

RESTATEMENTS AND JUDICIAL LAW REFORM

Andrew Burrows QC, FBA

Professor of the Law of England and Fellow of All Souls College, Oxford

[THIS IS INTENDED AS A GUIDE TO THE PRESENTATION AND IS NOT A FULL PAPER. IT SHOULD NOT BE QUOTED WITHOUT THE AUTHOR'S PERMISSION]

My presentation focuses on two alternative solutions to legislation: first, Restatements and, secondly, judicial law reform.

1. Restatements

(1) Type and purpose of Restatement

A Restatement of the English Law of Unjust Enrichment (OUP, 2012)

This comprises a 36 section Restatement with numerous subsections and an 80,000 word commentary which copies across the relevant section from the Restatement (which is put in a grey-shaded box) and then contains the commentary on that section. The commentary makes extensive use of hypothetical or real examples in the belief that this is commonly the best way of understanding the law. The leading cases have been cited but, while there is some reference to the academic literature, the aim of the commentary is to explain the Restatement not to reproduce the textbooks in this area.

The question arises, however, as to what difference there is between this type of principled Restatement and a *non-binding* code. They are clearly very similar. The essential difference is that a code does not need to be tied to the existing law whereas a Restatement must be within the interpretative reach of the courts.

Linked to this is that, as their title makes clear, these Restatements are not purported *European* codifications. Lord Rodger of Earlsferry, "Say not the Struggle Naught Availeth": the Costs and Benefits of Mixed Legal Systems':¹

'[I]t is boring enough to find branches of McDonalds, the Body Shop, and Benneton in every major European city without finding exactly the same law too. To find ourselves tied into a monolithic codified system in which all final decisions are taken in the colourless prose of a court in Luxembourg – presumably increased to an even more enormous number of judges – is unattractive, to say the least.'

(2) Working methods and the use of an advisory group

There was a small advisory group half of whom were academics and half of whom were judges or practitioners. Further invaluable assistance on drafting was given by retired Parliamentary Counsel.

¹ (2003) 78 Tulane LR 419, 431.

(3) Reaction

Time alone will tell whether in our common law single jurisdictional system a Restatement of English Law idea is regarded as a worthwhile means of filling a gap between judge-made law and legislation.

2. Judicial Law Reform

I have never been a great fan of legislative reform of the non-criminal common law. This legislative scepticism means that, for example, I think judges should be very wary of leaving possible reform of the common law to the legislature.² Even worse are arguments that, because the Legislature has not enacted some reform, it is the intention of Parliament that there should be no reform of it. The truth is that there is a myriad of reasons why Parliament may not have legislated on a matter and it is incorrect to regard it as necessarily reflecting a considered choice. Again, where there is legislation in place, I regard the role of the judges as being to treat the legislation as 'always speaking' and hence to ensure, so far as the wording permits this, that the statute remains fit for purpose.³

Lord Goff in *Woolwich Equitable Building Soc v IRC*⁴ said the following:⁵

'[It is argued that] for your Lordships' House to recognise such a principle would overstep the boundary which we traditionally set for ourselves, separating the legitimate development of the law by the judges from legislation. It was strongly urged by [counsel for the Revenue] in his powerful argument ... that we would indeed be trespassing beyond that boundary if we were to accept the argument of Woolwich. I feel bound however to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number of leading cases in your Lordships' House would never have been decided the way they were. For example, the minority view would have prevailed in *Donoghue v Stevenson*;⁶ our modern law of judicial review would have never developed from its old, ineffectual, origins; and *Mareva* injunctions would never have seen the light of day.'

I would like to draw your attention to two Law Commission projects to show that judicial law reform may be the best route forward even where legislation might seem, at least at first sight, the more obvious solution.

² For this argument see my article 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 LQR 232, 247-248. For a disappointing recent example, see some of the Supreme Court's reasoning in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 WLR 325 on the question of whether legal professional privilege should be extended to accountants giving legal advice.

