<u>The role of a judge in a small common law democratic country</u>

(A lecture delivered by Deemster Doyle at the Oxford Union
on 28 June 2017 as part of the Small Countries Financial Management Programme)

Introduction

I love the Isle of Man.

I imagine you all have similar feelings towards your home countries.

As the Roman statesman and philosopher Seneca captured it:

> "Men [and women] love their country not because it is great, but because it is their own".

Love of country can be intensified when members of its population demonstrate greatness or the population is under stress, but neither is an absolute requirement for love of country to exist.

My home is a small, sometimes windswept, but perfectly formed rock sitting in the Irish Sea with approximately 85,000 inhabitants, spread across 227 square miles. My country has a rich history including 'the oldest continuous parliament in the world.' Of course we love our countries irrespective of their geography, size, climate and history.

I have come only about 414 miles from the Isle of Man, albeit via Durham in the northeast where I attended my son's graduation ceremony yesterday. Many of you have come tens of thousands of miles from the other side of the globe. Geography does not change love of country.

Attendees for this year's Small Countries Financial Management Programme include Tuvalu with a population of around 10,000 to the largest, Jamaica, with nearly 3 million inhabitants. Though size is the differentiator for this wonderful programme, I think we can all agree size of population or lands has no bearing on a country's success, quality of life or status.

I must admit when I scanned the weather forecasts of your countries, reminding myself of where you have travelled from, I realised no one could doubt your commitment having come all this way, leaving your sun-drenched homes for a destination with an average summer temperature of 15 degrees centigrade.

So, why is a Deemster (a High Court judge) in a small common law democratic country starting with a bit of a 'love-in' about home and country?

Judicial Role, Life Experience and Emotion

Quite simply it is to make the point which may seem counter intuitive, judges are human beings, despite some saying there is evidence to the contrary.

As such they must come to terms with the management of their emotions while undertaking duties as a judge.

Even if their love of country has led them to take a judicial oath, they must not let that overriding emotion, or any other for that matter, cloud their judicial judgment. In a small country it can be challenging for judges to maintain total unemotional objectivity when issues are close to the community they serve and the community is very close to them.

The proper role of a judge is to decide the legal issues of the day in accordance with the law and the judicial oath. The judge must be impartial and independent and cases should be determined fairly and justly within a reasonable time. This involves active case management beginning as soon as the claim or application is filed with the court.

I doubt that many right-thinking and informed observers would reasonably disagree with those basic concepts. But there is much more to the judicial role than that. In a common law jurisdiction a judge is also involved in developing the common law taking care not to adopt the "mantle of the legislator".

My judicial philosophy is bound up with my loyalty to my judicial oath which requires that I:

> "… execute the laws of this Isle justly … as indifferently [as impartially] as the Herring backbone doth lie in the midst of the Fish".

However, this does not mean that I must be a cold fish. Professional emotional detachment does not mean detachment from the laws, the community or my life's experiences.

So, we have established that a judge must be impartial and decide cases justly and objectively in accordance with the law. However, we all carry with us the baggage of our experiences of life. When arriving at decisions or evaluating issues, judges need to be acutely aware of their own personal influences, prejudices and life experiences.

To maintain clarity, when exercising civil jurisdiction I try to approach legal decisions at first instance in a relatively structured way. I consider the issues, I consider the evidence and determine the facts. With these key elements in place I consider the law and then consider the arguments. Only with this process complete can I start to reach my conclusions. It does not however stop there. I must then work back and check my conclusions again against the evidence, the law and the arguments.

Every judge must approach every case with a mind that is open to persuasion and decide the case in accordance with the law. Judges must not usually be guided by anything other than the information placed before them by the parties.

Sir William Scott (later Lord Stowell) in *Lindo v Belisario* (1795) 1 Hag Con 216 at 220 stated that:

> "Judges ought certainly to come with minds open to all doubts, to the consideration of a question; in other words, they must not yield to hasty impressions, but they must ultimately decide those doubts; since it is the business of judges to send into the world, not doubts but decisions; and they must make up their minds on one side or the other, on the balance of the evidence that is before them".

I am grateful to Kemy Bokhary of the Hong Kong Court of Final Appeal for bringing that "golden oldie" to my attention.

However, judges must always be conscious that their decisions are influenced not just by the evidence, the law and the arguments presented to them, but also by their life experiences. One of my life experiences that continues to keep me grounded is my biannual sessions with trainee Manx advocates. Five lectures twice a year may not sound like very often, but these are challenging young people and I need an appropriate recovery time. The recurring topics give a clue to the areas of special interest to me: The rule of law, open justice, international judicial co-operation, duties of advocates, civil appeals, criminal appeals, judicial recusal and case law on the Rules of the High Court of Justice 2009. This may not sound fascinating to you, but its bread and butter pudding to me!

Small Social Pool

I can only really speak first-hand about the Isle of Man, but experiences in my small country tell me there are frequently events at which business leaders, judges, ministers, politicians, senior civil servants and professionals with a high local profile gather together.

