Opening Address by Sir Henry Brooke (Patron of the Public Law Project

at the PLP Conference on 4th March 2014

Private Law for Public Law Practitioners

Those of you who came to this conference hoping for a keynote speech by Sir Anthony Hooper are in for a disappointment. He has had to cry off, and as patron of PLP I have agreed to step into the breach at short notice. To some extent this may be a good thing, because he is a criminal law specialist while I spent my life as a common law butterfly, and I used to be very familiar with most of the topics we will be discussing to day.

I first met Tony Hooper more than 20 years ago when he joined the Bar's Race Relations Committee which I then chaired. and he shared my horror at the scale of thoughtless discrimination that was then being experienced by a lot of able new entrants to the Bar. Much more recently, he has shared my view that although serving judges cannot break ranks and speak publicly of what they really think about some of the Government's horrendous legal aid and judicial review reforms, those of us who can no longer sit as a judge due to statutory senility are bound by no such constraints. Indeed we both believe that we are under a duty to express our worries loud and clear, so long as we don't do it too often.

Today for me will be a trip down memory lane. The title of this conference says it all. "Private Law for Public Law Practitioners – Reaching the injustices other public law remedies cannot reach – Or, When you have established that public law authorities have got things wrong, what remedies could be used beyond those available in conventional public law?" In a long life in the law I have been very lucky. I have met many brilliant, dedicated lawyers. I have seen huge steps forward being made by imaginative judges, spurred on by imaginative lawyers, in pursuit of a fairer system of justice for everybody. Recent events make it more important than ever that lawyers' imaginations still run riot in the quest of justice. This is what today's conference is all about.

As I have said, the subjects we are discussing today bring back many memories. You must forgive an old man's rambling reminiscences. Fifty years ago I was a pupil in common law chambers. It was the world of the generalist, not the specialist. Today's distinction between public law and private law simply didn't exist in any kind of formulaic sense..

One of my favourite books was a collection of Lord Justice Denning's 1951 Hamlyn Lectures, published under the title "Freedom under the Law". The times were very different. The Crown Proceedings Act 1947, which allowed you to sue the Crown without asking the Attorney-General for permission to do so, had only just been passed. The report of the Franks Committee, which led to a right of appeal to the High Court on points of law from tribunal decisions, was still six years away. In his lectures Lord Justice Denning complained, among other things, about the limitations of certiorari as a remedy for wrongs done by

public authorities. You had to detect an error of law on the face of the record if you were to get anywhere., and if there was nothing that even the most ingenious judicial mind could recognise as a record, the Queen's Bench Divisional Court could give you no remedy by way of prerogative order, because there was no record that could be brought up there to be quashed.

In a purple passage at the very end of his lectures, he said this:

> "Our procedure for securing personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age."

He said the old procedures had to be replaced by new and up to date machinery, by declarations and injunctions and actions for negligence. All of these were what we would now call private law remedies. And so far as actions for negligence were concerned, whatever he may have said in his dissenting judgment that year in *Candler v Crane Christmas*, they were at that time still restricted to claims involving injury to persons or property. *Hedley Byrne v Heller* was not to be decided for another 12 years, in the year when I started to practise at the Bar. I was a judge's marshal in Cardiff at that time, and I remember some lively discussion at the judicial breakfast table in the Mansion House, where the judges stayed as the guests of the local authority in those pre-Beeching days..

At all events, this particular battle cry by Lord Justice Denning did, quite unusually, achieve general respectability. This is why so many of the leading public law cases up to 1982 were started by writ or originating summons, as if they were private law actions masquerading under a different guise. In some of the leading public law cases in the 1960s, like *Ridge v Baldwin* and *Anisminic*, all that the plaintiff was seeking was a declaration. If you claimed relief by way of private law action, you did not need to obtain leave to begin proceedings and there were no strict limitation rules. But you did have to have a Statement of Claim and a Defence in the usual way, and this had to be followed by full-blown discovery and a summons for directions before the action could be set down for trial. It was often a matter of chance whether an action against a public authority was started under what was then Order 53 of the Rules of the Supreme Court or by private law action.

