and pragmatic.

28. Where does this leave us? In his recent and magisterial examination of the origins and development of public and administrative law from the 1550s, Paul Craig shows us how there was life before *Wednesbury*;[47] how even the introduction and development of proportionality – a principle otherwise intrinsically linked with European Union law – can be traced back to one of the greatest common law judges: Lord Coke CJ.[48]

29. I can quite well imagine Roger would have smiled knowingly at this, and reminded us of something that he said in a lecture on international influences on the common law in 2014. He said this,

> '*The common law is our habitat. It is like the water in which we swim. We are not always as conscious as we should be of what it is to be found in it. It has served us very well and continues to do so. Its methodology enables it to be shaped and developed to meet the needs of justice in a changing world, politically, economically, technologically or socially. In adapting it, the court's horizons should never be narrow.*'[49]

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[46] Ibid at [86].

[47] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[48] P. Craig, *English Administrative Law from 1550: Continuity and Change*, (OUP, 2024) at 423 and following.

[49] Lord Toulson, *International Influence on the Common Law*, (2014) at [42], which is available at: https://supremecourt.uk/uploads/speech_141111_07f1343acf.pdf.

Paul Craig's recent work illustrates this perfectly. Through analysis such as his, which draws attention to underappreciated aspects of our legal history, we can become more conscious of lost conversations and reinvigorate our common law conversation, learning anew from those great judges and lawyers of the past, discovering insights from them so that we can continue to shape and develop the common law in their light. Not limited but inspired by them, so that – like Roger – we ensure that, in the service of justice, the court's horizons are never narrow.

30. Thank you.[50]

[50] And with grateful thanks to Dr John Sorabji for his assistance in the preparation of this lecture.