The reality is that these are often significant events and attendance is frequently required so everyone tends to end up in the same place. Have you experienced this phenomenon in your countries?

In this formal social environment respect for different roles must always be maintained. A judge must be hyper vigilant to ensure he is not inappropriately or accidently lobbied or questioned by a politician, minister or business leader, or worse still, a litigant in pending proceedings. The judge must always be on guard to ensure that the separation of powers and the judge's independence and impartiality are maintained.

Added to this there are also the informal moments when socialising in the local community, doing the everyday things that everyone does. It may be at local horticultural events, which you already know I attend and show off my prize-winning pumpkins. Ironically, it is at these that I am being judged. Or local coffee shops, restaurants, sporting events, art exhibitions, cinemas, yoga classes and even Young Farmers' events. These are all frequently attended by our High Court judges, the Deemsters who are well-known in the community. Could you imagine that in a larger country where judges appear more anonymous and distant?

In my opinion the rule for judicial survival in a small country with a small social pool, in addition to compliance with the relevant judicial code of conduct, is to be acutely conscious of the need to be, and be seen as, independent and impartial and to see issues from each other's perspectives and act accordingly. It also helps to keep to safe uncontroversial subjects.

Recusal

Given most small countries have a relatively small social pool of business leaders, ministers, politicians and judges, the percentage chance of the judge knowing or having links to the litigants involved in a case can increase.

The Judicial Committee of the Privy Council in *Grant v The Teacher's Appeals Tribunal* [2006] UKPC 59 considered the issue of recusal and indicated that they were mindful of the problems which face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. See also *Belize Bank Limited v AG* [2011] UKPC 36.

In large and small countries judges may sometimes have to recuse themselves. Recusal can put a strain on a potentially restricted number of judges in a small country. The law of recusal has to be applied robustly but with pragmatism and sensitivity in small countries. However, despite the practical problems judges must maintain their objectivity, impartiality and independence by being prepared to step down from a case where necessary.

Lord Bingham (whose mother's family were entirely Manx) in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (at paragraph 25) stated that it would be dangerous or futile to attempt to define or list the factors which may or may not give rise to judicial recusal. Lord Bingham however suggested that it was unlikely that utterances in lectures would, at any rate ordinarily, be a sound base for objection. Everything of course depends on the context, contents and nature of the lecture.

But I think I am on safe ground with my lecture to you this evening.

The Media

Whether judges like it or not, and I suspect most of them don't, their role in democratic societies is becoming more high profile.

Even outside the judging at local horticultural events, judges are being judged by politicians, the media and the communities they serve.

As Aharon Barak (the former Chief Justice of Israel) put it in his excellent book *The Judge in a Democracy* at page 315:

> "Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial."

The press in England appear to feel able to take up arms against the judiciary and in doing so often misrepresent the legal process. The judges presiding over the UK Brexit litigation in the Divisional Court were branded "Enemies of the people" in a November 2016 Daily Mail headline. Ironically, if they had read or seen the Henrik Ibsen play 'Enemy of the people' from which they acquired the headline, they might have recognised their own inappropriate behaviour. Similarly, "Truss at risk of losing job after clashes with judges" in the Times, April 2017. This was where the then Lord Chancellor Liz Truss got involved with the choice for Lord Chief Justice. Politicians should not seek to unduly influence judicial appointments.

This type of press coverage is obviously not confined to the UK, further afield the trend is continuing. The "Outrage at two-year prison terms for Hong Kong policemen who beat up political activist" headline in the South China Morning Post in February 2017 is another example.

The reality is that judges are appearing on the front pages worldwide with unfortunate headlines and the corrosive trend may spread to regional publications and smaller countries. It is therefore increasingly important that the role of a judge is properly debated and understood. In view of the importance of the role and its impact on all of us, it is vital that we all think seriously about the proper role of judges in the world. Tonight is just a taster. The main course and dessert may be dished out in future lectures.

Social Media Dangers

Twitter, Facebook, LinkedIn and other social media outlets provide yet another opportunity to post an opinion (sometimes anonymous) about the judiciary, often without reference to the informed facts. This can be a local situation that grabs a global audience. The textual limitations of this media can often mean that the context gets left behind and responses are built on, at best, half a story. Again, with images a single-sided story can produce a very destructive media tsunami. Ill-informed comment and a rush to judgment on social media is a dangerous unhealthy activity.

The US President, Donald Trump's unfortunate tweet in February 2017, addressed a federal judge's temporary halt on his travel ban. In his tweet he referred to judge James Robart as a "so-called judge". I will leave you to draw your own conclusions. For my part, I read the judgment and could see the good legal sense of it. It seemed to be based on the law. It rightly kept away from the politics of the situation.

In fairness, when it comes to small countries social media is powerful but word of mouth, day-to-day interaction and observed behaviour can also have an equally powerful effect. I would however urge you all to promote and encourage restraint in the area of social media and not to rush to judgment without considering the full facts and all sides of the arguments.