I remember the time when I was doing employment law cases for the Crown in the late 1970s as a member of the very first Attorney-General's panel. There was a lot of litigation about new statutory arrangements designed by Michael Foot to encourage trade union recognition. All the complaints about decisions of the Central Arbitration Committee finished up before a panel of three judges, usually headed by the Lord Chief Justice, in the Divisional Court. In contrast, all the complaints about reports by ACAS took the form of an action for a declaration or an injunction and were usually, but not always, started by writ in the Queen's Bench Division. I remember we once found ourselves in Chancery in a bitter trade union recognition dispute, when Derry Irvine was on the other side and I had to

explain to Mr Justice Oliver (later Lord Oliver) what the Bridlington Agreement was all about.

Those of us who knew this history knew that the present Lord Chancellor was talking rubbish when he suggested that the total number of Order 53 applications in 1976 was evidence of the total number of public law claims against public authorities that year. He did not know that so many of them were started as actions for a declaration or an injunction, and these claims could not be issued in the Divisional Court.. His ignorance was not his fault. He has often admitted the obvious: that he knows no law. It was presumably the fault of his legal advisers, But it was a very great shame that he did not correct the mistake once it was pointed out to him. Instead this has become part of the demonology, and it is trotted out again and again as part of the stock in trade of those who are trying to belittle the growth of judicial review, which was one of the great achievements of my time as a judge..

It took 25 years from the publication of "Freedom Under the Law" for the Law Commission to publish its proposals for a single remedy of judicial review. Now the same court could make a declaration or grant an injunction or award damages in addition to providing the relief available under the old prerogative orders. But although these proposals were implemented by a rule change in 1977 and buttressed by statute in 1981, it was only in 1983, in *O'Reilly v Mackman* that the House of Lords ruled that because every kind of remedy was now available through judicial review, all these public law claims had to follow the same Order 53 procedure and could not be started in any other way.

I was myself quite heavily involved in three big initiatives in the 1990s to make the new procedures simpler to use. But ever since 1982 the four corners of public law litigation have been quite firmly staked out, and the present divide between public law and private law. grew more and more like the Berlin Wall or the wall erected by the Israelis which I saw when I visited Ramallah for the first time six months ago. Ought things to remain this way? That is the question.

I thought I would use this opening address to tell you a little about what to expect during the rest of the day, with some marginal comments made by me as if I was the Chorus in a Greek tragedy.

When I have finished speaking – and I have promised not to go on for more than about 20 minutes – you are in for an embarras de richesses. I first met Philippi Kaufmann when she was the hyper-active chair of FRU, the Bar's Free Representation Unit. I was then one of its very laid back trustees. Indeed we were so laid back that although one of us was the chairman of a major clearing bank and another the top judicial expert on charity law, we allowed FRU's accounts to go unaudited for at least three years. Fortunately none of its money had gone walk about, or there might have been a lot of questions to be asked. Philippa will be explaining when and how a public law wrong may sound in damages.

I remember that when I was with Jack Beatson at the Law Commission 20 years ago, and we had just completed our major report on judicial review and statutory appeals, the next logical step forward was to carry out a similar in-depth review of Philippa's topic. But because we were spending public money, we had to obtain the Lord Chancellor's approval for all our projects. Even back in 1994 Lord Mackay thought that this would be a step too far, so far as some of his Cabinet colleagues were concerned.

Since then the topic has developed haphazardly, on a case by case basis, as has always been the way with the common law. You will remember that Lord Wright once described the way in which English judges preferred to proceed from case to case, "like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the open sea of system and science." We were deprived of the system and science that the Law Commission might have brought to bear, but the work done by the House of Lords in the late 1990s, widening the possibility of actions in negligence against social service authorities and education authorities, and the emergence of the tort of malfeasance in public office, which was scarcely heard of before Mr Justice Clarke's judgment in the *Three Rivers* case, managed to open up all sorts of possibilities which I imagine Philippa will be talking about.