³ This is sometimes referred to as statutes having an 'ambulatory' meaning. Examples of an application or acceptance of this by the courts include *Royal College of Nursing v Dept of Health and Social Security* [1981] AC 800; *R v Ireland* [1998] AC 147; *R (on the application of Quintavalle) v Sec of State for Health* [2003] UKHL 13, [2003] 2 AC 687; *Yemshaw v Hounslow LBC* [2011] UKSC 3, [2011] 1 WLR 433. For the contrary view, which I do not share, that the courts should not treat legislation as always speaking, see the casenote on *Yemshaw* by Ekins, 'Updating the Meaning of Violence' (2013) LQR 17.

⁴ [1993] AC 70.

⁵ *Ibid* at 173.

⁶ [1932] AC 562.

(1) The level of damages for non-pecuniary loss in personal injury cases

Heil v Rankin.⁷ Rather than recommending legislation, the Law Commission proposed that the level could and should be increased across the board by the Court of Appeal (or House of Lords) seeking to hear together a number of appeals dealing with injuries of different severity.⁸ Lord Bingham CJ wrote to the Law Commission as follows:

‘...I would myself think it possible to arrange for the Court of Appeal to hear a number of different appeals on quantum in personal injury cases, covering a range of different injuries and factual situations, and to invite the appointment of an amicus. I think it would be important to have independent representations, since the court would have to consider the effect on insurers of a sudden increase in levels of compensation if the court were to be invited to rule in favour of such a general increase.’⁹

So it was that eight conjoined appeals came before a specially convened five-judge Court of Appeal in *Heil v Rankin*. An amicus instructed by the Treasury Solicitor assisted the court with oral and written submissions, and written submissions were accepted from the Association of Personal Injury Lawyers and from various insurers and groups representing insurance interests.

Lord Woolf, giving the judgment of the court, summarised the defendants’ arguments as follows:

‘[It has been] contended that it would be unsuitable and inappropriate to seek to alter the level of awards by judicial determination. It is argued that Parliament is the appropriate forum in which such a change should be made. There could then be a full and proper public debate as to the justification for the increase in general damages which the Commission have recommended. All interested parties would then be able to make representations to their Members of Parliament. Existing and prospective litigants would know the progress and likely outcome. Parliament is in the position to achieve a change in levels which would be prospective only and can cater for the effects on the insurance industry by means of clearly defined commencement dates and transitional provisions. If the courts interfere, this would create undesirable uncertainty about the prospects of further changes which would not arise if Parliament dealt with the issue.’¹⁰

Lord Woolf rejected those arguments. ‘[I]t is appropriate for the court to consider the Commission’s recommendation. What is involved is part of the traditional role of the courts. It is a role in which juries previously were involved. Now it is the established role of the judiciary. It is a role which, as a result of their accumulated experience, the judiciary is well qualified to perform. Parliament can still intervene. It has, however, shown no inclination that it intends to do so. If it should decide to do so then the fact that the courts have already considered the question will be of assistance to Parliament. Until Parliament does so, the courts cannot avoid their responsibility. While a public debate on this subject would no doubt be salutary, the contribution which it could make to the actual decision of the court is limited. The court has the report of the Commission. It also has the other material which the parties have placed before it. It is in as good a position as it is likely to be to make a decision in the context of the present appeals. We see no reason to accede to [Counsel for

⁷ [2001] QB 272.

⁸ Report No 257, paras 3.140 - 3.165.

⁹ *Ibid* at para 3.165, note 195.

¹⁰ [2001] QB 272 at [10].

the defendants' submission] that we should postpone doing so. To postpone would be to neglect our responsibility to provide certainty in this area as soon as it is practical to do so.¹¹

As it was, the Court of Appeal decided that what the Law Commission had recommended (that damages of more than £3000 should be uplifted by at least 50%) went too far. Instead the decision made was that levels of damages over £10,000 should be increased on a tapered basis with the highest awards lifted by 33%. So while the previous highest award for the most serious injury was £150,000 that was increased to £200,000. That level of increase changed the law and has been the basis for all subsequent decisions and of all subsequent editions of the Judicial College's *Guidelines*.

