

# Principle and Pragmatism in Developing Private Law

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Lady Hale, President of the Supreme Court

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When designing the Supreme Court of the United Kingdom, we deliberately put the library at the heart of the building, surrounded by the three court rooms, one on top, one to one side and one to the other. It contains, of course, centuries of legislation and law reports. It symbolises an important truth: we are not making it up as we go along, but building on those centuries of legal learning, even if most of us now look them up on-line rather than from physical books.

At the same time, we probably all agree with Mr Justice Oliver Wendell Holmes' observation:

‘The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead... [There is] a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.’<sup>1</sup>

On the other hand, Holmes also said this:

‘It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.’<sup>2</sup>

So the law has to move with the times – up to a point. I have speculated in other talks about the *ways* in which the courts may develop the law to meet changing social and economic needs.

Today I want to speculate about *what should guide* such developments – principle or pragmatism, or to put it another way, doctrine or policy?

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<sup>1</sup> *Collected Legal Papers* (1920) p 138.

<sup>2</sup> ‘The Path of the Law’ (1897) 10 Harv L Rev. 457, 469.

We are, of course, the Supreme Court of the whole United Kingdom. Most Scots lawyers would probably still agree with the great Professor T B Smith that the unwritten law of Scotland was derived from different sources from the English and gave more weight to principle than to pragmatism. Smith attributed the development of English common law to the fact that the English monarchs established early on their control over the administration of justice. Judges built up the law precedent by precedent:

‘This was essentially a professional law, based on the Inns of Court, which were close corporations of lawyers. At quite an early stage these lawyers adopted a semi-insular and self-sufficient outlook; and in particular set their faces against the competition of ecclesiastical courts, against the Roman law, against the authority of academic treatises and against a system of professional legal education based on the Universities.’<sup>3</sup>

English private law, in particular, was the loser from this insularity and case by case approach, which led to multiple categorisations, rather than general principles. Scots lawyers, on other hand, were the opposite of insular. They looked to France and continental European influences, studying Roman law and continental treatises in continental Universities. This led eventually to Stair’s *Institutions of the Law of Scotland*:<sup>4</sup>

‘Gathering the various threads of Roman, canon, Feudal and other Customary law which had already been recognised by the courts, and drawing upon the learning of Europe’s leading civilian commentators, Stair “restated” the law of Scotland in an original, selective, comprehensive and rational manner.’<sup>5</sup>

These differences of approach are no longer associated with nationality. There are those of us who start from a basis of legal principle and those of us who start from a basis of pragmatism – starting from the beginning or starting from the end: what Stephen Sedley called, ‘reasoning from a given conclusion’.<sup>6</sup> But from whichever end we start, we are all guided to some extent by

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<sup>3</sup> T B Smith, The Hamlyn Lectures, *British Justice: The Scottish Contribution*, London, Stevens, 1961, p 7.

<sup>4</sup> James, Viscount of Stair *The Institutions of the Law of Scotland, deduced from its originals and collated with the civil, canon and feudal laws and with the customs of neighbouring nations* (1681)

<sup>5</sup> Hamlyn Lectures, p 12.

<sup>6</sup> Sedley S, *Ashes and Sparks: Essays on Law and Justice*, Cambridge University Press, 2011, p 156.

our view of which solution will work best, which will be the most practical, both in this case and in others like it. But how do we know what will work best? Back to Holmes and his famous dictum: ‘the life of the law has not been logic; it has been experience.’<sup>7</sup> But whose experience? And Lord Reid, in his famous lecture on ‘The Judge as Lawmaker’, where he exploded the fairy tale that judges do not, on occasions, make law, expressed the view that, where it was right for them to develop the law, they should ‘have regard to common sense, legal principle and public policy, in that order’.<sup>8</sup> But whose common sense? And what public policy?

I can illustrate the dilemma by recent examples from all three main areas of private law – contract, tort and family law.

