

# PATRICK ATIYAH

Patrick Selim Atiyah

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elected Fellow of the British Academy 1979

by

JAMES GOUDKAMP

P. S. Atiyah was one of the great legal scholars of the twentieth century. The law of torts (especially in so far as that field concerns personal injury and death) and the law of contract were his principal interests, and he made immense contributions to those areas. His research also encompassed legal history and legal institutions. His most important works include *Accidents, Compensation and the Law*, the first edition of which was published in 1970, and *The Rise and Fall of Freedom of Contract*, which was published in 1979.



P. S. ATIYAH

## Biography

### Early years

Patrick Selim Atiyah was born on 5 March 1931 in England. He was the second of four children of Edward Atiyah,<sup>1</sup> who was of Lebanese origins and a prolific author and political activist, and (Dorothy) Jean née Levens, who was of Scottish descent.<sup>2</sup> Edward and Jean met in Oxford, where Edward was studying at Brasenose. Jean was the sister of Robert Levens, who had long been the senior tutor at Merton. Patrick was brought up in the Sudan where his father was employed as a schoolteacher and subsequently as a liaison between the Sudanese intelligentsia and the condominium administration. He attended Victoria College in Egypt from age 10 as a boarder on a Sudan government bursary. Atiyah did not enjoy his time at Victoria College. He was subjected 'to a fair amount of bullying' and was not 'particularly successful academically, often averaging no better than half way up the class'.<sup>3</sup>

In 1945, the Atiyah family moved to Britain and Patrick attended Woking County Grammar School for Boys which, to his relief after his experience at Victoria College, was a day school. In 1948, he sat a scholarship examination at Oxford. When Atiyah asked his father for money for the train fare, his father handed him a few pounds and said that 'he felt like a punter laying money on a long shot'.<sup>4</sup> However, the 'punt' paid off and Atiyah was awarded an Entrance Exhibition at Magdalen College. In 1950, Atiyah went up to Oxford. He had intended to read history or philosophy, politics and economics but switched to jurisprudence shortly before his studies commenced.

The reason for his choosing to study jurisprudence lay in Atiyah's having collided with a pedestrian while he was riding a motorcycle. Upon his being summoned to attend the Magistrates' Court on a charge of driving without due care and attention, Atiyah defended himself and cross-examined the witnesses. He was convicted and fined a nominal sum but was asked by the magistrate, in view of the way in which he had conducted his defence, whether he was a law student. Atiyah reflected on these words and, by the end of the train journey home, he had essentially resolved to read law.

At Magdalen, Atiyah was taught principally by the powerhouse team of Rupert Cross (whom he admired and liked) and John Morris (whom he may have admired but

<sup>1</sup> Edward published an autobiography: E. A. Atiyah, *An Arab Tells His Story: a Study in Loyalties* (London, 1946).

<sup>2</sup> Atiyah's siblings were Michael, Selma and Joseph.

<sup>3</sup> P. S. Atiyah, *An Academic Autobiography*, ch. 3.

<sup>4</sup> *Ibid.*, ch. 4

did not like, and the antipathy appears to have been mutual).<sup>5</sup> Atiyah relished his studies and read far beyond that which was required for his tutorials. In what Atiyah describes as '[o]ne of my most exciting occasions at Magdalen',<sup>6</sup> he participated, in 1952, in the College's annual dinner moot (which still exists to the present day) before Lord Denning (then Lord Justice Denning), who was a mathematics graduate and Honorary Fellow of Magdalen. Atiyah unsuccessfully sought to persuade Lord Denning that he should not follow one of his earlier decisions although did manage to extract a concession that certain of his *obiter dicta* were perhaps in need of modification.

During his studies, Atiyah married Christine Best. They had four children, Julian (1954), Andrew (1956), Simon (1961) and Jeremy (1962), who generally called Atiyah 'Pad' (in addition to 'dad'). Atiyah completed his undergraduate degree in 1953 in which he obtained a First (and reportedly the best in the year) and won numerous prizes (he had also been awarded an honorary demyship).<sup>7</sup> He then read for the Bachelor of Civil Law, and was awarded that degree, which he also took with first class honours, in 1954. Later in the same year, Atiyah began his academic career as an assistant lecturer at the London School of Economics, and while in that role, in which he remained until 1955, he published his first article, which concerned the tort of conversion.<sup>8</sup> He described the burden of that contribution as being to reject 'the orthodox view'<sup>9</sup> that where 'the defendant has not infringed the plaintiff's possession he may set up the *jus tertii* as a defence'.<sup>10</sup>

### Africa again

Atiyah was then appointed as a lecturer and subsequently senior lecturer at the University of Khartoum, where he worked between 1955 and 1959 and headed the Commercial Law Department. He returned to Britain periodically during these years including in 1956 in order to be called to the Bar by the Inner Temple. While in Khartoum, Atiyah wrote numerous case notes for the *Sudan Law Journal*

<sup>5</sup> Atiyah wrote in his autobiography that 'Morris regarded me as conceited if not arrogant': *ibid.* See also the text accompanying n. 34, below. It appears, however, that Atiyah and Morris may have reconciled later in their careers: see *ibid.*, ch. 9.

<sup>6</sup> *Ibid.*, ch. 4.

<sup>7</sup> A demyship is a species of scholarship at Magdalen. Historically, demies were paid half the salary of a fellow (hence the name of the scholarship, which is derived from *demi-socii*) and had certain entitlements within the College.

<sup>8</sup> P. S. Atiyah, 'A re-examination of the *Jus Tertii* in conversion', *Modern Law Review*, 18 (1955), 97–107.

<sup>9</sup> *Ibid.*, 97.

<sup>10</sup> *Ibid.*, 98.

*Reports*.<sup>11</sup> These notes were concerned with the rights of an owner of property vis-à-vis its bona fide purchaser,<sup>12</sup> privity of contract,<sup>13</sup> the penalty doctrine,<sup>14</sup> the circumstances in which a court becomes *functus officio* and the ‘slip rule’<sup>15</sup> (as that rule is usually known in England),<sup>16</sup> exemption clauses and the doctrine of frustration<sup>17</sup> and the distinction between a mere breach of contract and fraud.<sup>18</sup> Atiyah also published in the *Sudan Law Journal Reports* a draft Sale of Goods Bill, which he described as being ‘[b]roadly . . . based on the English Act, but [with] considerable alterations and emendations’.<sup>19</sup> In addition, Atiyah wrote several substantial articles for other journals addressing the sale of non-existent goods,<sup>20</sup> the state of legal education in the Sudan,<sup>21</sup> hire-purchase agreements,<sup>22</sup> the requirement that a charity must be for the benefit of the public or a section thereof<sup>23</sup> and equitable remedies against infants who commit fraud.<sup>24</sup> In his autobiography, he referred to these publications as being ‘the sort of fairly humdrum stuff which it is the business of the academic to churn out’.<sup>25</sup>

Alongside these periodical writings, Atiyah published his first book, *The Sale of Goods*.<sup>26</sup> He would go on to produce a total of eight editions of that work, which turned out to be ‘the most successful and consistent seller’ of the many books that he would ultimately write.<sup>27</sup> In a review of the first edition, J. W. A. Thornley said that the text was a ‘courageous search for every conceivable difficulty in the subject’ and thus

<sup>11</sup> Atiyah was the general editor of the 1957 volume and was an active member of the editorial committee. See, further, W. Twining, *Jurist in Context: a Memoir* (Cambridge, 2019), pp. 47–8.

<sup>12</sup> P. S. Atiyah, ‘*Sudan Government v. Bakheit Adam Mohammed* and the recovery of lost and stolen property ordinance, 1924’, *Sudan Law Journal and Reports* [1956], 47–54.

<sup>13</sup> P. S. Atiyah, ‘*Sid Ahmed Mohamed v. Sudan Mercantile Co*’, *Sudan Law Journal and Reports* [1956], 55–9.

<sup>14</sup> P. S. Atiyah, ‘*Roughdi Boutros v. Christos Simos*’, *Sudan Law Journal and Reports* [1956], 93–4.

<sup>15</sup> P. S. Atiyah, ‘*Hassan Khalil Suleiman v. El A’Gig Ali and Christos Simos v. Mohd. Ali Ahmed*’, *Sudan Law Journal and Reports* [1956], 94–5.

<sup>16</sup> See Civil Procedure Rules, r. 40.12.

<sup>17</sup> P. S. Atiyah, ‘*Abdel Gadir El Baloula v. El Saggay Agricultural Scheme*’, *Sudan Law Journal and Reports* [1956], 95–7.

<sup>18</sup> P. S. Atiyah, ‘*Sudan Government v. Hirachand Jeraj Shah*’, *Sudan Law Journal and Reports* [1956], 97–8.

<sup>19</sup> P. S. Atiyah, ‘A new Sale of Goods Bill’, *Sudan Law Journal and Reports* [1957], 107–41.

<sup>20</sup> P. S. Atiyah, ‘*Couturier v Hastie* and the sale of non-existent goods’, *Law Quarterly Review*, 73 (1957), 340–9.

<sup>21</sup> P. S. Atiyah, ‘Legal education in the Sudan’, *Society of Public Teachers of Law*, 4 (1957–8), 137–42.

<sup>22</sup> P. S. Atiyah, ‘Injustices and anomalies in the Law of Hire Purchase’, *Business Law Review*, 5 (1958), 24–38.

<sup>23</sup> P. S. Atiyah, ‘Public benefit in charities’, *Modern Law Review*, 21 (1958), 138–54.

<sup>24</sup> P. S. Atiyah, ‘The liability of infants in fraud and restitution’, *Modern Law Review*, 22 (1959), 273–91.

<sup>25</sup> Atiyah, *An Academic Autobiography*, ch. 5.

<sup>26</sup> P. S. Atiyah, *The Sale of Goods* (London, 1957).

<sup>27</sup> Atiyah, *An Academic Autobiography*, ch. 5.

‘a stimulating change from the rather complacent “all-this-is-perfectly-explicable” style of most major monographs’.<sup>28</sup> It was not, however, a book for ‘the beginner’.<sup>29</sup>

It is worth pausing here to note both the scale of Atiyah’s output and his range. As to the former, the volume of writings was truly formidable. That is especially so bearing in mind the time in which he worked. Word processors and instant access to cases and articles via the internet lay decades in the future (Atiyah wrote using a manual typewriter that he operated with two or three fingers)<sup>30</sup> and the hardcopy resources to which he had access in Khartoum were (or were at least perceived by Atiyah as being) rather limited.<sup>31</sup> As to the breadth of Atiyah’s research, although his writings were broadly clustered around topics within the law of tort and contract, his range was unusually wide.<sup>32</sup>

After four years in Khartoum Atiyah was ‘restless for change’ and felt that his career was not developing as it should have.<sup>33</sup> He had applied unsuccessfully for positions at two Oxford colleges (one of the applications had been torpedoed by a critical reference written by John Morris) and for an assistant lectureship at Cambridge.<sup>34</sup> With the prospect of an Oxford fellowship, which was then ‘the height of [Atiyah’s] ambition’,<sup>35</sup> appearing not to be immediately on the cards, in 1959 Atiyah moved to Accra where he was employed on an eighteen-month contract by the Attorney-General’s department. He worked closely with Geoffrey Bing who was then the Attorney-General but, according to Atiyah, was ‘more in the nature of a personal political adviser to Nkrumah’.<sup>36</sup> While he was in Ghana Atiyah met Francis Bennion who was working in the Attorney-General’s department on secondment from the Parliamentary Counsel’s office in London. Atiyah and Bennion became great friends and they co-authored an article entitled ‘Mistake in the construction of contracts’.<sup>37</sup>

Atiyah initially enjoyed his work and life in Ghana, which involved advising government departments, conducting the odd criminal prosecution and drafting contracts and legislation, including a new criminal law and Sale of Goods Act.<sup>38</sup>

<sup>28</sup> J. W. A. Thornley, ‘Book review: *the Sale of Goods* by P. S. Atiyah’, *Cambridge Law Journal*, 16 (1958), 124.

<sup>29</sup> *Ibid.*

<sup>30</sup> Atiyah, *An Academic Autobiography*, ch. 11.

<sup>31</sup> See Atiyah, ‘Legal education in the Sudan’.

<sup>32</sup> The breadth of Atiyah’s scholarship is a theme that is explored further below: see the text accompanying nn. 228–9, below.

<sup>33</sup> Atiyah, *An Academic Autobiography*, ch. 6.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> P. S. Atiyah and F. A. R. Bennion, ‘Mistake in the construction of contracts’, *Modern Law Review*, 24 (1961), 421–43.

<sup>38</sup> Atiyah, *An Academic Autobiography*, ch. 6.

