

Impact and Law Reform Conference 2019

Impact in the Courts

Institute of Advanced Legal Studies, London

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The conference theme is ‘Impact and Law Reform’ – but this begs the question: impact *of* what and impact *on* what? *Of* what could be academic research, other kinds of research or Law Commission projects. *On* what could be on the Law Commissions, on Parliament, or on the courts. I think that my task is to talk about the impact of Law Commission projects and of academic and other kinds of research upon the courts.

I should begin by saying that in my view having been a Law Commissioner or worked at a Law Commission¹ is an excellent preparation for serving on the Supreme Court of the United Kingdom. No less than five of the current Justices have been Law Commissioners in England and Wales or Scotland.² Why is that a good idea? The experience teaches at least four valuable lessons:

- (i) how to take a synoptic view of the topic or subject as whole, rather than the snapshot presented in litigation;
- (ii) an appreciation of the value of both doctrinal and empirical research in understanding not only what the law is, but how it works and the policy implications of changing it;
- (iii) an understanding of the different ways of reforming law and the advantages and disadvantages of each; and
- (iv) a close involvement with the legislative process.

The courts, of course, are also expected to develop the law, especially in the UK Supreme Court, where we are bound by fewer precedents than lower courts. But in doing so, we have always to

¹ The Law Commission for England and Wales and the Scottish Law Commissions are statutory bodies set up by the Law Commissions Act 1965 to promote the reform of the law.

² Lady Hale, Lord Carnwath, Lord Hodge, Lord Lloyd Jones and Lady Arden.

ask ourselves what is the borderline between developing the law to meet modern conditions, which is acceptable, and judicial legislation, which is not: what, therefore, should we leave to Parliament, with or without help of the Law Commissions, and what can we properly do ourselves?

If we choose to develop the law, what use can, and should we make of the work of the Law Commissions and of academic and other kinds of research?

The impact of Law Commission projects on the work of the courts

It is a great help to us in answering those questions if the Law Commissions, instead of recommending legislation as they usually do, encourage the courts to develop the law.

The best-known example is the Law Commission's report which resulted from Professor Hazel Genn's research, *Personal Injuries Compensation: How Much is Enough?*³ This featured in two important cases which changed the law. First was *Wells v Wells*.⁴ The question was whether lump sum damages for future financial loss should be discounted by the conventional 4 to 5% assumed return from a mixed portfolio of investments or by the lower return from investing in index-linked government securities. Three trial judges had gone for the lower rate, but the Court of Appeal had reversed them, accepting that it was reasonable to expect personal injury victims to invest in a mixed portfolio including equities despite the increased risk. On appeal to the House of Lords, counsel relied on Professor Genn's finding that claimants preferred to put their money into banks and building societies rather than invest in equities. The question was whether they should be obliged to invest in equities to make the money go around, and the unanimous answer of the House of Lords was 'no'. Lord Lloyd and Lord Steyn referred to the research (which Lord Steyn called 'in-depth'), they and Lord Hutton referred to the Law Commission's report which had recommended the change.⁵ The other two Law Lords did not.

This is a good example of using research to counter what the judges might otherwise think was experience and common sense. But the same piece of research was also relied upon in the Court

³ Law Com No 225 (1994).

⁴ [1997] 1 WLR 652, CA; [1999] 1 AC 345.

⁵ Law Com No 224, *Structured Settlements and Interim and Provisional Damages* (1994).

of Appeal in *Heil v Rankin*⁶ as part of the support for the Law Commission's later recommendation that general damages for pain, suffering and loss of amenity (PSLA) should be raised, especially for the more serious injuries. Professor Genn's survey of victims had shown the very significant and long-lasting effects of personal injuries upon them and that they thought their damages had been too low. Added to this was a public opinion survey conducted by the Office of National Statistics (ONS) with the help of Mavis Maclean, who had 'played a prominent part in its design', which showed that generally the public thought that the current levels of damages were too low.