Tort is the most obvious illustration – my first husband used to say that it was void for vagueness. The law of negligence, in particular, is littered with concepts redolent of pragmatism – proximity, ‘fair, just and reasonable’, even causation and remoteness. Proximity, for example, sounds like a principle – suggesting a sufficiently close relationship between two people to found a duty that one should take reasonable care to avoid causing harm to the other. But debate rages over whether it is any such thing – is it not rather ‘an ad hoc device, judicially micro-refined by the particular facts of cases and particular idiosyncrasies of the judges hearing them?’<sup>9</sup> ‘Fair, just and reasonable’ is even worse – it doesn’t even sound like a principle. And until recently there was a tendency to think that it governed the whole of the law of negligence and not just novel situations. As Lord Reed explained in *Robinson v Chief Constable of West Yorkshire*,<sup>10</sup> the proposition that the ‘fair, just and reasonable’ test applies to all claims is a mistaken reading of the *Caparo* case.<sup>11</sup> It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised:

‘Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and

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<sup>7</sup> The Common Law, p 1.

<sup>8</sup> (1972) 12 JSPTL 22.

<sup>9</sup> Russell Brown, ‘Justifying the Impossibility of Recoverable Relational Economic Loss’ (2005) *Oxford University Commonwealth Law Journal* 5: 155-78.

<sup>10</sup> [2018] UKSC 4, [2018] AC 736.

<sup>11</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty, as Hobhouse LJ recognised in *Perrett v Collins*:<sup>12</sup>

“It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those circumstances comply with established categories of liability, a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case. Indeed, the previous authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied.”

Well, that’s all very well, but what then are we to make of the wrongful birth cases, following *Macfarlane v Tayside Health Board*?<sup>13</sup> In the Inner House, Lord Cullen said this:<sup>14</sup>

‘In considering the defenders’ argument that the birth, and hence the cost of rearing, the child could not be regarded as loss in view of the incalculably great benefit which a child represents, it is important, in my view, to endeavour to draw a clear line between the application of principle and the imposition of a policy decision as to what the court should entertain as a loss.’

He swiftly decided that, as a matter of principle, the costs of bringing up the child were a recoverable loss. He then went on to consider whether there were public policy arguments against allowing it, citing Lord Scarman in *McLaughlin v O’Brian*:<sup>15</sup>

“The distinguishing feature of the common law is this judicial development and formation of principle. Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle

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<sup>12</sup> [1999] PNLR 77, 90-91.

<sup>13</sup> [1999] 2 AC 59.

<sup>14</sup> 1998 SLT 307, at 312.

<sup>15</sup> [1983] 1 AC 430.

inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.'

Lord Cullen went on to point out that there were policy arguments on both sides, which he summarised thus:

'On the one hand is the argument that the rejection of the claim will vindicate the value of human life and the blessings which a child can bring to his or her parents. It avoids the risk of an undue temptation to seek abortion and the risk that a child in later life might discover that he or she was 'unwanted'. On the other hand there is the argument that these risks are overstated, that a child is not always a blessing, that the ability of couples to choose to limit the size of their family, in accordance with lawful and widely available means of contraception, should not be ignored, and that damages may help to alleviate hardship as well as meeting need.'

It was not for the court to assess the relative strength of these arguments. He was not persuaded that there was any overriding consideration of public policy against awarding the pursuers their damages.

The House of Lords, of course, reached a different conclusion. Lord Steyn, for example, was quite clear that policy outweighed principle:

'It is possible to view the case simply from the perspective of corrective justice. It requires somebody who has harmed another without justification to indemnify the other. On this approach the parents' claim for the cost of bringing up Catherine must succeed. But one may also approach the case from the vantage

point of distributive justice. It requires a focus on the just distribution of burdens and losses among members of a society.’

He was firmly of the view that commuters on the underground would say that the parents should not recover the costs of bringing up the child they never meant to have. I don’t know how he knew that. My guess is that the male commuters might have a different view from the female. But that’s by the way. Can it be right to set the views of a random collection of commuters against the application of long and well-established legal principle? Justice Michael Kirby, of the High Court of Australia, has commented that *Macfarlane* was an ‘activist’ decision.<sup>16</sup>

The saga continued with *Parkinson v St James and Seacroft University Hospital NHS Trust*.<sup>17</sup> The Court of Appeal permitted the claimant to recover the extra costs of bringing up a disabled child. The reasons given in *Macfarlane* for denying what would on normal legal principles be recoverable were ‘various and elegantly expressed’ but all arrived at the same result. At heart it was ‘a feeling that to compensate for the financial costs of bringing up a healthy child is a step too far’ (para 87). But ‘the notion of a child bringing benefit to the parents is itself deeply suspect, smacking of the commodification of the child, regarding the child as an asset to the parents’ (para 89). The defendants did not appeal.

