Stewart Boyd QC's Reflections

An exemplary purity of language and thought

The formal milestones of Mustill's career after he was called to the Bar can be set out briefly. The head of the chambers was Alan Mocatta QC (later Mocatta J.). Among the other members were Eustace Roskill (later Lord Roskill), John Megaw (later Lord Justice Megaw), John Donaldson (later Lord Donaldson, Master of the Rolls) and Robert (Bob) McCrindle, who rated high among the most talented advocates of his time. Anthony Lloyd (later Lord Lloyd) joined soon afterwards and was for years afterwards Mustill's constant opponent in the law courts, and eventually colleague in the House of Lords.

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

He became a QC in 1968. In 1972, he was appointed Recorder of the Crown Court, a precursor to being made a High Court Judge of the Queen's Bench Division in 1978. In 1981-94, he was Presiding Judge on the North Eastern Circuit and, in1984-85, Judge in Charge of the Commercial Court. In 1985, he was appointed Lord Justice of Appeal and admitted to the Privy Council; and in 1992, was made Judge of the Appellate Committee of the House of Lords, and appointed Lord of Appeal in Ordinary.

From the start of his judicial career as a part-time Recorder, Mustill came into contact with the criminal law, a field in which he had played virtually no part as counsel. He sat in criminal cases, both as a High Court Judge in trials before juries and as a member of the Court of Criminal Appeal. When he reached the House of Lords, he turned his mind to some of the more perplexing issues in that field.

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Mustill's method as a lawyer was, if not unique, at the very best level of his contemporaries. The conventional view of the common law at the time was that it was the best system of law that could be imagined, because it was based on decisions on individual cases as they came before the courts. It was not based, therefore, as were other systems of law - particularly the systems of civil law which prevailed in Europe and elsewhere - on speculative reasoning about hypothetical cases.

The classic statement of this point of view was that of Oliver Wendell Holmes: 'The life of the law has not been logic; it has been experience.' For Mustill, this was a strength but also a shortcoming. The strength lay in the focus on the practical issues in the case before the court, and the experience that the court could, with the help of counsel, bring to bear on them. But Mustill had a profound view that the legal decision of practical questions could not be divorced from a systematic and logical analysis of the underlying legal principles.

In his view, the weakness in the common law lay in the fact that systematic development of principles of law depended on the chance that cases arose which enabled the court to deal with them. In contrast, systems of law based on civil or Roman law were able to absorb more readily ideas based on principle, independently of the facts of actual cases, because they depended principally on the work of legal scholars, not on the decisions of judges. Mustill felt this to be a serious limitation

on the development of the common law. It was never enough for him to decide a case. He needed to know where the decision would lead in other cases and why.

He never started by assuming that the answer to any particular problem was to argue from the propositions decided by the reported cases. His instinct was always to treat the question he was attempting to answer as part of a wider set of questions, to which an answer could only be found by resorting to norms other than those derived from the legal precedents.

Sometimes, these were legal norms of more general application which underlay or sometimes contradicted those which were derived from the decided cases. There was also for him a basic principle that rules should be consistent unless the doctrine of precedent dictated otherwise. As one can see from the reasoning in some of his judgments, consistency meant not only consistency between decided cases on the point in question but also consistency between the logic of decisions in different but related fields of law. He was, for example, much troubled by the fact, which so far as is known, he never had the opportunity to articulate in any reported case, that administrative law had different principles from arbitration law and gave rise to different results in similar cases.

As an advocate, he was not a great orator. His style of argument as counsel was low key. He sought to persuade not by rhetoric but by the strength of his argument and the skill with which he handled the evidence. His voice was in the tenor range or perhaps upper baritone, tinged scarcely perceptibly by a Yorkshire intonation and a constant sense that he was on the point of saying something amusing. In private, his wit and good humour burst forth

the whole time but in court, both as advocate and as judge, he maintained a purity of language and thought which was exemplary.

He had the characteristic, which too few advocates have, of pausing before he answered a difficult question from the bench. This gave the impression, in his case quite correctly, that he wished to be sure of his answer before he gave it. He had a most d i s a r m i n g smile when challenged from the B e n c h - - - the same smile that he gave to his friends in private. His prose style was not only beyond reproach but maintained a freshness and fluidity which few lawyers in modern times have equalled.

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

He taught his pupils that the first minute of an argument was the one that really counted - the moment at which you aroused the interest of the court in your case and told them why the merits were on your side. In his last years as a junior, he often demonstrated to his pupils how to put this into effect before the Queen's Bench Masters, an overworked but admirable body of

junior judges dealing with matters which did not need to be decided by the judge himself. In those days, they had an appointment list after lunch for short applications in an area of the law courts known as the 'Bear Garden.'

Many barristers made the mistake of sauntering in and assuming that the Masters would listen patiently and respectfully to their arguments, not realising they had a huge workload and dreaded the *longueurs* of appearances by counsel. Not so Mustill. When his case was called, he would enter at the trot with his papers open in front of him, explaining why he was there and what he wanted before he had even passed through the door. By the time he had reached the Master's desk, he had virtually completed his submissions. Many opponents were quite blown off course by his whirlwind attack.

He had a great ability to break down a legal problem by analysis of every possible permutation of circumstances, in contrast to the usual forensic method of the advocate, who typically concentrates on arguments to defeat those of the opposite side. This skill was not deployed in argument but served to anticipate contrary arguments and difficult questions from the Bench. It was, however, very much a feature of his academic writing, which he regarded as a quest for the correct - or at least the best - answer to every foreseeable variation of the question at issue.