This time, however, the Law Commission's recommendations were subjected to searching forensic analysis by counsel for the insurance industry. The Court of Appeal concluded that the Commission had been over-influenced by the research. The ONS survey did not explain what else the victims would get, on top of their general damages; nor did it clearly explain that insurance premiums would rise and that the NHS might have less money to spend on patient care; indeed 'we have reservations whether it is possible to design a survey of this nature which would be capable of doing more than confirming or otherwise, in general terms, the message provided by other material' (para 88). The victim study 'we regard as being of interest, but again its results are capable of being explained, at least in part, by other reasons for dissatisfaction with the level of damages than dissatisfaction with the levels of damages for PSLA' (para 90). The court was much more impressed with the much less scientific response to the Law Commission's consultation (commenting that Lord Bingham was one of the respondents). Even so, the level of general damages was raised, although not as far as the Law Commission had recommended. It was accepted that this was something which the courts could do – the courts fix the level of damages and the courts can change it.

A similar example is *Knauer v Ministry of Justice*,⁷ where the United Kingdom Supreme Court departed from the previous House of Lords' decisions in *Cookson v Knowles*⁸ and *Graham v Dodds*.⁹ 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

⁶ [2001] QB 272.

⁷ [2016] UKSC 9, [2016] AC 908.

⁸ [1979] AC 556.

⁹ [1983] 1 WLR 808.

normal approach, used in non-fatal injuries, is to calculate the actual losses up to the date of trial, award a lump sum for those, and then 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 another 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. In fatal cases, calculating the multiplier from the date of death rather than the date of trial applies the 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. The only argument was about whether the court should put it right. We held that we could.

This was a case where 'times have moved on'. The assessment of damages for future loss was now a much more sophisticated science than it had been before the development of the Ogden actuarial tables.¹⁰ The court also had the benefit of a thorough investigation and analysis by the Law Commission; this had recommended that the law be changed, but pointed out that there was 'room for judicial manoeuvre without legislation' to do so.¹¹ The assessment of damages had always been a matter for the courts rather than the legislature.

A rather different example is *Patel v Mirza*,¹² in which a nine-judge court was convened to try and sort out the illegality defence. Once again, the Law Commission had encouraged the courts to develop the law.¹³ 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. That was, however, before fundamental differences of judicial opinion emerged in the Supreme Court cases of *Hounga v Allen*,¹⁴ *Les Laboratoires Servier v*

¹⁰ *Wells v Wells* [1999] 1 AC 345.

¹¹ Law Com No 263, *Claims for Wrongful Death* (1999), para 4.20.

¹² [2016] UKSC 42, [2017] AC 467.

¹³ 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).

¹⁴ [2014] UKSC 47, [2014] 1 WLR 2889.

Apotex Inc,¹⁵ and *Bilta (UK) Ltd v Nazir (No 2)*.¹⁶ One side favoured the ‘reliance’ rule in *Tinsley v Milligan*.¹⁷ 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? 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. The thorough investigation by the Law Commission was a great help to us in trying to do so (and I suppose that the presence on the bench of a former Chairman of the Law Commission¹⁸ who had been involved in the illegality project also helped). The integrity of the legal system 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.

But well-meaning Law Commission projects can stultify the development of the law. In *OBG v Allen*,¹⁹ one question was whether the tort of conversion should be extended to intangible property, such as debts. Lord Nicholls and I thought that it should. This was not to create a new tort or a new remedy. 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 because Parliament had legislated to modernise the law in the Torts (Interference with Goods) Act, on the basis that the torts of detinue, conversion and trespass to goods were limited to tangible property, it had precluded further development of the law. Perhaps it would be a good idea for Parliamentary counsel to find some way of saying that this is not the Parliamentary intent.

¹⁵ [2014] UKSC 55, [2015] AC 430.

¹⁶ [2015] UKSC 23, [2016] AC 1.

¹⁷ [1994] 1 AC 340.

¹⁸ The late Lord Toulson.

¹⁹ [2007] UKHL 21, [2008] 1 AC 1.

Use of academic legal research in developing the law

Of course, in one sense, when deciding any question of law, we are engaged in academic legal research – a great deal of work goes into discovering all the relevant previous case law, in trying to deduce the principles from it and work out what the law actually is (in all our cases we are supplied with volume after volume of decided cases). That is what doctrinal legal scholarship also does. But we are talking here about cases where the law is not clear or where there may be scope for developing it in an incremental fashion. And here we are up against the well-known views of such distinguished judges as Justice Oliver Wendell Holmes that ‘the life of the law has not been logic: it has been experience’;²⁰ or Lord Reid, that in developing the law, judges should consider ‘common sense, legal principle and public policy in that order’;²¹ or Lord Neuberger, that ‘the life blood of the law is experience and common sense’.²² Some might think that a little academic rigour would be an improvement over judicial experience and common sense, especially given the rather narrow range of experience enjoyed by the senior judiciary.