The saga ended with *Rees v Darlington Memorial Hospital NHS Trust*,<sup>18</sup> where the mother was disabled but the child was healthy. The Court of Appeal awarded her the extra costs of bringing up the child occasioned by her disability. This time the defendants did appeal. The House of Lords rejected the mother’s attempt to overturn *Macfarlane*. They also rejected my attempt to devise a principle from *Macfarlane* – the deemed equilibrium between the costs and the benefits of a healthy child to healthy parents, preferring the ‘fair, just and reasonable’ standard. Three of the seven Law Lords (Lords Steyn, Hope and Hutton) would have held that this too should be an exception to the *Macfarlane* rule, so the mother should have her extra costs. The majority (Lords Bingham, Nicholls, Millett and Scott) held that the rule must apply to the birth of a healthy child. But they invented a wholly new remedy - an award of a conventional sum, put at £15,000, to recognise the invasion of the mother’s right to live her life in the way she had planned. They attributed this recognition of the serious loss of autonomy to Lord Millett in

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<sup>16</sup> Hamlyn Lectures 2003, *Judicial Activism: Authority, Principle and Policy in the Judicial Method*, Sweet & Maxwell, 2004.

<sup>17</sup> [2001] EWCA Civ 530, [2002] QB 266.

<sup>18</sup> [2003] UKHL 52, [2004] 1 AC 309.

*Macfarlane*, but I dare to hope that my own prolonged account, in *Parkinson*, of what having a child means to a woman, may have had some effect.

The whole saga is a fairly clear example of pragmatism triumphing over legal principle. A more difficult example is the saga of the Supreme Court's development of the law of illegality. This whole area of the law is based upon a maxim of the public policy - that 'no court will lend its aid to a man who founds his cause of action on an immoral or illegal act'<sup>19</sup> – which can defeat what would otherwise be a good claim in contract, tort or restitution. Unusually, the Law Commission had encouraged the courts to develop the law.<sup>20</sup> 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. 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 the courts in trying to do so.

The Law Commission report came before the trilogy of Supreme Court cases, *Hounga v Allen*,<sup>21</sup> *Les Laboratoires Servier v Apotex Inc*,<sup>22</sup> and *Bilta (UK) Ltd v Nazir (No 2)*<sup>23</sup>, which had revealed differences of opinion within the Supreme Court. One side favoured the 'reliance' rule in *Tinsley v Milligan*:<sup>24</sup> 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? In *Patel v Mirza*,<sup>25</sup> a nine-judge panel was assembled to try and resolve matters.

Mr Patel gave Mr Mirza £620,000 to place bets on a bank's share prices with the benefit of insider information which Mr Mirza expected to receive from his contacts. Mr Mirza's expectation was not realised and the intended betting did not take place. But Mr Mirza did not

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<sup>19</sup> *Holman v Johnson* (1775) 1 Cowp 341 per Lord Mansfield CJ.

<sup>20</sup> 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).

<sup>21</sup> [2014] UKSC 47, [2014] 1 WLR 2889.

<sup>22</sup> [2014] UKSC 55, [2015] AC 430.

<sup>23</sup> [2015] UKSC 23, [2016] AC 1.

<sup>24</sup> [1994] 1 AC 340.

<sup>25</sup> [2016] UKSC 42, [2017] AC 467.

return the money to Mr Patel. Mr Patel sued for its return. But did the illegality involved in insider dealing bar the claim?

The Supreme Court unanimously agreed in the result: Mr Patel should get his money back, by application of the law of restitution. But there were differences of approach to the impact of the doctrine of illegality.<sup>26</sup> The majority (Lord Toulson, who gave the main judgment) Lord Neuberger, Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge upheld the ‘range of factors’ approach, whereas the minority (Lord Mance, Lord Clarke and Lord Sumption) adopted a ‘rule-based’ approach.

