

The Doctrine of Precedent and the Supreme Court

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I. Introduction

In this lecture, I wish to examine the doctrine of precedent in our highest appellate court: the United Kingdom Supreme Court's treatment of its previous decisions and those of its predecessor, the Appellate Committee of the House of Lords. This is what is sometimes referred to as 'horizontal *stare decisis*': a court's approach to its own decisions.¹ It is a subject which is of course well-trodden ground in extra-judicial speeches – indeed, Master Laws, the 2010 Treasurer of this Inn, gave this year's Annual Lecture of the Incorporated Council of Law Reporting on the topic last month² – but I hope this evening to offer an academic's perspective, in the light of the developing practice of the Supreme Court. Although the question of precedent is always relevant to Supreme Court deliberations, there have only been three occasions³ where express reference has been made to the Practice Statement (Judicial Precedent):⁴ *Austin v Mayor and Burgesses of the London Borough of Southwark*,⁵ *Jones v Kaney*,⁶ and *Jones v Kernott*.⁷ It is tempting therefore to subtitle my lecture 'Keeping up with the Joneses'. To avoid confusion, however, I shall refer to them by the respondent's name in each case.

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¹ For a valuable examination of the High Court of Australia in this respect, see M Harding and I Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34 *Melbourne University Law Review* 518.

² Sir John Laws, 'Our Lady of the Common Law' Incorporated Council of Law Reporting Annual Lecture, 1 March 2012, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-laws-speech-our-lady-of-common-law.pdf>. See also Lord Mance, 'Should the law be certain?', The Oxford Shrieval Lecture, 11 October 2011.

³ There have been some other cases where counsel have at least flirted with asking the Supreme Court to depart from a House of Lords decision, but not pursued the point: *Re S-B (Children)* [2009] UKSC 17, [13]–[19] (Lady Hale); and *Revenue & Customs v Tower MCashback LLP 1 & Anor* [2011] UKSC 19, [48] (Lord Walker) ('This Court has not been invited, formally or informally, to overrule or depart from *Ensign [Tankers (Leasing) Ltd v Stokes]* [1992] 1 AC 655'). There are also cases where the Supreme Court has expressly identified the lack of a relevant precedent: eg, *R v Gnango* [2011] UKSC 59, [2] (Lord Phillips and Lord Judge): 'No previous decision in this jurisdiction provides a clear indication of how the point of law should be resolved. The principles of law that fall to be applied are those of the common law, albeit that it will be necessary to consider a degree of statutory intervention... No precedent indicates the result of the interaction of these three areas of law on the facts of this case. In resolving the point of law it will be appropriate to have regard to policy.'

⁴ [1966] 1 WLR 1234.

⁵ [2010] UKSC 28.

⁶ [2011] UKSC 13.

⁷ [2011] UKSC 53.

There are many other interesting questions of precedent, but they are not within this paper's scope. For example, the circumstances in which the Court of Appeal may follow a Privy Council decision in preference to one of its own decisions, or in preference to one from the Supreme Court or House of Lords, is currently a matter of controversy.⁸ Or whether the Court of Appeal should more generally adopt a more creative approach to its precedents.⁹ The relationship between the Supreme Court and the European Court of Justice merits scrutiny,¹⁰ but there is a distinction in that the Supreme Court is not the highest court in the European legal order. Or, a particularly important question for pupil barristers: the status of High Court precedent in the county court.¹¹ But those situations, while important, are questions for another lecture.

As we shall see, a common reason for the Justices to decline to depart from a precedent is that any change is better left to Parliament. The relevance of statutes to judicial reasoning as to precedents is an under-explored topic, which I have considered previously¹² and I shall also be examining in a forthcoming book.¹³ Recently, Professor Burrows has argued in an important article that

it is an abdication of judicial responsibility for judges, at least in the law of obligations, to decline to develop the common law on the grounds that legislation is more appropriate. Even if a statutory solution would be better, no-one can predict whether legislation will, or will not, be passed. It is therefore preferable for judges to proceed as they think fit, whether the decision be in favour or against a development, knowing that the Legislature is free to impose a statutory solution if the common law position is thought unsatisfactory or incomplete.¹⁴

I wish to argue here with respect, that Professor Burrows puts his argument rather too strongly. At the very least, we need to understand the relevance of legislation (or the spectre of legislation) to the reasoning of our Supreme Court Justices: it is a marked feature of

⁸ As to which, see most recently the comments of Lord Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [72]–[87]. See also *R v James (Leslie)* [2006] EWCA Crim 14 and *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492. I have written on the point: J Lee, 'Fidelity in interpretation: Lord Hoffmann and the Adventure of the Empty House' (2008) 28 *Legal Studies* 1, 6-10. For an example of the Supreme Court disagreeing with the Privy Council, see *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, disapproving *MacLeod v MacLeod* [2008] UKPC 64.

⁹ As Sir Louis Blom-Cooper QC has argued: '1966 and All That: The Story of the Practice Statement' in L Blom-Cooper QC, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford, OUP, 2009), 142. The traditional approach, from *Young v Bristol Aeroplane Company* [1944] KB 718 has been recently reaffirmed, however: *R (on the application of King) v Secretary of State for Justice* [2012] EWCA Civ 376, [70] (Maurice Kay LJ).

¹⁰ A Arnull, 'Keeping Their Heads Above Water? European Law in the House of Lords' in J Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford, Hart Publishing, 2011).

¹¹ As to which see P Morgan, 'Doublethink and District Judges: High Court precedent in the county court' (2012) 32 *Legal Studies* (forthcoming).

¹² J Lee, "'Inconsiderate Alterations in our Laws": Legislative Reversal of Supreme Court Decisions' in *From House of Lords to Supreme Court* (n 10).

¹³ Lee (opening footnote).

¹⁴ (2012) 128 *Law Quarterly Review* 232, 258. N Duxbury, *The Nature and Authority of Precedent* (Cambridge, Cambridge University Press, 2008) 11.

judicial practice.¹⁵ It *is* legitimate for a court to conclude that a change is so dramatic as only to be effected by legislation.¹⁶

The motivation for the 1966 Practice Statement, in which their Lordships recognised their ability to depart from prior decisions, was to free the judges from the awkwardness of the practice of distinguishing bad precedents, confining them to their facts and so on¹⁷ which ran the risk of both discrediting the highest court and bringing the law into disrepute. It was an important addition to the judicial arsenal. The recognition of the power to depart from previous decisions is an integral part of our doctrine of precedent:

The value of the doctrine of precedent to the common law... is not simply that it ensures respect for past decisions but also that it ensures that bad decisions do not have to be repeated.¹⁸

My concern is that, paradoxically, the freedom to depart has led to a certain uncertainty over our top court's treatment of precedent. Any argument about respect for precedent runs the risk of appearing essentially conservative: as Lord Diplock put it in his 1965 Holdsworth Club Presidential Address, in 'the conflict inherent in the judicial process between the need for certainty and the need for change' and preventing the danger of rules becoming 'fossilised'.¹⁹ But that is not really my point. Certainty does not necessarily require that rules never change: in fact a change in precedent may serve to clarify the law and rescue it from a state of uncertainty. That said, even though the Justices now have the power to depart from previous decisions, it still behoves them to clear as to whether they are doing so.

II. Members of the Court

It is a particularly opportune time to consider the current state of the doctrine of precedent in the Supreme Court. Upon the swearing in of Lord Carnwath of Notting Hill JSC last week, after the retirement of Lord Brown, six of the twelve Justices of the Supreme Court have now been appointed since the transition from the House of Lords.²⁰ And, last Thursday, the deadline passed for applications to become the second President of the Supreme Court, to succeed Lord Phillips.

¹⁵ 'The possibility that legislation may be the better course is one which, though not mentioned in the [Practice] Statement, the House will not overlook': *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74, 106 (Lord Scarman).

¹⁶ And there may even be changes which are so fundamental that there are human rights restrictions on how the legislature may intervene, as suggested in *AXA General Insurance Ltd v Lord Advocate (Scotland)* [2011] UKSC 46; J Lee, 'Legislative Interventions, Human Rights and Insurance' [2012] *Lloyd's Maritime and Commercial Law Quarterly* 9.

