Reflections from The Rt. Honourable Sir Richard Aikens

Systematic analyst's landmark contribution to insurance law

I am proud to have had Michael Mustill as my pupil grandfather on both sides. Both my pupil masters – Jonathan Gilman and Nicholas Phillips -- had themselves been pupils of Michael. I met him when I was Jonathan's pupil in 1973 and counted him a friend from then on. Michael's contribution to the law of marine insurance took three forms: first as advocate; second as author; and third as judge. All these were important but the third contribution will probably last the longest.

Contribution as advocate

Michael had been pupil to Michael Kerr in 3 Essex Court where marine insurance was a central part of practitioners' work. He became a tenant there but moved to No 4 when the Lord Chancellor insisted that No 3 split. The team at No 4 (after some initial indecisions) consisted, in addition to Michael, of Michael Kerr, Bob Macrindle, Anthony Diamond, Anthony Evans, Mark Saville and Tony Colman. MJM developed a very large practice in shipping and insurance law cases. As a junior to John Donaldson QC, against his old pupil master leading Christopher Staughton, Michael appeared in ***Chandris v Argo Insurance Company*** [1963] 2 Lloyd's Rep 65***.*** This was a series of test cases on the issue of limitation in respect of three types of loss under policies of marine insurance. The case required Megaw J (also from 3 Essex Court) to analyse the nature of the cause of action on a policy of marine insurance. Megaw J confirmed that a claim on a marine policy was one for unliquidated damages and, in the absence of any terms to the contrary in the policy, the cause of action arose as soon as a loss

occurred by reason of a peril insured against. The judgment has been cited and approved again and again. It is a learned judgment. Although MJM did not make submissions (and was on the losing side), one can be sure that he did the hard legal research for Mr Donaldson QC, whose reputation and expertise was for practical solutions rather than learned scholarship in the law.

After Michael took silk, he appeared in another leading marine insurance case ***The Eurythsenes*** [1977] QB 49. The shipowners wanted to claim under their Protection & Indemnity Club cover in respect of liability to cargo interests after the ship had sunk. The Club rejected the claim on the ground that the ship had been sent to sea in an unseaworthy state with the privity of the assured; and so the Club had no liability because that was a breach of the implied warranty in a time policy pursuant to section 39(5) of the Marine Insurance Act. The shipowners, for whom Michael acted, denied that the contract with the Club was a time policy and argued that section 39(5) was excluded by the Club Rules. The key issue was the correct construction of the words "with the privity of the assured" in section 39(5). The report of the argument of Mr Mustill QC shows the immense learning of marine insurance law that he skilfully deployed on all the issues but particularly the last. The phrase "blind eye knowledge" that has come to be used to describe one form of knowledge of the assured for the purposes of section 39(5), was MJM's invention. The decision was applied and the phrase adopted by the House of Lords in the ***Star Sea*** [2003] 1 AC 469.

There were many other cases, including the celebrated ***The Anita*** [1971] 1 WLR 882, a war risks case, recently considered and approved by the Supreme Court in ***The B Atlantic*** [2018] 2 WLR 1671. MJM appeared in that case with Mr Gilman as his junior.

His opponent was Robert Goff QC. He and Anthony Lloyd QC, were frequent sparring partners of Michael's in the 1960s and 1970s. All three were later colleagues in the House of Lords.

Contribution as author

About half way through my pupillage with Jonathan Gilman, a large pile of A1 size paper arrived in Jonathan's room and in the middle of each page was pasted one page of the 15th edition of ***Arnould on the law of Marine Insurance and Average.*** That had been published in 1961 under the editorship of Lord Chorley and Mr CT Bailhache. Michael had agreed to be the senior editor of a new edition and he asked Jonathan, who had by then gained a deserved reputation as an expert in marine insurance law, to be junior editor. The text of ***Arnould*** was venerable but needed updating without destroying the value of the work of Mr Arnould himself and the first, very learned, editor Mr David Maclachlan.