The courts are quite comfortable with looking at doctrinal academic material, whether in ground-breaking books and articles or in commentaries on earlier cases. In the Supreme Court, we look at this sort of material all the time, sometimes as support for our own analysis of the current state of the law, sometimes as support for our view of how a disputed question should be decided, sometimes as support for our view of how the law should be developed.

A striking recent example of the first is *R (Privacy International) v Investigatory Powers Tribunal*,²³ where Lord Carnwath’s judgment contains a wealth of references to academic and extra-judicial writings which must be a joy to University departments looking to record the impact of their work. By my count, he referred to Paul Craig’s *Administrative Law*;²⁴ to Robert Craig’s article ‘Ouster Clauses, the Separation of Powers and the Intention of Parliament’;²⁵ David Feldman’s

²⁰ *The Common Law* (1881), p1.

²¹ (1972) 12 JSPTL 22.

²² ‘Judges and Professors – Ships passing in the Night’, Lecture at the Max Planck Institute, 14 August 2012.

²³ [2019] UKSC 22, [2019] 2 WLR 1219.

²⁴ 8th Ed (2016).

²⁵ [2018] PL 570.

chapter on *Anisminic* in Juss and Sunkin, *Landmark Cases in Public Law*;²⁶ Wade and Forsyth's *Administrative Law*;²⁷ Sir Stephen Sedley, writing extra-judicially, 'The Lion Behind the Throne: the Law as History';²⁸ De Smith's *Judicial Review*;²⁹ Joanna Bell, 'Rethinking the story of Cart and its Implications for Administrative Law';³⁰ Boughey and Burton Crawford, 'Reconsidering [Cart] and the Rationale for Jurisdictional Error';³¹ David Foulkes, Notes to Current Law Statutes;³² and Tom Bingham's chapter on 'The Rule of Law and the Sovereignty of Parliament' in *The Rule of Law*.³³ That this is an unusual level of academic citation may be illustrated by the fact that, in their judgments, Lord Lloyd-Jones referred only to David Feldman; Lord Sumption to Tom Bingham; and Lord Wilson to David Foulkes.

An example of resorting to academic literature to help resolve a disputed question of law is *FHR European Ventures LLP and others v Cedar Capital Partners LLC*.³⁴ This was about whether an agent who accepted a bribe held it on trust for his principal. The court held that it did. Lord Neuberger ended up by saying this:

'... the issue raised on this appeal has stimulated a great deal of academic debate. The contents of the many articles on this issue provide an impressive demonstration of penetrating and stimulating legal analysis. One can find among those articles a powerful case for various different outcomes, based on analysing judicial decisions and reasoning, equitable and restitutionary principles, and practical and commercial realities. It is neither possible nor appropriate to do those articles justice individually in this judgment, but the court has referred to them for the purpose of extracting the principle upon which the Rule is said to be based.'

²⁶ Oxford (2017).

²⁷ 11th Ed (2014).

²⁸ [2016] JR 289.

²⁹ 8th Ed (2018).

³⁰ (2019) 39(1) OJLS.

³¹ (2017) PL 1.

³² Vol 3 (1985).

³³ (2010).

³⁴ [2014] UKSC 45, [2015] 1 AC 250.

He then listed an impressive array of academic literature.³⁵ This included an article by the Master of the Rolls who referred to ‘this relentless and seemingly endless debate’, which, in the Court of Appeal, Pill LJ had described as revealing ‘passions of a force uncommon in the legal world’.³⁶ Lord Neuberger commented extra-judicially that “There were highly respectable arguments both ways, as was clear from the quality of the arguments in the various articles and the quality of the academic protagonists on each side who wrote them”.³⁷ Whether this copious citation and respect was any consolation to those who lost the argument, who included Professor Sir Roy Goode, may be doubted, but it must have shown up well in the ‘impact’ returns.

