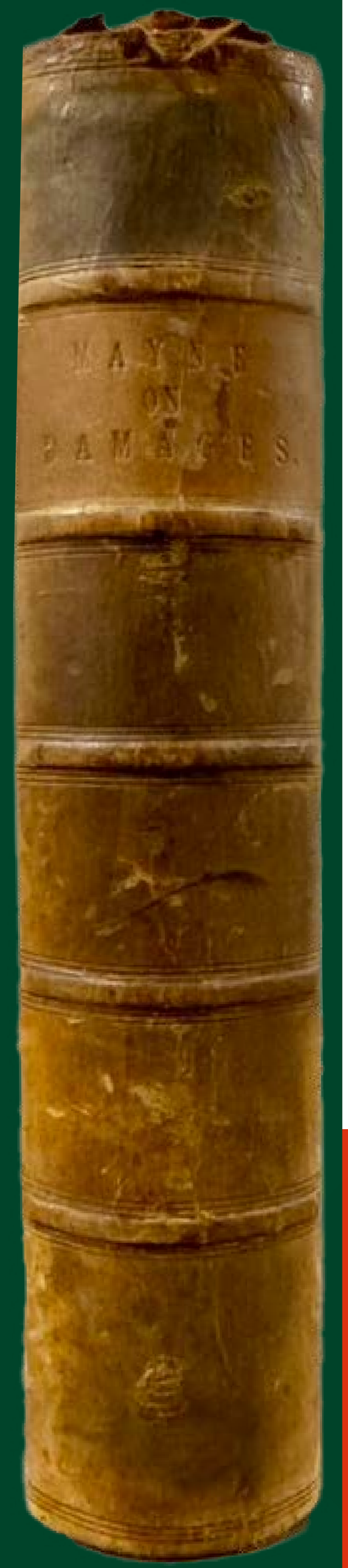

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The history and influence of *McGregor on Damages*

By James Edelman

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The History and Influence of McGregor on Damages

In 1856, an Irish barrister called John Dawson Mayne, only recently called to the English bar, wrote a book on damages. Mayne observed that with the exception of a short, and obsolete, work by Serjeant Sayer, "no English writer has ever thought of collecting" the scattered materials of the law of damages. Mayne wrote at a time when the legal principles concerning damages were in their infancy. The book ran to just over 300 pages. It did not start with great promise. The opening words of the first chapter were that damages "are the pecuniary satisfaction which a plaintiff may obtain by success in an action". That definition failed to respect the fundamental divide between debts that arise by consent and damages that are awarded for wrongdoing. But the book was a marvellous start for a conceptual approach to the law of damages. It was brimming with insights. For instance, the Court of Exchequer had just decided *Hadley v Baxendale* (1854) 9 Ex 341. That case was one of the most important decisions in the law of damages for centuries, establishing that loss that did not flow naturally from a breach could be recovered if the injured party had made the other party aware of the prospect of that loss prior to the breach. But that principle had difficulties. Mayne was one of the first to have doubts about the sufficiency of that restriction. More than 150 years later Lord Hoffmann (who did as much as any judge in history to reform the law of damages) gave the example of the passenger of a taxi who informed the driver that he would lose a £5 million deal if the taxi was late. The passenger cannot recover £5 million if the taxi driver, in breach of contract, carelessly misread the GPS and took the passenger to the wrong city.

Mayne continued as the author of *Mayne on Damages* for nearly 50 years. From the second edition he brought in Lumley Smith, later Sir Lumley Smith KC. In the second edition, which was more than 15 years after the first, Lumley Smith's edits were so minor that they were included only in parentheses. But Mayne rejoined for the third to seventh editions with changes that were much larger. He and Smith were concerned about the "growing bulk" of the book as it expanded beyond 500 pages. But between the 8th edition in 1909, edited only by Lumley Smith KC, until the 12th edition in 1961, there were only three editions. Each was edited by a different person. None made very significant changes. In the 10th edition in 1920, a Canadian, Frank Gahan, expanded the book to included cases from the "Dominions". In the 11th edition in 1946, the editor Judge Earengey KC took the view that the appropriate approach to take during wartime was to make as few changes as possible. From then the book remained dormant until Harvey McGregor arrived as "editor", an inapt description that always frustrated him.