Next Richard Hermer will be travelling in territory with which I used to be very familiar – the range of remedies available in private law claims, together with principles and practice in the quantification of damages. I first came across Richard when he appeared in some breathtakingly difficult human rights appeals in the Court of Appeal in my last years as a judge. More recently, he has been helping with some of the work I have been doing in support of human rights and environmental defenders in other parts of the world where the executive does not wholeheartedly believe in the importance of the rule of law. I firmly believe that every so-called public lawyer needs to be familiar with the topics which Richard will be addressing if he or she is to provide a proper service to clients.

As times change, lawyers' imaginations have to keep up with the pace of change. I remember the days when we had to explore the possibilities of the ancient writ *ne exeat regno* as a means of enforcing judgments, long before money whizzed round the world electronically on the click of a mouse, when the remedy of the *Mareva* injunction (now called a freezing order) had never been thought of. It was the ingenuity of Hugh Laddie, later Mr Justice Laddie, which contributed to the creation and growth of what used to be called an *Anton Piller* order, now a search order.

In my last days on the Bench, we created new ground rules for Protective Costs Orders to remedy an injustice that had troubled me ever since my days at the Law Commission 19 years earlier. We also created the *Bhamjee* order, to protect public authorities and others from a ceaseless flow of hopeless actions brought by persistent litigants who did not have to pay any fee at all before they instituted proceedings.. And we laid down new rules for first creating, and then limiting, the liability of third party funders who had made it possible for civil proceedings to be brought but who ought in fairness to share some of the risks if they

were eventually lost. None of these advances could have been made by judges on their own. They always needed the help of the lawyers who appeared in front of them, and in fields as complicated as these the lawyers could not simply be narrow specialists who knew nothing of law and procedure outside the covers of the specialist text books.

If I were to pick out one topic for special mention, it would be the recovery of damages against public authorities, and others, for psychiatric harm. The law relating to damages for so-called nervous shock – the secondary victim cases – seems to be irretrievably stuck like Winnie the Pooh in the rabbit hole. The House of Lords won't go back and they won't go forward, and Parliament refuses to clear up the illogical mess which the House of Lords has created.

But the law relating to primary victims still has a long way to go. In the field of dust-related disease, the House of Lords endorsed the principle 50 years ago that so long as the tortfeasor's contribution was more than *de minimis* and there was no other defendant before the court, he had to pay compensation for all the consequences of the disease, even if there may have been a lot of other contributing causes. I remember Lord Fraser explaining to us during the *Wilsher* case that the reason why the judges in Scotland were so keen on developing this principle was that bad factory-owners were never deterred by small fines in the sheriff's courts: it was only the risk of large compensation awards which frightened their insurers, and ultimately the factory-owners themselves, because of the size of their premiums, into ensuring that they had to do something to reduce the level of dust in their factories.

So much for liability for dust-related disease. But the law on damages for psychiatric injury (or for the injury that is said to flow from a negligent failure to diagnose dyslexia, or other learning disabilities), still has a long way to go. Lady Justice Hale's judgment in the *Hatton v Sutherland* group of cases on stress-related psychiatric illness was very much a collective effort. I remember we sounded a note of caution about cases where an employee's capitulation to stress-related illness might have had a lot of causes –for instance, a single mother trying to juggle the demands of difficulties with her home life to the excessive demands of a full-time job she was too frightened to give up for fear of losing her pension, was involved in one of the cases we heard. We cut that Gordian knot by saying this.

> "…If it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. There is no reason to distinguish these conditions from the chronological development of industrial diseases or disabilities."

