THE NICHOLAS WALL MEMORIAL LECTURE 2023

Is Family Law law?

Lord Justice Peter Jackson

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There is a hierarchy in the matter of talks. There is the common or garden presentation, maybe as a panel member, maybe as a solo speaker. Moving up, there is the glory of a keynote address, perhaps even to an international audience. Some would urge the claims of the shrieval lecture, such as those given at Hereford or Oxford. The after-dinner speech, with its unrivalled possibilities for enriching or wrecking a convivial evening must be up there somewhere. But the memorial lecture is in a class of its own. It is a tribute to someone, no longer with us, who was recognised by their colleagues as being special. It is a chance to celebrate their memory and to pass it on.

It is therefore an honour and a pleasure to contribute this fourth lecture to the series celebrating Nicholas Wall. For me, Nicholas was a *beau idéal*, an excellent example of everything a family lawyer and judge should be. By that I mean that he was tough (I bear the scars) but also humane, with a combination of erudition, energy and social conscience that found expression in thoughtful, well-written decisions that clarified and developed the law, with an equal concern for good practice and procedure. And he was even a cyclist. He was also unsparingly frank for a senior judge. For example, during a 2006 lecture as a judge of the Court of Appeal – a memorial lecture no less, in honour of Allan Levy and David Hershman – he said this:

> *I remain permanently dispirited about much of what is (and what is not) going on in the family justice system, although since family cases now represent only about half my workload, I feel both out of touch and, to an extent, disempowered.*

A lesser man with those feelings might have called it a day on family law, but Nicholas was not that man and in 2010 he became President of the Family Division for all too short a time before his retirement in 2012.

As a new judge during his short presidency, my abiding memory is of being called into his room and coming out five minutes later having agreed to spend half my working life on the Northern Circuit for the foreseeable future. *"You'll love it"*, he said, and he was right. He had become the circuit's first FDLJ in 1996 and to this day he is warmly remembered by family lawyers from Chester to Carlisle. When he left the circuit in 2001, the FLBA took him for a farewell boat trip on the Manchester Ship Canal, and I was touched when they did the same for me sixteen years later, sending me on my way with gifts of a flat cap and a mug with a whippet on it.

I have tried to find a subject that would be worthy of Nicholas's consideration. The topic I have chosen is family law itself. I will touch on its history and describe what it has become. I will then consider attitudes towards family law before returning to my title: *Is Family Law law?*

Family law as practised in this country is a relatively recent creation. From the Middle Ages onwards, the dominant idea was that marriage was a sacrament. The gateway in and out was supervised by the church, applying ecclesiastical law. After marriage, the law strongly supported the husband's right to control his wife, her property and their children. As time went on, the courts of equity presided over a system of marriage settlements to protect the wife's property from the husband, but this was only of concern to the wealthy. Likewise, the Crown could intervene through wardship to prevent the property of infants, lunatics and idiots from falling into the wrong hands. So matters rested until the middle of the 19th century.

Within the Royal Courts of Justice, the Family Division occupies its own group of buildings. In a rather symbolic way, they are joined to the central block, where the criminal appeal and

civil courts are found, by an aerial judicial corridor. You can see it from the Strand. It is ice-cold in every season – it must be home to a poltergeist, offended at the demolition of the 450 houses that had to come down when the new courts went up. The corridor is lined with old law books, among them this terrific volume: *A Treatise on the Law of Adulterine Bastardy* by Sir Harris Nicholas KCMG. Published in 1836, it captures the spirit of the legal age. For an adulterous wife to produce an illegitimate child struck at the social order in a nightmare manner. It defied the husband's rights over her body and, by producing a fake successor, amounted to the grand theft of his name and property.

For similar reasons, attempts to escape from marriage altogether got nowhere, unless you had connections. The only way out was an annulment through the ecclesiastical court (a declaration that the marriage never existed) or a divorce by private Act of Parliament, of which there were 314 between 1700 and 1857, a pleasingly exact rate of 2 a year (compare the peak rate of 165,000 a year in 1993). Anyhow, the state first took a hand with the passage of the Matrimonial Causes Act 1857, which introduced divorce by a decree of the civil courts, but with a marked gender bias. A husband could divorce his wife for a single act of adultery on her part, but she could only divorce him, even if his adultery was repeated, if she could also prove cruelty or two years' desertion.