An example of using academic writing to help decide in what way the law should develop (albeit in that case, going back to what it had been before it was developed) is *R v Jogee*.³⁸ Both sides recruited prominent academics to their teams and put much learned commentary before the court. We were also sent some unsolicited academic material. As so often, the comments of Professor Sir John Smith were probably the most influential:

‘Professor Smith . . . identified the question . . . as being whether it was sufficient to prove that a party to a joint enterprise knew that another party might use the violence that was used, or whether it was necessary to prove that it was understood between them expressly or tacitly that, if necessary, such violence would be used. The problem arose from the elision by Sir Robin Cooke in *Chan Wing-Siu v R*,³⁹ of “contemplation” and “authorisation which may be express but

³⁵ Those articles included Goode, ‘Proprietary Restitutionary Claims, in Cornish (ed), *Restitution, Past Present and Future* (1998), also (2011) 127 LQR 493; Worthington, ‘Fiduciary Duties and Proprietary remedies: Addressing the Failure of Equitable Formulae’ [2013] CLJ 720; Millett, ‘Bribes and Secret Commissions’ [1993] RLR 7, also [2012] CLJ 582; Lionel Smith, ‘Constructive Trusts and the No-Profit Rule’ [2013] CLJ 260; Watts, ‘Tyrrel v Bank of London: an Insider looks at an Inside Job (2013) 129 LQR 527; Hayton, ‘The Extent of Equitable Remedies: Privy Council versus the Court of Appeal’ [2012] Co Law 161; Swadling, ‘Constructive trusts and breach of fiduciary duty’ (2012) 18 Trusts and Trustees 985; Virgo, ‘Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?’ [2011] CLJ 502; Edelman ‘Two Fundamental Questions for the Law of Trusts’ (2013) 129 LQR 66 and others listed by Sir Terence Etherton, “The Legitimacy of Proprietary Relief”, (2014) 2(1) Birkbeck Law Review 59, at p 60.

³⁶ [2014] Ch 1, para 61.

³⁷ ‘Twenty Years a Judge: Reflections and Refractions’, Neill Lecture, Oxford, 2017.

³⁸ [2016] UKSC 8, [2017] AC 387.

³⁹ [1985] AC 168, at p 175.

is more usually implied”. Professor Smith commented that “contemplation” is not the same thing as “authorisation”, because one may contemplate that something will be done by another without authorising him to do it, but that the general effect of *Chan Wing-Siu* was that contemplation or foresight was enough.’

The Supreme Court was persuaded that the law had ‘taken a wrong turning’ in *Chan Wing-Sui* and should be put back on the right path.

Far more problematic than the use of doctrinal studies, it seems to me, is the use of socio-legal research, as indeed the fate of Professor Genn’s damages study shows. But that research undoubtedly influenced the law. A more recent example is the impact of Julia Brophy’s research on the practice of the family courts.

There has been a vociferous press campaign for more transparency in the family justice system, a campaign which was supported by the previous President of the Family Division, and one can well understand why. The Family Procedure Rules 2010 provide that the general rule is that family cases are heard in private.⁴⁰ But they were changed in 2009 to provide that amongst those who must be allowed to attend are ‘duly accredited representatives of news gathering and reporting organisations’.⁴¹ These can only be excluded in specified circumstances, which include where this is *necessary* in the interests of any child concerned in, or connected with, the proceedings. The related Practice Direction states that the rule should be applied on the basis that media representatives have a right to attend throughout the case unless the court decides to exclude them from all or part of the proceedings on the defined grounds.

However, Julia Brophy’s study for the Children’s Commissioner of *The views of children and young people regarding media access to family courts*⁴² found that a large majority of the children studied were opposed to having reporters in court. They felt that the proceedings address issues that are private. They concern events which are ‘painful, embarrassing and humiliating for children’. These are not the business of the media or of the general public. The children feared bullying at school and in their communities. Nearly all of them said that if they knew that a reporter might

⁴⁰ FPR, rule 27.10.

⁴¹ FPR, rule 27.11(2)(f).

⁴² 11 Million, March 2010.

be in court they would be less willing to speak openly to an expert about ill-treatment or disputes about their care or about their own wishes and feelings. In other words, this would inhibit them in the exercise of their rights under article 12 of the United Nations Convention on the Rights of the Child, to express their views freely in all matters affecting them and in particular to be heard in any judicial proceedings affecting them.