However, Atiyah quickly became disillusioned with both Ghana (particularly on account of the humidity and the constant risk of malaria, which Atiyah contracted) and his employment. In his autobiography, he complained about ‘the general smell of corruption which hovered over government activities’<sup>39</sup> but also because of ‘the increasing totalitarianism of the government’.<sup>40</sup> In 1961, Atiyah returned to England.

In the same year, he published his *An Introduction to the Law of Contract*,<sup>41</sup> a work which would become the classic student text on the subject in Britain and several other countries. Atiyah wrote the book, which formed part of the Clarendon Law Series, at the invitation of Professor H. L. A. Hart acting on the suggestion of Atiyah’s former tutor, Rupert Cross. He would go on to produce a total of five editions of the book.<sup>42</sup> The work was very positively received. In relation to the first edition, A. G. Guest wrote that the ‘book constitutes a most stimulating and original discussion of the basic principles of the law of contract’,<sup>43</sup> while J. C. Smith remarked that it brought a ‘fresh approach to old problems’.<sup>44</sup>

### The Civil Service

Once back in Britain, Atiyah purchased a house in St John’s, Woking, and worked as a legal assistant at the Board of Trade where his main role was to advise administrators on legal issues especially in the fields of corporate law and bankruptcy. He also drafted government legislation. One of the major projects on which Atiyah worked in this regard was the Resale Prices Act 1964, which work required him to liaise with a range of politicians and to attend sittings in Parliament.<sup>45</sup> Although he initially found his position at the Board of Trade rewarding, he ultimately found it rather unsatisfying on account of his being kept insufficiently busy. The Board (like the civil service generally, in Atiyah’s opinion) was overstaffed. His colleagues all arrived at work late and left early and one was expected to extend the break for lunch from one hour to

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> P. S. Atiyah, *An Introduction to the Law of Contract* (Oxford, 1961).

<sup>42</sup> Steve Smith was responsible for the sixth edition: S. A. Smith, *Atiyah’s Introduction to the Law of Contract*, 6th edn (Oxford, 2005). It is evident from their respective prefaces that Smith and Atiyah did not see eye to eye in relation to it.

<sup>43</sup> A. G. Guest, ‘Book review: *An Introduction to the Law of Contract* by P. S. Atiyah’, *Modern Law Review*, 24 (1961), 658.

<sup>44</sup> J. C. Smith, ‘Book review: *An Introduction to the Law of Contract* by P. S. Atiyah’, *Journal of the Society of Public Teachers of Law*, 7 (1962), 42.

<sup>45</sup> Atiyah dedicates an entire chapter of his autobiography to his work on this statute: Atiyah, *An Academic Autobiography*, ch. 8.

almost two hours.<sup>46</sup> In 1964, Atiyah transferred from the Board of Trade to the Parliamentary Counsel's Office, the application for which he had made at the suggestion of his friend Francis Bennion.<sup>47</sup>

### A law fellowship

Later in 1964, Atiyah received a letter 'quite out of the blue' from the Warden of New College, Oxford, enquiring whether he would be interested in a tutorial fellowship in law and inviting him to visit and dine in the College.<sup>48</sup> Atiyah accepted the invitation and following discussions an offer was promptly made. Although he was somewhat unsure whether to accept it on account of his having been frustrated by his previous unsuccessful applications for law fellowships at Oxford,<sup>49</sup> he ultimately took the post after some persuasion from his family members. Atiyah succeeded S. F. C. Milsom, who departed New College in order to accept the position of Professor of Legal History at the London School of Economics.

Shortly before his fellowship commenced, Atiyah lost both of his parents in tragic circumstances. His mother, who suffered from severe depression, committed suicide,<sup>50</sup> and his father died from a heart attack while he was speaking at the Oxford Union (as Atiyah and Christine were watching the debate from the public gallery).<sup>51</sup> These losses and their circumstances cannot but have had a profound impact upon Atiyah. It was at around this time that Atiyah discovered that he had inherited both his mother's tendency to depression as well as his father's weak heart.<sup>52</sup>

Atiyah's law colleague at New College was the legendary Tony Honoré who had been appointed in the same year as Atiyah as a University Reader in Roman-Dutch Law. With this formidable team, New College must have had a respectable claim to being the strongest Oxbridge college in law. At the time, Atiyah's older brother, Michael Atiyah, a mathematician, was a Professorial Fellow of New College (the Savilian Professor of Geometry, 1963–9) and one can imagine that having two Atiyahs at the same college would have caused no end of confusion among the porters and in the internal mail.

<sup>46</sup> *Ibid.*, ch. 6.

<sup>47</sup> *Ibid.*, ch. 8.

<sup>48</sup> *Ibid.*

<sup>49</sup> See the text accompanying n. 34, above.

<sup>50</sup> Atiyah, *An Academic Autobiography*, ch. 9.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

While at New College, Atiyah wrote *Vicarious Liability in the Law of Torts*,<sup>53</sup> which was his first major work concerned with tort law. That monograph quickly earned positive reviews<sup>54</sup> and, despite its having been published in 1967, has recently been described as being ‘still the leading text on vicarious liability’.<sup>55</sup> The librarians at the Bodleian Law Library report that it continues to be ‘re-shelved daily’. Atiyah presented *Vicarious Liability in the Law of Torts* as having been ‘written mainly for practitioners’.<sup>56</sup> Although it is true that much of the book is expository in nature, it is nonetheless clear that his intended audience was not, in fact, practising lawyers but legal scholars,<sup>57</sup> and that his real interest lay not in the details of the cases but in legal policy. Thus, the book commenced with an exploration of the master’s tort theory and the servant’s tort theory<sup>58</sup> followed by an excursus of what Atiyah called ‘The social justification for vicarious liability’.<sup>59</sup> Further, large tranches of the text are highly critical of the law of vicarious liability, which is not something that is usually seen in arid practitioner-orientated books. Thus, Atiyah laid siege, among other rules, to the control test, which he argued was a deficient way of identifying the existence of a contract of service,<sup>60</sup> and tests for determining liability in the case of borrowed servants.<sup>61</sup> This willingness to question the sense of principles of tort law would grow throughout Atiyah’s career.

### Australia

As the end of the 1960s approached, Atiyah grew increasingly dissatisfied with his position at Oxford. He had come to find Oxford’s tutorial system to be an ‘unbearable

<sup>53</sup> P. S. Atiyah, *Vicarious Liability in the Law of Torts* (London, 1967).

<sup>54</sup> See, e.g., J. A. Jolowicz, ‘Book review: *Vicarious Liability in the Law of Torts* by P. S. Atiyah’, *Cambridge Law Journal*, 26 (1968), 150–3; H. Silberberg, ‘Book review: *Vicarious Liability in the Law of Torts* by P. S. Atiyah’, *Comparative and International Law Journal of Southern Africa*, 2 (1969), 357–60; P. D. McKenzie, ‘Book review: *Vicarious Liability in the Law of Torts* by P. S. Atiyah’, *Victoria University of Wellington Law Review*, 5 (1968–70), 272–3; cf. the mixed review in H. Street, ‘Book review: *Vicarious Liability in the Law of Torts* by P. S. Atiyah’, *Society of Public Teachers of Law*, 13 (1968), 57–8.

<sup>55</sup> R. Stevens, *Torts and Rights* (Oxford, 2007), p. 259.

<sup>56</sup> Atiyah, *Vicarious Liability in the Law of Torts*, p. v.

<sup>57</sup> J. A. Jolowicz remarked that Atiyah ‘claims in his Preface to have written mainly for practitioners, but his book is not ordinary standard practitioner’s text. On the contrary it is a scholarly and thoughtful work on a topic of major importance in the law of torts today and it is to his credit that Mr. Atiyah was willing to do so much more than systematise and recount the many cases bearing on the subject’: Jolowicz, ‘Book review: *Vicarious Liability*’, 153. Similarly, Harry Street observed that ‘Despite the Preface and the blurb, this book is best judged as a monograph on Vicarious Liability’: Street, ‘Book review: *Vicarious Liability*’, 57–8.

<sup>58</sup> Atiyah, *Vicarious Liability in the Law of Torts*, ch. 1.

<sup>59</sup> *Ibid.*, ch. 2.

<sup>60</sup> *Ibid.*, 45–9.

<sup>61</sup> *Ibid.*, ch. 18.

grind<sup>62</sup> and sensed that there were few opportunities for promotion to a professorial fellowship. Atiyah considered that his specialisms rendered him eligible for only two of the six chairs that then existed at Oxford, neither of which, he anticipated, was likely to fall vacant in the near or medium-term future.<sup>63</sup> These circumstances led him to look for a position elsewhere, and he decided to accept a chair in the College of Law at the Australian National University (or ‘the ANU’ as it is generally known).<sup>64</sup> Alan Rodger succeeded Atiyah at New College.

Atiyah travelled with his family to Australia by ship. He enjoyed the five-week journey and especially the weather and food that it offered, and he arrived in Australia full of hope and expectation. Atiyah immediately found much that he liked about both Australia and the ANU in particular, which afforded him with significantly superior resources than he had enjoyed at Oxford, where the administrative demands on academics were (and remain) very substantial. Between 1972 and 1973, he served as the College’s Dean.<sup>65</sup>

Atiyah’s inaugural lecture at the ANU was entitled ‘Consideration in contracts: a fundamental restatement’,<sup>66</sup> which Atiyah described as an attempt to reinterpret the doctrine of consideration in order to take proper account of the way in which it was applied by the courts. Basic ideas usually thought to be central to the law of consideration, such as ‘benefit’ and ‘detriment’, were said to be neither sufficient nor necessary to amount to consideration. Guenter Treitel<sup>67</sup> wrote a review of the lecture in the *Australian Law Journal*,<sup>68</sup> which was regarded as hard-hitting by the standards of the time.<sup>69</sup> Atiyah was said to have been guilty of a ‘striking omission’ in failing to consider the rule that the courts do not generally have regard to the adequacy of consideration,<sup>70</sup> and his explanation as to why executory and bilateral agreements are enforceable was castigated as being ‘far from conclusive’.<sup>71</sup> Treitel’s overall assessment

<sup>62</sup> Atiyah, *An Academic Autobiography*, ch. 9.

<sup>63</sup> *Ibid.*, ch. 9.

<sup>64</sup> According to *The Canberra Times*, ‘Mr Atiyah [was] responsible for the introduction of specialised courses in business and commercial law’: ‘ANU chair for Oxford fellow’, *The Canberra Times*, 1 October 1969, p. 8.

<sup>65</sup> <https://law.anu.edu.au/about-us/our-history> (accessed 23 April 2020).

<sup>66</sup> P. S. Atiyah, *Consideration in Contracts: a Fundamental Restatement* (Canberra, 1971).

<sup>67</sup> On Sir Guenter Treitel see F. Reynolds, ‘Guenter Heinz Treitel 26 October 1928–14 June 2019’, *Biographical Memoirs of Fellows of the British Academy*, 19 (2021), 129–48.

<sup>68</sup> G. H. Treitel, ‘Consideration: a critical analysis of Professor Atiyah’s fundamental restatement’, *Australian Law Journal*, 50 (1976), 439–49.

<sup>69</sup> A kinder review was offered in J. U. Lewis, ‘Book review: *Consideration in Contracts* by P. S. Atiyah’, *Canadian Bar Review*, 50 (1972), 353–7.

<sup>70</sup> Treitel, ‘Consideration’, p. 439.

<sup>71</sup> *Ibid.*, p. 442.

was that ‘Professor Atiyah’s suggested Restatement will not lead to any significant improvements in the current position.’<sup>72</sup>

While at the ANU, Atiyah published what is arguably his most significant book, *Accidents, Compensation and the Law*.<sup>73</sup> That work, which is discussed in further detail below,<sup>74</sup> offered a revolutionary perspective on tort law in that it perceived it as just one of many overlapping systems that dealt with personal injury and death resulting from accidents. One commentator<sup>75</sup> claims that *Accidents, Compensation and the Law* was a catalyst for the Pearson Commission<sup>76</sup> which, in 1978, made a series of recommendations for the reform of (in particular) tort law in England.<sup>77</sup> It is in these circumstances that it is ironic that Atiyah (rightly) treated the Commission’s recommendations with derision,<sup>78</sup> although he welcomed the veritable trove of statistical information that the Commission’s report yielded.<sup>79</sup>

*Accidents, Compensation and the Law* was the first book published in the famous *Law and Context* series. One of the general editors of that series, William Twining, who had been Atiyah’s neighbour and colleague in Khartoum, had invited Atiyah to produce a book for that series and suggested that he write about regulation or commercial law. Atiyah responded that ‘he was bored with contract and commerce . . . [and that he] wanted to do a number on Torts’.<sup>80</sup> The book was written in short order and delivered before the deadline. Twining describes it as ‘a model of excellence for a “contextual” work’<sup>81</sup> and adds that although ‘[t]here is no ideal type for such works . . . anyone wanting to rethink a doctrinal field can learn a great deal from it’.<sup>82</sup>

<sup>72</sup> Ibid., p. 449.

