

Society of Legal Scholars Conference 2016

Legislation or judicial law reform: where should judges fear to tread?

Lady Hale, Deputy President of The Supreme Court

7 September 2016

James Lee set me a challenge in his paper on ‘The Etiquette of Law Reform’ at the seminar held last year to celebrate 50 years since the creation of the Law Commissions¹: why, he asked, was the Law Commission’s competence a factor against judicial development of the law on pre-nuptial agreements in *Radmacher v Granatino*² (or, he might more pertinently have asked, on witness immunity in *Jones v Kaney*³) but not similarly a factor in the joint ownership cases of *Stack v Dowden*⁴ and *Jones v Kernott*?⁵ Although generally a respecter of the judicial motto, ‘never explain and never apologise’, this is a fair question and I shall attempt to give it a fair answer. The wider question is ‘when should a judge feel free to develop, change or reform the law rather than leaving it to Parliament?’ In trying to answer the question, please forgive me for concentrating on the cases in which I have been involved.

Recently in the Supreme Court

There is a tendency, noticeable among some law students, but not among the members of this Society, to think of *Stack v Dowden* and *Jones v Kernott* as family law cases, concerned with discretionary property adjustment when an unmarried couple’s relationship breaks down. They were no such thing. They were property law cases concerned with deducing the intentions of the

¹ Ch 29 in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions* (2016) Bloomsbury; see also Ch 20, Andrew Burrows, ‘Post-legislative Scrutiny, Legislative Drafting and the “Elusive Boundary”’.

² [2010] UKSC 42, [2011] 1 AC 534.

³ [2011] UKSC 13, [2011] 2 AC 398.

⁴ [2007] UKHL 17, [2007] 2 AC 432.

⁵ [2011] UKSC 53, [2012] 1 AC 776.

parties as to their beneficial interests in a family home which was conveyed into their joint names. Whether there should be financial and property adjustment remedies available between unmarried couples is quintessentially a law reform project, conducted by the Law Commissions both north and south of the border,⁶ leading to similar solutions which have been implemented in Scotland but not yet in England and Wales. They both envisaged a brand new remedy unlike anything there had been before. The project raised the empirical issue of how far the need for such a remedy could be demonstrated. It raised the fundamental policy question of how far the remedies available to unmarried couples should be assimilated to, or different from, those available to married couples. It required that the principles underlying such a remedy be worked out in detail. It required a statutory scheme to give effect to those principles. In short, it was a project for which the techniques established by the Law Commissions were particular well suited – research into the incidence and circumstances of unmarried relationships; consultation and consensus-building; and careful attention to working out the details.

To my mind, according binding force to pre-nuptial agreements, as the majority did in *Radmacher v Granatino*, was the same sort of project. Admittedly, the original policy argument against doing so - that it encourages marital breakdown if spouses have agreed in advance what the consequences of their separation shall be - has lost much of its force. These days the law does not regard marital breakdown as something to be discouraged at all costs. It carries little if any social stigma and the law is no longer concerned to use matrimonial remedies as a punishment for the crime of breaking up. These days there is much to be said for the couple knowing in advance where they will stand if things go wrong. The problem is that the object of such agreements, at least in this country, is to deprive one of the spouses of the divorce settlement to which he or she would otherwise be entitled: it is to limit rather than to enhance the claim. There may be good reasons for this. But

⁶ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, (2007) Law Com No 307; Scottish Law Commission, *Report on Family Law*, (1992) Scots Law Com No 135.

there is also a strong public interest in ensuring that people who can afford to provide for needs which have arisen from their marriages are obliged to do so. And other common law countries which have recognised the validity of pre-nuptial agreements have also recognised the need for procedural safeguards: even if there is no inequality in bargaining power, people intending to marry are not always in the most rational or commercially astute frame of mind. At the very least, they need full disclosure of the resources upon which they might otherwise have a claim. And they need independent legal advice as to the effect of the agreement, what they are gaining and what they are giving up, and whether there should be break clauses or renegotiation should circumstances change. None of this comes cheap. But the devising of limits and safeguards such as these is exactly the sort of thing that is better suited to a legislative scheme than to judicial law making.