The Potential for Development of the Common Law and the Judge's Role

To help you gain a better understanding of a judge's role I would now like to look at the potential for development of the common law. I must acknowledge at this point that I am aware 15 of the countries represented today have a common law based system. So, in attempting to keep my timing under control I am going to focus on that model.

Once upon a time, many years ago, judges did not like openly admitting that they made law. Lord Reid in *The Judge as Lawmaker* (1972) 12 Journal of Society of Public Teachers of Law 22 at 23 famously stated:

> "There was a time when it was thought almost indecent to suggest that judges make law … Those with a taste for fairytales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairytales anymore."

Nowadays it is reasonable and healthy to observe that for hundreds of years the common law has been developing and evolving to meet the changing needs of society. Since at least the early 1400s the Deemsters in the Isle of Man have been developing Manx common and customary laws. Indeed, this year is the 600th anniversary of the Customary Laws of 1417 which appear in volume 1 of the Statutes of the Isle of Man. For all this time it has been the creativity and legal skills of the Deemsters that has enabled Manx common and customary law to remain in step with the needs of society and the people it protects.

Kirby at pages 30-31 in his *Judicial Activism* Hamlyn lectures (2003) captured the essence of this development as follows:

"So long as human language remains imprecise and human capacity to predict the future limited, it will fall to judges to fill the gaps in the law's rules. They will do so, as they should, by reference to considerations of principle and policy. Better that they should tell it as it is."

Sir Michael Birt, the former Bailiff (Chief Justice) of Jersey in his *Hong Kong Foods* [2017] JRCO 50 judgment put the position well at paragraph 141:

> "In our judgment, the Court should, so far as consistent with legal principle and precedent, develop the Jersey law of contract so as to be suitable for the requirements of commercial life in the 21st century and to be as easily ascertainable and understandable as possible."

Staying in the area of contract law I found further clarification from Lord Neuberger, the President of the Supreme Court of the United Kingdom and lead Justice of the Judicial Committee of the Privy Council, in *Express and Implied Terms of Contracts* (19 August 2016) where he says:

> "20. Of course, it is fair to say that the requirements of certainty and principle, on the one hand, and, on the other hand, the need for practicality and development are inevitably in tension, which means that deciding cases involves an element of practical assessment, even common sense … In that connection, law is not like mathematics, where logic alone holds sway. Indeed, the common law always has to hold the balance between logic and practicality."

Lord Neuberger's reference to "common sense" reflects the comments of Bermuda's very own Chief Justice Ian Kawaley who frequently speaks in terms of "common law and common sense". In his enlightening judgment (delivered some five months before Lord Neuberger's lecture) in *Uprise Corporation Limited* [2016] SC (Bda) 28 Civ (22 March 2016) at paragraph 46 Chief Justice Kawaley referred to the distinction between "impermissible judicial legislation" and what he has "extra judicially described as Bermuda's 'common law, common sense' approach to judging."

Some years earlier Judge of Appeal Hytner in the Manx case of *Dobson and Damaur v Cleator* (22 June 1990) at page 5 referred to the approach of the Deemster at first instance owing more "to common sense than arid academic analysis".

Justice Tang (of the Hong Kong Court of Final Appeal) in *Developing Common Law in Hong Kong* (27 October 2015) referred at page 27 to perceptions of justice and common sense and at page 28 to "public policy - or common sense, rationality and justice".

I thank Chief Justice Kawaley and others for their wisdom and assistance in my preparation for this lecture. Any errors remain my own. In my electronic exchanges with Chief Justice Kawaley we touched upon the pressing need for judges in small countries to be actively involved in the development of the common law. We also canvassed issues such as, in theory our judicial role in this respect being the same as in larger jurisdictions, but in reality the application of our role may be different because in small countries:

(1) there may be more legislative gaps (particularly in cross-border insolvency, as to which see Chief Justice Kawaley's paper on "*Relshio!": Liberating the Common Law on Judicial Cooperation from its State of Arrested Development – The British Atlantic and Caribbean World* (2015) 3 NIBLe J 10 and Lord Neuberger's speech

on *The Supreme Court, the Privy Council and International Insolvency* delivered on 19 June 2017), and extreme pressures on legislative and judicial resources;

(2) there is distinctive local legislation and regulation;

(3) there is a lack of academic and/or practitioner texts;

(4) there is a higher volume of truly novel points which are not illuminated by persuasive local or overseas authority; and

(5) there is a concentration of high value litigation in which unique points arise which are argued to a high level of abstraction.

Geoffrey Ma, Hong Kong's Chief Justice, refers to the "spirit of the law" (see for example his inspirational speech at the ceremonial opening of the Legal Year in Hong Kong on 9 January 2017). He uses the term "spirit of the law" to describe two facets of the law. Firstly, the simple notion of applying not just the letter of the law but also its spirit. Secondly and more importantly, the need for all institutions (principally those in power such as the government and its institutions, for example the police and regulators) to abide by the true spirit of the rule of law in everything they do.