The 1857 Act set up a new court: the Court for Divorce and Matrimonial Causes, with a solitary judge. Sir Cresswell Cresswell was a bad-tempered bachelor of no prior legal distinction, who had graduated from Cambridge with the lowest degree in the entire university. But he had been an MP and his ancestors had served in the Crusades. And cometh the hour, cometh the man. In 1857 there had in fact been not two but three divorces; the following year there were 300. Sir Cresswell threw himself into making a success of this new and controversial court and became a national treasure to unhappily-married middle-class women, until he died five years later after falling off his horse. By then the court was established and with the Judicature Acts

of 1875 its judge became President of the Probate, Divorce and Admiralty Division of the High Court of Justice. A century later, in 1971, the present Family Division emerged and it has now been with us for half a century. Of its eight Presidents to date, Nicholas Wall was the sixth.

Before I say something about the present nature of family law, it would be wrong to overlook other advances in the years since the Judicature Acts. To pick out six milestones: the Married Women's Property Act 1882 established the separate legal identity of married women and their independent right to own property; the Guardianship of Infants Act 1925 enshrined the welfare principle ahead of the common law rights of parents; the Adoption of Children Act 1926 created the legal status of adoption for the first time; the Legal Aid and Advice Act 1949 made remedies available to poorer litigants; the Matrimonial Homes Act 1967 conferred rights to occupy the family home on those who were deprived of protection because trusts law conferred no special status on spouses; and the Divorce Reform Act 1969 allowed divorce on the basis of irretrievable breakdown without the need to prove fault in every case. It was in 1969 that Nicholas was called to the bar here in Gray's Inn, so we are now entering what might loosely be described as the present day.

But let us return for a moment to the icy corridor to further consider the contrast between today's family law and what went before. The first edition of *Rayden on Divorce*, published in 1910 and the only edition to which William Rayden himself contributed, isn't there, but here is the second edition, which came out in 1926. It is a substantial volume, running to 700 pages. How much of it relates to children? One paragraph, which with its footnotes runs to slightly over one page. It is entitled '*When the guilty party may obtain custody or access'* and relates that, until a 1924 decision of which the editors approved, you could if you were a father but couldn't if you were a mother. Before then, as one footnote relates,

"The early attitude is represented by the judgment of Sir C. Cresswell in 1862:

> *"It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of or access to her children.""*

Before we get too smug, in 1984 I represented a father in a custody dispute. He was a pornographer whose wife, represented by the young Pat Scotland, had left him for another woman. On his behalf, I was able to cite recent Court of Appeal authority to the effect that a homosexual parent should only have custody of a child in exceptional circumstances. Fortunately for the children, a wise deputy, Aubrey Myerson QC, was having none of it.

That 1926 edition of *Rayden* was edited by Clifford Mortimer, immortalised by his son John in *A Voyage Round My Father*. It was John who once said in interview:

> *"Knowing the law is not much help for an advocate. In fact, it's a bit of a disadvantage, cramps your style."*

On the other hand, the preface to his father's 1926 book contains this passage:

> *"... [T]he attitude of the Court has altered upon many important matters, and the alteration has been, if we may be permitted to state our opinion, in the direction of greater humanity and common sense... Nothing is more troublesome in its exercise than an unfettered discretion; human nature craves for a strict rule to which any case can readily be referred, and in this respect Judges are not inhuman."*

I will return to that thought in a while.

In this unscholarly account of the past state of family law, we have reached the point where those of us who are coming to the end of our careers began them. It was a time when family