The answer might be thought to lie in the restrictions on what the media can publish about them. However, in Practice Guidance issued in January 2014 (*Transparency in the Family Courts: Publication of Judgments: Practice Guidance*), the President encouraged the publication of judgments in certain circumstances: always when publication would be in the public interest; in particular, when finding facts where serious allegations have been made; or when making final orders in care proceedings; or when making placement or adoption orders. This applied, not only to the High Court, but also to any court exercising powers in relation to children. This resulted in far more judgments, not only from the High Court, but also from county courts which carry a much greater burden of care cases, being made available on the British and Irish Legal Information Institute (BAILII) website.⁴³

In July 2014, Julia Brophy and her colleagues followed up their earlier work with a study commissioned by the National Youth Advocacy Service and the Association of Lawyers for Children, *Safeguarding, Privacy and respect for Children and Young People and the Next Steps in Media Access to Family Courts*. This showed children's continued opposition to media attendance at hearings in the family courts and their concerns about the publication of judgments. They were really worried about 'jigsaw identification' – simple anonymization is not enough. In these days of the internet and social media, it is particularly easy for tech-savvy young people to find out who is involved in a reported case, by joining up the dots. They were also worried about how young people might feel on reading about their case in a newspaper (and shocked by the gory details revealed in the judgments reported). They felt that there were better ways of improving public knowledge about the family courts and other avenues in which to explore allegations of unfair treatment. The children's interests were not identical to their parents', who might want to exploit the media for their own purposes. Above all, the children wanted the courts to consult them and to ascertain the views, interests and long-term welfare implications for any child involved of allowing media access to the court.

⁴³ <https://www.bailii.org>.

Dr Brophy was asked to draft some Judicial Guidance on *Anonymisation and Avoidance of the Identification of Children and The Treatment of Explicit Descriptions of the Sexual Abuse of Children in Judgments intended for the Public Arena* (2016). This contains a detailed list of do's and don'ts to avoid inadvertent and jigsaw identification. It also gives guidance on how to abridge judgments to avoid explicit descriptions of child sexual abuse being placed on the internet for all to see.

Julie Doughty and others' research into *Transparency through publication of family court judgments*⁴⁴ found wide variations in practice from court to court. The cases available on BAILII represented judicial and professional decisions made in only some geographical areas. Analysis of the press coverage over the same period showed that allegations of secrecy in family cases had reduced, but there was still evidence of cherry-picking facts and misleading headlines. The researchers felt that the 2014 guidance should be reviewed. Instead, a scheme should be piloted which required the publication of a representative range of cases from every judge and every court, supported by adequate training and administrative assistance in safe anonymization, the removal of identifying details and focusing on issues of genuine public interest.

Julia Brophy's guidance has certainly made me think twice about what I thought was a good idea. I hate referring to the children involved in family cases by their initials. It is so dehumanizing – almost as bad as referring to a child as 'it'. So, I try to give them a name which is not their own, but which appears plausible. Brophy reports that some children don't like this and there is a risk that a culturally inappropriate name may be chosen. The answer, I suppose, is to ask them.

The impact of other types of research

Those are examples of the impact of conventional academic socio-legal research. But there are many other sources of reliable research which provides important context for the decisions we reach. A good example is the use of research in the UNISON case.⁴⁵ The issue was whether the introduction of fees for bringing cases in the employment tribunals was an unlawful exercise of the Lord Chancellor's statutory power to impose fees for tribunal applications because of its impact on the fundamental right of access to justice. The court obviously needed some evidence

⁴⁴ Cardiff University, 2017.

⁴⁵ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

of what the impact was. Lord Reed cited a research study by the Department of Business, Innovation and Skills (BIS)⁴⁶ which showed how small many of the awards made in employment cases were – the median amount awarded in claims for unlawful deduction from wages in 2013 was £900 and in 25% of cases the award was less than £500. In many other cases it was far less than that and, in some cases, of course, there is no financial award at all (para 31). Another BIS Department study⁴⁷ showed that only 53% of successful claimants were paid, even in part, before bringing enforcement action, for a further fee, and even after that only 49% were paid in full, 15% paid in part and 35% paid nothing at all (para 36). This was all relevant to whether it would be rational for people to risk the fee of making a claim which, however well-merited, could never bring in very much.

Next the judgment looked at the evidence of the impact of introducing fees on the number of claims. This came from the Ministry of Justice’s published statistics and their own research.⁴⁸ Both showed a dramatic fall in the numbers of claims, particularly marked in the case of low value claims. Another BIS research report, before the fees were introduced, had predicted just this⁴⁹ (para 41).