I am keen to reference others on these points because I want you to have a spread of comments to consider from various jurisdictions. We all have a lot to learn from each other.

Let us move to Canada.

Justice Beverley McLachlin, now Canada's Chief Justice, in *The Role of Judges in Modern Commonwealth Society* (1994) 110 LQR 260 at 262-263 gives us an insight that further clarifies the situation:

> "Resolving disputes is still the primary and most fundamental task of the judiciary. But for some time now, it has been recognised that the matter is not so simple. In the course of resolving disputes, common law judges interpreted and inevitably, incrementally, with the aid of the doctrine of precedent or *stare decisis*, changed the law. The common law thus came to recognize that while dispute resolution was the primary task of the judge, the judge played a secondary role of lawmaker, or at least, law-developer. In the latter part of the twentieth century, the lawmaking role of the judge in Commonwealth countries has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy formerly the exclusive right of Parliament and the legislatures."

William Bailhache, the Bailiff of Jersey, in *Flynn v Reid* 2012 (1) JLR 370 progressively developed Jersey law in respect of unjust enrichment to achieve an equitable result. At paragraph 100 of his learned judgment the then Deputy Bailiff saw the need to "declare new limits on the cause of action for unjust enrichment" and added:

> "Indeed, we think that we would be failing the community in Jersey if we did not attempt to do so, recognizing that the circumstances which apply here might similarly apply in a good many other cases … So the context for a claim in unjust enrichment may change. However, the doctrine of unjust enrichment is a vibrant doctrine."

Further examples of where Jersey judges have developed the law would include *Flynn v Reid* 2012 (2) JLR 226 (costs), *Re B (Separate Representation of Minors)* 2010 JLR 387, *Attorney General v X* 2014 (1) JLR Note 17 (intermediaries for a child) and *Finance and Economics Committee v Bastion Offshore Trust Company Limited* 1994 JLR 370 (exercise of inherent jurisdiction on procedural matters).

Not everyone agrees that judges should develop the law. Neil Gorsuch, on accepting the US Supreme Court nomination on 31 January 2017, humbly acknowledged, as every good judge should, an awareness of his own imperfections and added:

> "I respect, too, the fact that in our legal order, it is for Congress and not the courts to write new laws. It is the role of judges to apply, not alter, the work of the people's representatives. A judge who likes every outcome he reaches is very likely to be a bad judge … [Laughter] … stretching for results he prefers rather than those the law demands."

Contrast this approach with the more liberal approach of Aharon Barak in *The Judge in a Democracy* at page 67:

> "… if in the end the judge arrives at a result that contradicts his sense of justice, the judge must retrace his footsteps. The judge must examine whether he has strayed from the path, for law's aspiration is to be just, and the judge's aspiration is to do justice …"

For my own part in *Impex Services Worldwide Limited* 2003-05 MLR 115 I felt it appropriate to gently develop Manx common law to give assistance to a provisional liquidator of an English company and was fortunately supported by the majority of the Judicial Committee of the Privy Council some years later in *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 who agreed with my decision "in principle". Hardly a ringing endorsement but I'll take whatever crumbs of comfort I can get from the JCPC.

In *Impex* I stated:

> "50. Some judicial development of the common law is inevitable and indeed desirable … I accept, however, that judicial development of the common law should be kept within proper limits and that certainty should not be sacrificed for flexibility or vague notions of where the interests of justice may lie. Litigants need to know where they stand in relation to the law and judges need to be aware that they are there to administer the law of the land and not assume the mantle of the legislators."

In other cases I have not felt bold enough to develop the law at first instance. In *Taylor and Neale* 2012 MLR 199 the Appeal Division came to my rescue and, despite the express terms of section 10 of the High Court Act 1991, provided the court with jurisdiction to hear and determine a doleance claim in respect of a wasted costs order made by the Court of General Gaol Delivery. In *Lombard Manx v Spirit of Montpelier Limited (in liquidation)* 2014 MLR 530 I held, following judgments in the English High Court of Hoffmann J, as he then was, that in the absence of express primary or secondary statutory provisions the court at first instance did not have jurisdiction to rescind a sealed winding up order, but the Appeal Division established such jurisdiction in the subsequent appeal which I now briefly turn to.

The Manx Appeal Division in *Spirit of Montpelier Limited (in liquidation)* 2015 MLR 250 held at paragraph 66 of its judgment that the Manx courts at first instance have:

> "… an inherent jurisdiction at common law to review, rescind or vary a winding-up order where such an order is necessary in the interests of justice."

At paragraph 62 the Appeal Division had referred to various local judgments and stated that they were:

> "… testament to the ability of the courts of this jurisdiction to formulate its own laws in a way which is considered most appropriate for the 'needs, requirements and interests' of the inhabitants of the Island and the wider international community of which the Island is a part."