I also took the view that the same applied to lifting the immunity of expert witnesses from actions in negligence brought by their clients in *Jones v Kaney*. That involved, of course, a particularly egregious piece of professional negligence, which probably deprived the client of the damages to which he should have been entitled. It is easy to see why the majority thought that he should have a cause of action. But that was to open a Pandora's box without a thorough examination of the arguments or a carefully designed scheme to flesh out the details: which actions, which experts, which clients, which activities and in which circumstances. The policy arguments in favour of witness immunity are not the same as the policy arguments in favour of advocates' immunity, but it appears that it was the removal of the latter which convinced the majority that it was appropriate to remove the former. I do accept, however, that this case was much closer to the borderline than others and deeply regret any offence that I may have caused by calling it 'irresponsible'.

Lord Nicholls and I might equally have been thought irresponsible in *OBG v Allen*,⁷ but I am unrepentant. It was our view that the tort of conversion should be extended to intangible as well as tangible property. This was not to create a new tort or a new remedy. It was not to remove a long-held immunity granted on public policy grounds. It was to recognise that in modern times the debts owed you by your creditors are just as much your property as the cash under the bed and should be protected by proprietary as well as contractual remedies. If the debt represented by a cheque can be converted, why not debts represented in other ways? The majority thought that it should be left to Parliament.

Stack v Dowden and *Jones v Kernott* were similarly an exercise in adapting well-established principles of the common law to meet modern circumstances. As Lord Reid suggested in *Hedley Byrne and Co v Heller and Partners*,⁸ ‘the law ought so far possible to reflect the standards of the reasonable man’ (or, of course, woman). The reasonable person would assume that if a home is put into joint names the couple intend to own it jointly unless there is a good reason to think otherwise. The competing presumptions of advancement and resulting trust were themselves an attempt to reflect what the reasonable man would assume the intentions of the parties or party to be. Regrettably the House of Lords had declined to remove the sexism in the presumption of advancement when they might well have done so in *Pettitt v Pettitt*.⁹ But if there had been no Matrimonial Causes Act giving property adjustment remedies on divorce, I think that the courts would have had little difficulty in assuming that, at least when it came to the family home, joint meant joint: the most commonly cited reason for putting a home into joint names is the right of survivorship. There cannot at one and the same time be an intention to hold jointly and an intention to hold in unequal shares. This is not to say that intentions cannot change over time. The only truly innovative feature of these

⁷ [2007] UKHL 21, [2008] 1 AC 1.

⁸ [1964] AC 465, at 482.

⁹ [1970] AC 777.

decisions was to recognise this, in what Lord Hoffmann referred to as the ‘ambulatory constructive trust’. So I hope that I can defend myself against any charge of inconsistency.

But should we distinguish between the incremental development of the law in this way and deliberately changing it, particularly where it has been decided at the highest level? We have just had a trilogy of cases in which the Supreme Court has done just that. First to be handed down was *R v Jogee*,¹⁰ where we decided that the criminal law had ‘taken a wrong turning’ in the Privy Council in *Chan Wing-Sui v The Queen*¹¹ [1985] AC 168 and adopted by the House of Lords in *R v Powell; R v English*.¹² If two people set out to commit crime A and one of them committed crime B, the other was guilty as an accessory to crime B if he foresaw that it might happen, even if he did not intend it to do so. This was a new principle ‘based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments’ (para 79). We had had ‘the benefit of a much fuller analysis’ (para 80); it could not be said that the law was now well-established and working satisfactorily (para 81); if the law had taken a wrong turn it should be corrected (para 82); adopting mere foresight as a test for the mental element in murder was a serious and anomalous departure from the basic rule (para 83); and it required a lower mental threshold for guilt in an accessory than for the principal (para 84). In short, the courts having got the law into this mess it was for the courts to sort it out rather than to leave it to Parliament (para 85).

Jogee is an interesting cautionary tale: a later case which is critical of the judicial law making in an earlier case, where it was now clear that the courts had developed the common law without proper consideration of the underlying principles or of the policy arguments in favour extending criminal liability in this way.

¹⁰ [2016] UKSC 8, [2016] 2 WLR 681.

¹¹ [1985] AC 168.

¹² [1999] 1 AC 1.

