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978-1-107-02047-4 - The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams

Edited by Dennis J. Baker and Jeremy Horder

Excerpt

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1

Glanville Llewelyn Williams 1911–1997: a biographical note*

PETER GLAZEBROOK

When, in 1957, at the age of 46, Glanville Williams was elected a Fellow of the Academy, his name had long been a byword among both practising and academic lawyers throughout the English-speaking world as that of its sharpest, most radically critical and most prolific living jurist. He had published three monographs on complex and detective aspects of the common law of obligations, whose originality, sophistication, penetration, breadth of reference, historical acuity, and analytical and critical clarity had set new standards for legal writing in this area. He had been the first to demonstrate how the techniques of linguistic analysis could be used to expose the emptiness of much jurisprudential debate and the irrationality of many a legal distinction. And he had capped all this with (what in its second edition was) a 900-page treatise on the general principles underlying the criminal law, which not only marked a fundamental change of direction in his own work, but also transformed the study of that subject, setting the agenda in it for several decades, and had led to his appointment as the only foreign Special Consultant for the American Law Institute's great project for a Model Penal Code. He had gone on, following paths first trodden by Jeremy Bentham, to appraise, and find wanting, many of the sacred cows of the English way of administering criminal justice, equalling his mentor in critical rigour and in the disdain shown for 'Judge & Co.', but writing infinitely more readable prose that re-ignited debates which still continue. He had also made a pioneering and outspoken study of the lengths to which Anglo-American law went to protect human life that would be seen as a seminal text when, nearly two decades later, medical law and ethics began to attract the attention of English law faculties. There had, moreover, been

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very few years in which he had not published half a dozen or more papers unravelling doctrinal complexities or critically analysing, often with iconoclastic zeal, judicial decisions and parliamentary legislation. And he had written a best-selling guide for aspiring law students which for half a century was for almost all of them to be their first introduction to their chosen profession. On top of all this, he had been active in the cause of law reform as polemicist, committee member and draftsman.

His election to the Academy could not, therefore, be said to have been premature. He was then a Fellow, and Director of Studies in Law, of Jesus College, Cambridge and Reader in English Law in the university. But he had already held two chairs in the University of London (the first at the London School of Economics, the second at the age of 39 its senior law chair, that of the Quain Professor of Jurisprudence at University College), and he was to hold two more at Cambridge (initially one of the university's first 'personal' chairs, and then the Rouse Ball Professorship of English Law). On reaching retirement age – he never, of course, really retired – he was rightly acclaimed by another member of the Academy, Sir Rupert Cross, Vinerian Professor at Oxford, as 'without doubt the greatest English criminal lawyer since Stephen'.¹

I

Born on 15 February 1911, Glanville Williams was the son of Benjamin Elwy Williams of Bridgend, Glamorgan, and his wife Gwladys, daughter of David Llewelyn of Pontypridd. His father, who came from a long line of modest, chapel-going, Carmarthenshire and Cardiganshire farmers, was then a partner in a local firm of tailors. His mother had been a primary school teacher.

The infant was precocious. There was no stage of baby language. On his first visit, aged three, to the dentist, hearing that a milk tooth was to be extracted, he looked up in alarm and asked 'Is it imperative?' An only child, with poor health, sometimes confined to bed, who was uncomfortable in large groups, preferring the companionship of a few close friends,

¹ 'The Reports of the Criminal Law Commissioners (1833–1849) and the Abortive Bills of 1853', in P. R. Glazebrook, *Reshaping the Criminal Law* (London: Sweet & Maxwell, 1978), pp. 5, 20. The reference is to Sir James Fitzjames Stephen (1829–1894), author of *A General View of the Criminal Law of England* (London: Macmillan, 1863), *A History of the Criminal Law*, 3 vols (1883) and *A Digest of the Criminal Law* (London: Macmillan, 1877), who drafted a Criminal Code, which, though it received the blessing of a Royal Commission, was not enacted in England, but was adopted elsewhere in the Empire.

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he developed his own interests and games. He built an elaborate model theatre, with performing puppets, and became a sufficiently competent conjuror to perform at school entertainments. Family holidays were often spent on the beautiful Glamorgan coast at Ogmore, where a neighbouring cottage was occupied by the young family of the Reverend William Evans, who (as Wil Ifan) was to be crowned bard at the National Eisteddfod. During the day, the children played on the long empty stretches of sand, exploring the rock pools and caves; in the evenings the two families read verse and prose to one another. These holidays left lasting impressions and life-long loves both of the countryside and of the classical poets, novelists and essayists of these islands.