The Appeal Division in *Spirit of Montpelier Limited (in liquidation)* preferred to follow the New Zealand first instance decision of Thomas J in *Bridon New Zealand v Tent World Ltd* [1992] 3 NZLR 725 rather than the English first instance decisions of Hoffmann J (as he then was) in *Re Intermain Properties Ltd* [1986] BCLC 265 and *Re Calmex Ltd v C Lila Ltd* [1989] 1 All ER 485.

Deemster Cain in *City and International Securities Limited* 2001-03 MLR 239 declined to follow the majority speeches in the House of Lords in *Home Office v Harman* [1983] AC 280. Chief Justice Kawaley in his seminal judgment in *Bermuda Bred Company v Minister of Home Affairs and the Attorney General* [2005] Bda LR 106 declined to follow the majority decision of the House of Lords in the case of *In Re Amin* [1983] 2 AC 818 on the basis that the reasoning did not apply to modern day Bermuda. In *Barclays Private Clients International Limited* (judgment 17 August 2016) I declined to follow the majority speeches in the House of Lords in the English case of *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 101 which concerned employment contracts in a bygone age and in a very different regulatory environment. Small Commonwealth jurisdictions do not always follow English law. Increasingly we are looking to our own local judgments in dealing with the legal issues of the day and where no local judgments are available we are looking, in addition to English judgments, to judgments from other Crown Dependencies and small countries and also judgments from further afield such as Australia, New Zealand and Hong Kong (see *Oxleys of Douglas Ltd* 2003-05 MLR 57 at paragraphs 26-28, *Drower v Gubay* 2003-05 MLR 531 at paragraph 50, *Dominator Limited v Gilberson SL* 2009 MLR 161 at paragraphs [91] to [93], *Bitel* (judgment 30 November 2007) at paragraphs 529-541 and *AB v CD* (judgment 30 June 2016) at paragraphs 53-72).

The Appeal Division's judgment in *Spirit of Montpelier* was criticised by Andrew Webb of Appleby in *That's the Spirit* (October 2015). Advocate Webb distilled the appeal court's decision as:

> "The Island's Courts are at liberty to make law where there are indications that English common law has been superseded by statute, in cases where the interests of justice require."

The learned advocate also referred to *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 and Lord Collins' castigation of "impermissible legislation from the bench" as "profoundly unconstitutional".

In *Milnes Waverley Limited (in liquidation)* 1978-80 MLR 256 (14 May 1980) Deemster Luft in effect refused to follow principles embodied in legislation in England when there was no equivalent legislation in the Isle of Man. Deemster Luft at 259-260 stated:

> "This court administers justice according to the law … Equity as administered in this court has for very many years now followed the law, and this court cannot assume the mantle of the legislator."

Judge of Appeal Hytner in *Barr and Anglo International Holdings Limited* 1990-92 MLR 398 (15 July 1992) at 409 stated:

> "Since this court is not in any way bound by decisions of the English courts it should not be assumed that we would follow dicta abandoned by Parliament."

Any judicial development of the law must be in conformity with justice, common sense, the spirit of the law, principle and policy. It must take into account the competing needs for certainty and flexibility and the avoidance of illegitimate "legislating from the bench".

See *Morton v Paint* 1996 Issue 21 Guernsey Law Journal 36 (Guernsey Court of Appeal Blom-Cooper, Southwell and Sumption JJA) for one small countries' perspective (in 1996) on the division between the legislature and the courts in law-making and where to draw the boundary line between the evolving nature of the common law and the role of Parliament in its over-arching legislative activity. In that case a relatively young Richard Collas (now Bailiff of Guernsey) was the advocate for the successful Plaintiff/Appellant and was credited with advancing an "attractively concise argument" and "cogent and succinct submissions" and such were included "within the reasons … for allowing [the] appeal". Blom-Cooper J felt, prior to the implementation of Human Rights legislation and the development of law on fundamental rights, that:

> "Where Parliament has intervened, it is the supreme law-maker. But where it is silent on a topic or has intervened only partially there is room for development of the law by the courts in harmony with legislative intentions."

Southwell J referred to the common law being continually developed to meet new circumstances and felt that the five English law aids to navigation, as in existence in 1996, should be employed in Guernsey:

(1) if the solution is doubtful, judges should be aware of imposing their own remedy;

(2) caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty, or has legislated while leaving the difficulty untouched;

(3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems;

(4) fundamental legal doctrines should not be lightly set aside;

(5) judges should not make a change unless they can achieve finality and certainty.

Sumption J agreed with both judgments.

Some 20 years later Lady Hale (Deputy President of the Supreme Court of the United Kingdom and a former Law Commissioner) gave the perspective of a larger country (England and Wales) in her stimulating lecture on 7 September 2016 *Legislation or judicial*

law reform: where should judges fear to tread? Lady Hale suggested that there were at least six things which the courts are competent to do if they choose:

(1) they may discern and articulate a general principle or principles from a mass of individual instances;

(2) they may adopt the general principles already discerned by the great doctrinal writers who have done the job for them and apply these to new cases;

(3) they may expand an existing concept to reflect modern thinking;

(4) they may develop the scope of an existing cause of action;

(5) they may develop the scope of existing remedies;

(6) they may even invent brand new remedies to support an existing cause of action.