But this left quite a lot of questions unanswered. I remember that we returned to the topic, equally inconclusively, when we were considering what damages should be awarded to a claimant for loss of earning capacity when his subsequent unhappy career, which included a period of detention as a restricted patient under the Mental Health Act, was attributed by

the judge to the fact that his condition of Asperger's syndrome was negligently undiagnosed and he was negligently placed in the wrong kind of school at the age of 11. There were many other operative causes which could have led to a similar outcome even if the negligence had not occurred. I don't think that the fairly broad-brush solution we suggested will necessarily stand the test of time.

Stephen Cragg will speak next. I would like to pay tribute to the enormous contribution he has made to the work of PLP while he has been chairing our management committee. He will be talking about the procedural maze that still confronts those who seek remedies against public authorities that fall under different headings with different procedural rules. We did our best in the 1990s to soften the rigidity of so-called procedural exclusivity, but there is still a lot more work to be done, especially as more and more lay litigants will be trying to bring claims against public authorities following the cutbacks in legal aid that are now coming into force.

Next there will be the panel discussion on Mediation on which I was originally billed to speak. This will be chaired by Stephen Grosz, who is learning more and more about mediation with every passing day of his retirement. I think I first met Stephen when I was chairing Lord Woolf's specialist working party on judicial review claims which formed part of the Access to Justice review.

Some of you will know that I threw my energies into the promotion of civil mediation as soon as I retired from the Bench, and I have conducted over 200 mediations in the last seven and a half years. But very few of them have been public law mediations, and although there is little to be gained from mediating simple judicial review cases, I think that far more cases could be successfully mediated if practitioners knew more about the opportunities it offers for early closure. If there is a 70% chance of winning, there will also be a 30% chance of losing. Mediation takes account of the risks of winning and losing in a way in which litigation cannot. I remember one quite tricky case in which I successfully mediated a solution which the council's officers were willing to recommend to the council. But councillors rejected it, and they got a very bloody and expensive nose when the matter was eventually decided in court.

This afternoon will be largely dedicated to workshops and there is no time to talk about them now. I hope you manage to turn them into forums for discussion, and you are not simply talked at from the platform, as has happened in some workshops I have attended in the past. After the workshops we will move on to learn the lessons from the *Mau Mau* case. Again, this was the kind of litigation that was unimaginable while I was still at the Bar, A lot of the credit for enabling wrongs like these to be righted lies at the door of Leigh Day & Co, from whom we shall be hearing this afternoon.

And then we will be moving from a slowish start to a *crescendo* at the end, with a closing address by Michael Fordham, who has contributed so much of his time *pro bono* towards

advancing the law in novel directions. I remember meeting him first when I was at the Law Commission, when I gave him advice about the kind of Chambers he ought to join. I can't remember what I said, or what advice I gave him, but either way it can't have done him much harm. Later I had direct experience of the immense volume of scholarship he contributed pro bono in inducing us to give authoritative backing for the new protective costs order regime in the *Corner House* case. His topic will be typically ground-breaking: "Looking Ahead: the potential for developing a public law wrong compensation tort," and this will then be debated by a panel of all the experts.

This is an idea whose time has surely come. We must do our best to break loose, wherever possible, from the straitjacket of procedures which may have worked well in the past, but may be restricting easy and effective access to justice now. This is particularly important now that so many more lay litigants may be forced to bring their claims against public authorities themselves. You will remember that in the United Australia case in 1940 Lord Atkin referred impolitely to some of the old forms of action in these terms::

> 'When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.'"

I hope that Mike Fordham will do a similar amount of ghost-bashing this afternoon, because it is high time it happened. Just because a claim has been put in a particular type of box for years and years, it doesn't mean it has to stay there if remaining there is impeding the development of justice. The other night I heard a brilliant address by Professor Andrew Burrows to Inner Temple students when he was encouraging us all to stop categorising unjust enrichment cases in two different boxes – a common law box for claims for monies had and received or a Chancery box for equitable restitution. We have to think more boldly. Restitution was merely a remedy that was available in lots of different causes of action. The relevant cause of action was unjust enrichment. In the same way, should a new cause of action be founded on wrongful acts by a public authority? Wait and see.