<sup>73</sup> P. S. Atiyah, *Accidents, Compensation and the Law* (London, 1970).

<sup>74</sup> See the text accompanying nn. 223–6, below.

<sup>75</sup> G. H. L. Fridman, ‘Book review: *Essays for Patrick Atiyah*’, *Canadian Bar Review*, 71 (1992), 394.

<sup>76</sup> *Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 7054 (London, 1978).

<sup>77</sup> The Commission’s work is analysed in J. G. Fleming, ‘The Pearson Report: its “strategy”’, *Modern Law Review*, 42 (1979), 250–69; D. K. Allen, C. J. Bourn and J. Holyoak (eds.), *Accident Compensation after Pearson* (London, 1979).

<sup>78</sup> ‘[It] has . . . proved a disappointment. The main proposals in the Report are tame and unadventurous and consist chiefly of a large number of relatively minor adjustments to existing institutional arrangements’: P. S. Atiyah, ‘No-fault compensation: a question that will not go away’, *Tulane Law Review*, 54 (1980), 274.

<sup>79</sup> ‘[T]he Pearson Commission Report . . . has provided an immense fund of information, figures and data on the tort and liability insurance system’: P. S. Atiyah, *Accidents, Compensation and the Law*, 3rd edn (London, 1980), preface.

<sup>80</sup> Twining, *Jurist in Context*, p. 154.

<sup>81</sup> Ibid., p. 155. The origins of *Accidents, Compensation and the Law* and the genesis of the law-and-context series are explored in W. Twining, ‘Reflections on law in context’, in P. Cane and J. Stapleton (eds.), *Essays for Patrick Atiyah* (Oxford, 1991), pp. 2–30.

<sup>82</sup> Twining, *Jurist in Context*, p. 155 (footnote omitted).

*Accidents, Compensation and the Law* was immediately greeted by considerable acclaim. Bob Hepple wrote that Atiyah had ‘succeeded in presenting a lucid and comprehensive analysis of a number of fundamental questions about compensation for personal injuries and death . . . consequent upon accidents’.<sup>83</sup> Allen Linden remarked that *Accidents, Compensation and the Law* ‘could trigger a revolution not only in our approach to accident law, but also in legal scholarship and legal education’.<sup>84</sup> Another reviewer described the book as ‘a *tour de force*’.<sup>85</sup> Of the third edition, Anthony Ogus wrote that the work ‘was, and remains, a classic’.<sup>86</sup>

While in Australia, Atiyah was briefly involved in a committee of inquiry that had been established by the Federal government in connection with plans to create a national compensation scheme based that which had been established in New Zealand.<sup>87</sup> However, he resigned from the inquiry before it reported<sup>88</sup> and returned to England in 1973. Atiyah’s abrupt departure from Canberra was prompted principally by significant umbrage that he took to the persecution by the Canberra police of his oldest son, Julian.<sup>89</sup> Julian had been arrested twice and had ‘trumped-up charges’ brought against him. In his autobiography, Atiyah describes a sinister campaign of police criminality coupled with incompetent and potentially corrupt conduct of a magistrate.

<sup>83</sup> B. A. Hepple, ‘Book review: *Accidents, Compensation and the Law* by P. S. Atiyah’, *Cambridge Law Journal*, 29 (1971), 294.

<sup>84</sup> A. M. Linden, ‘Book review: *Accidents, Compensation and the Law* by P. S. Atiyah’, *Canadian Bar Review*, 49 (1971), 146.

<sup>85</sup> H. L. Molot, ‘Book review: *Accidents, Compensation and the Law* by P. S. Atiyah’, *Alberta Law Review*, 10 (1972), 144.

<sup>86</sup> A. I. Ogus, ‘Book review: *Accidents, Compensation and the Law* (3rd edn) by P. S. Atiyah’, *International Review of Law and Economics*, 1 (1981), 119.

<sup>87</sup> See *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, 1967) and the *Accident Compensation Act 1972* (NZ). The current statute is the *Accident Compensation Act 2001* (NZ). Atiyah also served on various other committees including a committee established by the New South Wales government concerned with road accidents (see ‘Compensation inquiry team’, *The Canberra Times*, 24 January 1973, p. 1), a committee established by the Australian Capital Territory government regarding civil procedure (see ‘Court restaurant plan’, *The Canberra Times*, 6 February 1973, p. 1) and on the Australian Capital Territory Law Reform Commission (see ‘Reform body named’, *The Canberra Times*, 10 August 1971, p. 3). See, further, Atiyah, *An Academic Autobiography*, ch. 10.

<sup>88</sup> The inquiry reported in 1974 (National Committee of Inquiry, *Compensation and Rehabilitation in Australia: Report of the National Committee of Enquiry* (Canberra, 1974) but with a change of government nothing came of its recommendations. For discussion, see H. Luntz, *Compensation and Rehabilitation: a Survey of the Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia and the National Compensation Bill 1974* (Sydney, 1975) and H. Luntz, ‘Looking back at accident compensation: an Australian perspective’, *Victoria University of Wellington Law Review*, 34 (2003), 279–92.

<sup>89</sup> Atiyah, *An Academic Autobiography*, ch. 10.

## Warwick

Shortly after returning to England, Atiyah took up a chair at the University of Warwick, having been recruited by Twining,<sup>90</sup> who had himself accepted a position at Warwick in 1972.<sup>91</sup> He lived in Royal Leamington Spa. Atiyah found '[t]he University of Warwick [to be] totally different from anything [that he] had anticipated' and that 'there were a great many things about it which [he] did not like at all'.<sup>92</sup> He adjudged the campus to be 'exceptionally unattractive'<sup>93</sup> with the buildings bearing a striking resemblance to 'public lavatories'.<sup>94</sup> The law department had to make do with very limited funds and, when Atiyah started, had only a single administrative officer. Atiyah was allocated a 'miserable room'.<sup>95</sup> Matters were not assisted by the fact that Atiyah at this time became deeply depressed and had to labour under the effects of medication that he had been prescribed in an attempt to combat the condition. In Atiyah's eyes, a redeeming feature of Warwick was, however, its library, which had integrated the law collection with materials from the other social sciences. This permitted Atiyah easily to access non-legal materials that informed his legal research. In 1974, Oxford conferred on Atiyah the degree of Doctor of Civil Law.

## Return to Oxford

In 1977, Atiyah was elected Professor of English Law at the University of Oxford and made a Professorial Fellow of St John's College, with which college that chair is associated. He succeeded William Wade, who had been appointed Master of Gonville and Caius College, Cambridge. Atiyah records that receiving the letter of appointment from the University Registrar 'was one of the greatest moments' of his life.<sup>96</sup> In due course, he and his family moved to Middleton Stoney, a small village near Bicester.<sup>97</sup> The house was in poor condition and Atiyah spent a substantial amount of time personally carrying out renovations.<sup>98</sup>

<sup>90</sup> Twining, *Jurist in Context*, p. 155.

<sup>91</sup> *Ibid.*, p. 147.

<sup>92</sup> Atiyah, *An Academic Autobiography*, ch. 11.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

Atiyah's inaugural lecture at Oxford, which was subsequently published as a short book, was entitled *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*.<sup>99</sup> The burden of the lecture was to probe the tension between what Atiyah identified as being the two principal functions of the judicial role, namely, peacefully to resolve conflicts between disputants and to establish rules designed to encourage or discourage particular types of behaviour in the future. Atiyah's overarching thesis was that there had been a steady shift in favour of the former objective with the result that English judges were becoming increasingly focused on achieving pragmatic outcomes rather than on questions of principle.

As the holder of a statutory chair, Atiyah was no longer required to provide tutorials and he instead delivered a relatively small number of lectures and seminars, which method of instruction Atiyah found more enjoyable (or at least less deadening). As to his lecturing style, Atiyah was engaging and energetic and he not infrequently fulminated against judges and scholars with whose opinions he disagreed. This, coupled with frequent and pronounced gesticulations, made him a highly memorable speaker. Even when difficult to follow, Atiyah communicated his enthusiasm. Ultimately, however, he considered teaching to be something of a distraction from his research, which was his real passion, and Atiyah never regarded himself to be a particularly gifted educator.<sup>100</sup>

In 1979, Atiyah was elected a Fellow of the British Academy. In the same year, he completed work on his sprawling intellectual history of the law of contract, *The Rise and Fall of Freedom of Contract*,<sup>101</sup> the catalyst for which had been Grant Gilmore's monograph *The Death of Contract*.<sup>102</sup> The writing of the book, which Atiyah refers to as his 'magnum opus',<sup>103</sup> had been facilitated by a light teaching load at Warwick and several grants that had enabled Atiyah to take a leave of absence for the whole of the

<sup>99</sup> P. S. Atiyah, *From Principles to Pragmatism: Changes in the Function of Judicial Process and the Law* (Oxford, 1978). Atiyah delivered the same lecture at the University of Iowa College of Law in 1979 and it was reprinted in P. S. Atiyah, 'From principles to pragmatism: changes in the function of the judicial process and the law', *Iowa Law Review*, 65 (1980), 1249–72.

<sup>100</sup> Atiyah, *An Academic Autobiography*, ch. 12.

<sup>101</sup> P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979). *The Rise and Fall of Freedom of Contract* was preceded by an important article that Atiyah published in the *Law Quarterly Review* in which he doubted the explanatory power of the classical conception of contract. Atiyah contended that the classical account of contract did 'not reflect the values of our own times, but those of the last century': P. S. Atiyah, 'Contracts, promises and the law of obligations', *Law Quarterly Review*, 94 (1978), 194.

<sup>102</sup> G. Gilmore, *The Death of Contract* (Columbus, OH, 1974).

<sup>103</sup> Atiyah, *An Academic Autobiography*, ch. 12.

1976/7 academic year.<sup>104</sup> *The Rise and Fall of Freedom of Contract* explores in almost 800 pages the development of, and influences upon, English contract law. Its overarching claims are that classical contract theory had proven to be a failure and that ‘far from being the typical case of obligation’ contractual liability ‘may be a projection of liabilities based on benefit or reliance’.<sup>105</sup>

A deluge of overwhelmingly favourable reviews promptly ensued. John Baker acknowledged Atiyah’s ‘massive work’<sup>106</sup> as ‘a monument of legal history’.<sup>107</sup> In a lengthy review published in the *Yale Law Journal* Charles Gray referred to ‘Professor Atiyah’s extraordinary mastery of literature from many fields’<sup>108</sup> and remarked that he had ‘almost singlehandedly created nineteenth-century legal history in the mainstream of general history’.<sup>109</sup> Barbara Black was similarly effusive in her praise, writing that Atiyah had ‘done a major service in illuminating the history which illuminates the truth’,<sup>110</sup> while Keith Uff said that ‘it is hardly an exaggeration to say that every page contains some important new and perceptive insight’.<sup>111</sup> According to John Farrar, the work was ‘a major advance in English law scholarship’.<sup>112</sup> Dermot Ryan wrote that the book ‘is . . . a brilliantly argued polemic that renders current received dogma about contract law demonstrably bereft of intellectual merit and connection with the realities of English . . . society in the last quarter of the twentieth century’.<sup>113</sup> Charles Fried, while disagreeing vigorously with many of Atiyah’s claims, admired ‘not only the compendiousness of [his] learning, but his wit and imagination as well’.<sup>114</sup> Ian Duncanson was less charitable. He referred to Atiyah’s work as ‘a bit

<sup>104</sup> Atiyah, *The Rise and Fall of Freedom of Contract*, p. viii.

<sup>105</sup> *Ibid.*, p. 4.

<sup>106</sup> J. H. Baker, ‘Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah’, *Modern Law Review*, 43 (1980), 467.

<sup>107</sup> *Ibid.*, 469.

<sup>108</sup> C. M. Gray, ‘Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah’, *Yale Law Journal*, 90 (1980), 231.

<sup>109</sup> *Ibid.*

<sup>110</sup> B. A. Black, ‘Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah’, *Michigan Law Review*, 79 (1981), 946.

<sup>111</sup> K. Uff, ‘Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah’, *Holdsworth Law Review*, 5 (1980), 101.

<sup>112</sup> J. Farrar, ‘Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah’, *British Journal of Law and Society*, 8 (1981), 277.

<sup>113</sup> D. Ryan, ‘Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah’, *Australian Journal of Law and Society*, 1 (1982), 127.

