THE WIT, WISDOM AND JURISPRUDENCE

OF

SIR ROGER ORMROD.

Address given by
Edward Cazalet, Q.C.
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When Tom asked me to give this address, I thought that I should try to speak on a subject of which I had, at least, some direct experience. As there are some who, on seeing me, have a vague notion of horses and divorces, I thought that I might try to say something about the connecting links that I have found to exist between these two rather diverse fields of the law. I recalled a Discretion Statement which Robert Johnson was asked to settle on the basis of the following instructions. The client, a titled Lady, had kept her horse at livery during the hunting season in the same yard as that in which a Mr. Blenkinsop had also kept his hunter. And, to use those immortal words formerly so beloved of the drafter of the discretion statement, the friendship between the Lady and Mr. Blenkinsop ripened. And thus it was that on a number of occasions after hunting, the lady client had to concede that adultery had occurred between her and Mr. Blenkinsop in the back of the horse box. Instructing Solicitors then added - as part of their instructions -, "We are however assured by our client that no adultery has been committed outside the hunting season".

In those days adultery of any kind by one's female client raised considerable problems and in fact Robert had in mind that he should be led by Roger Ormrod, who was then our mutual Head of Chambers. It was then that lightning struck and I realised that in that I had had the privilege of being in Chambers with Roger for a period, and, following his appointment to the Bench, had appeared in front of him fairly regularly, a review of his immense contribution to Family Law was a topic eminently worthy of this Association. Indeed I think that I am right in saying that more of his judgments have been reported in the Family Division than those of any other Judge.

First and foremost it can be said that when in the 1960s social and moral values were changing more rapidly than has ever probably previously occurred, he was the one Judge who moved with the time more than any other. Looking at his many judgments, the pragmatic way in which he approached his cases was apparent and he brought a fresh and independent mind to developing the law, and more importantly to anticipating and to foreseeing changes which were needed, and which indeed were to come. For example, the concept of the "innocent wife" and the "unimpeachable parent" were removed from the fabric of the Law. Old shibboleths and deadwood were cut away and, as was to become apparent, most aspects of Family Law were to be subjected to Roger's reforming zeal.

In making a sweeping statement such as this, I should perhaps make clear at the outset that Roger properly made changes within the framework of the Law rather than simply adopting the approach which he took in one case (Sharpe v. Sharpe (1981) The Times, 17 Feb. 81 CA) - when perhaps he was looking out to sea rather enviously at that other Judge sitting under a palm tree - in which he stated: -

"When construing Section 25 of the Act, it is never of any assistance to have previous decisions cited. Each case invariably turns on its own facts".

This dictum seems to me to touch directly on the judicial discretion. Roger has spoken of the attraction to Judges of the fantasy of themselves as detached observers, reaching inevitably right conclusions by processing impeccable logic in perfect conformity with decisions of others. Realities are somewhat different: the judicial discretion is available so much more frequently in the Family Division than in any other, and so its Judges are conferred with considerable latitude in the decision making process. Indeed some Judges experienced in other branches of the Law still show - and occasionally express until they get used to it - considerable unease at the discretionary decisions which they are required to make in Family Law.

Roger himself has written of the unresolved paradox that arises in a period of change. On the one hand the Law is regarded as the rock on which we can all rely, on the other, social values call for change. And it is the Judges who are continually exposed to this conflict, with each eventually finding his own balance between the pole of stability and the pole of flexibility.

The late 1950s and the 1960s saw a period of striking liberalisation of the law in many different directions. It was an era when Parliament abolished the death penalty for murder, introduced the defence of diminished responsibility, legalised some homosexual activity and relaxed the law about abortion. Also the advance of psychology with the better understanding of the human mind deprived so many in virtually all walks of life of that confidence in making harsh moral judgements which seemed to come so easily to our predecessors.