law was typically and usually condescendingly referred to as matrimonial law, and one can see why. Family law was only just beginning to move beyond the narrower concerns of previous generations. Even in the 1960s, adulterous wives found it hard to get the remedy quaintly but persistently known as ancillary relief. They were then faced with the one-third rule, a relic of the ecclesiastical courts' practice that the husband's assets should be divided in thirds between himself, his wife and their children, even if there were no children. A more structured approach to financial remedies began to take shape through the Matrimonial Proceedings and Property Act 1970, which introduced the distinctive checklist that eventually became section 25 of the Matrimonial Causes Act 1973; it limited the relevance of conduct and by subsequent amendment promoted the concept of the clean break. At the same time, the Domestic Violence and Matrimonial Proceedings Act 1976 made a first step towards securing protection for victims of domestic abuse. Then, the Children Act 1989, again with a strong checklist, set up a Convention-compliant framework for cases about children and virtually abolished wardship in the process. The same was accomplished for persons lacking capacity with the Mental Capacity Act 2005. The Civil Partnership Act 2004 provided legal recognition for relationships between same-sex couples, and the Marriage (Same Sex Couples) Act 2013 recognised the equal right to marry. The long wait for no-fault divorce finally ended with the Divorce, Dissolution and Separation Act 2020. Now, in 2023, the Government has asked the Law Commission to review the discretionary powers given to judges over the division of financial assets, and to consider whether the law can give more certainty to divorcing couples by embedding principle in statute.

I have subjected you to this rather dry recital of legislation to show that modern family law is largely a creature of statute. Having set the scene, the time has come to survey what it has become in terms of range, gravity, scale and character.

Starting with range, it is arguable that the Family Court and its cohabiting cousin, the Court of Protection, are now home to a wider variety of work than any other branch of the law. All human life is there, from before the moment of conception to death and beyond. Put another way, family law engages almost every Convention right: Articles 2, 3, 5, 6, 8, 9, 10, 12, 14 and A1P1. In broad terms, a family lawyer may come upon cases in any of these eight categories:

1. Cases about children:
    - Disputes within the family about where and with whom they should live, who they should see, where they should go to school, and so on.
    - Child protection proceedings, leading in the most serious cases to adoption. These may require major fact-finding involving scientific and medical evidence; the more complex cases are akin to multi-party criminal trials.
    - International cases concerning the recognition of foreign orders, or the removal of children across borders through inward or outward abduction and relocation.
2. Financial cases, some involving sums that would not disgrace a medium-size PLC, and requiring an understanding of tax, trusts and all the other strategies employed by individuals, who prefer to be described as being 'of high net worth' rather than 'rich', to shelter their assets via complex corporate and offshore structures.
3. The protection of individuals from violence, coercion and harassment, often of criminal intensity.
4. The protection of the welfare and financial interests of incapacitated persons by the Court of Protection, including the authorisation of deprivation of liberty, a growth area in an ageing population that also includes an alarmingly large number of young people who are out of control.
5. Approval for the giving or withdrawing of serious medical treatment for children or incapacitated adults, including the removal of life-sustaining treatment.

6. Cases at the frontiers of scientific knowledge and social debate about parentage, assisted reproduction, surrogacy, gender, sexual orientation and religion.
7. Disputes about trusts of land, wills, inheritances and even the disposal of bodies.
8. A small rump of cases about the legalities of marriage and divorce.

All this is what 'matrimonial law' has become. Getting in and out of marriage itself, once the main issue, is rarely an issue at all, and instead of trapped spouses we now have vulnerable cohabitees, a group that is ripe for proper protection. And because we live in the age of the individual, and family law so closely relates to individual concerns, there is no sign that this expansion, this explosion, of subject-matter is likely to abate. On the contrary, although equality of gender and sexual orientation has been established, new battlegrounds are being found all the time.

As for gravity, the separation of a parent and a child through adoption or the ending of a life by withdrawal of life-sustaining treatment are the heaviest decisions a court can make. They are conventionally described as 'draconian', but even routine family cases may concern matters of tremendous importance to the family itself, and we must never forget that. On a lighter note, Draco was the chief magistrate of the Athenian republic in the 7th century BC, who instituted a very severe penal code. When asked why he had fixed the punishment of death for most offences, he said that he considered these lesser crimes to deserve it, and that he had no greater punishment for more important ones. Legend has it that met his own end in a rather unusual way. While he was at the theatre, his supporters decided to show their approval in the traditional Greek manner, by throwing their hats, shirts and cloaks on his head. So many garments were thrown that Draco suffocated. Who said legal history was dull?