In the Preface to the 16th edition---which, although signed by both editors, is so obviously in Michael's characteristically elegant and witty style---the problem is acknowledged. The principles of marine insurance law had been established by cases "relating to slave traders" (***De Hahn v Hartley*** famously) " sprung spars, broken cordage and the like." Yet many of the statements of principle of the author and David Maclachlan, although developed and elaborated subsequently, remained valid in 1981.

Like ***Mustill & Boyd on Commercial Arbitration,*** the 16th edition of ***Arnould*** had a long gestation period. It was published in 1981 in two volumes and I still have my well

thumbed copy. Michael acknowledged the "learning and industry which Mr Gilman had devoted to the laborious task of preparing the new edition" but that should not detract from his own learning and industry. He was particularly concerned with war risks, an area he knew well from the ***Anita*** and other cases.

Judicial work prevented Michael from continuing as editor of ***Arnould*** for further editions but he wrote the Foreword to the 18th edition which was published, under the chief editorship of Jonathan Gilman QC, in 2013. The Foreword is a joy to read. MJM recalls how working on the 16th edition was congenial, adding "however dry the issues might seem at first sight, they would often be enlivened by a lungful of sea air." This phrase captures Michael's intellectual enthusiasm for exploring any topic---legal or not---that he found challenging. He had a knack of making complex issues seem clear and simple. He could make almost anything interesting and often also amusing, with his great sense of humour and a touch of self-deprecation.

Decisions as a judge

There are so many decisions to choose from but I am going to discuss only two which are not marine insurance cases although both concern principles central to marine insurance law: ***Spinney's (1948) Ltd v Royal Insurance*** [1980] 1 Lloyd's Rep 406; and ***Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*** [1995] 1 AC 501.

The Spinney's case was a claim by three merchant enterprises on property insurance policies written by Royal Insurance Co Ltd on the claimants' three business properties in Beirut, Lebanon. The policies were essentially fire policies with various printed endorsements adding further cover, including that for losses by riot and strikes but

excluding cover for losses by “civil war, civil commotion, insurrection, rebellion, revolution, military or usurped power...” Those types of occurrence were declared not to be “riots” for the purposes of the policies and the insurers were relieved of liability for losses caused by them. The properties had been attacked, looted and damaged by groups of people in January 1976, during a period of civil disturbance – to use a neutral phrase. Some £1.4 million worth of damage had been done. The insurers rejected the claim, saying that one or more of the exclusions applied. The trial lasted 19 days in June and July 1979, about a year after MJM had gone to the bench, with Michael writing the judgment in August.

To decide whether the cause of the attacks on the insureds’ property and subsequent losses came within the terms of the cover or the exclusions, MJM had to reach a conclusion on the nature of the strife in the Lebanon in general and on the day of the attacks in particular. This required him to describe the origin, development and characteristics of the struggles in the Lebanon up to the time of the attacks. For the purposes of the case, Michael had to become, all at once, a diplomatic and social historian, political scientist and specialist insurance lawyer---which he relished and fulfilled.

In ten short pages, Michael describes, in prose of which a professional historian would be proud, the political, social and religious background to the civil disturbances. He starts his general view at 1860 and finishes in October 1976, with the establishment of a short-lived Arab peace-keeping force. He then switches to the particular violence in Beirut and makes some specific findings of fact relating to it. Then he turns to the question of whether, in the light of the facts found, a state of affairs existed in the

Lebanon or in the area of Beirut where the losses occurred, which fell within any of the exceptions in the policy.