<sup>114</sup> C. Fried, ‘Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah’, *Harvard Law Review*, 93 (1980), 1860.

predictable, and not very exciting' and ultimately compromised by a 'failure to explain and justify the theoretical presuppositions which inform the work'.<sup>115</sup>

Atiyah wrote in the preface that the book would be the first stage of a two-part study regarding the theory of contractual and promissory liability.<sup>116</sup> The second stage, he said, would 'explore the interrelationship of modern contract law with the underlying theories and values of modern England'.<sup>117</sup> However, the other half of the grand project was never written, although extensive notes were prepared and still survive to the present day. This was perhaps because Atiyah's thesis that freedom of contract had been rejected was shown by various developments in the United Kingdom and elsewhere during the 1980s to be radically wrong.<sup>118</sup> It may also have been the case that Atiyah simply no longer had the energy required for another vast undertaking.

Upon returning to Oxford, Atiyah contributed to the life of the Law Faculty in various ways. Perhaps most notably, Atiyah was the foundation editor of the *Oxford Journal of Legal Studies* and served in that role from 1981 until 1986. He found the work fairly tiresome and one senses that he was rather underwhelmed by the quality of many of the submissions that he received.<sup>119</sup> Atiyah helped to create a new post-graduate course entitled 'Remedies in Contract and Tort'.<sup>120</sup> He also played a fairly 'vigorous'<sup>121</sup> role in relation to Law Board and various associated committees.

### Rise to international prominence

Principally as a result of his two towering works, *Accidents, Compensation and the Law* and *The Rise and Fall of Freedom of Contract*, Atiyah's international reputation grew, and invitations to deliver named lectures across the globe came thick and fast. In 1980, Atiyah gave the Lionel Cohen Lecture at the Hebrew University of Jerusalem on the theme 'Judges and policy',<sup>122</sup> in which he engaged with the nature of the judicial

<sup>115</sup> I. Duncanson, 'Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah', *Law in Context*, 1 (1983), 134. Another critical review is R. A. Farber, 'Book review: *The Rise and Fall of Freedom of Contract* by P. S. Atiyah', *Minnesota Law Review*, 66 (1982), 550–66.

<sup>116</sup> Atiyah, *The Rise and Fall of Freedom of Contract*, p. vii.

<sup>117</sup> *Ibid.*

<sup>118</sup> One of many works concerned with the intellectual revival of freedom of contract is F. H. Buckley (ed.), *The Fall and Rise of Freedom of Contract* (Durham, NC, 1999).

<sup>119</sup> Atiyah, *An Academic Autobiography*, ch. 9.

<sup>120</sup> See the text accompanying n. 195, below.

<sup>121</sup> Atiyah, *An Academic Autobiography*, ch. 12.

<sup>122</sup> P. S. Atiyah, 'Judges and policy', *Israel Law Review*, 15 (1980), 346–71.

function and railed against the ‘combination of actual adherence to the realist theory with a publicly acknowledged adherence to the declaratory theory’.<sup>123</sup>

In 1981, Atiyah delivered the Oliver Wendell Holmes lectures at Harvard Law School. He described the invitation to give these lectures as ‘one of the greatest honours which can be bestowed on a legal scholar in the common law world’.<sup>124</sup> One of the three papers that Atiyah gave was published in the *Boston University Law Review*.<sup>125</sup> His concern in it was to test Holmes’s theory that the primary purpose of the law is to ‘induce external conformity to rule’<sup>126</sup> and that moral blameworthiness is not generally required for liability against criminal law, tort law and contract law in England.<sup>127</sup> Atiyah gave Holmes the following fairly underwhelming appraisal:<sup>128</sup>

[Holmes’s] theory of liability in criminal law may have been partially responsible for a near disaster, though in the end it proved short-lived. His theory of tort was more in tune with the times, and may have been influential on other writers, but precisely because it was in tune with the times, one cannot be sure how much of the credit truly belongs to Holmes. . . .

On contract, Holmes is best remembered for his brilliant and generally rejected paradox that there is no duty to perform a contract, and for his bargain theory of consideration, which has left little mark on English law.

In 1982, Atiyah published *Promises, Morals, and the Law*,<sup>129</sup> in which he provided a radical account of the nature of promissory obligations.<sup>130</sup> In it he contended that:<sup>131</sup>

the mere fact of expectations and of reliance (however intentionally induced) cannot alone create the grounds upon which promises are held to be obligatory. Something else is needed before this conclusion can be reached. The extra element, it is suggested, is compliance with some socially accepted values which determine when expectations and/or reliance are sufficiently justifiable to be given some measure of protection.

<sup>123</sup> *Ibid.*, 369.

<sup>124</sup> Atiyah, *An Academic Autobiography*, ch. 12.

<sup>125</sup> P. S. Atiyah, ‘The legacy of Holmes through English eyes’, *Boston University Law Review*, 63 (1983), 341–82.

<sup>126</sup> O. W. Holmes, *The Common Law* (Cambridge, MA, 1963), p. 42.

<sup>127</sup> *Ibid.*, pp. 42–3.

<sup>128</sup> Atiyah, ‘The legacy of Holmes’, 376–7.

<sup>129</sup> P. S. Atiyah, *Promises, Morals, and the Law* (Oxford, 1982).

<sup>130</sup> The book won the Swiney Prize: see ‘Annual report of the council’, *Journal of the Royal Society of Arts*, 132 (1984), 583.

<sup>131</sup> Atiyah, *Promises, Morals, and the Law*, p. 68.

The book was greeted by numerous reviews. The originality of Atiyah's enterprise was readily acknowledged but the analysis garnered few supporters.<sup>132</sup> Atiyah's thesis was variously described as resting 'on an unpersuasive attack on prior doctrine and an unwarranted faith in the morality of social practices',<sup>133</sup> being 'gravely weakened once [his] generalisations about the law are undermined',<sup>134</sup> depending on 'an untenable view of promises' and 'a distorted doctrine of their relation to the law'.<sup>135</sup>

In 1983, Atiyah delivered the Annual Cecil A. Wright Memorial Lecture at the University of Toronto. His theme was 'Contract and fair exchange'.<sup>136</sup> Atiyah made a withering attack on the 'traditional dogma of contract law that the adequacy of consideration is immaterial to the validity of a contract'.<sup>137</sup> This conventional wisdom, Atiyah argued, was 'seriously misleading' and that 'the law of contract is today greatly concerned with substantive fairness of exchange'.<sup>138</sup> He then proceeded to identify aspects of the law that supported this claim including the willingness of the courts to take account of the fairness of the exchange via the process of construction and the implication of terms.<sup>139</sup>

Also in 1983, Atiyah delivered the Roy R. Ray Lecture at Southern Methodist University School of Law on the theme 'Lawyers and rules: some Anglo-American comparisons'.<sup>140</sup> The burden of this lecture was to bear out the thesis that, despite the perception that America was the most 'law-ridden country in the world', Britain was in fact 'a more rule-governed country'.<sup>141</sup> This lecture eventually filtered into Atiyah's *Form and Substance in Anglo-American Law: a Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*,<sup>142</sup> which he co-authored with Robert Summers. Summers (who was universally known as 'Bob') was a professor at Cornell who,

<sup>132</sup> Hugh Collins described it as 'highly innovative' (H. Collins, 'Counsel to philosophers', *Modern Law Review*, 45 (1982), 226).

<sup>133</sup> Anonymous, 'Book review: *Promises, Morality and the Law* by P. S. Atiyah', *Michigan Law Review*, 31 (1983), 903.

<sup>134</sup> Collins, 'Counsel to philosophers', 228.

<sup>135</sup> J. Raz, 'Book review: *Promises, Morals, and the Law* by P. S. Atiyah', *Harvard Law Review*, 95 (1982), 938.

<sup>136</sup> The lecture was published as P. S. Atiyah, 'Contract and fair exchange', *University of Toronto Law Journal*, 35 (1985), 1–24.

<sup>137</sup> *Ibid.*, 1

<sup>138</sup> *Ibid.*, 3.

<sup>139</sup> *Ibid.*, 9–13.

<sup>140</sup> P. S. Atiyah, 'Lawyers and rules: some Anglo-American comparisons', *Southwestern Law Journal*, 37 (1983), 545–62.

<sup>141</sup> *Ibid.*, 545.

<sup>142</sup> P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law: a Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford, 1987).

in addition to being a leading commercial lawyer and legal theorist, was an Oxonophile (he owned a flat in Oxford for several years).<sup>143</sup>

It is impossible to do justice to *Form and Substance in Anglo-American Law* within the space available, which is (still) one of a very small number of intellectually rigorous comparative studies of Anglo-American law.<sup>144</sup> It will need to suffice to say that Atiyah and Summers's objective was to survey, with reference to the British and American legal systems, the relationship between formal reasoning (i.e., the application of rules without reference either to the justifications that underlie the rules being applied, or to other potentially relevant considerations of justice or welfare) and substantive reasoning (i.e., direct reference to considerations of justice, purpose, welfare or convenience). Atiyah and Summers claimed that a profound difference—perhaps the most profound difference—between the English legal system and those of the United States was that the English system was typified by highly formal modes of reasoning, while reasoning in the American system was driven by matters of substance, and in each case excessively so. Atiyah and Summers explained their thesis by reference to the idea of contrasting 'visions' of law, with the English vision of law being essentially that of 'a system of rules', while the American was of 'an outward expression of the community's sense of right or justice'.<sup>145</sup>

The book was heralded by largely glowing reviews, which described it as 'a rich quarry',<sup>146</sup> 'a classic of legal scholarship'<sup>147</sup> and as making 'an important contribution to comparative studies, both for its jurisprudential model and for its perceptive

<sup>143</sup> It is worth briefly commenting on the fact that *Form and Substance in Anglo-American Law* was co-authored. Atiyah wrote only three co-authored pieces, the others being articles written with Guenter Treitel about the Misrepresentation Act 1967 (P. S. Atiyah and G. Treitel, 'Misrepresentation Act 1967', *Modern Law Review*, 30 (1967), 369–88) and Francis Bennion about mistakes in the construction of contracts (Atiyah and Bennion, 'Mistakes in the constructions of contracts'). It is unsurprising that Atiyah co-authored just three pieces. Atiyah's style did not lend itself to collaborative work. His ideas were often sufficiently atypical that many other researchers would have found it difficult to subscribe to them, and one suspects that given the speed with which Atiyah wrote, he would have been frustrated by the slower rate of work that collaborative research inevitably involves. It is ironic that Atiyah teamed up, in particular, with Treitel given that Treitel's style could not have been more different from Atiyah's. Whereas Treitel tended to focus intensely on microscopic features of the case law and was a far more orthodox scholar than Atiyah, Atiyah's interests, as is discussed further below (see the text accompanying nn. 248–50, below), lay primarily in grand, sweeping ideas.

<sup>144</sup> Another impressive analysis albeit on a much smaller scale is R. A. Posner, *Law and Legal Theory in England and America* (Oxford, 1997).

<sup>145</sup> Atiyah and Summers, *Form and Substance*, pp. 19–21.

<sup>146</sup> D. F. Partlett, 'The common law as cricket', *Vanderbilt Law Review*, 43 (1990), 1431.

<sup>147</sup> J. Bell, 'Book review: *Form and Substance in Anglo-American Law* by P. S. Atiyah and R. Summers', *Anglo-American Law Review*, 22 (1993), 126.

analysis of American and British legal institutions and thought-ways'.<sup>148</sup> However, the reviews were not all uniformly positive. Martin Sigillito wrote a searing assessment in which he complained about almost every feature of the book, writing that 'much of the data is either incorrect or unpersuasive and the conclusions, while eminently arguable, remain essentially vague and unproven'.<sup>149</sup>

In 1984, Atiyah delivered the Chorley Lecture on the topic 'Common Law and Statute'.<sup>150</sup> In that celebrated paper, which was a major catalyst for interest in the United Kingdom in the interplay between judge-made law and legislation,<sup>151</sup> Atiyah grappled with how these two types of law fitted together. He began by drawing attention to the fact that the common law and statute are fundamentally interconnected in myriad ways. Statutes, Atiyah emphasised, were rarely 'self-contained instruments' and, when created, thus became 'part of a very large body of law'.<sup>152</sup> He then raised acutely the question of whether the courts ought to take account of statutes in developing the common law and, if so, how this should be done. Although Atiyah was not the first person to have considered whether the common law should be developed by analogy to statute,<sup>153</sup> the careful and eloquent way in which he addressed the issue made his lecture a landmark in scholarship regarding the relationship between judge-made law and legislation.