This general liberalising approach naturally had an immediate impact on the former attitudes held about Divorce Law and its various offshots. I feel that the sense of impatience which Roger usually showed when a "moralistic" submission was made to him, demonstrated his acute awareness of the changing views of Society coupled with the need for a more practical approach. Re-reading some of Roger's judgements, one gets the impression that in the 1960s he felt that many of those administering the law at that time were out of touch with the reality of human life. As a Puisne Judge from 1961 to 1974 his interpretation of the law foreshadowed many of the changes subsequently enshrined in statute. After his appointment to the Court of Appeal in 1974 he was responsible, practically single handedly at times, for effecting the fundamental reforms which were set out in the Matrimonial Causes Act 1970.

As a qualified Doctor (he had originally intended to go into medical practise) he had a considerable understanding of Psychiatry and had always been interested in the workings of the human mind as well as the behaviour of the human being. Consequently it is not surprising that someone of Roger's experience and qualifications, as well as being one who had specialised in family work at the Bar, was better suited to meeting the changing attitudes of Society in which a much more tolerant approach was being taken towards adultery, unmarried cohabiting couples, abortion and the divorced person - even that last bastion, the Royal Enclosure at Ascot, was at this time about to be conquered.

CONDUCT.

No facets of Family Law were riper for change in the 1960s than the importance of actually obtaining the divorce degree as well as the significance of conduct. In the past the importance of conduct was exemplified by the bitter contest which would take place in order to obtain the divorce decree since this of itself would have a vital impact on the award of maintenance and the granting of custody. Looking back it seems remarkable how we all endured defended divorce suits which regularly lasted a week or more. Of these long drawn out struggles Roger has recently written:-

"They provided stories of hundreds of married lives in which the idiosyncrasies, sexual and otherwise, of apparently normal members of society were described and, moreover, tested by cross-examination, revealing all sorts of aspects of the personalities involved - demonstrations, in effect, of dynamic psychology in almost a laboratory setting".

Further, it is worth remembering that it was not until 1923 that a woman was able to obtain a decree of divorce from her husband on the grounds simply of his adultery, whereas since 1857, it had always been open to a man to obtain a decree on the grounds of adultery against his wife. This no doubt was because the Laws had been passed by men and it was not until the 1920s that universal suffrage came in. As a matter of history it is interesting to note that the change in 1923 to permitting wives to petition for adultery alone arose from the greatly increased opportunities for adultery by both sexes available during the 1914-18 War. This brought marital breakdown closer to people in all walks of life. However, the major drive for change started with the writings of A.P. Herbert lampooning the divorce law as it then stood, followed by his Private Members Bill in 1937. From his different seat in the 1960s and 1970s it was Roger who kept things moving onwards.

I remember when I started as Sir Robin Dunn's pupil in the early 1960s hearing him discuss a particular case with Mr. Derek Clogg of Theodore Goddard. The question was whether a woman whose wealthy husband had behaved utterly despicably, had forfeited her right to any maintenance at all by committing adultery on two occasions late in the marriage. Because of this adultery the conference was concerned with whether the Court would award the wife even a compassionate allowance. Although the Court of Appeal had by this time decried the notion of a compassionate allowance, in practical terms this proved to be little more than a display of lip service towards its abolition. Indeed, even as late as 1969, a County Court Judge awarded a Wife, who had committed adultery, one shilling a year maintenance, and this despite a lengthy marriage, and the Wife's allegations of cruelty, upon which the Judge heard no evidence. These were the days when collusion (an agreement between parties as to a divorce) connivance and condonation were absolute bars to the obtaining of the divorce decree and hung like the Sword of Damocles over the parties. It was not until 1963 that a Wife could claim a lump sum award and not until 1970 that she could obtain a transfer of property order. So, in 1961, when Roger was appointed to the Bench, a Wife was essentially in the position of a supplicant for support and could only get what was, in effect, a cash allowance. Although today we talk freely about family assets and their redistribution between the parties it was Roger who led the way in breaching the sanctity of capital and property rights which had always in the past been so jealously protected by the Courts.