In Harvey's words, his 12th edition in 1961 "started in conventional fashion as a new edition of an established textbook: it ... finished as a total rewriting". More than 200 pages were excised and the book grew to over 1,000 pages. A review of the book in the *Modern Law Review* described it as a "monumental work" which would "far transcend the fame of any edition produced by John D Mayne". And so it was, and did. Indeed, just as the first edition of *McGregor on Damages* came very shortly after the monumental decision on remoteness of damage in *Hadley v Baxendale*, the first edition written by Harvey was published shortly after the monumental decision on remoteness of damage by the Privy Council in *The Wagon Mound* [1961] AC 388. That decision, which now commands wide (but far from universal) acceptance, was controversial when it was decided. One author wrote that contrary to the result in *The Wagon Mound* he rather liked "the idea that if someone by his negligence sets fire to my ship and destroys it utterly he must pay for its loss, even if he did set fire to it in a way which the Reasonable Man would not have considered plausible". Other commentators wondered if the Privy Council decision would be followed by English courts in place of the binding decision in *Re Polemis* [1921] 3 KB 560. But Harvey saw the writing on the wall. As has been the case on many occasions, his prescient views reflected the future development of

English law where *The Wagon Mound* came to be a central feature of remoteness of damages.

Harvey McGregor was a colourful character, both literally and figuratively. He would wear three piece suits with dazzling ties. And he had a penchant for grand pianos. Even when he lived in a two bedroom flat in London, the flat was adorned by a walnut grand piano. In later years he acquired an enormous painting of Mary Queen of Scots without a head, nothing above the ruffle on her neck. And as Lord Hoffmann observed in 2017, in the first edition of *McGregor on Damages* that was published after Harvey's death, Harvey was very fond of parties. After he was appointed Warden of New College in 1985, the atmosphere in the College was one of excitement and electricity. Lord Hoffmann wrote that "[s]oon one heard breathless reports from fellows about the redecorations: walls painted orange, bright carpets, modern pictures … And then there were the parties".

A story that I heard from a number of sources, but was never able to confirm from Harvey or his partner John before their deaths, was that *McGregor on Damages* was not Harvey's first choice as a principal work. It is said that Harvey approached Sweet and Maxwell with a developed proposal to write the first English text on a new subject about which the English legal profession was sceptical, the *Law of Restitution*. But he was several weeks too late. A young don at Lincoln College, Oxford, Robert Goff, pipped McGregor at the post. The book, by Goff (with Gareth Jones who later joined him) was called *The Law of Restitution*. It was published in 1966. Gareth Jones later remarked that Robert Goff's stature in the law (he became Lord Goff, the senior Law Lord) "helped the profession to walk to Damascus" in recognising restitution as a subject of law. Harvey chose instead to produce a new edition of *Mayne on Damages*.

"The Book", as Harvey called it, or "the Tome" as John called it, was never far from Harvey. Even in his later years he would rise at 5am to work on the book for two hours before toast and a crossword. When he was hospitalised after a stroke, Harvey kept the book by his bedside, perhaps for continued work or perhaps as a reminder for the hospital doctors and nurses of the importance of taking care. Under my stewardship, the many hours of work and daily attention to the Book have remained constant. Much has been rationalised but as the content has expanded, particularly to include damages that arise from wrongdoing in equity, the Book has still grown. Its content and foresight has remained fundamental. Lord Hoffmann remarked in his 2017 foreword that the Book was "the canonical authority" on the subject of damages. For more than half a century it has been the first port of all in many common law jurisdictions. Most recently, in *George v Cannell* [2024] 3 WLR 153, the Supreme Court of the United Kingdom confronted a very difficult issue of damages and referred to *McGregor on Damages* on eighteen occasions in their reasons, with extensive quotations.

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