The majority held that behind the illegality doctrine were two broad policy reasons: first that a person should not be allowed to profit from his own wrongdoing; second, that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand. The longstanding (and much criticised) rule in *Tinsley v Milligan*, which barred a claimant if he or she relied on the illegality to bring the claim, was overruled.

The majority emphasised that the court, in taking account of various relevant factors, was not free to decide a case in an undisciplined way. Rather, the public interest is best served by a principled and transparent assessment of the considerations identified (the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties’ respective culpability), instead of the more formal approach advocated by the minority. This was because the formal approach was capable of producing results which may appear arbitrary, unjust or disproportionate.

The minority felt that the ‘mix of factors’ approach would not offer the same coherence or certainty, and ‘converts a legal principle into an exercise of discretion, in the process exhibiting all the vices of “complexity, uncertainty, arbitrariness and lack of transparency” which Lord Toulson had attributed to the present law’. The proper response of the Supreme Court was ‘to supply a framework of principle which accommodates legitimate concerns about the present law. We would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one’.<sup>27</sup>

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<sup>26</sup> Reflecting ‘a longstanding schism between those judges and writers who regard the law of illegality as calling for the application of clear rules, and those who would wish to address the equities of each case as it arises’, Lord Sumption, para 226.

<sup>27</sup> Lord Sumption, para 265.



Was it the majority or the minority who were being pragmatic here? The goal of justice or of certainty could both be said to be pragmatic aims – the first recognising the impossibility of creating a satisfactory rule without regard to the circumstances and the impact of the illegality, the second recognising the need for litigants to be able to predict the outcome of their claim.

One answer could be for the statute laying down particular requirements in the transaction of particular types of business to specify what the civil consequences of failure to comply with those requirements will be. But even if Parliament is prepared to do this, it may well do so in terms which leave a discretion to the courts. Thus, in *Wells v Devani*,<sup>28</sup> an estate agent, who orally agreed to try and find buyers for the flats which the owner urgently needed to sell, did not supply the vendor with his written terms of business, including his commission rate and the occasion on which it would become payable, until after the buyer had been introduced, contrary to the requirements of section 18 of the Estate Agents Act 1979 and Regulations. Section 18(5) provides that failure to comply renders the contract unenforceable unless the court orders otherwise. If the agent applies to enforce the contract, section 18(6) provides that the court may only dismiss the application if it considers this just, having regard to the prejudice caused to the client and the culpability of the agent. Where the court does not dismiss the application, it may order that the sum payable be reduced to compensate the client for the prejudice caused. The trial judge reduced the agent's commission by one third.

This looks very like the majority approach in *Patel v Mirza*, but with the added ingredient of the power to make a deduction. Could the common law be flexible enough to accommodate that too? That really would be pragmatism over principle.

My third example is marital agreements. The common law recognises that there is a public interest in ensuring that married couples fulfil their financial obligations to one another so that the burden is not thrown upon the state.<sup>29</sup> The common law also used to recognise that married couples had an enforceable duty to live with one another, although that duty was more easily enforced by the husband than by the wife. But spouses might agree to relieve one another of that duty and might also agree the financial terms in doing so. Once the validity of separation

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<sup>28</sup> [2019] UKSC 4.

<sup>29</sup> Per Lord Atkin in *Hyman v Hyman* [1929] AC 601, at 629.

agreements was recognised,<sup>30</sup> the common law drew a distinction between agreements between couples who were already separated or were about to separate and agreements for a possible future separation between them.<sup>31</sup>

Separation agreements were generally regarded as a good thing. They mitigated the harmful effects of separation upon the dependent spouse and any children. They might well make better, or more flexible, provision than a court had power to make. Hence they were enforceable by the parties, although if there were matrimonial proceedings, they could not oust the jurisdiction of the court to order that proper provision be made. Following recommendations made by the Royal Commission on Marriage and Divorce in 1956,<sup>32</sup> a statutory power to vary their terms was introduced, to cater for changes in circumstances since the agreement was made (or where the agreement did not make proper provision for the children).<sup>33</sup>

Pre-separation agreements, on the other hand, whether made before or after the marriage, were generally regarded as a bad thing and thus contrary to public policy. They were catering in advance for a possible breach of the obligation to live together. They might even encourage the couple to separate. The policy was applied both to pre-separation agreements made during the marriage and to pre-marriage agreements catering for the possibility of separation or divorce. The rest of the common law world adopted this approach.