In Wachtel v. Wachtel (1973) Fam. 72, Roger recognised the difficulty which Registrars and Judges have had in evolving a satisfactory way of evaluating conduct and relating it to financial issues. Roger was not prepared to adopt the "all or nothing" approach, that is making a finding whereby one party was innocent and the other guilty. He considered this was far too simplistic an approach and was one which could not begin to probe the realities of the complex relationship that arises in almost every marriage. In recognising the ineptitude of the legal process for discerning the finer points of matrimonial conduct, he stated in Wachtel v. Wachtel at page 79F:-

"The fact is that the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex interactions which go on all the time in a family. Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality. There are, of course, cases, in which the contribution of one party seems to be either very marginal or quite clear, yet a more subtle approach will reveal how much the other has in fact contributed to the ultimate result.... In my experience, however, conduct in these cases usually proves to be a marginal issue which exerts little effect on the ultimate result unless it is both obvious and gross".

Roger subsequently conceded (out of Court, of course), that he had not at that time intended that his reference to "obvious and gross" should be elevated to the status of a precedent. Indeed he has called himself its "unwitting progenitor". However Lord Denning in the Court of Appeal duly paid him the compliment and, after simply changing the sequence of the two adjectives, "gross and obvious" became the litmus paper test for relevant conduct.

In his assessment of conduct in Wachtel, Roger's approach as the pragmatist and the diviner of human nature, was at its most apparent. Indeed in one case, it nearly went too far. Roger is alleged to have formed a view about a particular lady because of her large hat and florid appearance. Happily, however, matters were put to rights when he was told the lady concerned was not the wife but was the Solicitor's Managing Clerk. On the issue of conduct, Roger did not see adultery as necessarily the wrong in itself, but rather as the symptom of a much more complex state of affairs for which either party or more probably both, were responsible. It was Roger who liked to repeat Mr. Justice Vaisey's favourite dictum, "It takes three to commit adultery". He felt that the real cause of adultery was to be found in the personalities of the spouses and their behaviour towards each other over the years of the marriage. He frequently said that moral judgments in respect of a marriage were of no assistance. Why should a good and faithful wife be treated in the same way as a nagging, promiscuous bitch? His answer was essentially pragmatic and it was this. In the great majority of cases the mother must bring up the children. The fathers have their careers to pursue (he hated the type of father who gave up his job to look after the children). On that hypothesis the mother must have the house to make a home for the children and sufficient money to support them.

This was a bold and innovating approach to adopt in the early 1970s although it may now be that the pendulum is now swinging back to some extent.

Indeed no better example of this approach can be found in the way in which he dealt with the application to him to rescind *ab initio* a Maintenance Order made in favour of the wife. The wife has custody of the two children of the family and in a contested divorce suit (not heard by Roger), had succeeded in obtaining the dismissal of allegations that she had committed adultery with the Co-Respondent. The proceedings had ended with the Co-Respondent being dismissed from the suit with costs and a Maintenance Order being made in favour of the Wife. Three months after the hearing the Wife gave birth to a child whom it was accepted on all sides, could not have been the child of the Husband. The Husband then duly applied to have the Maintenance Order rescinded and the Wife was obliged to concede that she had in fact committed adultery with the Co-Respondent and had perjured herself in the proceedings. It was the Husband's application and his Councel, with some confidence, submitted that the Maintenance Order should be rescinded, or at least reduced considerably.

He concluded his submissions with a forceful peroration as to how this particular Wife
(1) had lied to the Court from the witness box about her adultery,
(2) had failed to ask for the Court's discretion and
(3) had lied in some three affidavits in financial proceedings before the Registrar.
As Counsel paused to draw breath to conclude his final summation, Roger, quite simply and with obvious irritation, interrupted from the Bench saying,

"So what, Mr. So and So. Even an adulteress has to eat, doesn't she?"

Counsel for the offending Wife was not called upon and the application was dismissed with costs.

Roger felt keenly that a Wife should look to her Husband rather than to the State to support the Family and it is worthy of note that in the course of a Lawson Lecture given in March 1983 Roger made the point that

"The Husband's conduct is never relied upon to increase the Wife's provision!"

The importance of Wachtel was also in his recognition of the new ground broken by the Matrimonial Proceedings and Property Act of 1970. For sheer understanding and feel of the new law and of Society's changed view of marriage as an institution, this judgment is a model. It was a bold decision on Roger's behalf because there had already been strong indications from the Court of Appeal that the new Act simply codified the earlier law (see Phillimore L.J. in Ackerman v. Ackerman (1972) 2 AER 420 at 424). Yet in Wachtel, Roger's thinking and judgment were refreshing departures from the shackles of previous law.