¹⁷ On the variety of possible techniques, see Harding and Malkin (n 1) 521.

¹⁸ Duxbury (n 14) x; also S Hershovitz, 'Integrity and Stare Decisis' in S Hershovitz (ed), *Exploring Law's Empire* (Oxford, Oxford University Press, 2006).

¹⁹ Lord Diplock, 'The Courts as Legislators' in BW Harvey (ed), *The Lawyer and Justice* (London, Sweet and Maxwell, 1978), 280. Lord Diplock's Address was given on 26 March 1965.

²⁰ Those who served as Law Lords: Lord Phillips, Lord Hope, Lord Walker, Lady Hale, Lord Mance and Lord Kerr (albeit that Lord Kerr was only appointed in June 2009, a month before the final judgments of the Appellate Committee). Those who will have only served in the Supreme Court: Lord Clarke, Lord Dyson, Lord Wilson, Lord Sumption, Lord Reed and Lord Carnwath.

It is worthwhile to look at some of the requirements of the application process. For any appointment as a Justice of the Supreme Court, as we might expect, 'Successful candidates will have to demonstrate independence of mind and integrity and that they meet the criteria listed below TO AN EXCEPTIONAL DEGREE.' (helpfully in capital letters). In the last round of Associate Justice appointments (when Lord Reed and Lord Carnwath were selected), serving judges were 'to submit copies of three judgments only which they believe demonstrate their judicial qualities, and explaining why.'²¹ Only non-serving-judicial applicants were required to send in articles or opinions.

For the Presidency, however the requirements were different: all applicants were required to send in examples of speeches or publications (rather quaintly described as 'extra-curricular'). Serving judges were required to submit 'two judgments only where their contribution has advanced legal thinking or changed the existing law, with a brief explanation of why those judgments have been chosen.'²² These differences speak to the particular role of leadership involved in the Presidency:²³ the President is expressly envisaged to have a role in leading legal *change*.

III. The Practice Statement

The Practice Statement²⁴ was announced by Lord Gardiner LC (a Bencher of this Inn) on 26 July 1966 (four days before England won the World Cup):

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.

²¹ http://www.supremecourt.gov.uk/docs/justices_ip_2011_07.pdf.

²² http://www.supremecourt.gov.uk/docs/information_pack_president.pdf.

²³ Those fond of judicial conservatism might prefer for a prospective candidate to have had to provide examples of judgments where they staunchly declined to develop the law.

²⁴ For a consideration of the exact status of the Practice Statement – it not being a precedent in the strict sense – see Duxbury (n 14) ch 4.

Three immediate points may be made about the Practice Statement.²⁵ First, it is highly significant that the House should 'modify [its] present practice' and adopt the ability to depart from previous decisions. Second, the power to depart from a previous decision is to be exercised 'when it appears right to do so'. At first sight, that seems to be a very broad power. However, and this is the third point, the recognition of a power to depart is expressly couched in the context of precedent as 'an indispensable foundation' for judicial decision-making, and affirms respect for certainty and the dangers of disturbing existing arrangements. That the power is a limited one would seem to be borne out by the relatively restrained use which the House made of the Practice Statement in subsequent years.²⁶ In his excellent book on the doctrine of precedent Professor Duxbury has described the language of the Statement as 'decidedly timid',²⁷ arguing that what 'the Practice Statement ought to have said – what, indeed, it was taken to mean – was that the House of Lords would now overrule its previous decisions when it appeared right to do so'.²⁸

For my part, however, I think that there is a usefulness in the phrase 'departing from': for one thing, I am not convinced that quite the same considerations apply to a change of precedent where a higher court is reversing a decision of a lower court, which is a *true* case of overruling. Where a court at the same level is changing a precedent in one of its own decisions, 'departing' makes that clear. In particular, 'overruling' implies that the subsequent court has a greater status over its predecessors. Thus the Supreme Court has continued to use the language of 'departure' rather than 'overruling': with one exception,²⁹ the Court has only used the term 'overruling' when correcting a precedent from a court of inferior jurisdiction.

Upon the transition from the Appellate Committee of the House of Lords to the United Kingdom Supreme Court, the Practice Directions made no observation as to the operation of precedent in the new Court. It would have been possible for the Court to adopt an entirely new approach to precedent: Lord Hope, in a 2010 lecture at Edinburgh, had noted that the 'most significant force for change [has been] that the Supreme Court has been released from the rules and conventions of the House of Lords and is free to develop them for itself'.³⁰ Indeed, on that occasion, Lord Hope apparently declined to clarify the extent to which the Practice Statement continued to apply.³¹ It was not until towards the end of the Court's first year of judgments that this particular question of the doctrine of precedent was considered.

²⁵ L Blom-Cooper (n 9).

²⁶ In *Miliangos v George Frank (Textiles) Ltd* [1973] AC 443, Lord Simon of Glaisdale (at 470) described their Lordships' approach as one of 'due restraint'.

²⁷ Duxbury (n 14) 127. See too Sir John Laws (n 2) para 4: 'That however is a loose expression: a rule that decisions are "normally binding" is not with respect coherent. What is meant is that the House will normally follow such decisions. That is not a rule of precedent but a rule of practice'.

²⁸ *Ibid.*

²⁹ *GC v The Commissioner of Police of the Metropolis* [2011] UKSC 21: see section VIII below.

³⁰ Lord Hope, 'Taking the case to London – maybe it's not over after all', Edinburgh Centre for Commercial Law, 12 March 2010 (http://www.supremecourt.gov.uk/docs/speech_100312.pdf) p 7.

³¹ H MacQueen and S Wortley, 'Life with the Supremes: where did our love go?' (2010) 14 *Edinburgh Law Review* 357, 358.

IV. *Austin v Southwark*

*Austin v Mayor and Burgesses of the London Borough of Southwark*³² concerned the ending of a secure tenancy and the provisions of s 82(2) of the Housing Act 1985: briefly, the point was whether such a tenancy ends when the tenant breaches the terms of a suspended possession order, or only later, when that order is executed, ie, when the tenant actually gives up possession. There were two House of Lords authorities relevant to the point: *Burrows v Brent London Borough Council*³³ and *Knowsley Housing Trust v White*.³⁴ Lord Hope DPSC spoke for the Court when he explained:

The Supreme Court has not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the Court's own name. This is because it has as much effect in this Court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this Court by section 40 of the Constitutional Reform Act 2005. So the question which we must consider is not whether the Court has power to depart from the previous decisions of the House of Lords which have been referred to, but whether in the circumstances of this case it would be right for it to do so.³⁵

s 40 of the Constitutional Reform Act only refers to the *jurisdiction* of the Supreme Court, and the transfer from the House of Lords. It does not expressly require the Court to adopt the same practices as the House. Lord Hope also went on to make clear that the Supreme Court plans to take the same approach as the House had to the exercise of the power.³⁶ The House's practice as to the Practice Statement was characterised by self-restraint. In *Horton v Sadler*,³⁷ a case on limitation, the House departed from *Walkley v Precision Forgings Ltd*.³⁸ Lord Bingham noted that, in the forty years since the Practice Statement,

the House [had] exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors.³⁹

In *Austin*, although Lord Hope had sympathy with the alternative suggested interpretation of the section, his Lordship was not persuaded that it would be right to depart from the earlier decisions.⁴⁰ The view taken in the earlier cases had been assumed to be correct in countless

³² [2010] UKSC 28.

³³ [1996] 1 WLR 1448.

³⁴ *Knowsley Housing Trust v White (Secretary of State for Communities and Local Government intervening)* [2009] AC 636.

³⁵ *Austin*, [25]. Counsel for the respondent had relied upon the Practice Statement as a ground for dismissing the appeal: [2011] 1 AC 355, 360.

³⁶ *Austin*, [24–[31].

³⁷ [2006] UKHL 27.

³⁸ [1979] 1 WLR 606.

³⁹ *Horton*, [29]. In *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, Lord Bingham (at [7]) also made the point that a mere 'change in the balance of judicial opinion' amongst the same generation of judges (in that case the challenged authority was decided only four years earlier: *McFarlane v Tayside Health Board* [2000] 2 AC 59).