Lady Hale, from the perspective of her well-resourced big pond, added:

> "Never say never, but I think that the judges are unlikely to create an entirely new cause of action, still less a new criminal offence. This they would now regard themselves as institutionally incompetent to do, even if they might on occasions have done so in the past, when Parliament was less active and there was no Law Commission to show how it should be done."

It is interesting to note that in *Attorney General v Thwaites* 1978 JJ 179 the Jersey Bailiff Ereaut found that there was no Jersey criminal law offence of committing a public mischief, adding that if it was felt appropriate to introduce such offence it would be for the legislature to act accordingly. A somewhat bolder approach was adopted by Bailiff Crill in *Attorney General v Foster* 1989 JLR 70 where he held that there was a common law offence of fraud in Jersey.

In addition to developing the common law in accordance with their judicial oaths, judges have other roles.

- ***Embracing Change and New Technology***

Justice Adrian Saunders of the Caribbean Court of Justice has spoken of the important role judges have in embracing change and new technology. He profoundly stated:

> "… the administration of justice tends towards conservatism. The law, after all, must be stable. Predictability and certainty in the law are attributes which, with good reason, we all highly value. Moreover, the common law method is one that rarely looks forward. It is essentially backward looking. We look backwards for the law we apply. We follow precedents established in the past. All of this produces ingrained habits of thought that often results in slowness to embrace change and new technology.
>
> Judges must consciously overcome this backward looking conservative approach to their work and fashion a response to this paradigm we have inherited. We have both an individual and a collective responsibility to innovate; to ensure that court processes

and rules of procedure are continually customer friendly, effective and designed to enhance independence, efficiency and public trust. We must constantly test radical solutions in order to meet our current and future needs. We must design and fully utilize new and appropriate methods of resolving the innumerable and ever growing body of cases that are annually filed. We must robustly engage in linking the court to all appropriate ways of dispute resolution; in making use of every conceivable method that might fairly and expeditiously resolve the cases that crowd our dockets.

In particular, we must harness modern information technology and management systems in order to expedite caseflow, afford better and greater access to justice and generally enhance justice delivery. Modern information technology provides a plethora of tools that can be used to revolutionise the administration of justice. In our profession we are fond of referring to colleagues as "learned". A colleague is "My learned sister"; the lawyer is "learned counsel". At a recent workshop in Jamaica the Jamaican change specialist, Dr Semaj, reminded us that in today's world, the definition of "learned" is not one who has obtained a law degree. A person who is learned is one who is able quickly to learn, unlearn and re-learn. Think of this for example in relation to your cell phone or to new iterations of the same software on your computer.

My short point is that it is essential that each of us judicial officers make it a habit of, as they say, thinking outside the box so that we can keep abreast of our work and be efficient and effective judges. My watchword is INNOVATION."

Richard Susskind in the recently published second edition of *Tomorrow's Lawyers* continues to predict a legal and judicial world that will change more in the next 20 years than it has over the past two centuries. Susskind refers to a world of online dispute resolution and virtual hearings.

See also *The Civil Court of the Future* (the Lord Slynn Memorial Lecture) delivered on 14 June 2017 by Sir Terence Etherington, Master of the Rolls in England and Wales.

- ***Highlighting the Benefits of the Judge's Home Country***

Another role of judges may be to highlight, in an increasingly competitive world for legal and judicial services, the benefits of the judge's home country. In *Oxleys of Douglas Ltd* 2003-05 MLR 57 (a case of alleged oppressive conduct in a corporate context) I stressed that one of the reasons investors chose to invest in the Isle of Man and conduct business in and from the Island was that the rule of law was respected. The courts exist to support and provide safeguards to local communities. I added:

"Investor protection is high on the Island's agenda and the courts will not hesitate to play their role in protecting those who choose to invest in the Island."

In *Dev Property Developments plc* (judgment 7 May 2008) I stated:

"23. It does us no harm and does not infringe the independence or integrity of the judiciary if we remind ourselves that the courts are here as a service to facilitate rather than to obstruct the carrying on of lawful activities and business in and from this Island and to provide assistance by way of judicial intervention where necessary and appropriate and when called upon to do so. The primary function of the judiciary is to

> deliver efficient, effective, fair and impartial resolution of the legal issues that come before the judiciary for determination.
>
> 24. Here on the Isle of Man the courts willingly serve the local and international community in respect of various Manx legal issues arising for determination in this jurisdiction …"

See also the Grand Court of the Cayman Islands' Guest Lecture 2017 delivered by Lord Thomas (the Lord Chief Justice of England and Wales) on 2 March 2017 on *Giving Business What it Wants – A Well Run Court for Commercial and Business Disputes.*

- ***Giving Guidance on Local Law and Procedural Issues***

Moreover, judges in small jurisdictions may have a bigger burden and significant role in respect of giving guidance on local law and procedural issues. In *The Isle of Man Financial Services Authority v Louis and others* (23 February 2017) at paragraph 120 I stated:

> "The Isle of Man is a compact jurisdiction with a limited number of full-time judges sitting at first instance and a limited number of judges sitting at appellate level. It is important that those local judges offer as much guidance as they reasonably and properly can and in that way develop Manx jurisprudence and assist litigants, lawyers and members of the community in an understanding of the relevant Manx law and procedure."