For questions requiring multiple answers, he would often construct elaborate algorithms and spreadsheets. These rarely saw the light of day in any of his published work but enabled him to be confident that he had covered the subject from every angle, and to seek out the general principles underlying a seemingly disorganised set of legal rules. Although the scaffolding was usually dismantled once the

general principles had been established, underpinning the general principles gave consistency and coherence to what he wrote.

His most accomplished work was published as 'Multi-party arbitrations: an agenda for law-makers.' The problems of multi-party arbitrations were very much to the fore at that time and had been discussed at length by the Departmental Advisory Committee on Arbitration Law, of which he was chairman. One weakness of arbitration, particularly at international level, was its inability to harness together related disputes between different parties, operating under different national laws and under different contracts.

The discussion of the problems to which this gave rise was not always well organised and the proposed solutions were correspondingly ineffective. Mustill's paper set new ground rules for discussion in a comprehensive and ordered framework and asked fundamental questions which needed to be answered. It was a masterpiece. The shape of the whole subject had been set---but answers have still to be found.

His monograph 'The new *Lex Mercatoria*: the first twenty-five years' had perhaps the greatest influence of all his published addresses on the theory of international arbitration law.

In the 25 years leading up to the publication of this monograph in 1987, there had grown up among academic lawyers—mainly but not exclusively from civil law countries---the concept of a transnational and non-national body of law supposed to represent the law of commerce and of merchants (hence *lex mercatoria).* The main advantage of this body of law was said to be its independence from the particular rules of any one national system of law and its supposed origins in the usages of trade and commerce.

Mustill dealt with the subject by posing a series of questions: What is the *lex mercatoria?* What kind of law is it? When does it apply? What are the sources? What are the rules? Does it empower the arbitrator to decide in equity? What is the relation between *lex mercatoria* and national law? How is it to be ascertained? Each question was answered methodically with compendious references to the published material.

Less well known is "Negligence in the World of Finance," the sixth Sultan Azlan Shah law lecture delivered in Kuala Lumpur in 1991.This was a tour de force. It contains an account of the history of claims for economic loss in the law of negligence, starting with Donoghue and Stevenson and describing the twists and turns via Hedley Byrne v Heller, Merton v Anns and Caparo v Dickman. This illustrates well Mustill's conviction that deciding cases which chance to come before the courts is not conducive to arriving at sound general principles.

He said "we can thus see that in the space of 60 years the courts have successively embraced six mutually inconsistent doctrines in a field of law great theoretical and practical importance, which the outsider would surely assume to be open to a simple and permanent solution. It involves no disloyalty on my part to the legal system in which I have spent my working life, or to past, present and future colleagues, to say that the picture thus painted is not one of unqualified success. My concern is principally with juristic method rather than with an exploration of what the law is, or what it should be."

The last part of his lecture suggested a way forward to a more coherent set of principles, with a set of questions to be addressed, many on issues of policy rather than strict legal rules, and a list of possible solutions, including the judicious use of the amicus brief, better financial regulation of auditors, and numerous other detailed suggestions. The paper was accompanied by no less seven diagrams to describe the different categories of case in which a claim for economic loss through negligence might occur.

This was Mustill at his very best, in command of the details of a huge and complex range of issues and trying to answer them free from the confining structure of the English decisions.

He contributed a short account of the doctrine of 'Manifest Disregard' under United States law, derived wholly from cases decided in the USA. This has proved of less value but was incidental to the discussion, in the body of the book, of ways in which an award might conceivably be challenged by procedures other than by way of appeal. It illustrates strikingly Mustill's readiness and ability to think outside the confines of English law.

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

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

His opinion is encapsulated in the following extract from his judgment. “Since this prosecution has been widely noticed, it must be emphasised that the issue before the House is not whether the appellants' conduct is morally right, but whether it is properly charged under the libertarian doctrine specifically related to sexual matters. Nor in the least do I suggest that ethical pronouncements are meaningless, that there is no difference between right and wrong, that sadism is praiseworthy, that new opinions on sexual morality are necessarily superior to the old or anything else of the same kind.

These are questions of private morality; that the standards by which they fall to be judged are not those of the criminal law; and that if these standards are to be upheld, the individual must enforce them upon himself according to his own moral standards, or have them enforced against him by moral pressures exerted by whatever religious or other community to whose ethical ideals he responds.”

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

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

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

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

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

particularly from his time as judge of the Commercial Court and an appellate judge.

For at least the last 40 years of his life, Mustill had an ambition to write an account of what he always called the case of 'the second Kumar' but is usually known as 'the Bhawal case.' This was a case which ran for years in India and eventually came before the Judicial Committee of the Privy Council in London. A short account of this astonishing history is that Ramendra Narayan Roy, the second Kumar of Bhawal, the ruler of a huge estate in Bengal, had in his youth spent most of his time hunting, in festivities and with women, having several mistresses. By 1905, he had contracted syphilis. In 1909, he went to Darjeeling to seek treatment but was reported to have died there at the age of 25 and to have been cremated.

Around 1920, a religious ascetic appeared in Dhaka covered in ashes, and gradually relatives and the local people became convinced that this was the second Kumar. He said he had lost his memory and had recovered in the jungle, where a guru had taken him into his care. In legal proceedings in India, two judgments found that he was indeed the second Kumar and the Privy Council upheld their decisions.

The case was a *cause celebre* in Bangladesh, comparable to the Tichborne Claimant in England many years earlier but with much more colourful detail and with far wider repercussions for the estate.

In the end, the book never appeared. The saddest thing about this was the discovery after his death of a box with all his research for the book he wanted to write. In the bottom of the box were all the photographs and documents he had had copied from the House of Lords library. He was convinced he had lost his copies and had searched far and wide to

locate the originals, which by then had been destroyed: but the copies were there all the time.

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