Then came the case of *MacLeod v MacLeod*,<sup>34</sup> on appeal from the Isle of Man to the Judicial Committee of the Privy Council. This concerned a post-nuptial agreement which had been put into effect when the couple separated. The wife was now claiming what she regarded as full financial provision when the couple divorced. The husband mounted a full-scale attack upon the common law's approach to pre-separation agreements. The Board took the view that it was not open to them to reverse the long-standing rule that ante-nuptial agreements were contrary to public policy:

“There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a

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<sup>30</sup> *St John v St John* (1803) 11 Ves 525, *Bateman v Countess of Ross* (1813) 1 Dow 235.

<sup>31</sup> *Westmeath v Westmeath* (1830) 1 Dow & Cl 519.

<sup>32</sup> 1951-1955, Report, 1956, Cmd 9678.

<sup>33</sup> Matrimonial Proceedings and Property Act 1970, s 14, consolidated in s 35 Matrimonial Causes Act 1973.

<sup>34</sup> [2008] UKPC 64, [2010] 1 AC 298.

married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and un hoped for future.’

On the other hand,

‘Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.’

There was nothing to stop couples entering into binding contractual arrangements governing their life together, provided that they make clear their intent to create legal relations – as this couple had by executing a deed – or governing their life apart when they separated, so why should they not be able to bind themselves in advance of their separation? Couples no longer had an enforceable duty to live together, so the old policy against encouraging their separation no longer held good. The statutory power to vary agreements if there was a change of circumstance applied to any agreement made between a married couple, before or after separation.

Thus the Board held that the agreement was valid and enforceable, except that it could not oust the jurisdiction of the court. But the court should give it the same weight that it would give to a separation agreement, which would normally be respected in the absence of unfairness in the circumstances in which it was made or a subsequent change in circumstances.<sup>35</sup>

Was that development pragmatic or principled? Whichever it was, I – as author of the Board’s opinion in *MacLeod* - was soon hoist with my own petard. In *Radmacher v Granatino*,<sup>36</sup> the majority of the Supreme Court wholeheartedly agreed that the old rule that agreements providing for a future separation are contrary to public policy was obsolete and should be swept away, for the reason we gave. However, they would not restrict it to post-nuptial agreements. They disagreed with both of the reasons which we had given for drawing the distinction.

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<sup>35</sup> Para 41.

<sup>36</sup> [2010] UKSC 42, [2011] 1 AC 534.

First, they disagreed about the power of variation. Now, if they had held that the power also applied to ante-nuptial agreements – which is a tenable view – then I could see that it would go a long way towards mitigating the problem. But instead they doubted whether the power of variation applied to any pre-separation agreement, which makes matters much worse.<sup>37</sup> Second, they did not agree that there was always a difference between ante- and post-nuptial agreements.<sup>38</sup>

I strongly disagreed. The case seemed to me to raise policy issues which could not and should not be resolved by a court deciding a particular case, especially a case with such unusual facts:

‘This is a complicated subject upon which there is a large literature and knowledgeable and thoughtful people may legitimately hold differing views. Some may regard freedom of contract as the prevailing principle in all circumstances; others may regard that as a 19th century concept which has since been severely modified, particularly in the case of continuing relationships typically (though not invariably) characterised by imbalance of bargaining power (such as landlord and tenant, employer and employee). Some may regard people who are about to marry as in all respects fully autonomous beings; others may wonder whether people who are typically (although not invariably) in love can be expected to make rational choices in the same way that businessmen can. Some may regard the recognition of these factual differences as patronising or paternalistic; others may regard them as sensible and realistic. Some may think that to accord a greater legal status to these agreements will produce greater certainty and lesser costs should the couple divorce; others may question whether this will in fact be achieved, save at the price of inflexibility and injustice. Some may believe that giving greater force to marital agreements will encourage more people to marry; others may wonder whether they will encourage more people to divorce. Perhaps above all, some may think it permissible to contract out of the guiding principles of equality and non-discrimination within marriage; others may think this a retrograde step likely only to benefit the strong at the expense of the weak.’