He rejected any sort of analogy with contributory negligence with its attempt to assess, possibly in percentage terms, the shared responsibility for breakdown. He regarded any such attempt as futile and illogical and the Court of Appeal gave him full support, especially Lord Denning. The Obvious and Gross test, although now it has shifted to one of conduct which it would be inequitable for the Court to disregard, seems to me, and I know to many of us, to be as good a test as can be devised. And indeed in Kyte v. Kyte (1987) 3 WLR 1114, Lord Justice Purchas recently expressed the view that there was much similarity between Gross and Obvious conduct with the new statutory test which has emerged in the 1984 Act.

Before leaving Wachtel, perhaps I could digress for a moment. Our late lamented and beloved Chairman of this Association, Joe Jackson, had a most disarming way of demeaning, on occasions, an authority which his opponent had cited. Joe would say to the Tribunal - for example to the Registrar -, "It may interest you to know, Sir, that there was a curious and final twist to the Order that was made in that case". Joe would then recount how, because he had been in the case and had become aware of the consequences of the Order, things hadn't worked out satisfactorily. The result of this was that one's authority was suitably

downgraded, sometimes to damaging effect. I can adopt the same approach in regard to Wachtel. I appeared in that case and there were events subsequent to the Court of Appeal judgment which caused the original orders made both for custody and finance to be reviewed. The result of this meant that there were yet further lengthy proceedings in this great case.
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In financial and property matters Roger's influence has been keenly felt. In O'D v. O'D (1976) Fam. 83, Roger at page 90E, beautifully summarised in two sentences how a Court should deal with the complexity of accounts and liquid assets. He stated:-

"The Court must penetrate through the balance sheets and profit and loss accounts to the underlying realities, bearing in mind the prudent financial management and skilled presentation of accounts are unlikely to overstate the Husband's real resources and, on the other side that there may be a great difference between wealth on paper and true wealth. Valuations may overstate or understate the results of realisation of assets, many of which may not be realisable within the immediate or foreseeable future".

In P. v. P. (1978) 1 WLR483, Roger made clear that the distinction between paper assets and liquid assets could be fundamental when he held that £100.000 in cash was to be regarded as something quite different to a farmer's small-holding in Devon worth £100.000. In his judgment, Roger indicated that, in his view, the submission of Mr. Anthony Ewbank, Q.C., as then he was (who had formerly been Roger's Pupil), was somewhat simplistic in seeking to equate the two.

Roger was the driving force in bringing about the disappearance of the Mesher v. Mesher (1980) 1 AER 126 type of order, when he spoke with force about "The chickens coming home to roost", as by the time he was in Court of Appeal, the orders were beginning to bite. This stemmed from highly unsatisfactory earlier orders of this type whereby former Wives found themselves having to submit to a sale of the homes in which they might have lived throughout their married lives simply because the children had departed.

THE BLOOD TEST CASE.

Another field in which Roger moved ahead of the times, concerned the desirability of a blood test being taken on a child whose paternity was unclear. This type of case was one which married his two professional qualifications. As I have said he was a qualified doctor and indeed he had served with the Royal Army Medical Corps for three years during the last War, obtaining the rank of Major.

In Re. L. (1968) 1 AER 20, the Court of Appeal upheld a decision of Roger's that, blood tests having been taken of the three adults involved (that is, Mother, Husband and Co-Respondent), the same should apply to the child, who was then four years of age. The Official Solicitor appeared for the child and opposed the taking of a blood test on the child.

The whole issue of paternity was now to be reconsidered. For more than two centuries the inherent difficulty of deciding such cases on the evidence of the parties, coupled with the social stigma that had always been attached to bastardy, had led to a number of consequences which could well be considered absurd today. These included (as Roger in a Radcliffe Lecture given at Oxford in December 1986, pointed out):
(a) the presumption of Legitimacy - whereby a child born to a married woman was presumed to be her husband's child unless it could be proved beyond doubt that he could not have been near her at the relevant time,
(b) the reinforcement of the presumption in that the husband for many years was not permitted to give evidence himself but had to prove his absence by the evidence of other witnesses, and
(c) "The relevant time" (the gestation period) had to be fairly elastic to ensure against bastardising the child unjustly.