Coming to the scale of modern family law, the published figures for court sitting days tell this story. In 2021, in round numbers, judges and legal advisers sat in the courts of England and

Wales on a total of 330,000 days. Broken down between crime, civil and family, 100,000 of these sitting days were allocated to crime, 76,000 to civil, and 139,000 to family, of which 83,000 were in private law and 56,000 in public law. The High Court sat for 9,300 days, of which 2,800 were in the Family Division and the Court of Protection. In the Court of Appeal (Civil Division) applications for permission to appeal in care cases currently represent over a quarter of the total number of applications to the court. The overall picture is that over 40% of sitting days are currently allocated to family law matters.

I list these figures to show the scale of the enterprise, not to glory in it. 140,000 family days in court each year represent a great deal of human anguish and expense, much of it needless. One could well wish that we needed fewer judges, sitting less often and without the unremitting intensity that now characterises the work of the Family Court. There should be fewer cases in the system and those that are in it should be shorter. But on any view the range, gravity and scale of the work shows that our family justice system and the law that underpins it have arrived at a state of maturity.

And so to the character of family law. As we have seen, and this is important, it is nowadays largely a statutory jurisdiction. In matters relating to children and the incapacitated, Parliament has explicitly chosen the welfare principle as the lodestar: the child's welfare shall be the court's paramount (i.e. most important) consideration and any decision made in respect of a person lacking capacity must be in their best interests. Preferential treatment of this kind does not appear in other areas of the law, where the common law and the human rights Convention seek to achieve even-handed fairness between parties. The welfare principle does something different. It emphasises the special position of the child or incapacitated person, who are very likely not to blame for the situation in which they find themselves. They are a human being, not a piece of property or a sum of money. They may be the object of a dispute, but they are the subject of the proceedings.

At the same time, the welfare principle does not ordain welfare as the only consideration. The welfare checklists, allied with respect for Convention rights, widen the focus and provide a broad framework within which decisions must be structured. The procedural rules are similarly adapted. The overriding objective of the civil rules is "enabling the court to deal with cases justly and at proportionate cost", while in crime, the pithy objective is simply "that criminal cases be dealt with justly." In comparison, in family cases the objective is "enabling the court to deal with cases justly, having regard to any welfare issues involved."

The distinctive character of family law lies in its principled flexibility. It is of course important to get the balance between principle and flexibility right. As Mortimer *père* wrote, an unfettered discretion is troublesome and some people, including some judges, like strict rules that just give you the answer. But the right approach is neither unfettered discretion nor strict rules: we have had enough of both in the past. The balance we have chosen is typified by those checklists, found in the Matrimonial Causes Act 1973, the Inheritance (Provision for Family and Dependents) Act 1975, the Children Act 1989, the Trusts of Land and Appointment of Trustees Act 1996, and the Adoption and Children Act 2002. These non-exclusive lists, uncharacteristic of other legal contexts, guide the decision but they do not prescribe it.

A further aspect of family law is that it is usually more concerned with prediction than other branches of law. A criminal or civil court may centrally be deciding whether an assault occurred or whether a trader acted dishonestly; the family court may be asking whether a parent injured a child, but for it that is not the ultimate question. It has to go on and look to the future and ask itself what sort of a person this parent is. If they did it before, will they do it again? This involves an effort to understand what the person is really like and then to work out what the child really needs. The decision may have lifelong consequences, and the court must take the initiative in trying to get it right. That responsibility does not generally exist in civil and criminal proceedings. Some consider that it is this inquisitorial character that differentiates

family law. However, family law has its own adversarial characteristics – too many of them – and the adversarial/inquisitorial distinction is not a fully satisfactory explanation in cases about children. To the extent that family law is different, it is because of its distinct statutory objective and its statute-mandated flexibility. Its inquisitorial features are a symptom of the difference, not the cause.

One consequence of the welfare objective is that the most deserving litigant is not always successful. Privileging the child's welfare may lead to uncomfortable results. In care cases, the parents may have had truly terrible childhoods themselves, and it is particularly disturbing that mothers who are the victims of severe domestic abuse may lose their children if they cannot escape the cycle of their own oppression. If they are trapped in it, the welfare principle is society's painful way of breaking the cycle for the good of the child in a way that can be extremely unfair to the mother. This is not soft law. In times past, the idea seemed to be abroad, including at the Judicial Appointments Commission, that sensitivity was the distinctive requirement for a family judge. Now, there is a general recognition that sensitivity, necessary as it is, won't get you far without toughness.