Next in the trilogy came *Knauer v Ministry of Justice*,¹³ which involved departure from the previous House of Lords' decisions in *Cookson v Knowles*¹⁴ and *Graham v Dodds*.¹⁵ The issue was whether the multiplier for calculating the financial loss suffered by dependants after a wrongful death should be measured from the date of trial or the date of death. The normal approach, used in non-fatal injuries, is to calculate the actual losses up to the date of trial and award a lump sum for those and then to calculate future losses by applying a multiplier (number of years) to a multiplicand (representing a year's loss of income and services). The multiplier reflects the normal life expectancy of the victim, based on actuarial tables which include a discount to take account of the so-called 'vicissitudes of life' and also a discount to reflect the benefit of getting a lump sum now to cater for losses which would have been suffered over a number of years in the future. Calculating the multiplier from the date of death rather than trial applies this discount for early receipt even though part of the sum has not been received early. In the case in question, this made a difference of over £52,000 to what Mrs Knauer's widower would receive. Everyone, including counsel for the defendant, agreed that this was wrong, a departure from the normal principle of full compensation. But could the courts put it right?

This was not so much a case of a 'wrong turning' in the past case but a case where 'times have moved on'. The House of Lords' decisions which had adopted the date of death were long before the Ogden actuarial tables which are now used to calculate future losses had been developed and accepted by the courts.¹⁶ The assessment of damages was a much less sophisticated science than it now is. Not only had the 'legal landscape' changed, but the court also had the benefit of a thorough investigation and analysis by the Law Commission; this had recommended that the law be changed,

¹³ [2016] UKSC 9, [2016] 2 WLR 672.

¹⁴ [1979] AC 556.

¹⁵ [1983] 1 WLR 808.

¹⁶ *Wells v Wells* [1999] 1 AC 345.

but that there was ‘room for judicial manoeuvre without legislation’ to do so.¹⁷ The assessment of damages had always been a matter for the courts rather than the legislature (with some exceptions). As in *Jogee*, the law had been made by the judges, and if shown to be defective, it should be corrected or brought up to date by the judges, unless there was a good reason to the contrary (para 26).

These were both unanimous decisions and probably uncontroversial, at least among lawyers. The same cannot be said of the most recent of the three, *Patel v Mirza*,¹⁸ in which a nine judge court was convened to try and resolve the differences of opinion as to the scope and rationale of the illegality defence which had emerged in the earlier Supreme Court cases of *Hounga v Allen*,¹⁹ *Les Laboratoires Servier v Apotex Inc*,²⁰ and *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1.²¹ One side favoured the ‘reliance’ rule in *Tinsley v Milligan*:²² if you could plead your claim without relying on the illegality you could recover; if not, not. The other side favoured an ‘integrity of the legal system’ approach: what was the purpose of the prohibition which had been transgressed; would it enhance that purpose to deny the claim; are there countervailing public policies; would it be proportionate? The latter approach prevailed by a majority of six to three. But we would all have allowed the particular claim in question: Mr Patel had handed over a large sum of money to Mr Mirza for the purpose of an insider dealing transaction proposed by Mr Mirza which never took place. Mr Patel was entitled to his money back. It did not serve the purpose of the legislation for Mr Mirza to keep his ill-gotten gains.

¹⁷ Law Com No 263, *Claims for Wrongful Death* (1999), para 4.20.

¹⁸ [2016] UKSC 42, [2016] 3 WLR 399.

¹⁹ [2014] UKSC 47, [2014] 1 WLR 2889.

²⁰ [2014] UKSC 55, [2015] AC 430.

²¹ [2015] UKSC 23, [2016] AC 1.

²² [1994] 1 AC 340.

Once again, the Law Commission had encouraged the courts to develop the law.²³ After a prolonged investigation of the illegality defence, it had declined to recommend legislative reform (save in one respect), on the ground that the courts seemed to be developing the law in the right direction (but that was, of course, before the differences of opinion revealed by *Hounga, Les Laboratoires*, and *Bilta*). This was clearly an area of judge-made law where the judges had got us into a mess and Parliament was most unlikely to get us out of it. A thorough investigation by the Law Commission was a great help to us in trying to do so.

So how are we to make up our minds whether an issue is suitable for development by the judges or whether it should be left to Parliament? Theoretically, an outdated or unjust law can always be corrected by Parliament. There are problems with relying on either the judges or Parliament to develop or reform the law.