(2) Illegality as a defence in private law

The defence of illegality in private law has long perplexed the courts. Technical rules, some based on Latin maxims, such as *ex turpi causa non oritur actio* ('no action arises from a disgraceful cause') and *in pari delicto potior est conditio defendentis* ('where both parties are equally in the wrong the position of the defendant is the stronger') have tended to hold sway; and there has been little scope for the courts to address the underlying policies at stake and, in particular, whether the denial of the cause of action or remedy by reason of the illegality is a proportionate reaction. Early on – and when I was still at the Commission – our provisional proposal had been for legislation by which the courts would be given a structured discretion to decide on what the impact of the claimant's illegality should be in relation to an otherwise valid claim based on contract, trust, or unjust enrichment.¹² Many years later, after I had left the Commission, the recommendation in the Law Commission's final report, *The Illegality Defence*,¹³ was that, subject to one exception, to deal with the House of Lords' decision supporting the 'reliance principle' in the context of trusts in *Tinsley v Milligan*,¹⁴ reform was essentially within the interpretative reach of the courts and that judicial law reform was the preferable way forward.

So in its final report the Law Commission approved the approach favoured in its earlier consultation paper, *The Illegality Defence, A Consultative Report*¹⁵ that the courts should articulate and balance the various policies in play in deciding the central question of whether the denial of the claimant's normal rights was a proportionate response to the claimant's illegality. The policies articulated were furthering the purpose of the rule which the illegal conduct has infringed, consistency, that the claimant should not profit from his or her own wrong, deterrence, and maintaining the integrity of the legal system.

Despite my intuitive preference for judicial law reform, I was very doubtful whether the judges could bring about the necessary reform in its area. I wrote as follows about the final recommendation of the Law Commission:

'A problem for the largely non-statutory reform now favoured by the Law Commission is that it is clearly somewhat unusual for the courts, at common law, to articulate and balance policies in the

¹¹ Ibid at [48].

¹² *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, Law Commission Consultation Paper No 154 (1999).

¹³ Report No 320 (2010).

¹⁴ [1995] 1 AC 340.

¹⁵ CP No 189 (2009) esp at paras 2.35, 3.142 and 4.44.

way recommended; and it is unclear, for example, whether one would need to wait for the Supreme Court to signal this as the correct judicial approach. Moreover, it seems unsatisfactory to leave the 'no reliance' *Tinsley v Milligan* approach in play outside the proposed statutory reform of trusts. The wide-ranging statutory solution, previously preferred, would avoid such uncertainty and would sweep up reform of *Tinsley v Milligan* at the same time.¹⁶

Similar scepticism about a non-statutory solution was put forward by Lord Sumption in a lecture in 2012 to the Chancery Bar Association.¹⁷

In its Report, the Commission had already seen signs of support for its favoured approach from the House of Lords in the tort case of *Gray v Thames Trains Ltd*,¹⁸ in which Lord Hoffmann said, 'The maxim *ex turpi causa* expresses not so much a principle as a policy. Furthermore that policy is not based upon a single justification but on a group of reasons which vary in different situations'.¹⁹

Crucially the Law Commission's approach has recently been explicitly approved and applied by the Court of Appeal in two cases. In *Les Laboratoires Servier v Apotex Inc*²⁰ the leading judgment was given by Etherton LJ, who was Chair of the Law Commission at the time of much of its work on illegality. Etherton LJ said as follows:²¹

