Web Journal of Current Legal Issues

Bennion, Review of Barnard, O'Sullivan and Virgo, '*What About Law? Studying Law at University*', [2008] 3 Web JCLI
http://webjcli.ncl.ac.uk/2008/issue3/bennion3.html

Catherine Barnard, Janet O'Sullivan and Graham Virgo; *What About Law? Studying Law at University*

Hart Publishing, Oxford and Portland, Oregon, 2007, 222 pages, £10.00.
ISBN 1841136328 / 9781841136325
http://www.hartpub.co.uk/books/details.asp?isbn=9781841136325
http://www.whataboutlaw.co.uk/

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Introductory

This book is described by its authors as a 'taster' for the study of law as an academic subject. It has two main objects. These are to help prospective students decide whether reading law at a university is for them and to provide an introduction to the main subjects that students will study for a law degree. The authors add:

> 'However this book comes with a health warning: it does not provide a comprehensive review of the nuts and bolts of the legal system . . . Nor is it packed full of useful tips as to how to be a good student of law (how to write good essays, how to prepare for exams, etc).'

As a specialist in statute law I would add a reference to that burgeoning academic subject, which underlies most other law. As might be expected, the book deals only cursorily with that.

The book outlines what general law subjects are, how they have developed, and how judges apply them. It does this by an ingenious method. Taking the six core subjects, criminal law, contract, tort, land law, equity and constitutional law (with which the authors join EU law) the book examines in depth a leading case from each. One object is to demonstrate that law is interesting and sometimes amusing; not dry as dust.

What led me to ask to review this book was the first of the two main objects, helping students decide whether reading law is for them. This struck a personal chord. I came out of the RAF in 1946 after five years war service not knowing what I wanted to do with my life. I went up to Oxford, where I chose at first to read PPE (Politics, Philosophy and Economics). It seemed a nice broad subject, leading in all sorts of directions. I was much more interested in politics than either of the other subjects, but never mind. So how after a year of PPE did I find myself switching to law?

I will answer that question at the end, after discussing the content of this book. I propose to do the latter mainly by describing how the authors tackle the first three of the key cases they chose to illustrate the core subjects. After that I will consider briefly how they deal with my own specialty.

The criminal law case

The chapter on criminal law was written by Professor Graham Virgo. He chose as his key case *R* v *Brown* [1994] AC 212, a notorious and controversial decision concerning the right of a group of masochist men to choose to undergo, at the hands of a group of sadists, severe physical abuse because its infliction gave the masochists (and incidentally the sadists also) acute sexual pleasure. Is doing this sort of thing, or should it be, among recognised human rights? The men in question were all over the age of consent. Their activities, involving branding, piercing and beating, occurred in private and were consensual. The injuries suffered involved no infection or permanent disability; and required no medical attention.

His description of the Crown Court trial in *Brown* enables Professor Virgo to explain the respective functions of judge and jury and to describe the charges (under the Offences against the Person Act 1861 – not correctly spelt in the book). Following the judge's ruling that consent was not a valid defence to the charges, the defendants pleaded guilty and were sentenced to imprisonment. Professor Virgo explains how the defendants unsuccessfully appealed against the judge's ruling to the Court of Appeal (Criminal Division). He adds that their prison sentences were reduced 'because they did not know that their conduct was criminal', missing the chance to explain that this was a problematic ground because of the rule that ignorance of law is no excuse. The case went to the House of Lords, where the House divided three to two in dismissing the appeal. This gives Professor Virgo the chance to explain dissenting judgments (or in this case speeches). He shows how the three Law Lords in the majority each gave different reasons, and how there was a common underlying principle or *ratio decidendi*. He says that the majority identified four key reasons justifying the decision: earlier authorities, technical reasons, policy reasons, and morality. He goes on to consider later relevant developments and human rights considerations. Altogether this is a thorough and acute use of *Brown* as an illustration of the criminal law in action.

The contract law case

Janet O'Sullivan chooses a fascinating and important decision for her key contract law case: *Ruxley Electronics & Construction Ltd* v *Forsyth* [1996] AC 344. Stephen Forsyth contracted with Ruxley that they would build a swimming pool in his garden with a depth of seven feet six inches at the diving board end. This was unusually deep, but he was a tall man and wished to feel confident that he would not hit his head when diving. As constructed the pool did not meet the depth requirement, and was at its

maximum only six feet six inches deep. The judge at first instance held that this depth was safe for diving, but that there was a breach of the contract because it stipulated for the greater depth.

What was the measure of damages? A common measure in such cases is the difference in the value of the property with the contract performed in the way it actually was and the value it would have with the contract correctly performed. Where this is not appropriate, the 'cost of cure' may be taken. The author explains the cost of cure measure, by which the offending party has to pay the cost of putting things into the form they would have been in if the contract had been correctly performed. Here the cost of cure would have been the cost of digging out the pool and refinishing it at the stipulated depth. The judge found there was no difference in the two market values of the property but calculated the cost of cure at the large sum of £21,650. One measure was inadequate and the other excessive. What was to be done? The judge broke new ground by awarding a 'middle' sum of £2,500. He did this by borrowing from tort law and measuring Forsyth's 'loss of amenity'. Forsyth appealed.