A consequence of the flexible character of family law is that assessments are routinely multi-factorial and case-specific. Outcomes will typically turn more upon the court's feel for the case than they will in legal contexts where more of the page is pre-populated with black letter law. This suits some practitioners more than others.

It is well said that welfare and child protection do not justify a wholesale disapplication of established legal principles. That would indeed be to allow unfettered discretion. But at the same time the importation of rules forged in legal contexts that lack the lodestar of welfare may cut across the statutory objective. I will give some examples once I have said something about attitudes to family law.

I start with legal education. Because family law was a slow developer in comparison to other legal topics, its profile in legal education was modest. The first student textbook, Bromley's *Family Law*, was published in 1957: compare the first editions of Anson's *Law of Contract* (1879) or Pollock's *Law of Torts* (1887). Today, family law is no more than an option among many others for law students, while crime, contract, tort, trusts, land law, public law and EU law (still) are mandatory courses. Take this course description for the undergraduate degree at one of our leading universities:

> *"First-year units are designed to help you start to think, write, reason and argue like a lawyer, while developing key skills in research and analysis…*
>
> *As you progress, our second- and third-year units provide increased flexibility to focus on what interests you most. Our wide range of specialist units span banking and finance, international and commercial law, criminology, IT, environmental, health and human rights law…"*

I do not draw attention to the invisibility of family law in any spirit of complaint, despite the high quality of much academic family law scholarship. I never studied family law myself, though this well-thumbed copy of the second edition of *Cretney* (1976) shows that Lord Justice Baker did. It is in any case understandable that law schools should identify a range of established subjects to get you 'thinking like a lawyer', so you are then equipped to 'focus on what interests you most'. In carpentry terms, those subjects no doubt teach you to measure accurately, cut straight and make those joints nice and snug. But it is easy to slip from there into making the false assumption that the mandatory civil subjects, heavily based in common law and equity, contain the blueprint for real law and that it is only by mastering them that you will become a proper lawyer.

My own experience was of excellent teaching in a range of classic legal subjects. I am surely the better for knowing how to manumit a slave, or how to recognise the rule against perpetuities. But as a young advocate these insights, along with my fragile command of the concepts of fundamental breach and the recoverability of pure economic loss, were never really tested, even though my chambers was then a common law set, fourteen strong, and covering a dozen practice areas. To be 'a general common lawyer' meant that you were expected to have, or at least pretend to have, some degree of competence in all the routine work of the Magistrates, Crown and County courts: crime, personal injury, contract, landlord and tenant, housing, debt, licensing and, yes, divorce. There were of course subjects like chancery and tax that were off limits, and there were even two specialist matrimonial sets, but there was a strong gravitational pull to the idea that law was law and that a good all-rounder could turn his hand to any game (and it usually was *his* hand; there were then just two women in my chambers). In that world, it was not surprising that some people approached a case about access to children in much the same way as they approached a possession action.

By contrast, when I left chambers thirty years later, there were 76 members doing one thing, family law. That of course means that they don't do the jury trials and running down actions that we once did, but then no one is asking them to. So the gravitational pull towards a unitary idea of the law is no longer coming from within each practitioner. Instead, it depends upon the different practice areas being aware of what is happening elsewhere, learning and borrowing from the good, noting and avoiding the rest.

Alongside the increasing specialisation on the part of lawyers and judges, family law has led on gender balance in the profession. It has always offered better opportunities for women lawyers than other fields of practice. For example, at the time I left chambers, precisely half its members were women. Now the men are in a minority (38 out of 82). By contrast, a randomly chosen commercial set with 85 members contains 69 men. Both are leading sets, but

one has a distinct advantage in life experience. Despite that, the fact that women are found in larger numbers in family practice than elsewhere has led some people to look down on family law. Likewise, to those who 'don't do legal aid', the fact that a lot of family clients depend on it has somehow been seen as a judgement on family law rather than on themselves. I have already mentioned that some practitioners have less of a taste than others for flexibility. Finally, family cases concern emotions, which some find hard to reconcile with 'thinking like a lawyer'. I mention these matters to support my argument that an area of law that is gender-balanced, public-spirited, pragmatic and emotionally intelligent has no reason to feel diffident about its pedigree.