⁴⁰ *Austin*, [28].

cases. A significant factor against changing the law was the enactment of provisions of the Housing and Regeneration Act 2008,⁴¹ which clarified the particular problem in the cases. To change the common law on the point would thus 'contradict the will of Parliament'.⁴² Even though, then, the position in the authorities could be seen to be 'unsatisfactory',⁴³ there were 'very good' reasons not to depart from the previous decisions.

Lady Hale JSC⁴⁴ issued a concurring speech: in her opinion, there was 'no House of Lords case which has addressed the issue full on and reached a reasoned conclusion about it', instead the House of Lords authorities had merely incidentally addressed the law as stated in a Court of Appeal decision.⁴⁵ Her Ladyship viewed the state of the authorities as resulting in 'nonsense':⁴⁶ the authorities 'were not merely wrongly decided. They set the law on a course which was wrong in principle and wrong in practice.'⁴⁷ Nevertheless, Lady Hale agreed, albeit 'reluctantly',⁴⁸ that the intervention of Parliament – acting on the basis of problem presented in the authorities – meant that there should not be a departure from the previous case law. Parliament had 'recently devised a considered and carefully balanced solution to the problem',⁴⁹ and the Court should respect Parliament's solution.⁵⁰

That said, the Supreme Court was able to allow the appeal on an alternative ground: 'the fact that the former secure tenant has died does not deprive the court of its jurisdiction to exercise the power conferred on it by section 85(2)(b) of the 1985 Act to postpone the date of possession under a possession order.'⁵¹ So the desired result was reached nevertheless.

Austin then endorses not only the Practice Statement itself, but also the subsequent jurisprudence of the Lords on when and how the power to depart ought to be exercised. That confirmation in *Austin* has now been incorporated into the revised Practice Directions:⁵² Direction 3.1.3 reiterates that the Statement still applies and requires that an application for permission to appeal to the Supreme Court must state clearly if it is to ask 'the Supreme Court to depart from one of its own decisions or from one made by the House of Lords'.⁵³

Although it has not yet been necessary to decide it, the Supreme Court appears to have endorsed another of the House of Lords' approaches to precedent, concerning prospective overruling. In *In Re Spectrum Plus*,⁵⁴ that, as a matter of principle, it would be possible for the Court to limit the retrospective effect of a decision.⁵⁵ In *Cadder v Her Majesty's Advocate*,⁵⁶ Lord Hope would have wished to exercise the power, had it been open

⁴¹ Specifically s 299 and Schedule 11 of the Act.

⁴² *Austin*, [30].

⁴³ *Austin*, [30].

⁴⁴ For the sake of consistency, in this paper, I shall, without intending any disrespect, refer to Lady Hale as 'Lady Hale', whether she was sitting in the Supreme Court or the House of Lords at the relevant time.

⁴⁵ *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425.

⁴⁶ *Austin*, [49].

⁴⁷ *Austin*, [54].

⁴⁸ *Austin*, [55].

⁴⁹ *Austin*, [56].

⁵⁰ See also Lord Walker at [43]; and Lord Mance (n 2) para 33.

⁵¹ *Austin*, [40].

⁵² <http://www.supremecourt.gov.uk/news/370.html>.

⁵³ Practice Direction 3.1.3a. If so, an enlarged panel of Justices may be required to hear the appeal: as to which, see text to nn 115 and 123 below.

⁵⁴ [2005] UKHL 41. Lord Diplock had supported consideration of prospective overruling in 1965: (n 19) 281-2.

⁵⁵ *Ahmed v HM Treasury (no 2)* [2010] UKSC 5, [17] (Lord Hope dissenting, but on a different point);

⁵⁶ [2010] UKSC 43, [58]–[59] (Lord Hope).

to the Justices to do so (albeit that he concluded that it was not open to the Court, in the light of the Strasbourg jurisprudence on the particular point).⁵⁷

V. Jones v Kaney

In *Kaney*,⁵⁸ a majority of the Supreme Court held that expert witnesses do not have a general immunity from suit in the tort of negligence in respect of their conduct relating to a trial. The case involved a strike-out action. The appellant⁵⁹ had been knocked off his motorcycle by a drunk and uninsured driver. He suffered physical injury but also various psychiatric consequences, including depression and post-traumatic stress disorder (PTSD).

The respondent, a consultant clinical psychologist, acted as an expert witness for the claimant in his personal injury claim against the driver and the Motor Insurance Bureau. Liability was admitted by the relevant insurer, but the issue of quantum had to be determined at trial. The insurer's expert took the view that the appellant was exaggerating his symptoms. The respondent, having examined the appellant, was more generous in her assessment. The trial judge ordered the two experts to prepare an agreed joint statement. The experts had a discussion over the telephone and the defendant's expert witness drafted a joint statement, which the respondent signed without commenting upon it or requesting any amendments. The joint statement suggested that the appellant's psychological symptoms were not of the order to justify a diagnosis of PTSD, and that 'the respondent had found the appellant to be deceptive and deceitful in his reporting'.⁶⁰ The respondent claimed that the report did not accurately reflect her views, but that she had felt under pressure to agree to it: 'her true view was that the claimant had been evasive rather than deceptive'.⁶¹

The appellant sought to sue the respondent, claiming that as a result of her negligence in agreeing to the joint statement, he had had to settle for a considerably lower sum than would otherwise have been the case. At first instance, the respondent successfully argued that the action must be struck out because she was able to rely on the immunity⁶² from suit for an expert witness. Blake J, however, granted a leapfrog certificate⁶³ for permission to appeal to the Supreme Court.⁶⁴ That certificate was granted because, in *Stanton v Callaghan*,⁶⁵ the Court of Appeal had determined that an expert witness's immunity included the preparation of a joint statement, with Chadwick LJ holding that the 'immunity is needed in order to avoid

⁵⁷ That observation was in the context of overruling the Appeal Court of the High Court of Justiciary in two cases, *Paton v Ritchie* 2000 JC 271 and *Dickson v HM Advocate* 2001 JC 203. The operation of precedent in human rights cases is addressed in Section VIII below.

⁵⁸ n 6.

⁵⁹ I shall use 'appellant' to refer to the claimant and 'respondent' to refer to the defendant, in order to avoid confusion with the claimant and defendant in the original claim relating to the accident.

⁶⁰ *Kaney*, [8].

⁶¹ *Kaney*, [9].

⁶² Following the Justices in *Kaney*, I shall refer to the 'immunity' of witnesses, but it is arguable that it is better thought of as the absence of any duty of care owed by the witness: see argument of counsel for the respondent, *Jones v Kaney* [2011] 2 AC 398, 403. On immunities in a different tort context, see C McIvor, 'Getting defensive about police negligence: the *Hill* principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 *Cambridge Law Journal* 133.

⁶³ Under s 12 of the Administration of Justice Act 1969.

⁶⁴ *Jones v Kaney* [2010] EWHC 61 (QB).

⁶⁵ [2000] QB 75.

the tension between a desire to assist the court and fear of the consequences of a departure from previous advice.⁶⁶ The concern is, as the title of the play has it, that it is difficult to have 'One Man, Two Guvnors'; the duty to the court should take priority.

The Court was split 5:2 on the appeal, with Lord Phillips PSC giving the leading opinion for the majority, and Lord Hope and Lady Hale dissenting. There are two features of the decision to consider, aside from the merits or otherwise of protecting expert witnesses, either generally or the seemingly negligent respondent in the instant case.⁶⁷ The first point is that, somewhat remarkably, the Justices could not agree over whether there was a relevant House of Lords authority on the point. Lord Hope and Lady Hale believed that there was, and therefore argued that to declare that there was no such witness immunity would involve a departure from authority. The majority disagreed.

The *Kaney* majority's view certainly overruled *Stanton*. The majority focused upon the specific question of whether paid expert witnesses should retain immunity from suit in negligence. That narrow question was traced to the 1992 decision of *Palmer v Durnford Ford*,⁶⁸ a decision of Simon Tuckey QC, sitting as a Deputy High Court judge: the Justices did not view the case as a sure foundation for the immunity. Instead, the majority held that the 'general rule [is] that every wrong should have a remedy and that any exception to this rule must be justified as being necessary in the public interest.'⁶⁹ The immunity for expert witnesses could no longer be justified.