At twelve, he went, with a scholarship, to Cowbridge Grammar School as a boarder. Dogged by a weak chest, he spent almost as much time in the school sanatorium as he did in the classroom, he nonetheless won a classical scholarship to the University College of Wales at Aberystwyth, to which he went aged 16, in 1927, living (in view of his age and frail health) at the home of his uncle Sir William Llewelyn Davis, Librarian of the National Library of Wales, a Celtic scholar and author of two Welsh grammars. His uncle's efforts to make him a Welsh speaker – his father, as a Carmarthen man, was bilingual but his mother was not – were, however, unavailing. Throughout his life Glanville remained unmoved by the claims of either Welsh nationalism or the Welsh language.

His four years at Aberystwyth were formative ones. (The first, before he turned to Law, was spent on Latin, English, Philosophy and History.) The Law Department, under the charismatic Professor T. A. Levi was, in that interwar period, a remarkable legal nursery. Among the students were a future lord chancellor, two law lords, a bevy of other judges and more than half-a-dozen professors of law, while several of the lecturers were also to have distinguished careers elsewhere. A First, and a scholarship, was to take him as an affiliated (i.e., graduate) student to St John's College, Cambridge, where the Law Fellows were Stanley Bailey (who had lectured at Aberystwyth) and Sir Percy Winfield. Winfield was to supervise his PhD research – after another First (Division 1), with an outstanding paper in Legal History, in the Law Tripos in 1933 – and to secure his election as a Research Fellow of the college in 1936.

While at Aberystwyth the law student had invented an alphabetical shorthand system for taking lecture notes. He patented it (as 'Speedhand') and compiled a manual,² and it was long taught in

² 1st edn, 1952, 8th edn, 1980.

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secretarial schools in Britain and South Africa. He also learnt to play golf on the finely sited course at Harlech and (under the tutelage of members of his uncle's staff) to bind books. Both hobbies were pursued for many years. More significantly, he was active in the university's vibrant pacifist movement, becoming President of the University of Wales branch of the League of Nations Society and representing it at a League conference in the United States in 1931.

II

For all lawyers, whatever their specialism, Glanville's name (and for many, even beyond the circle of friends and colleagues, this was both a sufficient and the customary appellation) is now inseparable from the criminal law. But it was the law of civil obligations, and particularly the law of torts – which governs the payment of compensation for injuries to a person, property, business interests and reputation – on which he cut his scholarly teeth, and established his formidable reputation.³ Torts lawyers long mourned his desertion of their subject. His PhD dissertation was on 'The History of Tortious Liability for Animals'. It was completed in little more than two and a half years, during which time he also sat the Bar exams. Its examiners (Sir William Holdsworth and Winfield) not only recommended that 'in view of its exceptional merit' the oral examination should be dispensed with, but each also went on to say that if only the dissertation had been in print and its author of sufficient standing, they would have recommended the award of the LL.D. 'The minute study of the authorities, of all periods, printed and manuscript', reported Holdsworth, 'the grasp of principle which he has shown, and his power to criticise the rules and principles which he has expounded, make his thesis an admirable example of the manner in which legal history ought to be studied and applied. It is obvious that it is only a lawyer of very remarkable ability who could turn out a piece of this kind.'⁴ The examiners' sole complaint was of the severity of the candidate's criticisms of the illogical reasons offered by judges for decisions that produced practically convenient results. They were, however, mistaken in thinking that increasing age would remedy this trait.

³ See generally, B.A. Hepple, 'Glanville Williams 1911–1997: Civil Obligations', *Cambridge Law Journal*, 56 (1997), 440–5.

⁴ Cambridge University archives.

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The dissertation was expanded to become *Liability for Animals. An account of the development and present law of tortious liability for animals, distress damage feasant and the duty to fence in Great Britain, Northern Ireland and the common-law Dominions*, published by Cambridge University Press in 1939⁵ and greeted as ‘one of the best legal treatises’ to be published ‘in England’.⁶ The subject is fascinating and complex, presenting problems which go to the heart of notions of legal responsibility and have demanded solutions ever since the human race began to keep animals for its own purposes and to look to tribunals for the settlement of its disputes. For it is the animals, not the humans, who do the damage, and they have wills of their own. Yet taking it out on them, though it has in various societies and at various times been done, affords those whom they have harmed rather limited satisfaction. And the arrival on the scene of motor vehicles had added one more problem: hitherto there had been no reason why animals and humans should not share the highways on more or less equal terms. Although a modern law, the author argued, ought to be based on negligence, penetrating historical analysis⁷ explained how and why so much liability without fault had survived.

