

Charles S. Desmond, Chief Judge of the New York Court of Appeals: A Tribute

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In summing up a life-long study of the ways of judges and the methods of decision making, Karl Llewellyn used to say in conversation that when the common law functioned at its best, the judges aimed simultaneously at three things: to do justice in the case at hand; to see that the result was harmonious with the central body of law; and to so cast the decision that its rule would usefully serve the future.

The first, Llewellyn thought, involved a sense of fairness; the second, a feeling for legal order and arrangement; the third was an act of creative legal statesmanship.

This sharp insight into the ways of common law judges fits the historical facts and articulates that which is often left implicit in the greatest judicial writing. It describes, indeed, the necessities of the role of decision at common law.

No one could work closely with Chief Judge Charles S. Desmond or read many of his opinions without sensing that Llewellyn's generalization fit closely the spirit of approach and the method of execution which he followed regularly in his work in the New York Court of Appeals.

He was, first of all, activated by an instinctive sense of justice immediately responsive to conditions of demonstrated unfairness or legal deprivation.

This sort of initial and instinctive reaction to injustice—visceral if you will—has beyond all doubt played a critical part in common law development, even in those tribunals which explicitly and coldly regard themselves as courts of "law" and nothing else. One has to look very far for a truly great judicial opinion—great by the standards of the profession—which sanctions an injustice. The Chief Judge's innate intuition for the truly just result was in harmony with this common law pattern.

But he worked within the requirements of the well-worn conventions. He kept closely attuned to the materials which make for legal order and arrangement. He was assiduous in finding cases, in reading them understandingly and in citing them when pertinent.

His sense of justice as instinct or intuition never led him to cut loose from the hard realities of legal method. Justice was to be achieved within the available range of choices and possibilities as framed by statute and case law. The range is doubtless wide; but it has limits to which he adhered.

Finally, and this must be taken as the cherished ambition of the good judge, he was sensitive to the future value of the rule of the case. The decision as he projected its effect had to serve and not stifle the need of tomorrow's community so far as our eyes are able to see the road that lies ahead.

Judge Desmond's total contribution to New York law during his quarter of a century on the Court of Appeals in the adaptation of old rules to meet new and predictable situations is of prime significance. Hundreds of opinions over this long period give evidence of this total and balanced contribution. Illustration is, perhaps, best made by a random sampling of the run-of-the-mill cases, the usual method of statistics, without looking out for the "great" cases.

For this purpose we might read at random three cases appearing in volumes four, five and seven of the New York Reports, second series.

In *McConnell v. Commonwealth Pictures Corp.*,¹ plaintiff had a legally well-formulated contract with defendant that if he succeeded in negotiating with a motion picture producer to give defendant distribution rights, defendant would pay him certain sums of money. Plaintiff procured the distribution rights, but the defense to his action was that he had obtained the rights by bribing a representative of the producer. Against strong arguments in dissent that this did not affect the obligation of the contract, Judge Desmond carried the decision to a reversal of the appellate division in an opinion which illustrates what must have initially been an instinctive feeling that wrongdoing as

¹ 7 N.Y.2d 465, 166 N.E.2d 494, 199 N.Y.S.2d 483 (1960).

thus shown must not get judicial help even in support of a contract:

All we are doing here is labeling the conduct described in these defenses as gross corruption depriving plaintiff of all right of access to the courts of New York State. Consistent with public morality and settled public policy, we hold that a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its performance.²

One might look, too, at his opinion in *Berkshire Fine Spinning Associates, Inc. v. City of New York*³ to see close attention, within the conventions of judicial writing, to a complicated tax problem and the balanced examination of a wide range of decisional law running through six pages of opinion leading to the recommended result.

The creative casting of a rule for the future, arising from a decision of the present, as the common law practice was, is to be seen in *Sengstack v. Sengstack*.⁴ A mentally ill wife, not adjudged incompetent, was permitted to sue her husband for separation against the arguments that she was without legal capacity to sue and her attorneys were without authority to institute the action. The process of making a just rule and a procedurally supportable rule in an unusual situation is to be seen step by step as one follows the Desmond logic to the end.

Through the long judicial career this sensitive awareness of the justice of the case; this felt necessity to act within the conventional frame of decisional law; this creative molding of the law to meet new needs as they arise and can be foreseen, suggest that the tradition which Charles S. Desmond followed was in the mainstream of the common law.

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² *Id.* at 471, 166 N.E.2d at 497, 199 N.Y.S.2d at 487.

³ 5 N.Y.2d 347, 157 N.E.2d 614, 184 N.Y.S.2d 623 (1959).

⁴ 4 N.Y.2d 502, 151 N.E.2d 887, 176 N.Y.S.2d 337 (1958).