However, there were *obiter dicta* in the case of *Arthur Hall v Simons*,⁷⁰ in which the House of Lords removed advocates' immunity from suit from negligence claims in respect of civil and criminal proceedings. In that case, several of their Lordships had directly referred to witness immunity, which was not impeached, in contrast to that of advocates.⁷¹ Furthermore, the minority in *Kaney* believed that there was a House of Lords authority for the proposition that no action lies against a witness for any evidence which they give to court (whether during the trial or in preparation for it): the decision in *Waston v M'Ewan*.⁷²

Watson itself is a short case, running to just nine pages of the law reports, and was an appeal to the House of Lords from the Court of Session. The claim was brought against a doctor, who had given evidence in a court dispute between a husband and a wife. It was originally framed in slander and breach of confidence. The House of Lords held that the immunity of witnesses extended not only to what was said in court, but also to things said in preparation for trial. *Watson* had been recognised as establishing the immunity in a variety of

⁶⁶ *Stanton*, 101-2.

⁶⁷ As to which see K Hughes, 'The abolition of expert witness immunity' (2011) 70 *Cambridge Law Journal* 516; and S Carr and H Evans, 'The removal of immunity for expert witnesses: the decision in *Jones v Kaney* and some unanswered questions' (2011) 27 *Professional Negligence* 128.

⁶⁸ [1992] QB 483.

⁶⁹ *Kaney*, [108]. The dictum that 'wrongs should be remedied' is traceable to Sir Thomas Bingham MR in *X v Bedfordshire County Council* [1995] 2 AC 633, 663.

⁷⁰ [2000] UKHL 38; [2002] 1 AC 615.

⁷¹ *Arthur Hall*, at 698 Lord Hoffmann spoke of 'the traditional witness immunity. The alleged cause of action was a statement of the evidence which the witness proposed to give to the court. A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth'; also 740 (Lord Hobhouse of Woodborough). See also the argument of Andrew Edis QC, Peter Duckworth, Nicholas Bowen and David Balcombe for the clients at 671.

⁷² [1905] AC 480.

English cases,⁷³ and Lord Hope⁷⁴ concluded that it was part of 'a formidable body of authority which should not be lightly disregarded'.⁷⁵ Lady Hale in fact began her judgment by quoting the Practice Statement:⁷⁶ observing that the instant case illustrated 'how hard it is to apply that wise guidance in practice.'⁷⁷

Surprisingly, the majority did not really engage with the relevance of *Watson*: in 126 paragraphs of the five majority judgments, *Watson* is mentioned only once, in paragraph 19, where Lord Phillips observes that *Watson* is a Scottish case, 'of unusual facts'. (Incidentally, there is nothing in the judgment of the Earl of Halsbury LC in *Watson* to suggest that it was limited to Scots law).⁷⁸ Having quoted the Early of Halsbury's judgment, Lord Phillips regards it as of limited assistance:

Watson lends some support for extending witness immunity to experts, but it is right to observe that the focus of the House of Lords appears to have been the claim for slander and the case was not concerned with the duty of care that, under the modern law, is owed by an expert to his client.⁷⁹

Lord Dyson (whose analysis persuaded Lord Kerr) stated that he could not agree with Lord Hope's view that there was a lengthy body of authority in favour of the immunity,⁸⁰ instead assessing the immunity in the specific context of claims in negligence. Yet Lord Dyson did not consider *Watson* at all. Criticisms can of course be made of *Watson*: in *Lincoln v Daniels*, Devlin LJ had observed that it was 'not at all easy to determine the scope and extent of the principle'⁸¹ recognised by the House of Lords. But the doctrine of precedent requires faithful engagement with relevant House of Lords and Supreme Court authorities: they may be applied, distinguished or departed from if needs be under the Practice Statement. *Watson* ought not to have been ignored: as Lord Hope put it, it was 'not just a fringe decision'.⁸²

Watson aside, though, it was clear that there were authorities recognising immunity from suit for expert witnesses, albeit possibly not at House of Lords level. The second point of interest then is that the dispute between the majority and minority also involved a disagreement over the correct starting point. Lord Phillips for the majority stated:

It would not be right to start with a presumption that because the immunity exists it should be maintained unless it is shown to be unjustified. The onus lies fairly and

⁷³ House of Lords: *Rondel v Worsley* [1969] 1 AC 191; *Roy v Prior* [1971] AC 470; *Saif Ali v Sydney Mitchell & Co. (A Firm)* [1978] 3 WLR 849; *Trapp v Mackie* [1979] 1 WLR 377; *Martin v Watson* [1996] AC 74; *Taylor and Another Appellants v Director of the Serious Fraud Office* [1999] 2 AC 177; *Darker and Others v Chief Constable of the West Midlands Police* [2001] 1 AC 435; (Also Court of Appeal: *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475 and *Fulham Football Club Limited and Others v Cabra Estates Plc* [1992] BCC 863).

⁷⁴ Lord Hope had, it should be noted, dissented in *Arthur Hall*.

⁷⁵ *Kaney*, [148].

⁷⁶ *Kaney*, [175].

⁷⁷ *Kaney*, [175].

⁷⁸ His Lordship referred to 'what is called apparently in Scottish law his precognition—what we call the interview between the intended witness and the solicitor who takes from him what we call the proof', and so it may be inferred that he was speaking to both Scots and English law (*Watson*, 486).

⁷⁹ *Kaney*, [173].

⁸⁰ *Kaney*, [107].

⁸¹ [1962] 1 QB 237.

⁸² *Kaney*, [149].

squarely on the respondent to justify the immunity behind which she seeks to shelter.⁸³

Similarly, Lord Kerr observed:

Whether or not witness immunity has had a long history (and, as to that, I agree with Lord Dyson that this is far from clear) this court should not be deflected from conducting a clear-sighted, contemporary examination of the justification for its preservation.⁸⁴

But the existence of a relevant precedent *is* a reason to preserve the immunity. The question of precedent is distinct from the question of the wisdom or otherwise of the immunity. It provides a reason for the rule outside of the arguments and the merits of the particular case.⁸⁵

Lord Hope was particularly unhappy⁸⁶ with what we might call the ‘bootstraps’ argument, that, by analogy with the removal of the immunity for advocates in *Arthur Hall*, so should the expert witness immunity be removed:

I find this disturbing I do not think that anyone who sat in *Arthur J S Hall & Co v Simons* foresaw that removing the immunity from advocates would be taken as an indication that it should be removed from expert witnesses too... There is a warning here, to repeat the old adage, that one thing leads to another. Removing just one brick from the wall that sustains the witness immunity may have unforeseen consequences.⁸⁷

For Lord Hope, it was unsatisfactory for *Arthur Hall*, in which the expert witness immunity was expressly not challenged, to then become authority to be used in favour of removing that very immunity.

VI. *Jones v Kernott*

In *Kernott*, the Supreme Court considered the question of the property rights of unmarried cohabitants in their shared home, in situations where the parties have not expressly agreed what their respective shares to be. In order to understand the case we need briefly to consider the earlier authorities in this area, especially the controversial decision of the House of Lords in *Stack v Dowden*,⁸⁸ four years previously.

⁸³ *Kaney*, [51].

⁸⁴ *Kaney*, [88].

⁸⁵ See eg A Kavanagh, ‘Defending deference in public law and constitutional theory’ (2010) 126 *Law Quarterly Review* 222, 232-3.

⁸⁶ *Kaney*, [163]–[164].

⁸⁷ *Kaney*, [163].

⁸⁸ [2007] UKHL 17.