Problems with judicial development

There are many objections to the judges' developing the law, but the most powerful one is the character of litigation itself. As the great RE Megarry said,²⁴ 'argued law is tough law' (albeit adapting FW Maitland's 'taught law is tough law',²⁵ which should be music to the ears of members of this Society). When an issue has been thrashed out in adversarial argument between two or more parties to whom the result really matters, any judge is more likely to appreciate the pros and cons of any particular outcome than if he had simply investigated it for himself. Any judge who has read one side's written argument and thought, 'that seems pretty convincing', knows perfectly

²³ Law Com No 320, *The Illegality Defence* (2010); following Consultation Paper No 154, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts Law* (1999), Consultation Paper No 160, *The Illegality Defence in Tort* (2001), and Consultation Paper No 189, *The Illegality Defence: A Consultative Report* (2009).

²⁴ *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, p 16.

²⁵ *English Law and the Renaissance* (1901), p 18; see Sir Robert Megarry (ed Bryan A Garner), *A New Miscellany at Law* (2005), p 89.

well that it will seem much less convincing once he has read the other side, and different again when each side has had the opportunity of debating it with the judge at the oral hearing.

Maybe so. But the parties are not debating the issue in order to promote the just and orderly development of the law. They are doing so in order to achieve the result that they want. It is usually they who frame the issues – in our court we require them to agree a ‘statement of facts and issues’. They will then choose which materials and arguments to deploy. It is rare for a court to decide a case on the basis of an argument which has not been deployed by the parties. If the court is inclined to decide the case on a completely fresh basis, it is customary to give the parties an opportunity of commenting: argued law is tougher law and judicial research is not infallible. Not that it is always easy to decide whether the basis is completely fresh: it might have been briefly touched upon in the argument²⁶ or simply be a different way of analysing the materials which have been presented²⁷.

So most of the time the case is decided on the arguments presented by the parties. The court may even refer to the fact that no-one has argued something else or disputed a particular proposition. Each party may have had their reasons (not necessarily the same reasons) for not disputing a particular proposition or opening up a particular line of argument²⁸. Busy courts encourage them to focus on their best points, so they concentrate on the ones which they think most likely to win them the case and leap upon any olive branch offered by the court.

Added to this, the parties usually have neither the will nor the resources to research the background facts and policy arguments, whether of legal or social or economic or any other kind of policy. In

²⁶ Witness counsel’s unsuccessful attempt to reopen the appeal in *Assange v Swedish Prosecution Authority (Application to Re-open Appeal)* [2012] 3 WLR 1 (not included in the AC report).

²⁷ Witness the benefit cap case, where further argument was allowed after the hearing and the outcome changed: *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

²⁸ Witness the faint-hearted attack on *Addis v Gramophone Company* [1909] AC 488 in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22.

Jones v Kernott, for example, we were referred to none of the extensive academic literature which had both preceded and followed *Stack v Dowden*. We had to consult it ourselves. It is difficult for the parties, at least until they get to our court, to know whether the court will be interested either in academic commentary or in comparative law. We usually are interested, but it takes skill and resources to research this properly. Fortunately, there seems to be a growing trend for parties to recruit academic lawyers to their legal teams, which certainly happened in both *Jogee* and *Patel*.

As well as the limitations of the adversarial process, there are the limitations of the judiciary. I am so old that I remember being in the audience for Lord Reid's famous lecture to the Society of Public Teachers of Law on 'The judge as lawmaker' in September 1971.²⁹ There he exploded the 'fairy tale' that judges simply discover rather than make the common law. But he went on to say that, where there was scope for the judges to mould the development of the common law, they should 'have regard to common sense, legal principle and public policy, in that order'. I have no problem with legal principle. That seems to me the main basis on which we should be developing the law - hence if criminal liability is in principle based on subjective intention, or sometimes recklessness, it was wrong to substitute foresight for intention, as happened in *Chan Wing-Siu*, and it was right to correct it, as happened in *Jogee*.

But I have problems with common sense and public policy. Once upon a time I was rude enough to say that 'one man's common sense is another woman's hopeless idiocy'.³⁰ I was referring to the 19th century rule that complaints of statutory rape had to be brought within three months, that is, before any pregnancy became apparent. The thinking was that, once a pregnancy became apparent, the victim was so likely to lie about the perpetrator that a prosecution would be unsafe, even though, of course, the pregnancy demonstrated beyond doubt that she had indeed been a victim

²⁹ (1972) 12 JSPTL 22.