Perhaps most telling in accounting for this dramatic fall was the research by the Advisory, Conciliation and Arbitration Service (ACAS) based on a representative sample of claimants.⁵⁰ It included figures relating to claimants who were unable to resolve employment disputes through conciliation but who did not go on to issue Employment Tribunal proceedings. The most frequently mentioned reason for not submitting a claim was that the fees were off-putting. More than two thirds of the claimants who gave that reason said that they could not afford the fees. Others said that the fee was more than they were prepared to pay, or that the value of the fee equalled the money that they were owed (para 45).

The judgment also placed weight on the effect of the fees on hypothetical claimants, worked out by UNISON, and using the Joseph Rowntree Foundation’s report on minimum income

⁴⁶ *Findings from the Survey of Employment Tribunal Applications*, Research Series no 177.

⁴⁷ *Payment of Tribunal Awards* (2013).

⁴⁸ *Tribunal and Gender Recognition Certificate Statistics Quarterly* (December 2016), *Review of the introduction of fees in the Employment Tribunals: Consultation on Proposals for Reform* (Cm 9373).

⁴⁹ *Findings from the Survey of Employment Tribunal Applications 2008* (2010).

⁵⁰ *Evaluation of Acas Early Conciliation* (2015).

standards for the UK⁵¹ (para 51). This was in answer to the Lord Chancellor's argument that claimants would still be able to afford the fees without undue hardship, so they were not being denied access to justice.

Without that sort of evidence, it might have been very difficult to counter the Lord Chancellor's arguments about the effect of the fees: the courts below had not felt able to do this.

The case also depended upon the fundamental principles of our law. There is further evidence of the impact of academic scholarship in the citation of a letter written by Lord Gardiner, Lord Chancellor, to the Treasury in 1965, quoted by Professor Genn in *Judging Civil Justice* (2010):

“(i) Justice in this country is something in which all the Queen's subjects have an interest, whether it be criminal or civil.

(ii) The courts are for the benefit of all, whether the individual resorts to them or not.

(iii) In the case of the civil courts the citizen benefits from the interpretation of the law by the Judges and from the resolution of disputes, whether between the state and the individual or between individuals.”

Evidence of the practical effect of the law can be particularly important in human rights cases, when we are looking at whether the law can be justified as a proportionate means of achieving a legitimate aim. This is where we often find the interventions of interested non-governmental organisations helpful. In benefits cases, for example, the interventions by Child Poverty Action Group can provide us with useful and reliable information.⁵² In housing cases, we often have interventions by Shelter or other charities working with homeless people.⁵³

⁵¹ Joseph Rowntree Foundation, *A Minimum Income Standard for the UK in 2013* (2013).

⁵² Examples include *In re McLaughlin* [2018] UKSC 8, [2018] 1 WLR 4250, R (*on the application of SG and others*) v *Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, and *Zalewska v Department for Social Development* [2008] UKHL 67, [2008] 1 WLR 2602.

⁵³ Examples include *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289, and *Hotak v Southwark LBC* [2015] UKSC 30, [2015] PTSR 1189.

Conclusions?

I hope I have said enough to show that both Law Commission projects and academic and other research studies can have a profound impact upon what we do in the courts, especially at the higher levels. They have, however, to be treated with some caution.

‘Argued law is tough law’, said Mr. Justice Megarry, disagreeing with his own extra-judicial opinion when deciding a real case.⁵⁴ Thus the Court of Appeal found itself disagreeing with the Law Commission when its recommendations were subject to searching forensic scrutiny in *Heil v Rankin*.

Research evidence put in by one party may have an answer in research evidence which could be put in by another party. So sometimes we have to deny ourselves the benefit of evidence which interveners wish to introduce because it would not be fair to use it without giving a time consuming and costly opportunity to the parties to counter it.

Trawling the academic literature is costly for the parties. Until the case gets to the Supreme Court, they may not be sure that the court will be very interested in it. Even then the expense may be out of all proportion to the amount at stake: *Jones v Kernott*⁵⁵ was a good example of this. For this and other reasons we may feel the need to do some research ourselves with the help of our invaluable judicial assistants. But of course, if this turns up anything important which might affect the outcome of the case, we have to give the parties an opportunity to comment upon it, leading to further expense and delay.

This all goes to show that the enterprises of formulating recommendations for the reform of the law; of researching the law and its effects in the real world; and of deciding real cases are different from one another. We can all learn and benefit from what each of us does but we should not forget that our enterprises are different, in method and in outcome and in their place in the constitutional order.

⁵⁴ *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, p 16.

⁵⁵ [2011] UKSC 53, [2012] 1 AC 776.