'Following its Consultation Paper No. 160 on "The Illegality Defence in Tort", the Law Commission in its 2009 Consultation Paper No. 189 and its 2010 final Report (Law Com 320) on "The Illegality Defence" recommended that the illegality defence should be allowed where its application can be firmly justified by one or more of the following policies underlying its existence: furthering the purpose of the rule which the illegal conduct has infringed; consistency; the claimant should not profit from his or her own wrong; deterrence; and maintaining the integrity of the legal system. As the cases plainly show, this does not mean that the illegality defence will always apply where one or more of those policy rationales is relevant. It means that, if the illegality defence applies at all, it must find its justification firmly in one or more of them. ... I do not accept, therefore, [counsel for Servier's] strictly exclusive four part categorisation of the circumstances in which, notwithstanding illegality, the claimant is not barred from recovery by the illegality principle. I readily acknowledge that his categorisation is a useful way of analysing the cases My objection is that it imposes an unwarranted inflexibility in a difficult area, whereas what is required in each case is an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce a just and proportionate response to the illegality. That is not the same as an unbridled discretion.'

¹⁶ *The Law of Restitution* (2011) at 601.

¹⁷ 'Reflexions on the Law of Illegality', 23 April 2012. The final paragraph of that lecture was as follows:

'It is true that in some cases the courts have been able to escape the harshness of the law, but they have done it by cheating, a process which is not conducive to either clarity or coherence in the law. The government is, I believe, still considering its response to the Law Commission's final report. We may be permitted to hope that it will prefer the more imaginative proposals which the Commission had put forward in its early consultation documents to the abandonment of the cause which is evident in its final report.

¹⁸ [2009] UKHL 33, [2009] 1 AC 1339.

¹⁹ *Ibid* at [30].

²⁰ [2012] EWCA Civ 593, esp at [66], 73] and [75].

²¹ *Ibid* at [66] and [75].

Etherton LJ's judgment and the approach of the Law Commission were then supported by the Court of Appeal in the contract illegality case of *Parkingeye Ltd v Somerfield Stores Ltd*.²² Sir Robin Jacob said:²³

'In applying the "disproportionate" test I do not think I am exercising a judicial discretion. It was settled by *Tinsley v Milligan*²⁴ that a defence of illegality point cannot be solved by applying a discretion based on public conscience. Proportionality as I see it is something rather different. It involves the assessment of how far refusal of the remedy furthers one or more of the specific policies underlying the defence of illegality. Those policies Etherton LJ identified in *Les Laboratoires Servier v Apotex Inc*,²⁵ (from the Law Commission report) as: "furthering the purpose of the rule which the illegal conduct has infringed; consistency; the claimant should not profit from his or her own wrong; deterrence; and maintaining the integrity of the legal system". Etherton LJ was careful to add: "As the cases plainly show, this does not mean that the illegality defence will always apply where one or more of those policy rationales is relevant. It means that, if the illegality defence applies at all, it must find its justification firmly in one or more of them."

Sir Robin Jacob concluded: 'I do not think the facts of this case, considered with a sense of proportionality, involve such an invasion of any of the policy rationales as to deprive ParkingEye of its remedy.'²⁶

Similarly, Toulson LJ concluded as follows: 'In summary, the disallowance of ParkingEye's claim on the ground of illegality is not compelled by the authorities, and it would not be a just and proportionate response to the illegality.'²⁷

3. Conclusion

If like me, you trust judges and have some scepticism about legislation in relation to English private law, there are alternatives. The Restatement project seeks to remedy the lack of accessibility that the common law might otherwise be thought to suffer from in contrast to legislation. And reform of the common law can be achieved by the judges even in areas where it might at first sight seem that legislation is the only way forward.

²² [2012] EWCA Civ 1338, [2013] 2 WLR 939.

²³ *Ibid* at [39].

²⁴ [1994] 1 AC 340.

²⁵ [2012] EWCA Civ 593, at [66].

²⁶ [2012] EWCA Civ 1338, [2013] 2 WLR 939, at [40].

²⁷ *Ibid* at [79].