THE APPEARING OF JUSTICE: JUDGES AND PUBLIC INTEREST IN PRIVATE LITIGATION

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Focused on the future of learning.
Three High Profile Cases

• *Somerset v Stewart* (1772)
  Is the master of a ship docked at London legally justified in detaining a slave on the orders of the alleged slave owner?

• *Donoghue v Stevenson* (1932)
  Does a manufacturer have a duty of care in tort towards a consumer of its product in the absence of privity of contract?

• *Agent Orange* (1984)
  Are manufacturers of products containing toxic dioxin liable for injury to Vietnam veterans exposed to them in the war?
Three Extraordinary Judges

- **Chief Justice Mansfield** (1705-1793)
  A Scot; leading barrister in London; Solicitor General; Attorney General; Cabinet Minister; Speaker of the House; Chief Justice King’s Bench 1756-1788; treated a black woman (Dido Elizabeth Belle) as a member of the family; rationalized commercial law

- **Lord Atkin** (1867-1944)
  Australian born, Welsh upbringing; barrister in London; Judge of King’s Bench, Court of Appeal, and House of Lords; took London buses to the Lords; sat as a local magistrate on holidays in Wales

- **Judge Jack Weinstein** (Born 1921)
  Brooklyn raised WWII veteran; human rights lawyer; law professor and scholar; expert on evidence and procedure; renowned for class actions and mass tort litigation; Federal Judge 1967-1993
Three Remarkable Outcomes

- **Somerset v Stewart**
  Settlement judicially pursued; judgment for the slave “though the heavens may fall”; slavery an “odious condition”; no “positive law” shown which justified imprisonment; no comment on the status of slavery under the common law

- **Donoghue v Stevenson**
  Settlement judicially raised; judgment for the consumer; “neighbor principle” advanced as a theoretical basis for negligence based on the parable of the good Samaritan; most famous common law case today (“the snail in the bottle”)

- **Agent Orange**
  Settlement judicially promoted and achieved; $180 million trust fund; no admissions of liability; all related actions dismissed; upheld on appeal
Three Common Factors in Judging

• *Legal acumen*
Mastery of common law principles and techniques and of litigation procedures; acute sensitivity to judicial prerogatives and constraints

• *Agony of decision*
Appreciation of interests of all litigants and of public needs and concerns; understanding of wide ranging consequences of possible decisions

• *Responsibility for justice*
Recognition that the public expects actual justice to be done and not merely to appear to be done through following accepted procedures
When Justice Must Appear

- **Actual public interest** in private litigation is **essentially different** from the public interest as a matter of law or the representation of public interests through participation in litigation.

- An interested public that is not represented in litigation is not satisfied with procedural justice but expects **substantive justice**.

- An attentive public is diverse in its interests and justice must appear to all.
A Judge’s Special Burden to Enable Justice to Appear

• An immeasurable responsibility to all the litigants and the public

• **Indeterminate decision making** amongst plausible outcomes including settlement

• Necessity of using all available **legal knowledge and techniques**

• **Lack of guarantees** of success or appreciation

• Jacques Derrida’s characterization of **deconstruction as justice** may be a guiding vision (see “Force of Law: The ‘Mystical Foundation of Authority’”)
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