³⁰ John Maurice Kelly Memorial Lecture, *Law Maker or Law Reformer: what is a Law Lady for?* (2005) Faculty of Law, University College Dublin, p 7.

of the crime and not all statutory rapes result in pregnancy. I am not, of course, arguing that judges should not use their common sense, merely that they should not mistake their own prejudices and preconceptions for it.

Public policy is also a necessary but dangerous consideration. It has so many different meanings. It can simply mean fairness as between different groups of people: if the spectators at Hillsborough who suffered psychiatric harm by witnessing the disaster as it unfurled were denied compensation it would be wrong for the police officers who suffered the same harm for the same reason to be compensated.³¹ If, as Lord Reid seemed to think, public policy refers to keeping in step with public opinion, going to the grass roots, then there is no machinery for the judges to find out what this is. Inquiries among their own social circle are unlikely to be a reliable guide. At the Law Commission, we did occasionally conduct reasonably scientific studies of public opinion on a particular issue.³² It was very difficult to do this in a way which conveyed enough information to respondents for them to form reasonable opinions, but at least we could try. The judges cannot do this, and neither on the whole can the parties, although we have on occasions been presented with survey evidence, usually by NGO interveners who have conducted research for their own purposes. If public policy refers to resource implications, in the widest possible sense, or to the likely effect upon people's behaviour, as the judges often seem to think, then again, they rarely have reliable information about this. In *Michael v Chief Constable of South Wales Police*,³³ for example, the issue was the liability of the police for the negligent mishandling of a 999 call thus failing to prevent the murder of a young mother by her former partner. In the earlier cases on the scope of the police duty of care in the prevention and investigation of crime,³⁴ the impact on police

³¹ *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

³² Eg Law Commission No 192, *Family Law: The Ground for Divorce* (1989), Appendix D.

³³ [2015] UKSC 2, [2015] AC 1732.

³⁴ Principally *Hill v Chief Constable of West Yorkshire* {1989} AC 53, *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495, and *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] AC 225.

resources and behaviour of widening their potential liability had loomed large. Most of those arguments had been exploded, and not only because the police remain potentially liable under the Human Rights Act if death results. While I did not agree with the majority in the result, I was glad to see that their reasoning relied much more heavily on legal principle – the general principles governing liability for omissions and liability for the misdeeds of third parties - than on such public policy arguments.

There are other disadvantages in judicial law reform. The law should be clear and predictable, especially if people have for many years been basing their transactions or their behaviour on a particular understanding of what the law is. Judges should be slow indeed to change that understanding, although this is not unknown: perhaps the most famous examples being *Woolwich Building Society v Inland Revenue Commissioners*,³⁵ on the recoverability of money paid under a mistake of law; *R v R*,³⁶ on rape within marriage; and *Re Spectrum Plus*,³⁷ on whether a charge over book debts was a fixed or a floating charge.

Once upon a time, when judges were a relatively homogenous group who led somewhat cloistered lives (some still do), it may well have been that, if called upon to decide a new issue, or to develop the law in a particular way, it was reasonably predictable how they might do this. Their reputation for impartiality and neutrality was not endangered by their doing so: they may have been, to borrow Will Carling’s phrase, ‘old farts’, and boring at that, but at least they were predictably boring old farts. But once judges become a more diverse group with a wider range of background, experience, and philosophy, their approach to particular issues might also become more diverse and thus less predictable. Some fear that this unpredictability might endanger the reputation of the judiciary as a whole for impartiality and neutrality. We do not want it thought that the identity of the individual

³⁵ [1993] AC 70.

³⁶ [1992] 1 AC 599.

³⁷ [2005] UKHL 41, [2005] 2 AC 680.

judge or the composition of the particular panel deciding the case will make a difference to the outcome.

Finally, it is argued that if the judges put right the worst injustices or anomalies in the law, there is less incentive for Parliament to legislate for a comprehensive and properly worked out solution. This was, for example, an objection to the incremental development of the law of conversion which Lord Nicholls and I favoured in *OBG v Allen*. But that leads us to the problems with leaving it to Parliament to develop the law.