A. The Background

There were three earlier decisions of the House of Lords on cohabitation: *Pettitt v Pettitt*,⁸⁹ *Gissing v Gissing*⁹⁰ and *Lloyd's Bank v Rosset*.⁹¹ Those cases had established that both the resulting and constructive trusts may be used to establish an interest in the home; that with the common intention constructive trust the search was for the parties' actual intentions; and that it was not possible to 'impute' intention (to attribute an intention to the parties even though they did not have it). Finally, in *Rosset*, Lord Bridge had famously observed that, in the absence of agreement,

the court must rely entirely on the conduct of the parties both as to the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.⁹²

Stack was however the first time that had had the opportunity to examine property rights in the situation where an unmarried couple had lived together in a home, title to which was in both of their names, and where both had contributed substantially to the purchase of the property.⁹³ Their Lordships therefore felt able to recast the law. The leading speech in *Stack* was delivered by Lady Hale, while Lord Walker added a concurring speech, which he described as 'a sort of extended footnote'⁹⁴ to her Ladyship's opinion. The House in *Stack* decided that there was no room for the presumed resulting trust in the 'domestic consumer context':⁹⁵ instead the common intention constructive trust was the appropriate basis for calculating the respective beneficial interests. The House wished to establish a simplified framework,⁹⁶ based upon the starting presumption⁹⁶ that equitable interests reflected the legal interests. Where legal title to the property is in the name of one party, the presumption is that the sole beneficial interest rests with them; where it is in joint names, the presumption is that the beneficial interest is shared 50:50. There would be a 'considerable burden'⁹⁷ on the party asserting that the beneficial interests should differ from their legal interests, as this

⁸⁹ [1970] AC 777. Lord Reid's speech in particular repays reading for present purposes. 792: 'For the last twenty years the law regarding what are sometimes called family assets has been in an unsatisfactory state. There have been many cases showing acute differences of opinion in the Court of Appeal It might be possible to decide this case on somewhat narrow grounds without examining the wider questions, but I do not think that that would be satisfactory. The fact that the appellant has legal aid has enabled the argument to range widely, and I think that it is at least desirable, if not necessary, to deal with the various issues which have emerged.' 794-5: 'We must first have in mind or decide how far it is proper for the courts to go in adapting or adding to existing law. Whatever views may have prevailed in the last century, I think that it is now widely recognised that it is proper for the courts in appropriate cases to develop or adapt existing rules of the common law to meet new conditions.'

⁹⁰ [1971] AC 886.

⁹¹ [1991] 1 AC 10.

⁹² *ibid*, 132-3:

⁹³ See *Stack*, [15] (Lord Walker); [40] (Lady Hale). Lord Collins in *Kernott* (at [59]) also noted that prior to *Stack* the 'authorities were mainly concerned with a different factual situation, namely where the property was registered in the name of only one of the parties'.

⁹⁴ *Stack*, [15].

⁹⁵ *Stack*, [58].

⁹⁶ *Stack*, [3] (Lord Hope).

⁹⁷ *Stack*, [14] (Lord Walker); also [68] (Lady Hale).

framework was intended to govern most situations. It was recognised in *Stack* that it was possible that the parties' intentions may change over time.⁹⁸

The majority also suggested, although it was not necessary for the decision, that it may be permissible to impute an intention – that is, to ascribe an intention which the parties did not actually have.⁹⁹ Lord Neuberger vehemently dissented in *Stack*,¹⁰⁰ both as to the general approach – his Lordship would have applied the resulting trust analysis to all situations concerning the purchase of property, regardless of the parties' relationship – and, particularly, on the suggestion that imputation was permissible:

To impute an intention would not only be wrong in principle and a departure from two decisions of your Lordships' House in this very area [*Pettitt* and *Gissing*], but it also would involve a judge in an exercise which was difficult, subjective and uncertain.¹⁰¹

It is certainly the case that the earlier House of Lords decisions indicated that imputation was not possible: for example, Viscount Dilhorne in *Gissing* had made clear that 'one cannot counteract the absence of any common intention at the time of acquisition by conclusions as to what the parties would have done if they had thought about the matter'.¹⁰²

B. The decision in *Kaney*

Kernott engaged with several of the lingering points of uncertainty after *Stack*. It involved the breakdown of the relationship between Ms Jones, a hairdresser, and Mr Kernott, an ice-cream salesman. They were an unmarried couple with children, who had lived together in a house, 39 Badger Hall Avenue, which was in their joint names, for just over eight years. Their relationship ended and Mr Kernott moved out: he had nothing more to do with the property until the case came to court, fourteen years later. The question for the Supreme Court was as to the extent of their respective beneficial interests in their property. Significantly, it was accepted that the parties' interests were equal up to the moment when Mr Kernott left.¹⁰³ The Supreme Court unanimously allowed the appeal and restored the first instance judge's original conclusion that the parties' intentions had changed and that the beneficial interests should be held 90:10 in favour of Ms Jones.

⁹⁸ *Stack*, [62] and [70] (Lady Hale).

⁹⁹ *Stack*, [33] (Lord Walker) 'In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, *or imputed* to the parties' (emphasis added); [60] (Lady Hale): 'The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.'

¹⁰⁰ Strictly speaking, Lord Neuberger did not dissent in *Stack*, as his preferred resulting trust approach would have produced the same outcome as the majority, because of a concession by Ms Dowden's counsel in the Court of Appeal. But it is convenient to refer to it as a dissent here: in *Kernott*, Lord Wilson (at [79]) described Lord Neuberger's opinion as 'a speech of dissent (other than in relation to the result)'.¹⁰¹

¹⁰¹ *Stack*, [127]. Lord Neuberger expanded upon his views in 'The conspirators, the tax man, the Bill of Rights and a bit about the lovers', his 2008 Chancery Bar Association Annual Lecture, http://www.chba.org.uk/library/seminar_notes/?a=58256.

¹⁰² *Gissing*, 900.

¹⁰³ *Kernott*, [43].

The Supreme Court did not however speak with one voice as to the reasons for allowing the appeal.¹⁰⁴ Lord Walker and Lady Hale gave a joint leading judgment, and reaffirmed their approach in *Stack*.¹⁰⁵ Lord Collins agreed with their joint judgment. Lords Kerr and Wilson, however, while concurring in the outcome, disagreed with the majority's approach, both in terms of principle and on the facts of the case. This dispute turned upon the breadth of the judicial ability to infer the parties' intentions from their conduct. The majority found it possible to infer – to conclude on the evidence – that, in the light of their dealings with the property since the end of their relationship, the parties' actual intentions were that Ms Jones should have a greater share. For the minority, it was not possible to draw such an inference, because the parties simply had not thought about it. What the minority *were* prepared to do, however, was to impute that intention: that is, to ascribe such an intention to the parties, even though they did not actually have it.

The effect of *Kernott* is that it seems much more likely that the presumptions under *Stack* 'general framework' will be more easily rebutted.¹⁰⁶ One should always be wary when a court creates a general rule, but in the next breath recognises an exception to that very rule. Aside from the decision under appeal,¹⁰⁷ there is no mention of any of the many Court of Appeal decisions following *Stack* which had sought to apply the framework in one way or another.¹⁰⁸ A particular question which had been examined in several of the authorities was the very question of post-acquisition change of intention, and the courts had been reluctant to infer such a change of intention.¹⁰⁹ This, as Professor Cooke has noted, is an 'inevitable outcome of our system of precedent; a decision has a ratio, and only later cases can really determine how broad that ratio is. So one major decision is likely to be followed by a series of satellite cases determining its extent.'¹¹⁰ And yet, this considerable, rapidly-developed body of case-law was utterly ignored by the Court in *Kernott*.

Another feature of *Stack*, endorsed in *Jones*, is the language used in the treatment of the authorities. There was no talk of overruling. Instead, it was asserted that the law had

¹⁰⁴ I have written on the difference between unanimity and univocality elsewhere: see J Lee, 'Fidelity in interpretation' (n 8), 15-18 and generally 'A defence of concurring speeches' [2009] *Public Law* 305.

¹⁰⁵ In *Twinsectra v Yardley*, Lord Millett had reached the conclusion that his own analysis of the law on a given point, offered in a 1985 article in the *Law Quarterly Review* was the correct one: [81] 'I am disposed, perhaps pre-disposed, to think that this is the only analysis which is consistent both with orthodox trust law and with commercial reality'. After ruling out alternative arguments, he concluded that he had been right all along, at [100]: 'As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth.' It would be an interesting question whether his Lordship ought perhaps to have recused himself from hearing the appeal on a topic on which he had written: see Lord Neuberger's 2012 Holdsworth Club Presidential Address, 'Where Angels Fear to Tread', paras 20-21. <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf>.

¹⁰⁶ S Gardner and K Davidson, 'The Supreme Court on family homes' (2012) 128 *Law Quarterly Review* 178, 181.

¹⁰⁷ *Kernott v Jones* [2010] EWCA Civ 578.