Michael stated views on the "natural meaning" of the wordings and analysed in detail the reported cases. His familiarity with the cases and what they decided is obvious, as is the clarity of the exposition. Of particular interest to the legal historian perhaps is his analysis of the development of the strangely worded exception "usurped power." He started with the Treason Act 1351, progressed via the Riot Act of 1710 and then considered cases arising out of the Old Pretender's rebellion in 1715 and the Gordon Riots in 1780. He concluded, on the facts he had found, that the action of the citizens in stopping movement of people and using violence to "…impose peace, constituted direct action and arrogated the functions of the state" and so constituted "usurped power." He held it was clear that the violence, death and destruction in the Lebanon amounted to "civil commotion." Further, the claimants could not satisfy him (as they had to on a reverse-burden clause in the policy) that the losses were not caused by "civil commotion" or "usurped power." Thus the claims failed.

Mr Justice Mustill decided other important insurance cases. Notable among them were the celebrated case of ***The Salem*** [1981] 2 Lloyd's Rep 316 (a variation on piracy) and ***JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd "The Miss Jay Jay"*** [1985] 1 Lloyd's Rep 264. In each, the judge had to consider fundamental questions on the nature of the perils covered by marine policies and exceptions to them. MJM tackled the issues by an analysis from principle, as well as displaying a masterly knowledge of the case law. His decision in ***The Miss Jay Jay*** was considered recently by the Supreme Court in the ***Cendor Mopu*** [2011] 1 Lloyd's Rep 560***,*** where

his reasoning was subjected to close analysis and approval by Lords Saville, Mance, Collins and tonight's President, Lord Clarke of Stone-cum-Ebony. ***The Salem*** went on appeal. MJM's conclusions did not all survive. Recently, his reasoning in that case on the insured peril ("persons acting maliciously") was adopted by the Supreme Court in ***The B Atlantic*** [2018] 2 WLR 1671.

In the House of Lords, Mustill contributed at least three very important judgments on insurance and reinsurance law but, to my mind, the preeminent contribution is that in his speech in ***Pan Atlantic v Pine Top Insurance*** [1995] 1 AC 501**.** This case concerned a policy of reinsurance on so-called "long-tail liability" risks. The underlying risks incurred disastrous losses and the reinsurers faced equally huge losses on the reinsurance treaty. However, the reinsurers claimed they were entitled to avoid the treaty under the Common Law equivalent of section 18(1) of the Marine Insurance Act on the ground that the previous loss history with other reinsurers was a "material circumstance" that had not been disclosed at the time this treaty was negotiated. The trial judge had found that the broker had understated the losses for one year (1981), that they were material and that non-disclosure gave Pine Top the right to avoid. The Court of Appeal dismissed the appeal while expressing regret at being compelled to do so.

The case in the House of Lords raised two points on the correct interpretation of sections 18 and 20 of the Marine Insurance Act which had divided insurance lawyers and judges for some years. They both concerned section 18(2) of the Act and centred on what constituted a "material circumstance" that had to be disclosed by an assured. The first issue was what was meant by the phrase "influence the judgment of a prudent insurer" in section 18(2) of the Act. Did that mean that for the particular circumstance

that had not been disclosed to be “material,” would it have to have been a “decisive influence” on the mind of the anthropomorphic entity “the prudent underwriter” in deciding whether to take the risk? Or was it sufficient to prove that the matter would have some lesser degree of influence in order to be “material?”

I always used to compare this latter test with the line in WB Yeats’ poem *An Irish Airman foresees his death.* “I balanced all, brought all to mind.” The second question was whether, assuming there had been a material non-disclosure (by whatever test), it was necessary to prove that the non-disclosure had, in fact, induced the actual underwriter to write the policy on the terms agreed; or was the existence of the non-disclosure enough of itself to give the actual underwriter the right to avoid?

The contentious decision of the Court of Appeal in the ***CTI case*** in 1984 had answered those two same questions by saying that it was the lower influence test and that the underwriter did not have to prove that he was actually induced by the non-disclosure to conclude the contract; the fact of non-disclosure was enough. Some (including Lord Templeman in ***Pan Atlantic*****)** thought this combination gave underwriters a charter to avoid policies on the slightest whim. They probably had in mind the ditty by that prolific poet ANON, which was often quoted in insurance circles in the City. It went: “An underwriter at Lloyd’s/ Who wants to be one of the boys/ Will scratch without thought/ Any risk that he’s brought/ But when there’s a loss, he avoids.”