In 1987, Atiyah delivered the Hamlyn Lectures at the University of Leeds on the theme 'Pragmatism and theory in English law'. This work drew extensively upon Atiyah's *From Principles to Pragmatism* and *Form and Substance in Anglo-American Law*. In his first lecture, Atiyah argued that English lawyers are more pragmatic than their continental colleagues, who are more theoretically inclined. English lawyers, he said, have a 'preference for precedent or pragmatism over principle'.<sup>154</sup> The burden of the second lecture was to pay tribute to the strengths of the English legal system's pragmatism, and Atiyah discussed in this regard innovations such as the *Mareva*

<sup>148</sup> J. G. Fleming, 'Book review: *Form and Substance in Anglo-American Law* by P. S. Atiyah and R. Summers', *International & Comparative Law Quarterly*, 37 (1988), 446.

<sup>149</sup> M. T. Sigillito, 'Book review: *Form and Substance in Anglo-American Law*', *St Louis University Law Review*, 34 (1990), 389.

<sup>150</sup> P. S. Atiyah, 'Common Law and Statute', *Modern Law Review*, 48 (1985), 1–28.

<sup>151</sup> See, e.g., J. Beatson, 'The role of Statute in the development of Common Law doctrine', *Law Quarterly Review*, 117 (2001), 247–72; A. Burrows, 'The relationship between Common Law and Statute in the Law of Obligations', *Law Quarterly Review*, 128 (2012), 232–59.

<sup>152</sup> Atiyah, 'Common Law and Statute', 2.

<sup>153</sup> The relationship between the common law and statutes had long been debated in, in particular, the United States: see, e.g., R. Pound, 'Common Law and legislation', *Harvard Law Review*, 21 (1907), 383–407.

<sup>154</sup> P. S. Atiyah, *Pragmatism and Theory in English Law* (London, 1987), p. 31.

injunction<sup>155</sup> and *Anton Piller* order.<sup>156</sup> In the final lecture, Atiyah explored what he regarded as defects in English law's being 'neglectful of the need for rationality in the law'.<sup>157</sup> The book that the lectures yielded<sup>158</sup> was described as 'a sparkling critique of the pragmatic tradition in English law'.<sup>159</sup>

## Retirement

In 1988, Atiyah retired early from his chair at Oxford on medical advice. As well as his having been afflicted by chronic and sometimes severe depression intermittently throughout his career, Atiyah had long had trouble on account of congenital defects with his heart, having suffered from a cardiac arrest when he was around 40 years old and having undergone heart bypass surgery in 1987.<sup>160</sup> In the same year, St John's elected Atiyah to an Honorary Fellowship and in 1989 the University of Warwick recognised Atiyah with a doctorate of law.<sup>161</sup> Also in 1989, Atiyah was appointed Queen's Counsel *honoris causa*.<sup>162</sup> Atiyah and Christine moved to Hayling Island where their son, Andrew, was living nearby. Atiyah enjoyed cooking, listening to classical music (which he described as being 'one of the pleasures of [his] life'),<sup>163</sup> tending to his garden and reading (in a range of fields but especially history and politics). He wrote but never published during his lifetime an autobiography, the manuscript for which was only located after his death. With the permission of Atiyah's family, arrangements for it to be published are underway.

Atiyah, although claiming to be 'bored with law' and to have given it up (at least when he wished to decline professional invitations), published four further scholarly works during his retirement.<sup>164</sup> The first was his Wallace Wurth Memorial Lecture

<sup>155</sup> *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 213 (CA).

<sup>156</sup> See *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

<sup>157</sup> Atiyah, *Pragmatism and Theory in English Law*, p. 103.

<sup>158</sup> *Pragmatism and Theory in English Law*.

<sup>159</sup> D. Gibson, 'Defending logic from a bum rap: pragmatism and theory in English law', *Manitoba Law Journal*, 17 (1987), 227.

<sup>160</sup> Atiyah, *An Academic Autobiography*, ch. 14.

<sup>161</sup> <https://warwick.ac.uk/services/gov/calendar2015-2016/hongrads/> (accessed 24 April 2020).

<sup>162</sup> 'Queen's Counsel 1989', *The Times* (23 March 1989).

<sup>163</sup> Atiyah, *An Academic Autobiography*, ch. 4.

<sup>164</sup> Not included in this tally are the publication by Atiyah of new editions of his books. In his retirement, Atiyah published a new editions of his *The Sale of Goods* (P. S. Atiyah, *The Sale of Goods*, 9th edn (London, 1990)) and *Law and Modern Society* (P. S. Atiyah, *Law and Modern Society*, 2nd edn (Oxford, 1995)) as well as two further editions of his *Introduction to the Law of Contract* (P. S. Atiyah, *An Introduction to the Law of Contract*, 4th edn (Oxford, 1989)); P. S. Atiyah, *An Introduction to the Law of Contract*, 5th edn (Oxford, 1995)).

entitled ‘Justice and predictability in the Common Law’,<sup>165</sup> which he delivered at the University of New South Wales in 1992.<sup>166</sup> The lecture comprised a reflection on Atiyah’s *Form and Substance in Anglo-American Law* although the focus was on ‘why English practising lawyers and judges still place so much stress on predictability and formality’.<sup>167</sup> Atiyah argued that, in terms of where it lies in the spectrum between form and substance, ‘Australia occupies a position somewhere between England and America’.<sup>168</sup>

The second was a chapter entitled ‘Personal injuries in the twenty first century: thinking the unthinkable’ in a volume of essays edited by Peter Birks.<sup>169</sup> In that contribution, Atiyah continued his assault on that part of tort law that is concerned with liability for personal injury and death but considered that his earlier proposals to replace it with a welfare system were now misguided (or unrealistic) in view of the changed political landscape. He considered that the prospect of the social security system being massively expanded in order to deal with the problem of disabilities resulting from accidents was improbable in the extreme in an age that emphasised increased self-reliance. Accordingly, Atiyah proposed the abolition of tort law (in so far as it concerned accidents) and replacing it with nothing.<sup>170</sup> The result, he thought, would be that the market would devise solutions for dealing with accident-related losses. Specifically, the absence of redress in tort law for such losses would, Atiyah argued, trigger growth in the market for first-party insurance for personal injury and death. The idea was about as radical as any that any torts scholar had ever proposed.

That book chapter laid the foundations for Atiyah’s penultimate publication, a book entitled *The Damages Lottery*.<sup>171</sup> In that monograph, Atiyah developed at much

<sup>165</sup> P. S. Atiyah, ‘Justice and predictability in the Common Law’, *University of New South Wales Law Journal*, 15 (1992), 448–61.

<sup>166</sup> A responsive essay was written by Michael Kirby, who was then President of the New South Wales Court of Appeal: M. Kirby, ‘In praise of Common Law renewal: a commentary on PS Atiyah’s “Justice and predictability in the Common Law”’, *University of New South Wales Law Journal*, 15 (1992), 462–82.

<sup>167</sup> Atiyah, ‘Justice and predictability’, 449.

<sup>168</sup> *Ibid.*

<sup>169</sup> P. S. Atiyah, ‘Personal injuries in the twenty first century: thinking the unthinkable’, in P. Birks (ed.), *Wrongs and Remedies in the Twenty-First Century* (Oxford, 1996), pp. 1–46.

<sup>170</sup> Atiyah’s book chapter is well known and, perhaps because of this, it seems to be assumed that it was in that contribution that Atiyah first articulated his proposal to abolish tort law in so far as it concerned accidents and to permit first-party insurance to fill the resulting void. In fact, Atiyah had seriously considered that initiative decades earlier. As much is clear from a letter that he wrote to the editor of *The Canberra Times* that was published in 1971. In that letter, Atiyah even seemed to prefer a first-party insurance system to one based on third-party insurance: see ‘Avoiding insurance delays’, *The Canberra Times*, 24 July 1971, p. 2.

<sup>171</sup> P. S. Atiyah, *The Damages Lottery* (Oxford, 1997).

greater length the essential idea that he had promoted in his book chapter. In a recent lecture delivered to the Personal Injuries Bar Association, Lord Sumption remarked that *The Damages Lottery* is ‘one of the most eloquent polemics ever to be directed against a firmly entrenched principle of law’.<sup>172</sup> It is noteworthy that Atiyah wrote *The Damages Lottery* primarily for popular consumption.<sup>173</sup> He did so because he felt that reform could be achieved only if there were a sufficient shift in public attitudes regarding tort law. The public, Atiyah felt, needed to understand why the tort system had gone horribly wrong and what needed to be done in order to fix the problem and that only then could the political momentum that was necessary for change be achieved. Atiyah considered that the various stakeholders as well as the Law Commission were far too committed to the existing system to be able to effect the type of reforms that he had in mind on their own motion.<sup>174</sup>

Atiyah’s final publication was a tribute to Lord Denning’s contribution to the law of contract<sup>175</sup> (fittingly given Lord Denning’s role at the formative stage of Atiyah’s life in the law).<sup>176</sup> In that article, Atiyah surveyed four streams of authority to which Lord Denning had made important contributions. The first concerned the doctrine of promissory estoppel and Lord Denning’s decision in *High Trees*,<sup>177</sup> the result in which Atiyah described, echoing Lord Denning’s language in *Candler v Crane, Christmas & Co*,<sup>178</sup> as being ‘Bold Spirits 1, Timorous Souls 0’.<sup>179</sup> Second, Atiyah addressed a line of cases regarding the circumstances in which stevedores could take advantage of exemption clauses in contracts between carriers and cargo interests.<sup>180</sup> He observed that Lord Denning had been ‘almost total[ly] vindicate[d]’<sup>181</sup> by the way in which the law had developed. The third and fourth areas concerned Lord Denning’s efforts to nurture the

<sup>172</sup> J. Sumption, ‘Abolishing personal injuries law: a project’, *Journal of Professional Negligence*, 34 (2018), 113.

<sup>173</sup> Atiyah wrote one other book in his career that was aimed primarily at the layperson, namely, P. S. Atiyah, *Law and Modern Society* (Oxford, 1983). Atiyah made various other attempts to bring legal issues to the public’s attention. For example, he regularly wrote law-related letters to the editor of *The Times*, and participated in a television programme in which he addressed the liability of pharmaceutical companies for birth defects (see the text accompanying n. 258, below).

<sup>174</sup> Atiyah, *The Damages Lottery*, p. 173.

<sup>175</sup> Atiyah, ‘Lord Denning’s contribution to Contract Law’. See also P. S. Atiyah in J. L. Jowell and J. P. W. B. McAuslan (eds.), *Lord Denning: The Judge and the Law* (London, 1984), pp. 29–77.

<sup>176</sup> Atiyah, *An Academic Autobiography*, ch. 4.

<sup>177</sup> *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB (KBD) at 130.

<sup>178</sup> [1951] 2 KB 164 (CA) at 178.

<sup>179</sup> Atiyah, ‘Lord Denning’s contribution to Contract Law’, 6.

<sup>180</sup> *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 (HL); *The Eurymedon* [1975] AC 154 (HL); *Norwich CC v Harvey* [1989] 1 WLR 828 (CA); *The Nicholas H* [1996] AC 211 (HL).

<sup>181</sup> Atiyah, ‘Lord Denning’s contribution to Contract Law’, 8.

doctrine of fundamental breach<sup>182</sup> and to weaken the doctrine of privity of contract,<sup>183</sup> where Lord Denning had been less successful in carrying the day. Atiyah clearly admired Lord Denning despite the following overall assessment (which, read in context, was written more in jest than in earnest, although it still contained a serious point):<sup>184</sup>

We all know that Lord Denning's judicial technique, his handling of precedents and arguments can often be faulted. He does not always play fair. Precedents are often mishandled, and wilfully misinterpreted; the desired result dictates the nature of the reasoning more consciously and more determinedly than is usual with judges in the English tradition; the fairness of the desired result is often taken for granted rather than openly justified; and so on. All these faults are plain to see in many of the contract cases I have surveyed. And the faults would be serious indeed if they were indulged in by too many appeal judges at the same time but after all, Lord Denning was unique. It is perhaps a paradox to conclude that Lord Denning did a great deal of good to the law of contract, but at the same time to recognise that it is a good thing there was only one Lord Denning.

After a cruel and lengthy battle with dementia that prevented him from engaging in the final years of his life with the academic world to which he had contributed so much, Atiyah died at the age of 87. He passed away on 30 March 2018, which was just a few days before a workshop took place in Worcester College, Oxford, the goal of which was to consider the contributions of leading scholars to the law of torts.<sup>185</sup> Naturally, Atiyah was among the academics whose work was addressed.<sup>186</sup>

## The person

This section seeks to understand Atiyah the individual and has been written based on discussions with colleagues who knew him, presentations delivered at a memorial workshop convened at St John's College, Oxford, in 2018 and interviews of members of the Atiyah family. A key message gleaned from these sources is that Atiyah was a serious individual who was deeply committed to his own research but at the same time was someone who engaged passionately with the ideas, both inside and outside the law, offered by those around him.