The problems with Parliament

Anyone who has ever had anything to do with the work of the Law Commissions, both here and elsewhere in the common law world, will have grasped how hard it is to develop or reform the common law by legislation. The easiest route may simply be abolition (as eventually happened with the common law crimes of blasphemy and blasphemous libel³⁸). But even this is not simple, because you have first to define what it is that you are abolishing. When I first arrived at the Law Commission, I thought that I knew what the parol evidence rule was and that it ought to be abolished. But the Commission decided that there was nothing to abolish. All it meant was that, if the parties had agreed that their writing would contain the whole of their agreement, neither should be allowed to adduce evidence that it contained something else. If they had not so agreed, there was no objection to their adducing parol evidence as to the true contents of their agreement. Some of us would have preferred a simple little statute making this clear to the lesser mortals who had a simpler view of the law, but this view did not prevail.³⁹

³⁸ Criminal Justice and Immigration Act 2008, s 79.

³⁹ Law Com No 154, *The Parol Evidence Rule* (1986).

The problems of abolition are nothing compared with the problems of reform. It begins with formulating your proposals. First you have to decide what the law is, then you have to decide how it should be changed, and then you have to persuade Parliamentary counsel to find the words to express this clearly and precisely enough for the parties and judges who will have to apply it in future. Deciding what the law is may not be so difficult where there are clear decisions of the House of Lords or Supreme Court directly in point. But it is much harder where there is a mass of Court of Appeal and High Court authority which has to be reconciled and which may well change before your proposed reforms are implemented.

The problems continue if your proposals are put before Parliament. The democratic process may wreak havoc with what you thought was a carefully thought-out and coherent scheme (as happened when our proposals for reform of the ground for divorce⁴⁰ reached the statute book in the Family Law Act 1996). Not only that, once done, legislative reform freezes the law in a particular place and prevents its incremental development on a case by case basis. Indeed, if Parliament has legislated on one assumption as to what the law is, for example that the tort of conversion is limited to chattels, this may be seen as a barrier to challenging that assumption, as it was in *OBG v Allen*.

Even when it is quite clear what the law is and how it should be changed, Parliament may be reluctant to spend precious time on it. Reforming the common law is not a high priority for government or politicians. The Law Commission has tried hard, both to gain government ‘buy-in’ before a project is undertaken and to obtain a timely response once it is completed.⁴¹ This has worked well in some areas, most notably, I think, where the statute book (as interpreted by the judges) is in a mess: firearms is a good example. But it has worked less well in areas where the

⁴⁰ Law Com No 192, *The Ground for Divorce* (1990).

⁴¹ Law Commission Act 2009, ss 1 and 2, inserting ss 3A and 3B into the Law Commissions Act 1965, and Law Com No 321, *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010).

common law has proved inadequate and statutory reform is needed: financial remedies between cohabiting couples is an example.

Worst of all, there are some areas where the judges are all too well aware of their own inadequacies and would dearly love Parliament to solve the problem for them. Switching off life support, or withdrawing artificial nutrition and hydration (ANH), is an obvious example. In the Tony Bland case, Lord Browne-Wilkinson said that ‘Where a case raises wholly new moral and social issues, in my judgment it is not for judges to seek to develop new, all-embracing, principles of law in a way which reflects the individual judge’s moral stance when society as a whole is substantially divided on the relevant moral issues’.⁴² It seemed to him imperative that the issues should be considered in Parliament and the judges’ function should be to apply the principles adopted through the democratic process.

But what is the judge to do if Parliament resolutely refuses to do this? Unlike Parliament, the judge does not have a ‘do-nothing’ option. He has to decide the case in front of him. So he has to do the best he can. And that is, of course, what the judges have been doing with the Tony Bland cases ever since. They have deduced what the common law principles are and applied them to the situation. Invasive medical treatment is an assault unless the patient has consented; where the patient is incapable of consenting, it may be justified under the doctrine of necessity; such treatment is only necessary if it is in the patient’s best interests; so the issue is not whether turning off the machine, or withdrawing ANH, or declining to give life-sustaining treatment, is in the patient’s best interests; the issue is whether continuing or providing the treatment is in the patient’s best interests.⁴³ That is all a reasonably straightforward application of settled principles to a developing factual situation. Of course, deciding what is in the patient’s best interests is not at all

⁴² *Airedale NHS Trust v Bland* [1993] AC 789, p 880.