Someone who could, in his mid-twenties, handle such a wide-ranging topic in so masterly a fashion was clearly going to be a jurist to be reckoned with, as a 1938 paper on the ‘Foundations of Tortious Liability’⁸ had also signalled. Two generations of grand old men (including his own research supervisor) had, he argued, all got it wrong. The law of torts was neither founded on a single general principle that was subject to exceptions, as some of them had concluded, nor was it, as others said, simply a host of single instances. Rather there were several general rules of, and also several general exceptions to, liability, together with stretches of disputed territory. A further sixty years of hard-fought debate, judicial and academic, has confirmed the accuracy of this analysis.

Plans for a year at the Harvard Law School were frustrated by the onset of war in 1939. He registered as a Conscientious Objector and, being (in

⁵ The Syndics (of Cambridge University Press), having noted the receipt of several grants in aid of publication (and gravely underestimated sales) magnanimously agreed to bear the ‘remaining losses’.

⁶ Dean Cecil Wright of Toronto, *Canadian Bar Review*, 17 (1939), 613, 615.

⁷ Which ‘represents an important stage in the development of our knowledge’ of the emergence of the action on the case: M. J. Prichard, ‘*Scott v. Shepard* (1773) and the Emergence of the Tort of Negligence’, Selden Society Lecture (1976), p. 35.

⁸ *Cambridge Law Journal*, 7 (1939), 111.

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the event unnecessarily) well-stocked with arguments for his interview with the tribunal, was without ado allotted to civil defence work and encouraged to continue teaching law, which he was to do in the company of a handful of the elderly, the medically unfit and of refugees from Germany. His jurisprudence lectures are remembered by its briefly sojourning students (and those of the evacuated LSE) as a bright spot in a muted Cambridge. He continued, too, to act as a 'Poor Man's Lawyer' (Legal Aid still lay in the future), and to help with the Society of Friends' club for refugees. No new university appointments were being made and when his Research Fellowship and University Assistant Lectureship expired in 1941, he combined practice at the Bar⁹ – for the rest of his life he was to marvel at how little law many very successful barristers knew, and even then how often they got that little wrong – with *ad hoc* law teaching and, during the long vacations, work on a fruit farm.

Among the many legal problems exposed by the outbreak of war was the unsatisfactory state of the law governing contracts whose performance had for that or any other reason become impossible. It remained as the litigation engendered by the First World War had left it. Glanville edited, and added to, a monograph¹⁰ written by one of his contemporaries as a research student who had returned to New Zealand to practise law there. And when the *Law Reform (Frustrated Contracts) Act 1943* was enacted he wrote a Commentary on it,¹¹ which said, elegantly, almost all that has ever needed saying. As H. C. Gutteridge noted:

No one who consults this commentary can fail to be impressed by the depth of [the author's] learning and by the amazing versatility which he displays. Nothing seems to have escaped his attention. In fact [he] has at times allowed his flair for incisive criticism to get the upper hand of him so that it becomes a little difficult to distinguish between his expository conclusions and his views as to what Parliament ought to have done or the draftsman should have said.¹²

Having shown his paces as both lawyer and legal historian, Glanville was next to demonstrate his skill as a legal philosopher. A five-part

⁹ In Walter Raeburn KC's chambers in King's Bench Walk.

¹⁰ R. G. McElroy, *Impossibility of Performance: a Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration and Frustration*, ed. with additional chapters by G.I.W. (Cambridge University Press, 1971).

¹¹ *The Law Reform (Frustrated Contracts) Act 1943* (1944) and (1943), *Modern Law Review*, 7 (1944), 66.

¹² *Law Quarterly Review*, 61 (1945), 97.

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article, ‘Language and the Law’,¹³ and a paper, ‘International Law and the Controversy concerning the word “Law”’,¹⁴ which, but for wartime publishing difficulties, might well have appeared together as a monograph, were the first serious attempt to apply the philosophical technique of linguistic analysis to law and jurisprudence. In the paper on international law, he sharply attacked the many jurists and international lawyers who had debated whether international law was ‘really’ law. They had been wasting everyone’s time, for the question was not a factual one, the many differences between municipal and international law being undeniable, but was simply one of conventional verbal usage, about which individual theorists could please themselves, but had no right to dictate to others. This approach was to be refined and developed by H. L. A. Hart in the last chapter of *The Concept of Law* (1961), which showed how the use in respect of different social phenomena of an abstract word like ‘law’ reflected the fact that these phenomena each shared, without necessarily all possessing in common, some distinctive features. Glanville had himself said as much when editing a student text on jurisprudence,¹⁵ and he had adopted essentially the same approach to ‘The Definition of Crime’.¹⁶