No better example can be found of the remarkable consequences which these principles could produce than in the Gardner Peerage case (1824) Le Marchant's Report 169. So hard had it become to rebut the presumption, that it seemed that it was only the Sailor who, before the days of air travel, might be able to do so. Yet, in this case, the presumption was applied even to a Sailor where the child was born some 11 months after he had bid fond farewells to his wife at Portsmouth as he set out to deter the ambitions of Bonaparte in the West Indies. However the gale of change came when Roger was confronted with the presumption and, as a qualified Doctor, saw how clearly the legal presumption of legitimacy had outlived its useful purpose.

In Re. L., Roger considered that the presumption must now give way to the advance of medical science coupled with the changing attitude of society towards the illegitimate child. So clearly and succinctly did he set out these particular changes, that I would like to read the two relevant paragraphs from his judgment (see page138F):-

"The question which I have to consider is whether this presumption now requires me, in exercising my discretion, to refuse to order this child to be blood-grouped so as to preserve to her the benefit of it. In the days when it was first formulated and during the succeeding centuries, the legal incidents of bastardy were extremely serious. The bastard was literally a *filius nullius* in the eyes of the law. Moreover, until the development of serologigal techniques during the last 20 years or so, proof or disproof of paternity was exceptionally hazardous unless there was very clear independent evidence of non-access by the husband. The presumption was thus the only reasonable solution to the dilemma and it was jealously guarded by the court in the interest of the child. Today, the attitude towards illegitimacy and the legal incidents of being born a bastard have changed to a remarkable degree. The courts are no longer preoccupied with property rights but are increasingly required to make adjudications which vitally affect the intimate personal and private lives of the litigants who appear before them. In most of these cases today property rights are, at most, ancillary to the important personal issues. When these social changes are accompanied by scientific developments which provide an invaluable evidential tool to help in the solution of problems such as the present, to decline to use the tool in deference to tradition is to run the risk of imposing a restriction on the ability of the court to do justice, which it is difficult to justify".

Blood tests were therefore ordered to be taken from the child. This decision of Roger's was upheld in the Court of Appeal and heralded the statutory change in the law brought in the following year by the Family Law Reform Act, 1969, which gave the Court authority to direct that blood tests could be taken. It also entitled the Court to draw adverse inferences against an adult who refused in the appropriate circumstances to participate in the testing procedure.

All this had had the effect of causing the long drawn out paternity suits of the past almost to disappear completely. No better demonstration of the desirability of this is to be found than in the story which Roger tells so well. It concerns a case in which a very senior Judge of today appeared as Counsel when he was just starting at the Bar. He was a bright young man and one of the first cases which he was given was an Affiliation Suit on behalf of the Putative Father. He looked up the Law with great thoroughness and was fully satisfied that there was no corroboration. For this reason he confidently expected the Putative Father to be dismissed from the suit. In the course of evidence, as Counsel had expected, no corroboration emerged. The Bench retired but, on return, found, to the consternation of Counsel, that the case was proved.

In the course of travelling back to chambers, counsel, by chance, found himself sitting in a Railway Carriage opposite the Chairman of the Bench. Counsel plucked up his courage and said to the Chairman that he realised that it was probably very impertinent of him to ask this question but he would be most interested to know what corroboration the Bench had found. The answer came back that the Bench had had the advantage over Counsel of seeing the baby and the baby was the spitting image of the Defendant, who had been sitting in front of the Counsel. "That", Counsel replied, "was my Instructing Solicitor".

Roger's desire to anticipate reforming statutes was well demonstrated when he found himself in the following situation. As you may know, it was on the 1st January 1971 that the Law Reform (Miscellaneous Provisions) Act 1970 came into force. One of the provisions of this Act was to abolish the right of a Husband to claim damages against a Co-Respondant. Ten days before this right was abolished, Nicholas Wilson in my Chambrs, appeared before Roger on behalf of a Husband making a claim for damages against a Co-Respodent. Nicholas had a very strong case indeed for mulcting the Co-Respondent in damages. However, as such a right was about to be abolished and as in any event Roger had always been strongly opposed to the law permitting such claims to be made, he found himself on the horns of what must have been for him an infuriating dilemma. Nevertheless, true to form, he solved the problem - by awarding £100 damages against the Co-Respondent, this to be paid at the rate of £10 per annum over the next 10 years.