<sup>182</sup> See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 (CA).

<sup>183</sup> *Beswick v Beswick* [1966] Ch 538 (CA).

<sup>184</sup> Atiyah, 'Lord Denning's contribution to Contract Law', 10–11.

<sup>185</sup> The papers presented at this workshop were published in an edited volume: J. Goudkamp and D. Nolan (eds.), *Scholars of Tort Law* (Oxford, 2019).

<sup>186</sup> See J. Goudkamp, 'Professor Patrick Atiyah (1931–2018)', in Goudkamp and Nolan, *Scholars of Tort Law*, pp. 309–35. A further volume in the same series to be entitled *Scholars of Contract Law* is planned and will likely be published in 2022. It is intended that Atiyah will feature in that work, too.

It is obvious that Atiyah must have been ferociously hard-working, it being quite impossible for his massive volume of writings to have been yielded without relentless industry.<sup>187</sup> Atiyah, in ‘manic phases’, would write around 8,000 words per day.<sup>188</sup> Although he would return home in time for dinner with his family, he would generally spend the evenings reading and jotting down ideas as they occurred to him. Work was a passion for him rather than a chore. At times, Atiyah was so consumed by his work that he took sedatives in the evening in order to enable his ‘restless mind to get some sleep’.<sup>189</sup> Atiyah’s diligence was not confined to his own research. It appears that he returned comments on his students’ work (or at least that of some of his doctoral students) with exceptional speed. Jane Stapleton, who read for a doctorate under Atiyah, recounts that a note was waiting for her at Balliol the day after she had turned in her first tranche of draft material that informed her that Atiyah had read it and was ready to discuss it with her.

Atiyah could sometimes be a rather difficult colleague and impatient with scholars who were less gifted than him, and he could let his temper get the better of him. In his writing, Atiyah tended to be fairly sparing in his praise of others, and it is not immediately obvious who were his intellectual heroes (or, indeed, if he really had any).<sup>190</sup> He once left a Society of Legal Scholars’ conference early muttering that none of the papers delivered at it offered anything of value to him. Atiyah’s gravitas and the power of his ideas were such that co-leaders of seminars that he ran at Oxford sometimes came across as mediocre and forgettable by comparison.

In 1976, Atiyah notoriously clashed in the *Law Quarterly Review* with Peter Millett QC (later Lord Millett) who had represented one of the litigants in *Crabb v Arun District Council*.<sup>191</sup> Atiyah had castigated the decision, in which it had been held that the claimant was entitled to relief in equity, as being symptomatic of ‘the extraordinary conceptual morass into which English contract law is falling, largely because of outmoded ideas about the purpose and nature of the doctrine of consideration’.<sup>192</sup> In brief, Atiyah contended that the claimant had a straightforward claim in contract

<sup>187</sup> A list of Atiyah’s publications is provided in P. Cane and J. Stapleton (eds.), *Essays for Patrick Atiyah* (Oxford, 1991), pp. 375–81.

<sup>188</sup> Atiyah, *An Academic Autobiography*, ch. 11.

<sup>189</sup> *Ibid.*

<sup>190</sup> Although Atiyah much admired Arthur Corbin (see the tribute paid to Corbin in Atiyah, *Consideration in Contracts*, p. 5), A. W. B. Simpson, particularly in connection with his *History of the Common Law of Contract: the Rise of the Action of Assumpsit* (Oxford, 1975) (see the remarks in Atiyah, *Rise and Fall of Freedom of Contract*, p. viii), and Glanville Williams (see the comments in Atiyah, *Pragmatism and Theory in English Law*, pp. 181–3).

<sup>191</sup> [1976] Ch 179 (CA).

<sup>192</sup> P. S. Atiyah, ‘When is an enforceable agreement not a contract? Answer: when it is an Equity’, *Law Quarterly Review*, 92 (1976), 174.

with the result that there was no need to resort to an equitable remedy. Millett, who described Atiyah's note as 'interesting, if intemperate',<sup>193</sup> contended that his criticism of the decision was 'misplaced'<sup>194</sup> and not least because the claimant had initially brought a claim in contract but had desisted with it in view of the insuperable difficulties into which it had run.

Atiyah had a well-known falling out with Guenter Treitel. Although initially on good terms (they co-authored an article early in their respective careers),<sup>195</sup> their relationship rapidly deteriorated, although opinion is divided as to the extent of the antipathy and whether it was mutual. One possible cause of this was Treitel's critical review of Atiyah's inaugural lecture at the ANU.<sup>196</sup> Matters were not helped by the fact that Atiyah and Treitel were rivals for positions at Oxford, with Atiyah being appointed to the Professorship in English Law in 1977 and Treitel to the Vinerian Chair in 1979. When Atiyah was appointed to the former chair in 1977, Treitel was (to put it mildly) displeased. Finally, it appears that Atiyah and Treitel had what seems to have been a rather petty squabble regarding the creation of a new subject at Oxford on 'Remedies in Contract and Tort', which Atiyah felt was worthwhile, but which Treitel worried may overlap unduly with a subject in restitution, which he taught.<sup>197</sup> In the event, neither said more than a few words to each other following their both being appointed to chairs at Oxford.<sup>198</sup>

Atiyah plainly felt that he and his efforts were rather undervalued, especially outside the legal academy. In several of his writings he discussed at length the function that legal academics perform in common law systems and in Britain in particular. Atiyah emphasised the relatively modest institutional role that they are generally regarded as discharging, their 'decidedly inferior status' relative to other participants in the legal system<sup>199</sup> and the even lower level at which they are remunerated.<sup>200</sup> All of this, one suspects, he felt was fundamentally unfair in circumstances where legal scholars, Atiyah opined, had made a far greater impact upon the development of the law than was generally appreciated.<sup>201</sup>

<sup>193</sup> P. J. Millett, 'Crab v Arun District Council—a Riposte', *Law Quarterly Review*, 92 (1976), 342–6.

<sup>194</sup> *Ibid.*, 343.

<sup>195</sup> Atiyah and Treitel, 'Misrepresentation Act 1967'. The rather intemperate language that features in the article strongly suggests that Atiyah was primarily responsible for drafting it.

<sup>196</sup> Treitel, 'Consideration: a critical analysis of Professor Atiyah's fundamental restatement'. Atiyah responded to Treitel's review when he republished his lecture in P. S. Atiyah, *Essays on Contract* (Oxford, 1986), ch. 8.

<sup>197</sup> Atiyah, *An Academic Autobiography*, ch. 12.

<sup>198</sup> *Ibid.*

<sup>199</sup> Atiyah, *Pragmatism and Theory in English Law*, p. 35.

<sup>200</sup> *Ibid.*, p. 40.

<sup>201</sup> '[L]egal theory, and the work of academics, has in truth played a much larger role in the development of our law than has generally been acknowledged, and . . . a great many fields of our law have been

Atiyah could be impulsive. He once purchased a house without consulting Christine, and he moved home unusually frequently, living in around fourteen houses during his lifetime. Atiyah's restless disposition probably had some bearing on his decisions to relocate to Khartoum, Accra and Canberra (although he had, as described above, a childhood connection with Khartoum, and it may have been a condition of his government scholarship that he received to attend Victoria College in Egypt that he return). The world was a much larger place in the 1950s, 1960s and 1970s than it is today, and these moves, to regions of the world remote from Britain (even if they were formerly part of the Empire), may have been perceived by some as somewhat radical and unusual.

It appears that Atiyah may have felt himself as rather living in the shadow of his older (and clearly the senior) brother, Sir Michael, who was one of the world's most celebrated mathematicians. As Patrick puts it in his autobiography, 'whether as a result of age, ability or personality, Michael was decidedly a leader and I was a follower'.<sup>202</sup> Although Patrick had risen to the apex of the legal academy and was one of the best-known academics in the common law world, Michael's accolades were in a different league. His many academic and state honours included being elected, at the age of 33, a Fellow of the Royal Society (1962), being awarded the Fields Medal (1966) and being made a Knight Bachelor (1983) and member of the Order of Merit (1992). Michael and Patrick argued boisterously with each other at family gatherings about all manner of subjects but especially politics, with Michael's inclinations being more to the left, and Patrick's sympathies lying to the right and increasingly so as the years rolled by.<sup>203</sup> However, Patrick and Michael enjoyed a warm relationship with each other, and had done so since they were young, even if they only met relatively infrequently in their later lives due to their often being based in different countries and although there was something of a rivalry between them.<sup>204</sup> While a student at Trinity College, Cambridge, Michael would ride to see Patrick in Oxford on what he described as a 'dangerous motorcycle' with James Mackay (later the Lord Chancellor) as a pillion passenger. And

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profoundly influenced by academic writing and theory . . . [T]here is a more general case for thinking that legal writing, and particularly academic writing, is in the long perspective of history, an important part of the law itself . . . [I]t seems certain that we have greatly underestimated the influence of academics on the development of the law in the past': Atiyah, *Pragmatism and Theory in English Law*, pp. 166, 179–80.

<sup>202</sup> Atiyah, *An Academic Autobiography*, ch. 1.

<sup>203</sup> This shift to the right was reflected in Atiyah's academic work. See the text accompanying nn. 217–19, below (where it is noted that Atiyah rejected a welfare-orientated reform for which he had previously argued in favour of a market-based solution).

<sup>204</sup> Patrick gave Michael a copy of the Festschrift edited by Peter Cane and Jane Stapleton in his honour (Cane and Stapleton, *Essays for Patrick Atiyah*) and added to it the following inscription: 'To Michael, From your undistinguished brother, so strangely honoured by the OUP and various authors. Patrick, 6 Jan 1992. Sibling rivalry runs deep.'

when Michael was appointed Master of Trinity College in 1990, Patrick attended the ceremony and he and Michael and their brother Joseph posed for photographs together.<sup>205</sup> Michael, who read at least some of the books that Patrick authored, died not long after Patrick, on 11 January 2019.

Atiyah enjoyed travelling with his family, especially to the Mediterranean, and to other warmer climates. In the early 1980s, he purchased a holiday house in the Dordogne in France (he spoke good French as well as Arabic) would spend much time there during the summer writing (having hauled with him a large supply of reading materials).<sup>206</sup> Atiyah liked food (especially Lebanese food) and wine and delighted in discussing public affairs, often rambunctiously. Dinner parties with Atiyah were never dull or subdued occasions. He enjoyed working with his hands and embarked on a wide range of do-it-yourself projects at home. A doctor whom Atiyah consulted upon encountering difficulty with his hands due to the intensity of renovation efforts in which he engaged was surprised to learn that he was an academic.<sup>207</sup>

Atiyah benefited throughout his career from considerable support from Christine, a bright and sparkling person who was well liked by Atiyah's law colleagues. Christine helped financially when Atiyah and she were based in Khartoum by working as an air hostess with Sudan Airways. Atiyah used to scribble his ideas down on cards in order to keep track of them and Christine helped to organise things in this regard. Atiyah and Christine suffered tragedy when their youngest son, Jeremy, a journalist, died suddenly and unexpectedly on 12 April 2006 in Italy. Jeremy was a travel writer and at one stage wrote for *The Independent*.<sup>208</sup> At the funeral, Atiyah read out several letters that Jeremy had written home over the years. Atiyah and Christine were hit exceptionally hard by Jeremy's death and never really recovered from it.

## Influence

Atiyah's research had a significant impact on scholarly debates about the law, in the United Kingdom and elsewhere,<sup>209</sup> and continues to do so to the present day.<sup>210</sup> For

<sup>205</sup> See <http://www.atiyah.plus.com/familypictures.htm> (accessed 7 May 2020).

<sup>206</sup> Atiyah, *An Academic Autobiography*, ch. 14.

<sup>207</sup> *Ibid.*, ch. 11.

<sup>208</sup> *The Independent* published an obituary: see <https://www.independent.co.uk/news/obituaries/jeremy-atiyah-6103673.html> (accessed 24 April 2020).

<sup>209</sup> Unusually for a British academic, Atiyah's research sparked significant interest in, in particular, the United States. For example, numerous reviews of his books were published in American journals (a substantial number of which are cited above).