Similarly, the family justice system is thought to have performed particularly well in the pandemic, both in comparison with other countries and with other disciplines domestically. IT was energetically and imaginatively harnessed by the Family Court to enable an appropriate range of remote, hybrid and attended hearings, meaning that the service continued at a time of great need.

Pausing to take stock, this lecture comes in three parts, like Henry VI and The Godfather. In Part One, I traced the historical emergence of family law as a distinct entity. In Part Two, I said something about its current characteristics, noting the tenacity of classical civil subjects at the heart of the academic curriculum, and praising some progressive aspects of family law practice. It is now time to turn to Part Three and the question posed in my title.

I will be referring by name to just one reported authority today, and that moment has arrived. *Rumpelheimer v Haddock* concerned the important question of whether the law of the land or the law of the sea applied on Chiswick Mall at a time when it was flooded by the River Thames. Naturally, it was tried by none other than the President of the Probate, Divorce and Admiralty Division. In finding that maritime law prevailed, he said this:

"The question is, 'What is the law?' – a question which frequently arises in our Courts and sometimes receives a satisfactory answer."

I think you will agree that this observation from one of A. P. Herbert's *Misleading Cases* does not advance matters a great deal, but that is often the way with caselaw.

So *Is Family Law law?* Superficially, the question is obtuse and the answer obvious. But I chose the title as a way of considering what 'law' is and how much we should care when family law differs from what is sometimes called 'the general law'.

Thomas Aquinas described law as the rule of reason for the common good. Whatever the legal topic, the common aim is to achieve justice with procedural fairness and efficiency. The wisdom of ages has shown that certain broad rules tend towards this end: listening to both sides before making a decision, not relitigating the same subject matter, not having an interest in the outcome of one's decisions, following binding precedent. They all have Latin tags, and sensibly they are not absolute. Sometimes decisions have to be taken without hearing from everyone, sometimes cases are relitigated, judges are not expected to have no interest whatever in the cases they decide – for example, it would normally be wrong to recuse oneself from hearing a large care case involving one's own local authority, even if the outcome might put a penny on the rates – and sometimes binding precedents are revisited.

If one then moves beyond this level of generality, one finds that the varied branches of the law share many characteristics. For administrative purposes, the civil work of the Court of Appeal can be broken down into 17 workstreams, but members of the court sit in all areas. When doing so, we notice the broad commonality of approach between courts working in different fields, but we also notice the differences. The principles and practices that regulate intellectual property licensing are not identical in all respects to those that apply to care proceedings, and why should they be? But variance between subject areas must be justified and some rules are

universal. The answer to the question of whether property belongs to a company or an individual cannot depend on whether it is given in the Rolls Building or the Queen's Building.

Predictability promotes consistency and certainty for the common good. It is an important characteristic of the rule of law and deserves high respect in any developed legal system. But consistency is a servant of justice and there is no credit in being consistently wrong. A legal or procedural rule that has been developed in one context may well be applicable in another context, but that is not automatic. To insist otherwise is to privilege a theoretical vision of the law, and in this respect, to borrow from Mortimer *fils*, knowing too much law can be a bit of a disadvantage. Our law is not a code, but an amalgam of common law, statute and convention, the product of occasional strategy and continual pragmatism. The 'seamless web' theory of law does not require that all parts of the law are identical, but rather that unnecessary gaps are avoided and that the joins are no more visible than they need to be.

The argument that family law should conform to 'the general law' tends to enlist geographical metaphors. Family law must not be allowed to become 'a desert island', with its castaways and palm tree justice. It is not 'some legal Alsatia' – I had to look that up, it was an area south of Fleet Street that was beyond the reach of the law and was consequently the haunt of 17th century fugitives from justice. These analogies are entertaining, but they are tilting at windmills. No one is suggesting that family law should not respect proper principles. What is in issue is whether rules derived and applied in some areas of the law should be imposed everywhere, regardless of the consequences. A better geographical metaphor is not a mainland of civil law with an offshore island of family law, but a continent on which all areas of law co-exist. As with any continent, there will be common features, but there will also be regional variations. There is no mono-climate: one does not expect the same weather in Chiswick and Athens, at least not yet. One region is not an exception to another, it is just different in certain

ways. Talk of 'family exceptionalism' fails to recognise this. Where is the talk of 'criminal exceptionalism'?