AS A TRIBUNAL.

One of the difficulties for the Advocate in matrimonial litigation is to achieve the balance in evidence between those matters which are desperately important to the client but which have no bearing on the decision which the Judge has to make, and those matters that do have such bearing. Roger consistently looked to the future in determining these cases and this meant that a protracted disection of the events of the past which did not reflect on the future, even though such may have had some impact on the blameworthiness of the parties and have been felt by them to be of real significance, understandably caused his irritation. And indeed what should perhaps be remembered is that the field of Family Law is the only judicial field in which the Judge is mainly concerned with what is to happen in the future rather than as to what has occured in the past. The fact is that Roger probably had one of the fastest minds on the Bench and as he saw so clearly and quickly the issues in a case, any unnecessary embellishment of their background was both unnecessary and at times exasperating to him. All the cant and hypocrisy of moral jingoism, which was a hangover from concepts of "guilt" and "innocence" were for him an anathema. And I believe that his desire to get at the realities of a case as soon as possible effected a major change in the whole style of advocacy in the Family Division. Faced with prolixity, Roger's impatience would at times break out and on such occasions, one of his foibles was to pull on his gown when he became irritated.

Jumbo Rice, now His Honour Judge Rice, tells a story of an occasion when he appeared for an Appellant in the Court of Appeal with Roger sitting on the wing as one of three Judges. Apparently as Roger sat down after coming into Court, he was already seen to be pulling feverishly at his gown. As Jumbo rose to address the Court, the following exchange took place. Mr. Rice:- "In this case I appear for the Appellant - even though I see that My Lord, Lord Justice Ormrod, is already against me". To this Roger replied:- "Come, come, Mr. Rice, I am only adjusting my gown".

I recall appearing in a battle in front of Roger as to which Boarding School a child should attend. Although each parent was put forward as whiter than driven snow, it was apparent by the end of the first day that both were alcoholics, both had far too much money and that both were extremely spoilt. Roger rightly formed a dim view of both of them, which was made even dimmer by the fact that they were still unable to agree upon the appropriate Boarding School. At the start of the second day, Roger came back, undoubtedly exasperated by the two parties concerned, and said with his tongue in his cheek, that in order to resolve the schooling issue, he considered that only one question needed to be answered and that was:-
"Which school has the shorter school holidays?"

CHILDREN.

It was here that one finds so well exemplified Roger"s concern to uphold the practical importance of the welfare of the child rather than the moral issues between the parents. Time and again he said that the welfare of the minor was the first and paramount consideration and that this must be the factor which took precedence over the claims of an unimpeachable parent (if there is such a thing) and the moral justice of the case as between the parents. In S. v. S. (1977) 1 AER 656 at 660H, Roger stated as follows:-

"It is clear from J. v. C. that if the interests of the children require a decision in favour of one parent, the perfectly proper interests and wishes of the other parent, unimpeachable or impeachable, must yield to the interest of the children. The phrase 'unimpeachable parent' seems to exercise a certain fascination over Judges and Advocates from time to time. I think it is a most misleading phrase. It is hurtful to the other parent in whom it invariably creates an immediate resentment and a bitter sense of injustice, and, in my experience, it is a most potent stimulus for appeals to this court. I have never known and still do not know what it means. It cannot mean a parent who is above criticism because there is no such thing. It might mean a parent against whom no matrimonial offence has been proved. If so, it adds nothing to the record which is before the Court and in the event is now outmoded. I think in truth it is really an Advocate's phrase. ... If it is used in a case where the dispute is between one parent and the other it invariably acquires an antithetical flavour, so that one parent has to be labelled 'unimpeachable' and the other parent 'impeachable'. If not, if both are unimpeachable then the word has added nothing to the argument whatsoever".