In ‘Language and the Law’, he ranged more widely, taking as his starting point C. K. Ogden’s and I. A. Richards’ *The Meaning of Meaning* (1923). He showed, with examples from a vast variety of legal rules and decisions, and references to a host of juristic debates, that the resolution of legal and jurisprudential questions called for careful attention not just to the different meanings and uncertainties attaching to almost all words, but to (at least six) different sorts of meaning, behind which value judgments almost always lie concealed. It was with these, rather than verbal distinctions and semantic issues, that the jurist should be primarily concerned. The mistakes of supposing, for instance, that abstract concepts could usefully be discussed otherwise than in regard to ‘concrete referents’, that law had an existence other than as a ‘collection of symbols capable of evoking ideas and emotions, together with the ideas and emotions so evoked’, that uncertainties in the meaning of words could be eliminated by technical legal definitions, that there were any ‘single’ facts to which single terms could be applied, and that

¹³ *Law Quarterly Review*, 61 (1945), 71–86, 179–95, 293–303, 384–406; *Law Quarterly Review*, 62 (1946), 387–406; supplemented by ‘A Lawyer’s Alice’, *Cambridge Law Journal*, 9 (1946), 171–84.

¹⁴ *British Yearbook of International Law*, 22 (1945), 146–63.

¹⁵ Sir John Salmond, *Jurisprudence*, 10th edn (London: Sweet & Maxwell, 1947), p. 33.

¹⁶ *Current Legal Problems*, (1955), 107–30.

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distinguishing between the ‘substance’ and the ‘quality’ of a thing, or between a person’s ‘identity’ and ‘attributes’ could resolve legal problems,¹⁷ were all ruthlessly exposed, as was the claim of the extreme logical positivists that ethical, and therefore legal, statements were meaningless. As Hart said, ‘these articles not only sweep away much rubbish, but also contribute much to the understanding of legal reasoning’.¹⁸

Many of their arguments were incorporated and developed in an edition of Sir John Salmond’s classic student textbook on *Jurisprudence*,¹⁹ many pages of which were extensively revised or rewritten, marking out ground which others were later to till. A key theme (sections IV–VI) of Hart’s influential lecture ‘Definition and Theory in Jurisprudence’ (1953) was foreshadowed in the treatment of the juristic controversy as to whether legal corporations were to be regarded as ‘real’ or ‘fictitious’ persons.²⁰ Glanville’s concentration on legal rules and rulings did, however, lead him to exaggerate the arbitrariness of ordinary linguistic usage, and so to underestimate the connections that underlie it, with the result that these writings had more influence among lawyers than philosophers.²¹

In 1945, his wartime connection with the LSE solidified with his appointment as Reader in English Law there. He became Professor of Public Law the following year. He did his duty by the title of his chair²² with (among several other papers) a scathing denunciation of the shabby reasoning offered by the law lords for holding that William Joyce (‘Lord Haw-Haw’), a US citizen of Irish birth, owed allegiance to the British Crown, and so had committed treason when he broadcast for the Germans during the war.²³ And he wrote another elegant commentary on another

¹⁷ Elaborated on in a classic article: ‘Mistake as to Party in the Law of Contract’, *Canadian Bar Review*, 23 (1945), 271–92, 380–416. Later examples of this genre are ‘Forgery and Falsity’, *Criminal Law Review* (1974), 71 (demonstrating the fatuity of a general defence of forgery) and ‘The Logic of “Exceptions”’, *Cambridge Law Journal*, 47 (1988), 261.

¹⁸ ‘Philosophy of Law and Jurisprudence in Britain (1945–52)’, *American Journal of Comparative Law*, 2 (1953), 354, at p. 361.

¹⁹ See above n. 15. The editor’s alterations and rewriting are listed in Appendix V.

²⁰ At p. 330.

²¹ Cf. J. Wisdom, *Philosophy: Metaphysics and Psycho-Analysis* (Oxford: Blackwell, 1953), pp. 249–54, which shows that Wisdom had not read the papers of which he was so critical with any care.

²² S. A. de Smith’s classic, *Judicial Review of Administrative Action*, 1st edn (London: Stevens, 1959), 5th edn (London: Sweet & Maxwell, 1999), began as a PhD dissertation under his supervision.

²³ ‘The Correlation of Allegiance and Protection’, *Cambridge Law Journal*, 10 (1948), 54–76.