⁴³ *Aintree University Hospital NHS Trust v James* [2013] UKSC 67, [2014] AC 59.

straightforward, but Parliament would always leave that to be decided on a case by case basis, perhaps with some guidance as the factors to be taken into account (as has happened in the Mental Capacity Act 2005). So is there really a need for legislative reform?⁴⁴

So is there an answer?

So is there an answer to the question? I agree with Lord Dyson (in his ALBA lecture of 2012⁴⁵ and his Bentham Association Presidential address in 2014⁴⁶) that there is no one principled answer but that the overall key is institutional competence. This is not the same as democratic legitimacy. In our unwritten Constitution it is accepted that both Parliament and the judges may make the law. It is also accepted that Parliament can make or unmake any law: whether there are any limits to this has yet to be properly explored. On the other hand, it is accepted that there are limits to the law-making role of the courts. Those limits are set by what a court, in deciding the individual case before it, is competent to do. As Lord Dyson points out, some judges are more adventurous and take a broader view of their competence than others. We have to acknowledge that the judge often does have a choice about whether to develop the law or whether to leave it alone: perhaps that is the biggest objection to judicial law-making.

But I would suggest there are at least six things which the courts are competent to do if they choose:

- (1) They may discern and articulate a general principle or principles from a mass of individual instances, as the majority were prepared to do in *Donoghue v Stevenson*.⁴⁷

⁴⁴ The real problem is one which the judges have created, by insisting that all these cases come to court whether or not there is any dispute. The judges could solve that.

⁴⁵ 'Where the Common Law Fears to Tread' (2013) 34 SLR 1.

⁴⁶ 'Are the Judges too powerful?' 12 March 2014.

⁴⁷ [1932] AC 562.

- (2) They may adopt the general principles already discerned by the great doctrinal writers who have done the job for them, and apply these to new cases, as has certainly happened in the law of restitution.
- (3) They may expand an existing concept, such as ‘personal injury’, ‘bodily harm’ or ‘domestic violence’, to reflect modern thinking.⁴⁸
- (4) They may develop the scope of an existing cause of action, for example, by expanding liability in negligence for failing to inform patients of the risks and benefits in certain treatments,⁴⁹ or by recognising that the tort of malicious prosecution can apply to bringing civil as well as criminal proceedings.⁵⁰
- (5) They may develop the scope of existing remedies, for example by decreeing an increase in the level of damages for pain suffering and loss of amenity in *Heil v Rankin*,⁵¹ or by recognising new heads of damages for personal injury, or by altering the basis of calculation, as in *Knauer v Ministry of Justice*.
- (6) They may even invent brand new remedies to support an existing cause of action; obvious examples are freezing orders (Mareva injunctions) and search orders (Anton Piller orders), but my favourite is *Rees v Darlington Memorial Hospital NHS Trust*,⁵² where the majority invented a brand new award of a non-negligible but non-compensatory sum to recognise the invasion of autonomy and bodily integrity involved in causing a woman to have a child she should never have had.

Never say never, but I think that the judges are unlikely to create an entirely new cause of action, still less a new criminal offence. This they would now regard themselves as institutionally

⁴⁸ Eg in *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433.

⁴⁹ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430.

⁵⁰ *Willers v Gubay* [2016] UKSC 43, [2016] 3 WLR 477.

⁵¹ [2001] QB 272.

⁵² [2003] UKHL 52, [2004] 1 AC 309.

incompetent to do, even if they might on occasions have done so in the past, when Parliament was less active and there were no Law Commissions to show how it should be done.

But should they be so cautious? A good test case is the invasion of privacy. In *Kaye v Robinson*,⁵³ the courts refused to recognise that it was an actionable wrong for reporters to brazen their way into a private hospital room where a seriously injured patient was lying in bed, take photographs of him, and then publish them along with an ‘interview’ which he was in no fit state to give. They could be prevented by the tort of malicious falsehood from pretending that he had agreed to give the interview but they could not be prevented from publishing the photographs and what they said he had said. Why could not the tort of intentionally causing harm have been developed to cover such a situation, as it had previously been developed to cover similarly outrageous behaviour in *Jannier v Sweeney*?⁵⁴ Why did it take the Human Rights Act to bring about such a development (and thus to earn it the media’s opprobrium)? I wish I knew the answer.

⁵³ [1991] FSR 62.
⁵⁴ [1919] 2 KB 316.