Also in Re. K. (1977) Fam. 179 at 190B, Roger stated the following:-

"For my part, I do not think that justice between parents in these cases is ever simple. On the contrary, it is a highly complex question which can very rarely be answered satisfactorily, and then only after exhaustive investigation.

In the present case, this aspect of it was, quite rightly, not pursued in any detail because I do not think the welfare of the children required any such enquiry. So I prefer to keep an open mind as to where the justice of the case, as between the father and the mother lies".

Lord Justice Balcombe in an address he gave in 1984 to this Association, having said that he would be the first to accept that no-one has done more for the development of Family Law in the last decade than Roger, expressed the view that he did not fully agree with Roger's approach on this matter. He saw Roger as the principal proponent of the welfare approach and also of the approach that there are no absolute rights and wrongs in family cases. He accepted that, in the great majority of cases, it is really all a matter of different shades of grey. However, Lord Justice Balcombe felt that there are cases where a Judge can properly come to the conclusion that one party is wholly, or to a very large degree, responsible for the break-down of the marriage, and he believed that in those cases, the Judge has the responsibility of saying so, even in circumstances where the consideration of the welfare of the children requires him to come to the decision which works an injustice to the "innocent parent". In Lord Justice Balcombe's view, such a statement by the Judge may be the only solace for the innocent parent,who, as in the case of the father in Re. K. loses wife, his children and his home.

I cannot resist making the point that the one thing that to Roger was like a red rag to a bull was the telephone call between parent and child when the child was staying with the other parent. He regarded this as one of the most disruptive single factors in an access visit in that it would so often bring back to all concerned the various underlying tensions. Roger is the only Judge whom I have heard speak out for the virtual abolition of any such telephone communication, and speaking for myself, I think there is much to be said for this view.

In Dipper v. Dipper (1981) Fam. 31 Roger reversed an order made at first instance giving care and control of the children to one parent and custody to the other. In giving the parents joint custody, Roger, ever adopting a practical approach, said this:

"It is wrong to suggest that the parent with custody has the right to control the children's education, religion or other major matter in their lives. Neither parent has any pre-emptive right over the other, each being entitled to be consulted, and disagreements between them must be resolved by the Court".

ADOPTION.

In the case of In Re. O. (1978) Fam. 196, the facts were that a child was the subject of an Adoption Order in circumstances where at that time the natural mother still played some part in looking after the boy. The Adoptive Father a later stage sought to prevent the Mother from making further contact with the boy. The Mother then made the boy a Ward of Court and sought access. The Adoptive Father applied to strike out the Wardship Summons on the basis that it was misconceived in the context of the Adoption Order which had been made. Roger, in his judgment at page 205D, stated:-

"This case has been described as unprecedented, in my judgment correctly. Equally it should not, I think, ever be cited as a precedent for anything. It is an extraordinary situation and one which is gravely disturbing".

He then demonstrated his very real concern for the welfare of the child vis a vis his natural Mother and his dislike of legal niceties which might obscure the real issues as follows:-

"She may have ceased in law to be the mother by reason of the adoption, but in human terms her relationship with the child was entirely unaffected by the Adoption Order. .... So in my judgment on the facts of this particular case, this case should be treated as if Mr. O. was the child's natural father and the mother the child's natural mother, and they should be dealt with accordingly: and nice legal points about adoptive parents and natural parents abandoning their parental rights should be treated, since we are dealing with the welfare of a child, as irrelevant".

Roger ordered that the wardship should continue for a full investigation of access despite the Adoption Order.

Yet no Judge was quicker to uphold the importance of the Adoption Order in that it gave vital security both to the Adoptive Parents and thus onwards to the child. In Re. H. (1982) 3 FLR 386 at 388, Roger answered the question, "What do the Adoptive Parents gain by an Adoption Order over and above what they have already got on a long term fostering basis?" by stating the following:-

"To that the answer is always the same - and it is always a good one - adoption gives us total security and makes the child part of our family, and places us in parently control of the child; long term fostering leaves us exposed to changes of view of the local authority, it leaves us exposes to applications, and so on, by the natural parent. That is a perfectly sensible and reasonable approach; it is far from being only an emotive one"

This passage was given full approval of the House of Lords in the recent case of Re. C. (1988) as yet unreported but with judgment given on the 25th February 1988. In this latter case, the House of Lords imposed a condition for access to a natural brother despite the existence of the Adoption Order and despite the conventional view that adoption and access were incompatible, a view Roger had foreseen in Re. O., a decade earlier. The security of adoption as crystallised in Re. O. did not have to be abandoned merely because access was also desirable. This followed the route that Roger had blazed in the case of O., referred to above.