- ***Developing Local Jurisprudence***

A very important role of a judge in small countries is to help to develop local jurisprudence in the best interests of the small jurisdiction, taking into account its responsible place within the world. Each country must develop its legal system and its philosophy of law to suit its own needs.

- ***Promoting the Rule of Law***

Both inside and outside court judges, whether in large or small countries, should act as the promoters and guardians of the rule of law both in their home jurisdictions and further afield. Judges must try to maintain and increase confidence in the rule of law worldwide. As Stephen Breyer (Justice of the Supreme Court of the United States of America) in *The Court and the World* in chapter 12, *Advancing the Rule of Law,* put it at page 271:

> "The interchange amongst judges, lawyers, and law students can help build support for a more basic goal, the furthering of the rule of law itself."

- ***Policy Considerations***

Judges in small countries may also, where appropriate, refer to issues of policy relevant to those jurisdictions. See for example in the Jersey Royal Court the judgment of Commissioner JA Clyde-Smith in *Lloyds Trust Company (Channel Islands) Limited* [2017] WTLR 103 at 115 paragraph [28] referring to:

> "… important reasons of policy … namely the need to deter fraud and corruption and to have the ability to strip fiduciaries who have channelled their illicit funds through this jurisdiction of all benefits."

In *Wine v Wine* (29 May 2007) at paragraph 74 I referred to the policy of the Manx jurisdiction to assist foreign courts, insolvency officers and regulatory officers where appropriate and subject to suitable safeguards in the provision of full information and documentation, to enable a proper, just and fair determination of any issues or disputes in the principal jurisdiction where such issue or dispute was to be determined. Although from time to time it is appropriate for judges to refer to issues of policy, judges must, of course, exercise real caution before commenting on any potentially controversial issues of government policy unless they impact adversely on the rule of law and it is otherwise appropriate to make comment. See further Lord Neuberger's lecture on *Judges and Policy: A Delicate Balance* (18 June 2013).

I have also stressed the importance of the policy of openness in the legal process (see for example *Delphi* 2014 MLR 51). On other occasions I have stressed the importance of respecting privacy and confidentiality (see for example *AB v CD* 30 June 2016). This is not evidence that I have a Jekyll and Hyde personality. It reveals what many judges will tell you, whether they operate in large or small countries: at its core judging involves balancing various factors and doing your best to arrive at a just result in each case in accordance with the relevant law and the judicial oath.

- ***Legal Education and Law Reform***

Judges should also get involved in legal education and law reform where appropriate.

Judges have an important role to play in respect of legal education both in helping to decide how it is delivered and in assisting in its delivery. Lord Neuberger in *Reforming Legal Education* (15 November 2012) at page 3 stated:

> "The judiciary in particular brings both practical and principled insights. The judges have many years of accumulated legal practice, are quasi-consumers of legal services in court, represent the branch of the state which upholds the rule of law, and constitute the ultimate disciplinary body of the legal profession."

Judges also have an important role to play in respect of law reform. As I touched upon in my lecture *The rule of law and the separation of powers* in this famous debating chamber in 2015, whilst the primary responsibility for law reform must be that of the legislature, judges are sometimes ideally placed to suggest areas of law reform that would merit further consideration by the legislature.

- ***Focus on the Needs of Court Users***

Judges should be continually focused on the needs of all court users including the important finance sector business which comes before the courts of some small countries. In *Dev Property Developments plc* (judgment 7 May 2008) I stated:

> "20. … It is not improper or inappropriate for this court to recognise the importance of the finance sector to the Island's economy. It is, of course, not to be given any undue preferences as everyone is equal under the law but there is no difficulty in recognising its importance to the Island.

> 21. The courts of the Island are here to provide an efficient service to the local and international community in respect of legal issues arising for determination in this jurisdiction whether those issues are finance sector related issues or not …"

Moreover, with an increasing number of litigants in person the court system must continue to provide appropriate support and guidance. His Honour George Edgar Moore, a former First Deemster and Clerk of the Rolls, recognised this in his farewell address at Castle Rushen on 9 December 1974 just before he embarked on a round the world trip when he stated:

> "I have always had particular care for litigants appearing in person. I have always taken the view very strongly that persons without legal experience coming into any court find it strange and I have always taken the greatest care to make sure that as far as I can the litigant in person understands what the proceedings are about and particularly understands what his rights are. Of course for those other litigants who are wise enough to engage counsel – the importance is that the counsel should be learned."