<sup>210</sup> For a citation analysis of Atiyah's tort-related scholarship, see Goudkamp, 'Professor Patrick Atiyah (1931–2018)', pp. 330–4.

example, his work was addressed in a Festschrift edited by Peter Cane and Jane Stapleton<sup>211</sup> and it continues to be regularly debated in Oxford in Bachelor of Civil Law seminars. In 2018, the biannual obligations conference took place at Melbourne Law School and it drew scholars and delegates from across the common law world. The conference's theme, 'Form and substance in the law of obligations', had been inspired by Atiyah and Summers's *Form and Substance in Anglo-American Law*.<sup>212</sup> The proceedings yielded an edited collection many of the chapters of which engage with Atiyah and Summers's text.<sup>213</sup> Two of Atiyah's books, *Accidents, Compensation and the Law*<sup>214</sup> and *The Sale of Goods*,<sup>215</sup> survive to the present day in the hands of other writers. Atiyah's research continues to be regularly cited in the courts, especially his *Vicarious Liability in the Law of Torts*,<sup>216</sup> although his impact on judicial decisions appears to be rather muted. This is probably unsurprising given the radical nature of many of his claims, which rendered them unlikely to be endorsed by the courts. The real significance of Atiyah's work lies, therefore, mainly in its contribution to the intellectual history of the law, and it is profitable in these circumstances to explore the reasons for the longevity of his ideas. Six factors seem to be particularly important in this regard.

## Integrity

One reason why Atiyah's work has been so influential concerns the fact that he was, ultimately, interested in what was right and true. He was not afraid to adopt positions that few or no other scholars endorsed. And Atiyah had the courage to reject his previous views when he no longer agreed with them. The best but certainly not the only illustration of this concerns Atiyah's opinion regarding the proper fate of the tort

<sup>211</sup> Cane and Stapleton, *Essays for Patrick Atiyah*.

<sup>212</sup> Atiyah and Summers, *Form and Substance in Anglo-American Law*.

<sup>213</sup> A. Robertson and J. Goudkamp, *Form and Substance in the Law of Obligations* (Oxford, 2019).

<sup>214</sup> Atiyah authored three editions of *Accidents, Compensation and the Law* before handing responsibility for that text to Peter Cane, who authored the fourth to eighth editions and co-authored the ninth edition (P. Cane, *Atiyah's Accidents, Compensation and the Law*, 4th edn (London, 1987); P. Cane, *Atiyah's Accidents, Compensation and the Law*, 5th edn (London, 1993); P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th edn (London, 1999); P. Cane, *Atiyah's Accidents, Compensation and the Law*, 7th edn (Cambridge, 2004); P. Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edn (Cambridge, 2013); P. Cane and J. Goudkamp, *Accidents, Compensation and the Law*, 9th edn (Cambridge, 2018)).

<sup>215</sup> Atiyah wrote eight editions of *The Sale of Goods* before John Adams authored the ninth (J. N. Adams, *The Sale of Goods*, 9th edn (London, 1995)). The book is now in its thirteenth edition (C. Twigg-Flesner, R. Canavan and H. MacQueen, *Atiyah and Adams' Sale of Goods*, 13th edn (Oxford, 2016)).

<sup>216</sup> See, e.g., *Bazley v Curry* [1999] 2 SCR 534 at [21], [24], [28]; *Majrowski v Guy's and St Thomas's NHS Trust* [2005] EWCA Civ 251; [2005] QB 848 at [26]; *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] QB 510 especially at [12].

system and that which should take its place.<sup>217</sup> In the early stages of his career, Atiyah argued in favour of substantially abolishing tort law and replacing it with a comprehensive welfare system.<sup>218</sup> Then came a dramatic volte-face. In his book chapter in the collection edited by Peter Birks,<sup>219</sup> and more comprehensively in *The Damages Lottery*,<sup>220</sup> Atiyah fundamentally changed his mind as to how the law should be reformed. He now perceived a welfare solution to the inadequacies of tort law itself to be inadequate and favoured allowing market forces to fill with first-party insurance the void left by the removal of the tort system. This shift involved a degree of intellectual honesty on Atiyah's part that is rarely seen in academic lawyers. Surprisingly, Atiyah has been criticised for having changed his mind. Andrew Burrows writes:<sup>221</sup>

One must have concerns, about Atiyah's willingness to argue so vehemently for such radically different conclusions in such a relatively short space of time. Critics would say that, had policy-makers applied his arguments in the 1970s, we would have abolished the tort system and instead had in place a wide-ranging social welfare scheme for the benefit of the injured. Yet only fifteen years later those policy-makers would have been condemned by Atiyah for creating a misconceived new system which should be abolished. Those concerned with legislative reform may be forgiven for thinking that such a willingness to 'switch horses' means that one must not take Atiyah's views too seriously. Fascinating, beautifully expressed and brilliantly argued as they are, they may be the stuff of classrooms and academic conferences and not for the real world.

This criticism is, with respect, unjustified, and for several reasons,<sup>222</sup> but relevantly for current purposes because the mere fact that Atiyah changed his mind does nothing to undermine either the case that he presented in favour of the social security solution or the first-party insurance solution. Atiyah may well have been wrong to abandon the former as the type of reform for which society should strive. Equally, prior acceptance of another view does nothing to show that a newly held position is incorrect. The fact

<sup>217</sup> Another illustration of Atiyah abandoning ideas that he formerly held is found in Atiyah, *Consideration in Contracts*, in which he rejected (see at p. 5, footnote 2) what he described as the 'orthodox' view of the doctrine of consideration that he had endorsed in the first edition of his *An Introduction to the Law of Contract*.

<sup>218</sup> Atiyah's fullest statement of his position in this regard was offered in *Accidents, Compensation and the Law*. In that book Atiyah wrote that '[w]hat is surely needed is a single comprehensive system based on the existing social security system, but with benefits as adequate as society can afford': Atiyah, *Accidents, Compensation and the Law* (1970), p. 572.

<sup>219</sup> See the text accompanying n. 169, above.

<sup>220</sup> See the text accompanying n. 171, above.

<sup>221</sup> A. Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford, 2000), p. 122.

<sup>222</sup> See E. Peel, 'Book review: *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* by Andrew Burrows', *Law Quarterly Review*, 115 (1997), 340–1.

of the matter is that Atiyah's preparedness to revisit his earlier views and shift his position where he felt that doing so was appropriate is a desirable quality in a scholar rather than a shortcoming.

### Original

Atiyah's writings were in significant respects highly original. An excellent example in this regard is his *Accidents, Compensation and the Law*. This 'pathbreaking work'<sup>223</sup> constituted a dramatic departure from the existing method of legal scholarship in Britain. When Atiyah wrote *Accidents, Compensation and the Law*, the prevailing mode of legal research in Britain (and much of the rest of the common law world) was fundamentally positivistic. The overriding concern of academic lawyers was faithfully to expound the law as found in the cases. Criticism of judicial decisions was generally offered sparingly if at all, and it was more or less unprecedented for the merits of basic features of given areas of law to be questioned. *Accidents, Compensation and the Law* rejected all of these traditions. It advanced searing criticisms of tort law as an accident compensation system, and its objective was not so much to describe tort law as to reduce it to just one of a collection of overlapping systems by which redress for personal injury and death could be obtained. Importantly, *Accidents, Compensation and the Law* broke free from traditional legal categories in that it hived off and subjected to separate treatment that part of tort law that was concerned with injuries to the person and said nothing about other parts of tort law, such as the economic torts and defamation, which Atiyah regarded as dealing with fundamentally different problems.

In the twenty-first century, it is easy to fail to appreciate the originality of this approach. In order properly to understand the revolutionary methodology adopted in *Accidents, Compensation and the Law*, we must put out of our minds the last fifty years of legal scholarship. When Atiyah wrote *Accidents, Compensation and the Law* the leading work on torts in England was *Salmond on the Law of Torts*.<sup>224</sup> This was an important textbook that exerted a powerful influence on the courts across the common law world but it was deeply committed to the traditional mode of legal scholarship.<sup>225</sup> As such, it was about tort law rather than the tort system, and it said relatively little regarding matters such as insurance, settlement, the incidence of accidents and

<sup>223</sup> T. Weir, 'Book review: *Essays for Patrick Atiyah*', *Cambridge Law Journal* [1992], 376.

<sup>224</sup> *Salmond on the Law of Torts* was first published in 1907: J. Salmond, *Law of Torts* (London, 1907). Atiyah himself described *Salmond on Torts* as 'the most influential English torts book of the twentieth century': Atiyah, 'The legacy of Holmes', 352.

<sup>225</sup> For searching examination, see M. Lunney, 'Professor Sir John Salmond (1862–1924): an Englishman abroad', in Goudkamp and Nolan, *Scholars of Tort Law*, pp. 103–32.

alternative compensation systems. *Accidents, Compensation and the Law* could not have contrasted more sharply with *Salmond*. Twining, who felt that as a student that he had been betrayed by *Salmond* in that it presented a picture of the law of torts that was fundamentally divorced from its practical operation, puts the matter in the following understated but nevertheless revealing terms:<sup>226</sup>

Atiyah's method is interesting in contrast to traditional Torts textbooks. First, his *standpoint* was of a mildly Fabian legal scholar talking *about* the Tort system in general, rather than expounding its rules in detail. Secondly, it was critical, with a clear sense of the underlying *political values and rationales*. Thirdly, it was concerned with the *actual operation* of the relevant law; fourthly, it substituted 'compensation for accidents' (not a doctrinal concept) for 'Torts' and 'Negligence' as *the organising concept* and this provided a basis for comparing different compensation regimes and showing up the injustices, incoherence and anomalies of the situation. Fifthly, he explained the situation largely in terms of a *history* of piecemeal growth without any coherent guiding principles or ideology. Finally, the book is explicitly addressed to law students to help them to *understand* the existing system; the explicit *critique and recommendations* were largely confined to a relatively short last chapter.

A second illustration of Atiyah's originality is supplied by his *The Rise and Fall of Freedom of Contract*. This work was innovative on various levels. Particularly noteworthy is the fact that it offered detailed treatments of prevailing social, political and economic conditions between 1770 and 1970 and sought to show how these conditions impacted upon the fabric of contract law. At a time when most legal research in Britain was heavily doctrinal, Atiyah's approach was essentially unprecedented. The book's ultimate thesis that 'freedom of contract [had] ceased to be a living issue'<sup>227</sup> was equally radical. Developments that occurred across the common law world at around the same time that *The Rise and Fall of Freedom of Contract* went to press revealed that Atiyah's thesis was mistaken. However, this did not prevent the failure of the book's central claim from being a glorious one.

## Range

By any measure, Atiyah's range, from the beginning to the end of his career, was astonishingly wide, and this gave his work a wider readership than it may otherwise have enjoyed. Whereas legal academics' interests had long been becoming more and more specialised owing, in part, to the increasing complexity of the law and exponential growth in legal sources, Atiyah was a legal polymath whose interests spanned tort

<sup>226</sup> Twining, *Jurist in Context*, p. 155 (emphasis in original).

<sup>227</sup> Atiyah, *The Rise and Fall of Freedom of Contract*, p. 716.

law, contract law, legal history and legal institutions. This range meant that Atiyah was able to draw upon his vast knowledge in one field in support of analyses that he developed in another. A good illustration concerns Atiyah's *Promises, Morals, and the Law*<sup>228</sup> about which Joseph Raz wrote:<sup>229</sup>

[T]he book fulfils its promise in being a genuinely interdisciplinary study. Atiyah is not a philosopher using a few legal cases as illustration, nor is he a lawyer who uses the occasional philosophical argument. He is a great legal scholar who has studied the philosophical issues in detail and who speaks with equal confidence in both fields.

### Comparative

Atiyah was not a comparative lawyer in the traditional sense of that term and, indeed, he referred to himself as someone 'who has never studied comparative law and has no pretensions to being a comparative scholar'.<sup>230</sup> However, he was nevertheless profoundly interested in the law in other jurisdictions, and he made a concerted effort to engage with materials from a range of countries,<sup>231</sup> and this too increased his readership. In particular, Atiyah grappled with the law in the United States, where he spent substantial periods of time including while holding visiting positions at Yale Law School (1968),<sup>232</sup> the University of Texas (1979),<sup>233</sup> Harvard Law School (1982–3)<sup>234</sup> and Duke University (1985).<sup>235</sup> He found his 'visits to America very exciting as well as very rewarding occasions, in all senses',<sup>236</sup> and was tempted to accept a position at Duke.<sup>237</sup> Atiyah greatly admired American universities and, in particular, their method of instruction, which he felt was vastly superior to that in Oxford, which he castigated as being 'gravely deficient'<sup>238</sup> on account, in part, of its tutorial system ensuring that students received relatively few contact hours with their teachers.

<sup>228</sup> See the text accompanying nn. 129–35, above.

<sup>229</sup> Raz, 'Book review: *Promises, Morals, and the Law* by P. S. Atiyah', 917.

<sup>230</sup> Atiyah, *Pragmatism and Theory in English Law*, p. 1.