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reforming statute, the Crown Proceedings Act 1947,²⁴ in which Parliament had at last recognised both that the immunity of the Crown (i.e., government departments) from civil suit could no longer be justified, and that legal fictions were not the right way to the outcomes which justice required. His principal interest still lay, however, in the darkest areas of private law. The immensely obscure and (as he demonstrated) gravely defective rules governing cases where a legal obligation is owed, or harm has been caused, by more than one person, were made the subject of two complementary treatises²⁵ totalling over 700 pages, which half a century later had not been replaced. The ‘great analytical and dialectical ability’²⁶ displayed in them was admired by judge²⁷ and jurist alike.²⁸

It was not until the early 1960s that Glanville, then in his fifties, decided to devote himself single-mindedly to the criminal law. But it is in what Professor B. A. Hepple has described as his ‘astounding’ Inaugural Lecture as Quain Professor in 1951 on ‘The Aims of the Law of Tort’²⁹ that his work in private law may be seen to culminate.

This has never been bettered as an account of the social function or *raison d’être* of the law of tort, in particular the action for damages . . . He concluded that there was a lack of coherence with the law . . . trying to serve a multiplicity of purposes but succeeding in none . . .³⁰ The future student of the intellectual history of this branch of the law may place him at the end of one period of legal scholarship and the beginning of another. He brought the ‘scientific’ positivism of early twentieth-century scholars, such as Salmond and Winfield, to its apotheosis, but his utilitarian concerns with the wider purposes and policies of the law were a harbinger of the socio-legal revolution in legal scholarship which began in the late 1960s.³¹

III

Criminal Law: The General Part, first published in 1953, with a second edition in 1961, stands high in the list of great books written about English

²⁴ *Ibid.*

²⁵ *Joint Obligations: A Treatise on Joint and Joint and Several Liability in Contract, Quasi-contract and Trusts* (1949) and *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common Law Dominions* (1951).

²⁶ Lord Wright, *Law Quarterly Review*, 66 (1951), 528.

²⁷ Lord Justice Denning, *Law Quarterly Review*, 65 (1950), 253.

²⁸ L. C. B. Gower, *Modern Law Review*, 13 (1950), 400.

²⁹ *Current Legal Problems*, 4 (1951), 137.

³⁰ *Cambridge Law Journal*, 56 (1997), 444–5. ³¹ *Ibid.*, p. 441.

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law in the twentieth century.³² It was another astonishing achievement, transforming scholarly and (rather more slowly) professional attitudes to its subject. The mapping of the territory was so comprehensive, the analysis so penetrating, the critique so trenchant and the prose, enriched with echoes of the Bible and the English classics, so lucid and so elegant. In over (in its second edition) 900 pages there is not a sentence that is obscure, or ambiguous or superfluous. It has provided a programme for debate and further research which is only now being travelled beyond. Much of his own subsequent writing on the criminal law, including the innovatory *Textbook* (1st edition 1978, 2nd edition 1983), was devoted to developing, elaborating and defending the principles propounded in *The General Part*, to which he adhered with remarkable consistency and, in almost all instances, well-warranted tenacity.

It is, first and foremost, its creativity and vision, its breaking out of the straitjacket of traditional legal categories, that makes *The General Part* such a great book. The masterly survey and description of the case and statute law, for which the rest of the common law world was scoured to supplement the rather sparse English material, was there to serve a higher purpose. For ‘unfortunately, as has appeared only too plainly from these pages, there is no unanimity about anything in criminal law; scarcely a single important principle but has been denied by some judicial decision or by some legislation’.³³ Nor was the author much concerned to predict how future courts would respond to particular issues, for he took a dim view of the rough and unthinking ways in which ‘the charmed circle of the judiciary’ frequently resolved questions of criminal liability. Placing few bets he felt no need to hedge them. Rather, he set out to persuade his readers not that England had, but that it was possible for a common law jurisdiction like it to have, a criminal law that was fair and just because principled, internally consistent and rational (the criteria were professedly utilitarian which was why he thought a general ‘lesser of two evils’ – he called it a necessity – defence so important).³⁴ The discretions conceded to judges and juries (he profoundly distrusted both) had, therefore, to be kept to the

³² It was awarded the Ames Prize by Harvard University.

³³ *Criminal Law: The General Part* (London: Stevens, 1953), at p. 435; cf. also p. 130. All further page references are, unless otherwise indicated, to this (1st) edition. For a fuller discussion, see P.R. Glazebrook, ‘Glanville Williams: 1911–1997: Criminal Law’, *Cambridge Law Journal*, 56 (1997), 445–55.

³⁴ At pp. 567–87; ‘The Defence of Necessity’, *Current Legal Problems*, (1953), 216; *Sanctity of Life*, at pp. 286–7; ‘A Commentary on *R v. Dudley and Stephens*’, *Cambrian Law*