¹⁰⁸ *Holman v Howes* [2007] EWCA Civ 877; *James v Thomas* [2007] EWCA 1212; *Morris v Morris* [2008] EWCA 257; *Laskar v Laskar* [2008] EWCA Civ 347; *Fowler v Barron* [2008] EWCA Civ 377; *Gibson v Revenue & Customs Prosecution Office* [2008] EWCA Civ 645; *Williamson v Sheikh* [2008] EWCA Civ 990; *Qayyum v Hameed* [2009] EWCA Civ 352. *Fowler v Barron* was cited by Wall LJ in the Court of Appeal in *Kernott*, *ibid*, at [84]. *Adekunle & Ors v Ritchie* [2007] WTLR 1505, a decision of HHJ Behrens in Leeds County Court, does get a mention (without comment) at [16] in the joint judgment.

¹⁰⁹ Eg *James v Thomas*, *op cit*, Sir John Chadwick at [24]: '[In] the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition'.

¹¹⁰ E Cooke, 'Taking Women's Property Seriously: Mrs Boland, the House of Lords, the Law Commission and the Role of Consensus' in *From House of Lords to Supreme Court* (n 10) 64.

'moved on'¹¹¹ since the earlier authorities. But, with respect, if before the decision, the law was one thing (one cannot impute intention) and after the decision, the law is something else (one can impute intention, albeit in limited circumstances), then that does not appear to be 'moving on', but a change in precedent.

Thus, a difficulty with both *Stack* and *Kernott* is that the Justices appear to wish to have it both ways. The freedom which the judges felt that they had in these two cases was because the earlier House of Lords authorities had been single names cases, involving trivial 'contributions',¹¹² and those distinctions did justify reconsidering the law. However, if the facts of *Stack* and *Kernott* were distinguishable from the previous House of Lords authorities, then it is questionable whether it was legitimate for those authorities to be undermined without expressly being overruled. It would have been possible, if undesirable, simply to adopt a separate regime for joint names cases: yet *Kernott* confirms that there is overall a single regime for both single and joint names cases. So why, therefore, was there no mention of use being made of the Practice Statement?

Only Lord Collins, concurring with the joint judgment, referred to the Practice Statement:

I would hope that this decision will lay to rest the remaining difficulties, and that it will not be necessary to revisit this question by reconsideration of the correctness of *Stack v Dowden*, by which this court is bound (subject to the application of Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 regarding departure from previous decisions). It should not be necessary because the differences in reasoning are largely terminological or conceptual and are likely to make no difference in practice. But should it be necessary, the court (no doubt with a panel of seven or nine) would need much fuller argument (together with citation of the enormous critical literature which the decision has spawned) than was presented to the court on this appeal.¹¹³

Lord Collins there adverts to the possibility of enlarged panels hearing cases in the court. In its first five terms, the Supreme Court sat in panels of seven Justices twenty-one times and nine Justices sixteen times:¹¹⁴ this is a significant contrast with the House of Lords did so relatively rarely.¹¹⁵ The Court has published criteria¹¹⁶ for determining when more than five Justices should hear a case, which are as follows:

If the Court is being asked to depart, or may decide to depart from a previous decision.

¹¹¹ *Stack*, [26] (Lord Walker): 'Whether or not Lord Bridge's observation was justified in 1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction...'; [60] (Lady Hale): 'The law has indeed moved on in response to changing social and economic conditions'. See also the Opinion of the Privy Council in *Abbott v Abbott* [2007] UKPC 53, delivered by Lady Hale, at [3] and [19].

¹¹² Lord Collins in *Kernott* (at [59]) also noted that prior to *Stack* the 'authorities were mainly concerned with a different factual situation, namely where the property was registered in the name of only one of the parties'.

¹¹³ *Kernott*, [58]. Lord Collins was also disappointed by the lack of citation of comparative material to the Court in *Kaney*, [76].

¹¹⁴ *The Supreme Court Annual Report and Accounts 2009-10* (12 July 2010) pp 24-5; and *The Supreme Court Annual Report and Accounts 2010-11* (15 June 2011) pp 23-4.

¹¹⁵ See B Dickson, 'The processing of appeals in the House of Lords' (2007) 123 *Law Quarterly Review* 571, 592-3 (though note that the House of Lords also sat in a nine-member bench even earlier see *Allen v Flood* [1898] AC 1; Lee, 'A defence of concurring speeches' (n 104) 320). It should also be acknowledged that the practice became more common under the House of Lords in its final decade.

¹¹⁶ <http://www.supremecourt.gov.uk/procedures/panel-numbers-criteria.html>.

- A case of high constitutional importance.
- A case of great public importance.
- A case where a conflict between decisions in the House of Lords, Judicial Committee of the Privy Council and/or the Supreme Court has to be reconciled.
- A case raising an important point in relation to the European Convention on Human Rights.

Although *Kernott* purports to follow *Stack*, and broadly does so,¹¹⁷ it is arguable that there is a conflict between those two decisions and the earlier authorities of the House of Lords, especially as regards imputed intention (even if confined to a 'fall-back position' as suggested in *Kernott*). So at least two of these criteria are engaged. The earlier authorities are largely glossed over by the Justices in *Kernott*: Lord Diplock's speech in *Gissing* is given some attention (being the most sympathetic to the idea of imputation),¹¹⁸ while *Rosset* receives only a passing mention in Lord Collins' judgment.¹¹⁹ *Pettitt* is still referenced for observations about the relevance of presumptions,¹²⁰ without any mention of whether it generally remains good law. The conflict persists. There is thus a certain irony in Lord Collins' invocation of the Practice Statement, because reference to it is conspicuous by its absence in *Stack*.¹²¹ Nor does *Kernott* resolve the issues: the decision has since been analysed in the literature, not entirely favourably.¹²²

Where, then, does the law stand? Their Lordships in *Stack* subtly planted the possibility of the imputation of intention, and reaped the harvest in *Kernott*. The position appears to be that *Pettitt* and *Rosset* have been undermined, though not expressly departed from. Again, as in *Kaney*, we see 'bootstraps reasoning' at work. It seems that *Stack* reset the clock to zero. 'The law has moved on'; the tide has turned; the winds have changed. As Lord Hope said in *Kaney*, one thing has led to another.¹²³

VII. Precedent and Legislation

Lord Neuberger, who had so vigorously disagreed with the majority in *Stack*, is now of course the Master of the Rolls. In a recent lecture on what role, if any, remains for the creativity of Equity,¹²⁴ his Lordship expressed a preference for legislative development of the law, and argued that, in the UK,

it seems to me that the legislature suffers from two complementary, but apparently inconsistent, problems, which renders a degree of judicial activism arguably necessary

¹¹⁷ Though see Gardner and Davidson (n 106). In particular, the treatment of *Oxley v Hiscock* [2004] EWCA Civ 546 does not appear to be consistent between the two cases.

¹¹⁸ *Kernott*, [28]ff.

¹¹⁹ *Kernott*, [59].

¹²⁰ *Kernott*, [24] and [29] (Lord Walker and Lady Hale).

¹²¹ Se W Swadling, 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72, 96, fn 126.

¹²² See A Briggs, 'Co-ownership and an equitable non sequitur' (2012) 128 *Law Quarterly Review* 183. The latest issue of the *Conveyancer* contains several comments on the case: M Dixon, 'Editor's notebook: the still not ended, never-ending story' [2012] *Conveyancer* 83; M Pawlowski, [2012] *Conveyancer* 149; M Yip, [2012] *Conveyancer* 159 and J Mee, [2012] *Conveyancer* 167.

¹²³ *Kaney*, [163].