The case went first to the Court of Appeal, which awarded the cost of cure, and then to the House of Lords, which restored the 'loss of amenity' award. Lord Mustill said that once one recognised the possibility of a 'middle ground' award for loss of amenity

> ' . . . the puzzling and paradoxical feature of this case, that it seems to involve a contest of absurdities, simply falls away. There is no need to remedy the injustice of awarding too little by unjustly awarding far too much'.

The author goes on to show how *Ruxley* has been applied and interpreted as a precedent in many subsequent cases. She adds:

> 'In fact, it has been cited and discussed many times, in all sorts of case, but just looking at two very different examples will give you a flavour of its development and influence.'

She goes on to discuss these two examples. It is a splendid illustration of the common law in action.

The tort law case

On tort law, Tony Weir stresses the theme that, while it is necessary to know what the law is (for the time being), it is also very desirable to know how it comes to be the way it is and how easily it might have been otherwise. He adds: 'And that is one of the things that makes the law as interesting as it is.'

After showing that tort law differs from contract law in that there are a number of different types of tort, Weir settles on the quintessential tort, negligence, and within that the quintessential case, *Donoghue* v *Stevenson* [1932] AC 562. He describes the horrified girl who finds, after drinking most of the bottle of ginger beer, that a dead snail was inside it, as having been 'poisoned', though according to Lord Buckmaster what she suffered from was 'shock and severe gastro-enteritis'. From that classic case he moves on to the negligence decision he has picked out for special treatment,

McFarlane v *Teeside Health Board* [2000] 2 AC 59. Like *Ruxley* in contract law this poses a tough problem.

Mr McFarlane decided that his existing four children were enough. He was given a vasectomy by a surgeon employed by the Health Board. Later the surgeon negligently told him it was now safe to dispense with contraception. He did so, and a pregnancy resulted. The child was healthy. There was no abortion, and after birth the child was not submitted for adoption. The parents claimed damages from the Health Board. The case went to the House of Lords, where the speeches display a bewildering array of arguments. Any student who reads the report and still considers law boring should study something else, because it displays the law as actually both fascinating and shot through with many aspects of human drama.

I am not sure that Tony Weir quite does justice to the richness of *McFarlane*, but perhaps that is not possible within such a limited space. Lords Steyn and Millett placed importance on *distributive* justice as opposed to *corrective* justice. Weir shows impatience with this. The distinction is between on the one hand doing right as between the parties and the rest of the community and on the other hand doing right as between the parties themselves. In resorting to distributive justice Lord Steyn rather pointlessly replaced the man on the Clapham omnibus with the man on the London Underground. He said:

> '. . . it may become relevant to ask of the commuters on the Underground the following question: Should the parents of an unwanted but healthy baby be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the cost of his or her majority, ie until about 18 years? My Lords, I have not consulted my fellow travellers on the London Underground but I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic No.'

Statute law

Space does not permit me to examine further the way the book treats individual types of law. I turn to how it treats the underlying subject of statute law. On statutory interpretation the book says (in somewhat simplistic fashion): 'Judges may need to interpret what a particular statutory provision means and, having decided what it means, this interpretation will then become law in its own right and be applied in future cases' (p. 7). However, as part of a disquisition on legal method, there are then three pages enlarging on this treatment of interpretation (pp. 21-24). Two interesting cases are examined, but this is done solely from the point of view of purposive interpretation, which is only one of the dozens of different interpretative criteria that a court may need to apply and weigh. There is no mention of what I have called the basic rule:

> 'The basic rule of statutory interpretation is that it is taken to be the legislator's intention that the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned.' (*Bennion on Statutory Interpretation*, 5th edn 2008, section 193).

There are other brief statements in the book on statute law and its importance, and it would perhaps be unreasonable to expect it to be given more attention in a book of this type. I would however like to see legal authors giving more emphasis to a truth proclaimed in the book just cited:

> 'The clue that should not be missed is that statutory interpretation keys into the whole system of law; indeed that whole system is subject to the relevant scheme of interpretation and in turn feeds into it. This means that statutory interpretation when treated comprehensively and historically . . . forms perhaps the best introduction to, and summary of, a country's entire legal system.' (P. 8.)

Conclusion

I said at the beginning that the book under review has two main objects, to help prospective students decide whether reading law at a university is for them, and to provide an introduction to the main subjects that students will study for a law degree. The book succeeds handsomely in the second object, but I have doubts about the first. Here it is perhaps too efficient in its various discussions of the law. A school leaver who has not yet reached a decision on what subject it would be right for him or her to study on arrival at university may be put off by the comparatively advanced level of legal analysis contained in this book.

I think back to my own case. After five years service in the wartime RAF I went up to Oxford at the advanced age of 23, and had still not made up my mind which subject I should study. I procrastinated by reading PPE for a year, then at last a decision began to form. I would switch to law if Balliol would let me. Why? Because I found that the friends I was making at college were among the law students. I was fascinated by their endless arguments about snails in ginger beer bottles, animals *ferae naturae*, and deleterious substances escaping from land. I began to understand a little about the nature of the legal mind, and to suspect that my own mind was like that. After sixty years practising law in one way or another I know now that I was not mistaken.
But it took more than a book like the one under review to do the trick. It took something that is not available to the school leaver: a year's preliminary experience of university life.