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<sup>37</sup> Paras 54-56.

<sup>38</sup> Para 57.

In 1834, Mr Justice Burrough protested against arguing too strongly on public policy because ‘it is a very unruly horse, and once you get astride it you never know where it will carry you’.<sup>39</sup> If ever there was an unruly horse, it was this. But which side was being principled and which pragmatic? In fact, we were both being pragmatic as we saw it. And a very fine illustration it is of the dangers involved. After all, in neither *MacLeod* nor *Radmacher* did we need to decide whether or not the agreements were enforceable as contracts. Both cases were about the weight to be given to them by the court deciding what orders to make in divorce proceedings. In *MacLeod*, we could have decided that a post-marital, pre-separation agreement should usually be given the same weight as a separation agreement without undoing the old public policy rule. What the majority in *Radmacher* would then have decided, I cannot say. But they would have been less likely to change the law on enforceability.

Pragmatism is as unruly a horse as public policy. Indeed, I am not sure what the difference is. The dangers are obvious. It may be that I am suffering from ‘cognitive dissonance’ in this context as well as in the constitutional context where I have been accused of it.<sup>40</sup> But I think that my caution stems from having had experience both of law reform at the Law Commission and deciding the hard cases in the Supreme Court. Generally speaking, the incremental approach from established principle is to be preferred to imposing the court’s own choices which are clearly based upon practical or policy considerations rather than on principle. Although I took a different view from the majority in *Michael v Chief Constable of South Wales*,<sup>41</sup> I welcome the fact that they decided against a police duty of care towards a person whose life they knew to be at risk, not on the basis of policy reasons which had largely been exploded, but on the basis of principle: generally, there is no liability for omissions and no duty to protect from the unlawful acts of third parties.

The *Macfarlane* saga is a very good example going the other way. The lower courts in both England and Scotland had reached a result by applying conventional principles. If Parliament or the public did not like it, then Parliament could have changed it. Instead, in *Rees*, the majority had to resort to an extraordinary device to row back from the unjust results of the earlier, policy-based decision. I would also say that the *MacLeod/Radmacher* saga is a good example. The

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<sup>39</sup> *Richardson v Mellish* (1824) 2 Bing 229, at 252.

<sup>40</sup> B C Jones, ‘Dissonant Constitutionalism and Lady Hale’ (2018) 29(2) *King’s LJ* 177-186.

<sup>41</sup> [2015] UKSC 2, [2015] AC 1352.

practical and policy arguments were even more complicated. And there are aspects to the problem which are much more susceptible to legislative solutions than to judicial pronouncement in individual cases – what prior safeguards should be required; what variation powers there should be; what, if any exceptions, should be made, for example to cater for need;<sup>42</sup> what, if any, power to court should have to depart from the agreed arrangements on divorce; and so on.

But what about illegality? Experience had shown that a one size fits all approach simply would not work, given the wide variety of situations in which the question can arise. Experience had also shown that attempts to devise a single legislative solution also would not work. Legislative solutions were best tailored to the particular legislative scheme establishing the illegality, as in the Estate Agents Act; and they might very well entail the same sort of flexibility as in *Patel v Mirza*. So I'm not sure that I am being inconsistent in joining in the majority there.

I offer a final word from Lord Kerr, dissenting in *Michael*:<sup>43</sup>

‘A decision based on what is considered to be correct legal principle cannot be lightly set aside in subsequent cases where the same legal principle is in play. By contrast, a decision which is not the product of, in the words of Lord Oliver, “any logical process of analogical deduction” holds less sway, particularly if it does not accord with what the subsequent decision-maker considers to be the correct instinctive reaction to contemporaneous standards and conditions. Put bluntly, what one group of judges felt was the correct policy answer in 2009, should not bind another group of judges, even as little as five years later.’

You have been warned!

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<sup>42</sup> As recommended by the Law Commission: Law Com No 343, *Matrimonial Property, Needs and Agreements* (2014), para 5.77.

<sup>43</sup> Para 161.