Summary

In short summary, the role of a judge in a small common law democratic country includes I would suggest, amongst others, the following important areas:

(1) judges should decide the legal issues of the day in accordance with the law and the judicial oath. Judges must be impartial and independent and cases should be determined fairly and justly within a reasonable time. This involves active case management beginning as soon as the claim or application is filed with the court;

(2) judges are also properly involved in developing the common law but any judicial development of the law must be in conformity with justice, common sense, the spirit of the law, principle and policy. It must also take into account the competing needs for certainty and flexibility and the avoidance of illegitimate legislating from the bench. Judges should develop the law in a way which is considered most appropriate for the needs, requirements and interests of their home country and the wider international community of which that home country is a part;

(3) judges must embrace change and new technology;

(4) judges may highlight the benefits of the judge's home country;

(5) judges should give guidance on local law and procedural issues;

(6) judges should help to develop local jurisprudence in the best interests of their home country taking into account its responsible place within the world;

(7) judges should promote the rule of law both locally and internationally;

(8) judges should, where appropriate, refer to issues of policy relevant to the judge's home country;

(9) judges should get involved in legal education and, where appropriate, law reform; and

(10) judges should be continually focused on the needs of all court users.

Trumpeting the Rule of Law

Before I close, I would like to reprise an area where small countries must endeavour to hold their own.

In my lecture last year, I mentioned the pressures that small countries are put under when international organisations and others seek to validate and check their processes and services. Care must be taken to try to understand the true motivation behind any proposed intervention and ensure a level international playing field. Small countries must vigorously protect their own legitimate best interests against any self-serving agendas of larger countries. Small countries may have to wise up and should always be on their guard against the possibility of undue manipulation by outsiders who may be, inadvertently or otherwise, promoting the best interests of larger countries at the expense of smaller countries.

Without the resources to allocate a dedicated team to positively and constructively engage with outsiders invading our lands to check up on us, these evaluation visits can be stressful and difficult to deal with.

But before I go any further I would like to share the results of last year's MONEYVAL assessment conducted on the Isle of Man insofar as it concerned the judiciary. We endeavoured to present ourselves in a way that our competence, integrity and independence would be recognised by these potentially influential outsiders.

Now there is a fine line between legitimate self-promotion and unhealthy narcissistic behaviour, and I confess that on occasions I do cross it. And this, without apology but much pleasure, is one of those occasions. So, casting aside any undue modesty here are the banner headlines from the MONEYVAL Report insofar as the Manx judiciary is concerned:

- "… the rule of law and an independent judiciary are all well established" in the Isle of Man (paragraph 93 on page 19). Horray!

- "The IoM has a sound legal system … It enjoys an independent judiciary committed to the rule of law." (Key Findings, page 36). Bravo!

And I leave the best until last:

- "The Deemsters of the IoM have [an] excellent reputation and are independent" (paragraph 242 on page 50). Yindyssagh - Manx for wonderful.

This may sound like a self-serving advertisement but it is more sharing joy, relief and pride in hard work that delivered a strong result. We will not be complacent. There is much more work to be done.

These Oxford sessions on the rule of law have helped us to gain those positive comments from outside evaluators. I thank you and your predecessors for making sure that I stay

focused on endeavouring to enhance the rule of law. Thank you. The Manx judiciary's success is your success.

Economics and the Law

In closing, I must acknowledge the reason you are here in the British Isles. Economics, finance and regulation are at the top of your agenda and my dry legal input is just a small sideshow relative to the main areas of debate.

However, we have some common ground. Law and economics are both basically built on the premise that people's behaviour is rational. Laws are passed, interpreted and enforced using a rational process that must remain unswayed by subjective opinion, emotion or ill-informed comment.

It is interesting to note that the very people we are seeking to protect and support with the law and economics frequently fail to behave with reason and logic. My judicial oath requires me to execute the laws of the Isle of Man "without respect of favour or friendship, love or gain". It is sometimes said that lovers, inappropriately impassioned business people and criminals frequently do not make a rational assessment of their situation. Indeed, it is generally accepted that the former, love, creates a clearly definable mental imbalance. I am sure we have all been there and perhaps some of us still are. I believe the world of science has not yet ascertained whether love of country generates the same response, but I am confident that the Deemsters of the Isle of Man have this firmly under control.

I am also confident, on the basis of your helpful responses to my questionnaire, that the judges in your countries are also able to maintain impartiality and decide cases justly and objectively in accordance with the law. But I would ask you to remember that judges in small countries need to be supported in this endeavour because they are subjected to pressures and influences not always found in larger jurisdictions. So please bear this in mind as you head back to your homes and families.

In total, you have all travelled approximately 133,000 miles to get to this event and you will do the same again on your way home, stacking up a combined distance that is nearly 11 times around the world and there is nothing small or insignificant about that. I salute you for making the commitment to attend. My only hope is that I have managed, for my own small part, to give you something to take away that will be useful in the years to come. I love the law just as you love economics and I am sure we all acknowledge the significance of both in forming the bedrock of a fair, strong and prosperous country.

Safe travels.

David Doyle
First Deemster and Clerk of the Rolls of the Isle of Man
28 June 2017