<sup>231</sup> See, e.g., the remarks P. D. McKenzie, 'Book review: *Vicarious Liability in the Law of Torts* by P. S. Atiyah', *Victoria University of Wellington Law Review*, 5 (1968–70), 273 (discussing Atiyah's engagement with New Zealand cases).

<sup>232</sup> Atiyah, *An Academic Autobiography*, ch. 9.

<sup>233</sup> *Ibid.*, ch. 11. In the same year, Atiyah delivered a lecture at the Tulane University School of Law: see Atiyah, 'No-fault compensation'.

<sup>234</sup> *Ibid.*, ch. 12.

<sup>235</sup> In 1987, Atiyah returned to Duke in order to give the Currie Lecture: P. S. Atiyah, 'Tort Law and the alternatives: some Anglo-American comparisons', *Duke Law Journal*, 6 (1987), 1002–44.

<sup>236</sup> Atiyah, *An Academic Autobiography*, ch. 13.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*, ch. 9.

Atiyah studied American tort law, with which he felt that British lawyers could not avoid engaging, '[b]ecause American litigiousness affects the whole world'<sup>239</sup> and because the United States 'has often been widely perceived as the trend-setter in the common-law world'.<sup>240</sup> Unusually for a British legal academic (both in Atiyah's time and today), he published extensively in law reviews in several jurisdictions including Australia,<sup>241</sup> Canada,<sup>242</sup> Israel,<sup>243</sup> the Sudan<sup>244</sup> and, in particular, the United States.<sup>245</sup> He also wrote at length about the law in the United States for British journals.<sup>246</sup> Atiyah's interest in and exploration of American tort law culminated with the publication in 1987 of his *Form and Substance in Anglo-American Law*.<sup>247</sup>

### Perspective

By and large, Atiyah was not particularly interested in the microscopic features of cases and statutes. Although he was not a caviller about the detail when it mattered and wrote several works that were primarily doctrinal in outlook<sup>248</sup> his real interests lay with deeper structural issues. Put differently, to the extent that Atiyah engaged with the minutiae of cases and legislation he generally did so as a means to an end rather than as the end in itself. Consider, for example, his 'Judicial techniques and the

<sup>239</sup> P. S. Atiyah, 'Book review: *Contract as Promise* by Charles Fried', *Michigan Law Review*, 81 (1983), 904–8; Atiyah, 'Tort Law and the alternatives', 1004.

<sup>240</sup> Atiyah, 'Justice and predictability in the Common Law', 448.

<sup>241</sup> See, e.g., P. S. Atiyah, 'Watt v. Rama', *University of Western Australia Law Review*, 10 (1971), 159–61; Atiyah, 'Justice and predictability in the Common Law'.

<sup>242</sup> See, e.g., P. S. Atiyah, 'Causation, contributory negligence and *Volenti Non Fit Injuria*', *Canadian Bar Review*, 43 (1965), 609–37; P. S. Atiyah, 'Judicial techniques and the English Law of Contract', *Ottawa Law Review*, 2 (1968), 337–62; P. S. Atiyah, 'Misrepresentation, warranty and estoppel', *Alberta Law Review*, 9 (1971), 347–85; Atiyah, 'Contract and fair exchange'.

<sup>243</sup> See, e.g., Atiyah, 'Judges and policy'.

<sup>244</sup> See the text accompanying nn. 11–19, above.

<sup>245</sup> See, e.g., P. S. Atiyah, 'Book review: *The Death of Contract* by Grant Gilmore', *American Political Science Review*, 71 (1977), 636–7; Atiyah, 'From principles to pragmatism'; P. S. Atiyah, 'Liability for Railway Nuisance in the English Common Law: a historical footnote', *Journal of Law and Economics*, 23 (1980), 191–6; Atiyah, 'No-fault compensation' (republished as P. S. Atiyah, 'No-fault compensation: a question that will not go away', *Insurance Law Journal* [1980], 625–40); P. S. Atiyah, 'Book review: *Contract as Promise* by Charles Fried', *Harvard Law Review*, 95 (1981), 509–28; P. S. Atiyah, 'The theoretical basis of Contract Law – an English perspective', *International Review of Law and Economics*, 1 (1981), 183–205; Atiyah, 'Lawyers and rules: some Anglo-American comparisons'; Atiyah, 'The legacy of Holmes'; Atiyah, 'Tort Law and the alternatives'.

<sup>246</sup> See, e.g., P. S. Atiyah, 'American Tort Law in crisis', *Oxford Journal of Legal Studies*, 7 (1987), 279–301.

<sup>247</sup> Atiyah and Summers, *Form and Substance in Anglo-American Law*.

<sup>248</sup> See, e.g., P. S. Atiyah 'Res Ipsa Loquitur in England and Australia', *Modern Law Review*, 35 (1972), 337–46.

English Law of Contract'.<sup>249</sup> That article surveyed decisions regarding a range of doctrines in contract law. However, it did so not simply in order to come to grips with the principles that those cases established but with a view to demonstrating that the role played by judges in interpreting contracts had 'absorbed almost as much of the law of contract . . . as negligence has absorbed of the law of torts'.<sup>250</sup> Atiyah's survey was also motivated by the objective of revealing that judges' decisions were suffused by policy considerations. The fact that many of Atiyah's best-known works were predominantly concerned with fundamental questions about the law rather than matters of detail is important because it gave his work broader appeal than it may otherwise have had. It meant that his work was not tied to the law as it stood at any particular point in time, as is generally the case with the writings of doctrinal legal scholars.

### Prose

Consider, finally, Atiyah's highly distinctive writing style. His writing was exceptionally engaging and, when reading Atiyah's work, one almost feels as though one is in conversation with him. Joseph Raz referred to Atiyah's prose as 'vigorous and lucid'<sup>251</sup> while A. G. Guest remarked that 'Mr. Atiyah has a lively and interesting style which is frequently coupled with felicitous, if caustic, turns of phrase.'<sup>252</sup> Although Atiyah was often prolix his writing was exhaustive rather than exhausting and never dreary or difficult to understand. His work was generally lightly referenced,<sup>253</sup> which is consistent with Atiyah's interest usually lying not in the minutiae of cases and statutes but in wider concerns<sup>254</sup> although it can also be attributed to the fact that nearly all of Atiyah's research was done in the pre-internet age and at a time when paid research assistance was essentially unknown. The sparse (and sometimes almost completely absent)<sup>255</sup> footnoting had the advantage of preventing his readers (and perhaps Atiyah, too) from becoming bogged down in the details.

<sup>249</sup> Atiyah, 'Judicial techniques and the English Law of Contract'.

<sup>250</sup> *Ibid.*, 362.

<sup>251</sup> Raz, 'Book review', 916.

<sup>252</sup> Guest, 'Book review', 658.

<sup>253</sup> A striking illustration is Atiyah, 'Contracts, promises and the law of obligations', which is a lengthy article in the *Law Quarterly Review* that is virtually devoid of citations.

<sup>254</sup> See the text accompanying nn. 248–50, above.

<sup>255</sup> See Atiyah, *The Damages Lottery*, which, he explained at p. vii, contained almost no footnotes in order that the intended audience (i.e., the public) would not be dissuaded from reading it.

Some of the more memorable passages in Atiyah's work that are also revealing of his style are as follows:

1. 'All lawyers, of course, know that large areas of both the common law and the statute law are a shambles, but is it one shambles or are there two?'<sup>256</sup>
2. 'There is something paradoxical, almost comical about the fact that, in the last decade or so, the main thrust of the literature on [whether tort law can be justified on the grounds of efficiency] has concerned the highly abstract and theoretical economic arguments about efficiency in the resource allocation sense. Once it had been thoroughly and convincingly demonstrated that the tort system was, by any comparable standard, highly inefficient in practice, new legal and economic theorists appeared on the scene to assure us that it was, nevertheless, extremely efficient in theory.'<sup>257</sup>
3. 'Common sense is, I am afraid, sometimes a mere cover for the person who does not choose to study the facts.'<sup>258</sup>
4. 'I do not expect to make many immediate converts to these proposals or anything remotely like them. Practising lawyers will naturally condemn them unreservedly. Many academic lawyers who still hanker after Woodhouse-type schemes will probably regard me as a traitor to the cause. Other academic lawyers who delight in the apparently constantly expanding frontiers of legal liability will hardly welcome the disappearance of an entire legal subject with which they are familiar. Politicians on the left will be aghast at the idea of little old ladies not being allowed to sue the drug companies, and doubtless most politicians on the right will feel equally unhappy at the idea of discarding tort law, which they were told by Margaret Thatcher was a system of personal responsibility. The media will presumably express shock and horror at the very idea of abolition of an important source of copy for them, and the public will undoubtedly be outraged at the idea of having their right to sue taken away, and being expected to pay for some alternative.'<sup>259</sup>
5. 'When Holmes dipped rights into his cynical acid he found that they disappeared altogether, but duties retained a more solid sort of existence as a summary of the unpleasant things that would happen to those who failed to perform them.'<sup>260</sup>
6. 'I don't suppose that there are many people present who have suffered the indignity of being censored by order of the Court of Appeal. It happened to me, in

<sup>256</sup> Atiyah, 'Common Law and Statute', 1.

<sup>257</sup> Atiyah, 'No-fault compensation', 279.

<sup>258</sup> Atiyah, *Pragmatism and Theory in English Law*, p. 136.

<sup>259</sup> Atiyah, 'Thinking the unthinkable', 44–5.

<sup>260</sup> Atiyah, *Pragmatism and Theory in English Law*, p. 19.

1981, not, I hasten to add, because of anything I myself said or did, but because I had the misfortune to take part in a television programme which was adjudged to fall foul of the law of breach of confidence. Adjudged, that is, by a majority of the Court of Appeal. Lord Denning dissented. In his judgment the Master of the Rolls described the television programme and had the kindness to say of my modest contribution that it “was all very sensible and straightforward”. Ever since then I have felt that I owe Lord Denning a debt, and I am glad today to be able to repay it, even if it stretches things a little to say that his contributions to the law were “all very sensible and straightforward”.<sup>261</sup>

7. ‘These days academics all seem so busy writing that nobody appears to have enough time to read.’<sup>262</sup>
8. ‘The beautiful thing about precedents is that they save the lawyer from the need to think the problem out afresh.’<sup>263</sup>

## Conclusion

Atiyah’s work encapsulates the qualities to which all serious academic lawyers aspire. His writing was thought-provoking and displayed mastery of the materials on which his research was based, and compelled serious reflection about what, in particular, the law of tort and contract was ultimately about. He had no agenda other than a search for the truth. As Guido Calabresi (then the Dean of Yale Law School) wrote in the preface to the collection of essays written in Atiyah’s honour, ‘Patrick has been a model for us all of what a scholar should be. Always thorough, comprehensive and careful, he has, nonetheless, been willing to take on topics which were truly daunting and whose examination could never give rise to that “perfect treatment” in which lesser scholars take comfort.’<sup>264</sup> In a similar vein, Tony Weir, who was himself a great scholar whose career substantially overlapped with Atiyah’s,<sup>265</sup> wrote in a review of the same collection that ‘Atiyah is unrivalled in the number, scope and quality of his contributions to English scholarship in the last 40 years.’<sup>266</sup>

<sup>261</sup> Atiyah, ‘Lord Denning’s contribution to Contract Law’, p. 1 (footnote omitted). The case to which Atiyah referred is *Schering Chemicals Ltd v Falkman Ltd* [1982] Q.B. 1 (CA).

<sup>262</sup> Atiyah, *An Academic Autobiography*, ch. 7.

<sup>263</sup> *Ibid.*

<sup>264</sup> Cane and Stapleton, *Essays for Patrick Atiyah*, Preface.

<sup>265</sup> See P. Giliker, ‘Mr Tony Weir (1936–2011)’, in Goudkamp and Nolan, *Scholars of Tort Law*, pp. 337–57.

<sup>266</sup> T. Weir, ‘Book review’, 375. G. H. L. Fridman, who also reviewed the collection, wrote that Atiyah ‘is among the most original of modern English scholars’: Fridman, ‘Book review’, 393.

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Certain parts of this memoir draw fairly modestly on a chapter that I previously wrote about Atiyah.<sup>267</sup> The overarching purpose of that contribution was to understand the influences on Atiyah's tort-related scholarship and to consider the impact that his research had on scholarly understanding of the subject more generally (readers of this memoir who are interested in Atiyah's tort law scholarship from a more specialist perspective are referred to that chapter). This memoir has fundamentally different ambitions and consequently covers very different territory from my previous study of Atiyah but it nevertheless profited from some of the earlier research.

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<sup>267</sup> Goudkamp, 'Professor Patrick Atiyah (1931–2018)', in Goudkamp and Nolan, *Scholars of Tort Law*, pp. 309–35.