Roger's concern that the welfare of the child should take precedence over all other criteria, may have led him into judicial legislation. The House of Lords in Richards v. Richards (1984) AC 174, held that Roger had gone too far in the emphasis which he had placed on the welfare of the child when considering the appropriate circumstances for making an Ouster Injunction under the Domestic Violence and Matrimonial Proceedings Act 1976. In Bassett v. Bassett (1975) Fam. 76, Roger, at page 84F, stated his views as follows:-

"My conclusion is that the Court, when it is dealing with these cases, particularly where it is clear that the marriage is already broken down, should think essentially in terms of homes, especially for the children, then consider the balance of hardships..."

In Spindlow v. Spindlow (1979) Fam. 52 at page 59D, Roger went on to say:

"If this case is looked at rationally, it is essentially a housing matter, housing for the children, and it should be looked at, in my judgment, mainly in that light".

In Samson v. Samson (1982) 1 WLR 252, Roger stated at page 254G:-

"It is quite obvious in this case that the wife has no case at all for an order ousting the Husband from the matrimonial home unless she is to be responsible for looking after the children. It would be quite ridiculous to order him out if it were not for the children so the children become the centre of the problem"

The Husband was duly ordered to leave although it had clearly emerged, for once, that he was wholly devoid of blame. The children simply had to have a home. This case was fully considered in the House of Lords in Richards. It was then that the line developed by our former President, Sir John Arnold, was followed, namely that of taking the four different criteria in Section 1(3) of the Matrimonial Homes Act 1967, and giving each the same weight rather than giving preference to the welfare of the child. Lord Brandon made clear that, in the ouster-type of proceeding, the needs of any child were only one of a number of factors to be considered. It was noteworthy that Lord Scarman dissented from the majority decision in Richards and essentially supported Roger in the approach that he had adopted.

Although Roger's view as to the prime importance of the needs of children in ouster applications did not prevail, his view of the primacy of those needs in determining questions of ancillary relief came, as we all know, to be reflected in the amendments to Section 25 of the 1973 Act wrought by Parliament in 1984.

GENERAL.

Roger was a man who had an immense sense of humour. It was never more apparent than when as a Junior he was pleading in a particular case in which medical negligence was alleged. He, with his medical qualifications, was on occasions instructed on behalf of the Defendant doctor, usually supported by the Medical Defence Union. However, because Roger was apt to ask awkward questions in conference, he was not always instructed in medical cases by the Medical Defence Union.

In the Plaintiff's Statement of Claim, the allegation was made that at some stage during an operation, the patient had fallen off the operating table and in the course of this, had somehow got his head stuck into a Refuse Bin which was on the floor. The pleadings developed and eventually led on to interrogatories. The Plaintiff interrogated the Defendant in the following way:-

"Is it not a fact that at some stage in the course of the operation the plaintiff's head ended up in a Refuse Bin on the floor of the Operating Theatre?"

Roger drafted the answer to this interrogatory in the following manner:

"It is no part of the Defendant's case that the Plaintiff's head was at any stage during the operation severed from its body."

CONCLUSIONS.

I have sought to demonstrate that through the period from 1961 when Roger was appointed a High Court Judge till 1982, when he retired as a Lord Justice (and even since then when he has sat from time to time in the Court of Appeal), Roger has shown himself to have brought one of the most original and constructive minds to the Family Division at a time when it was most needed.

Looking at the cases decided since Roger retired, the authority of so many of his decisions still stands. Looking further on to the future, I maintain that Sir Roger Ormrod will continue to be seen as a Judge who has made an immense and vital contribution to the Law of England in the context of Family Law in all its different aspects.

Edward Cazalet, Q.C.