¹²⁴ Lord Neuberger MR, 'Has Equity Had its Day?', Hong Kong Common Law Lecture 2010, 12 October 2010.

and certainly beneficial. The first problem is that of too much ill thought-out legislation; the second is ... failing to legislate in controversial and sensitive areas.¹²⁵

His Lordship nominated the law of cohabitation as an example of the latter, of Parliament 'failing to grasp the nettle'.¹²⁶ In *Kernott*, Lords Collins lamented 'the absence of legislative intervention (which continues despite the Law Commission Report¹²⁷ ...) [which] made it necessary for the judiciary to respond to adapting old principles to new situations.'¹²⁸ Lord Wilson remarked upon 'the continued failure of Parliament to confer upon the courts limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship'.¹²⁹ The joint judgment noted that there were no plans for the Commission's proposals to be implemented 'in the near future',¹³⁰ and it may be that the Court was fortified in its revision of the law by the lack of Parliamentary enthusiasm for legislative reform.¹³¹

Having examined the three Supreme Court authorities on the Practice Statement, we have seen that the role of legislation in developing the law has been expressly engaged. What emerges from the regular reference to the possibility of Parliamentary change is that the question is not whether it is right that the law should be changed: rather, it is whether it is right that it should be changed *judicially*. As noted above, Professor Burrows has argued that it amounts to an 'abdication of judicial responsibility for judges... to decline to develop the common law on the grounds that legislation is more appropriate'.¹³² Burrows is correct to argue that 'the relationship in England between common law and statute has traditionally been woefully underexplored by commentators'.¹³³ A particular feature of several of the decisions which we have considered has been the relevance of not only Parliament but also the Law Commission.¹³⁴ Both Professor Burrows and Lady Hale¹³⁵ are former Law Commissioners, which may inform their views on this point; while Lord Carnwath is the first Law Lord or Supreme Court Justice to have previously been a Chairman of the Commission since Lord Scarman.

¹²⁵ *ibid*, para 38.

¹²⁶ *ibid*, para 40.

¹²⁷ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307 (2007).

¹²⁸ *Kernott*, [57].

¹²⁹ *Kernott*, [78].

¹³⁰ *Kernott*, [35]. The present Government has stated that the Commission's proposals will not be taken forward during the current Parliament: 6 Sep 2011 : Column WS19. For a strong response from the Law Commission, see the statement by the relevant Commissioner, Professor Elizabeth Cooke, on the same day as the Ministerial Statement: http://lawcommission.justice.gov.uk/docs/20110906_Statement_on_Govt_response.pdf.

¹³¹ 'In the meantime there will continue to be many difficult cases in which the court has to reach a conclusion on sparse and conflicting evidence. It is the court's duty to reach a decision on even the most difficult case.' *Kernott*, [36].

¹³² Burrows (n 14).

¹³³ *ibid*, 232.

¹³⁴ Further examples may be found in *Spiller v Joseph* [2010] UKSC 53, [117] (Lord Phillips) 'These are difficult questions. Some may have to be resolved judicially, but the whole area merits consideration by the Law Commission, or an expert committee.'; *Berrisford v Mexfield Housing Co-operative Ltd* [2011] UKSC 52, [115] (Lord Dyson) 'I think that, rather than the court introducing a change to such a fundamental tenet of the law of landlord and tenant, it would be better if this were done by Parliament after full consultation of interested parties of the kind that is routinely undertaken by the Law Commission.'; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [120] (Lady Hale dissenting), 'The solution to problems like that is principled and comprehensive law reform'.

¹³⁵ See her Ladyship's judgment in *OBG v Allan* [2007] UKHL 21, [315], where she begins by observing 'Reforming the common law by statute is not an easy task...'

What, then, of Professor Burrows' argument that it is not appropriate for the courts to decline to develop the law on the basis that it is more appropriate for Parliament to do so?¹³⁶ In *Arthur Hall*, the advocate's immunity case, counsel for the defendants made the argument that any change, even if the House viewed it as necessary,¹³⁷ should be left to Parliament. The House, as we have seen, disagreed. Lord Steyn used the same terminology as Burrows:

It would certainly be the easy route for the House to say 'let us leave it to Parliament'. On balance my view is that it would be *an abdication of our responsibilities* with the unfortunate consequence of plunging both branches of the legal profession in England into a state of uncertainty over a prolonged period.¹³⁸

Counsel for the clients in the case had argued strongly for a change, but also recognised the relevance of Parliamentary intervention: 'the immunity should be abolished by judicial decision now. Alternatively that task should be left to Parliament, with full guidance in the speeches of the House indicating the view that it ought to be abolished.'¹³⁹

We have seen that both dissentients in *Kaney* viewed any change on witness immunity as properly within the province of Parliament, preferably with the advice of Law Commission. We might also compare Lady Hale's approach in *Stack* and *Kernott* with her dissenting judgment in *Radmacher v Granatino*.¹⁴⁰ That case saw the Supreme Court recognise the validity of ante-nuptial agreements. It was a nine-member panel, and Lady Hale was the sole dissentient. Her Ladyship viewed the majority's approach as inappropriate, especially because the Commission had a current project under way. The Commission 'can develop options for reform across the whole field, upon which it can consult widely. In the light of all this, it can make detailed proposals for legislative reform, which can be put before Parliament.'¹⁴¹ She continued:

that is the democratic way of achieving comprehensive and principled reform. There is some enthusiasm for reform within the judiciary and the profession, and in the media, and one can well understand why. But that does not mean that it is right.¹⁴²

In her Ladyship's opinion, the effect of the majority's approach was to undermine the status of marriage: she concluding with the declaration that 'Marriage still counts for something in the law of this country and long may it continue to do so.'¹⁴³ What is not clear is quite why the Law Commission's competence is a factor against the judicial development of the law in *Radmacher* and *Kaney*, but was not similarly a factor in *Stack* or *Kernott*.

¹³⁶ '[In] appropriate cases, "comity with the legislature" may demand that a court stay its hand, notwithstanding that the law would be improved by overruling a precedent decision' Harding and Malkin (n 1) 527.

¹³⁷ *Arthur Hall*, 607 (Submissions of Peter Scott QC, Clare Montgomery QC, David Perry and Mark Simpson for the Bar Council).

¹³⁸ *Arthur Hall*, 683 (emphasis added). See also Lord Hoffmann at 704-5.

¹³⁹ *Arthur Hall*, 671 (submissions of Andrew Edis QC, Peter Duckworth, Nicholas Bowen and David Balcombe).

¹⁴⁰ *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

¹⁴¹ *Radmacher*, [134].

¹⁴² *Radmacher*, [135].

¹⁴³ *Radmacher*, [195].

And yet, is some reform is better than none at all? A new regime governs the relationship between the Law Commission¹⁴⁴ and the Government. The Law Commission Act 2009¹⁴⁵ introduces new governmental accountability for the implementation of Law Commission reports, in that an annual report must be issued, indicating what decisions have been made about any yet-to-take-forward proposals. There is also now an agreed protocol between the Government and the Commission,¹⁴⁶ which requires the specific endorsement of a Government Department before the Commission can even begin a project.¹⁴⁷ Given that regular reform of private law principles rarely captures the political imagination, it requires the spur of sector-specific campaigns, such as seen in the asbestos litigation,¹⁴⁸ or the spur of changes at the supranational level, to ignite interest in reform.¹⁴⁹ If the Law Commission is therefore to have limited to scope to propose reform of common law rules, perhaps we shall see the Supreme Court become more willing to develop the law.

VIII. Human Rights Cases

My focus in this lecture has been on the Supreme Court's approach to the Practice Statement in the common law context, but I should say a few words about human rights cases. The Human Right Act imposes an obligation on the courts, including the Supreme Court, to 'take into account'¹⁵⁰ the relevant Strasbourg jurisprudence on a particular point. The controversial question has been whether the Court is to regard itself as 'bound' by Strasbourg or not (not least since the ECtHR does not follow the same doctrine of *stare decisis* as the English courts). I do not intend to examine that vexed issue here, but it is helpful to reflect upon some of the cases in the context of precedent.

The overtaking of previous authorities¹⁵¹ by subsequent human rights case law has been considered in the case law, and it is in this context that the Supreme Court has used the language of 'overruling' earlier decisions. In fact, in the final decision of the House of Lords, *R (Purdy) v Director of Public Prosecutions*,¹⁵² the Appellate Committee recognised that part

¹⁴⁴ As Duxbury has noted, 'Opportunities to use the power, it should be noted, diminished at the very time that it was created: the establishment of the Law Commission in 1965 led to an increase in legislative activity, which made the overruling of some unsatisfactory House of Lords precedents unnecessary.' Duxbury (n 14) p 128 fn 59.

¹⁴⁵ See Lee, "Inconsiderate Alterations in our Laws" (n 12) 95-99.