The House of Lords split on the first issue. The majority, led by Lord Mustill, opting for the lesser “influence” test, whilst the minority, led by Lord Lloyd, went for the “decisive influence” test. Lord Lloyd, when Lloyd J, had taken the same view at first instance in the ***CTI*** case. But their Lordships were all agreed on the second issue: there had to

be actual inducement of the actual underwriter by reason of the material non-disclosure before the right to avoid arose.

MJM gave the leading speech for the majority. On the first issue, he analyses incisively the wording of section 18(2) and demonstrates, conclusively in my view, that the "decisive influence" test is inconsistent with the actual wording used. It is striking how Lord Mustill argues the point in a way that is particularly powerful. He then examines the cases both before and after the 1906 Act to see whether his construction is inconsistent with any of the cases. He does this with a scholarship which is as easy to read as it is to admire.

The second issue was, in a sense, more difficult. As MJM noted, there is nothing in the wording of sections 18 of the MIA about a requirement that there must be a causal connection between the wrongful non-disclosure and the actual writing of the risk before the underwriter had the right to avoid. Nor was there in section 20 of the Act, which deals with the effect of a "material representation." That section simply said that if the material representation was untrue, "the insurer may avoid the contract."
So, on the face of the Act, there was no express requirement to have any link between the existence of the material misrepresentation or non-disclosure and the writing of the risk. Did this mean (as the Court of Appeal in ***CTI*** had held) there was no such need for any link or did the Act, properly understood, require a causative link? MJM's instinct was that there must be a link between the material misrepresentation or non-disclosure and the conclusion of the contract. However, his analysis of the pre and post-1906 Act marine insurance cases on representations demonstrated that they are not conclusive one way or the other.

He found the answer in an inventive way: by examining the law outside marine insurance just before the 1906 Act was going through Parliament. He noted that by then the Common Law and Equity gave the remedy of rescission of a contract for fraudulent misrepresentations. He noted that those Common Law and equitable rules must apply to marine insurance contracts, unless inconsistent with the Act *(see Section 91(3*). The cases at Common Law and in Equity required a link between the fraudulent misrepresentation and making of the contract before there could be a right to rescission: the innocent party had to have been induced to enter the contract by the fraudulent misrepresentation before there was a right to rescind. This analysis led MJM to reach what looks like a bold conclusion: there is an implied qualification in both sections 20 and 18 of the Marine Insurance Act that a material non-disclosure or misrepresentation does not entitle the insurer to avoid the policy unless he was thereby induced to enter the contract. However, the analysis and reasoning underlying the conclusion is compelling.

Sections 18 to 20 of the Marine Insurance Act have now been repealed by the Insurance Act 2015, in force from 12th August 2016 but Lord Mustill's conclusions on the degree of influence needed and the requirement for inducement remain good law. They have been given statutory form in sections 7(3) and 8(1) of the new Insurance Act which applies to both marine and non-marine insurance.

What makes Michael Mustill's contribution to the law of insurance, indeed to the law generally, so distinctive? I cannot improve on the statements of Stewart Boyd QC in his biographical memoir of Michael as a Fellow of the British Academy. Boyd said MJM

had a “systematic and panoptic approach to fundamental questions of principle.” His “special contribution was not in deciding cases as they happened to arise for decision but as a systematic analyst of the law.” It is perhaps easier to attempt to be a “systematic analyst of the law” as author or even as advocate, although few succeed. In cases like ***Spinney’s, The Miss Jay Jay*** and, in particular, ***Pan Atlantic,*** MJM’s profound knowledge and understanding of insurance law and his analytical skills coupled with a precise yet elegant prose style enabled him not just to decide cases but make landmark contributions.