¹⁴⁶ *Protocol between the Lord Chancellor (on behalf of The Government) and The Law Commission* (Law Com No 321).

¹⁴⁷ *ibid*, paras 6-9.

¹⁴⁸ Lee, "Inconsiderate Alterations in our Laws" (n 12).

¹⁴⁹ See also J Lee, 'A Civil Law for the Age of Statutes' in J Steele and TT Arvind (eds), *Tort Law and the Legislature: Common law, statute, and the dynamics of legal change* (Oxford, Hart Publishing, forthcoming 2012).

¹⁵⁰ s 2. The same phrase is used in the context in s 8(4) of the Act.

¹⁵¹ On the impact upon Court of Appeal authorities, see Maurice Kay LJ in *R (on the application of King) v Secretary of State for Justice* [2012] EWCA Civ 376, [70]. Any suggestion that the Court of Appeal should feel free to depart from House of Lords or Supreme Court decisions in the light of the Human Rights Act has now been closed off: see J Steele, '(Dis)owning the Convention in the Law of Tort' in *From House of Lords to Supreme Court* (n 10) 104, citing *Leeds City Council v Price* [2005] EWCA Civ 289.

¹⁵² [2009] UKHL 45, departing from *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department Intervening)* [2002] 1 AC 800.

of its previous decision on whether art 8(1) is engaged by the end of life decision-making could no longer stand.¹⁵³

In June 2009, the House re-examined the question of control orders in *Secretary of State for the Home Department v AF*,¹⁵⁴ and held that its previous decision in *Secretary of State for the Home Department v MB*¹⁵⁵ could no longer stand in the light of subsequent decision of the European Court of Human rights.¹⁵⁶ Lord Rodger viewed this as inevitable: 'in reality, we have no choice: *Argentorum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed'¹⁵⁷ Lord McCluskey has disapproved of the tenor of this approach, of the courts viewing themselves as bound by Strasbourg: 'This judicially developed doctrine seems inconsistent with the provisions of section 2 of the Human Rights Act 1998. It is a kind of judicial autolevitation.'¹⁵⁸

Lady Hale has, both judicially¹⁵⁹ and extra-judicially,¹⁶⁰ commented upon the relationship with Strasbourg. Her Ladyship has suggested that the Supreme Court is 'not obliged to follow that jurisprudence if there are good reasons to depart from it. We have not so far failed to follow a decision of the Grand Chamber... But the day might come when we would find good reasons to do so.'¹⁶¹ It is beyond the scope of my present lecture to consider this in detail, and it has in any case since become a favourite theme for the Supreme Court Justices' extra-judicial observations. However, Lady Hale does refer to there being 'good reasons to depart from' Strasbourg authority: an echo of the 'when it appears right to do so' approach in the Practice Statement.

In the recent Supreme Court decision of *GC v The Commissioner of Police of the Metropolis*,¹⁶² the parties were agreed that a previous decision of the House of Lords in *R(S and Marper) v Chief Constable of South Yorkshire*,¹⁶³ had been overtaken by a subsequent appeal to the ECtHR.¹⁶⁴ The dispute before the Supreme Court was over the appropriate remedy to be given to the applicants. But both the majority and minority referred to *Marper* as being 'overruled'.¹⁶⁵ Earlier this year, Lord Kerr proposed a modification of Lord Rodger's observation, continuing the Latin banter amongst the Justices: "*Argentorum locutum, nunc est nobis loquendum*" – Strasbourg has spoken, now it is our time to speak.'¹⁶⁶

¹⁵³ Lord Hope was the only judge to refer expressly to the Practice Statement point: *Purdy* [34] – [39] (though Lord Neuberger supported the same point at [95]).

¹⁵⁴ [2009] UKHL 28.

¹⁵⁵ [2007] UKHL 46.

¹⁵⁶ *A & Ors v United Kingdom* (2009) 49 EHRR 29.

¹⁵⁷ *AF* (154) [98]. (*Argentorum* was the Roman name for Strasbourg).

¹⁵⁸ J McCluskey, 'Supreme error' (2011) 15 *Edinburgh Law Review* 276, 278 fn 9. Lord McCluskey was generally commenting on *Cadder* (n xx), but the criticism in the quote is specifically directed towards Lord Rodger's dictum. 'Autolevitation' is, of course, just a more sophisticated way of referring to what I have called 'bootstraps reasoning'.

¹⁵⁹ *McCaughey, Re Application for Judicial Review* [2011] UKSC 20, [93].

¹⁶⁰ B Hale, 'Argentorum Locutum: is Strasbourg or the Supreme Court supreme?' (2012) 12 *Human Rights Law Review* 65.

¹⁶¹ n 159; reiterated in Hale (n 160) 76.

¹⁶² [2011] UKSC 21.

¹⁶³ [2004] UKHL 39.

¹⁶⁴ *S and Marper v United Kingdom* (2008) 48 EHRR 1169.

¹⁶⁵ *GC* (n 162) [73] (Lady Hale); [105] (Lord Rodger, dissenting).

¹⁶⁶ Lord Kerr, 'The UK Supreme Court: The modest underworker of Strasbourg?' Clifford Chance Lecture, 25 January 2012, http://www.supremecourt.gov.uk/docs/speech_120125.pdf.

What we may note for now is that the Practice Statement, having been expressly readopted by the Supreme Court, pre-dates both the European Communities Act 1972 and the Human Rights Act 1998. It is perhaps possible simply to accommodate a subsequent judgment from Strasbourg or Luxembourg as a factor making it 'right' for the Supreme Court to depart from a previous decision. But that would seem to underplay the significance of these other courts, and the developing body of jurisprudence on the ECtHR. The need for certainty in respect of the basis of 'contracts, settlements of property and fiscal arrangements' and in the criminal law all get a mention in the Practice Statement, but no other areas. Perhaps the Practice Statement needs to be updated?

IX. Conclusion

Lord Rodger, the late, great Supreme Court Justice, observed that some problems will always arise with the doctrine of precedent,

because, even in the highest courts, judges will change their minds from time to time. This is nothing to be ashamed of: indeed there is divine precedent for it. As Pope Innocent III remarked in 1215, in a decree issued during the Fourth Lateran Council changing the rules on the impediments to marriage by reason of affinity, 'in the New Testament even God himself made some changes to what he had laid down in the Old'.¹⁶⁷

Amen to that. It has been argued here that it is important to take precedent seriously. Where a decision is to be departed from, it should be done clearly and deliberately, with an appreciation of the consequences. We have not seen a consistent approach in the decisions which we have examined. I have suggested that the possibility of departing from previous decisions, as recognised by the House of Lords in the Practice Statement and now adopted by the Supreme Court, may have had a paradoxical effect on judicial decision-making in our highest court. That effect is that the Court, because it *can* depart from its own decisions when 'right' to do so, is not always clear about whether it is actually doing so. Furthermore, it is important to avoid the suspicion that a change is deemed judicially appropriate when the judge agrees with the substantive result, but should be left to Parliament when the particular judge disagrees with the proposed change.

The theme of the Inn's Lecture Series this year is 'Academics and Practitioners: Friends or Foe?'. With that in mind, I am conscious that the labyrinthine reasoning of appellate courts provides, as Lady Hale has put it, the 'grist to the advocates' and academics' mills',¹⁶⁸ and any suggestion that diminishes the intricacies of the law and the consequent room for argument for both academics and practitioners might be like turkeys asking for Christmas. But given that both advocates and now expert witnesses no longer have any immunity from suit, perhaps we need all the help that we can get.

The doctrine of precedent remains an 'indispensable foundation... for [the] orderly development of legal rules'. We began this lecture with keeping up with the Joneses: I have

¹⁶⁷ A Rodger, 'A time for everything under law: some reflections on retrospectivity' (2005) 121 *Law Quarterly Review* 57, 79.

¹⁶⁸ *OBG v Allan* (n 135) [303].

argued that the Supreme Court's fidelity to precedent should not merely be a matter of the Justices keeping up appearances. To borrow from Lady Hale in *Radmacher*, the doctrine of precedent 'still counts for something in the law of this country and long may it continue to do so'.¹⁶⁹

¹⁶⁹ *Radmacher*, [195].