Issues of this kind arose in recent decisions in family appeals about foreign convictions and about issue estoppel. In the first decision we rejected the argument that we were bound by a rule devised in a road traffic case in the 1940s, and we said the same in the other case about a rule originally formulated in a bankruptcy context in the 1870s. We refused to torture the civil rules into confessing an exception to cover our cases, and instead recognised that the rules in the family cases are different when they need to be.

The question of transparency is another example. I strongly support the family courts being as open as reasonably possible. Nicholas Wall set an example by energetically publishing his judgments and he eventually brought most of the Family Division with him. That was a major contribution to the opening-up of family practice to public scrutiny. The general benefit of doing justice in public is a powerful consideration, but there are times when public justice can come at too high a price. It is not apparent what public interest is served by the routine publication of intensely private information that can be traced back to individuals who have been unfortunate enough to find themselves before a court. If people find that details of their private lives will be exposed to public gaze for no better reason than that they need a divorce or a financial settlement, they may be deterred from pursuing a just cause. Those who can may go elsewhere, leaving the courts to those who can't. So I would not take a doctrinaire view on the basis of general norms. Here, the rhetoric champions the disinfectant effects of sunlight, but there is a limit to how much disinfectant one wants to have about the place, and too much sunlight is bad for you. As with most things in life, one should look for a happy medium.

Each branch of English law is in a continual state of development and of learning from elsewhere. An example of good learning concerns expert evidence. In the late 80s a judgment

in a shipping case set out some broad principles. That lead was soon taken up and developed in the family law context in a judgment given by a new Family Division judge whose identity you will have no difficulty guessing, and a few years later he and Iain Hamilton wrote the *Handbook for Expert Witnesses in Children Act Cases*, a document that is equally accessible to lawyers and experts.

Another example of borrowing is the Scott Schedule, invented by George Alexander Scott, the Official Referee in the 1920s, as a form of pleading in building defects cases. Some years ago, it was enthusiastically taken up as a form of pleading in domestic abuse cases. Scott won't have expected that, and a century later we are trying to work out how his schedules help and how they don't.

An example of something that does not, in my view, translate well is the recent encouragement to family lawyers and judges to prefer documentary evidence to oral evidence and, relatedly, to place little weight on the demeanour of witnesses. There is much to be said for this in commercial litigation where there will often be a rich digital paper trail, but it does not transplant so well to the thinner soil that may be found in family cases. Granted, the parties' social media may shine light on what was going on at the relevant time, and there will often be professional record-keeping that deserves a lot of weight – and will be given it. But in the Family Court, oral evidence may give insights that are not in the gift of logic and cannot be picked up on paper. Sensible practitioners and judges will understand that all manner of cognitive bias can creep into the giving of evidence and the drawing of conclusions about it. Yet a person's manner of giving evidence (their demeanour) may tell you something important about their character as a partner or a parent, provided any conclusions are drawn with a seasoned caution. The fact, underpinned as it is by psychological research, that impressions cannot be taken at face value is not a reason for the court to deprive itself of this information, and besides, a parent is surely entitled to be listened to when a decision is being taken about

their child. In criminal trials, jurors are expected to form a view of the witnesses, using their ordinary experience of life, and both there and in the family jurisdiction we pay close attention to the recorded interviews of young children. Compelling accounts can be given in a few words and, as anyone who has watched these video recordings will know, in how they are spoken – in the children's demeanour. It is true that some of the worst people make the best liars. Similarly, a very poor witness may well be telling the truth. But it is the judge's task to work it out, and overall there is no sign that bad decisions are being made in family cases as a result of naïve assessments of oral evidence. The judgments that I read do not refer to demeanour that often and when they do it is usually to describe florid characteristics that it would be senseless to ignore. I would be the first to say that we should make oral evidence shorter and more focused, but that is a different point. The position remains that family judges must, as they have always done, apply their judgement to all aspects of the evidence when reaching their conclusions.

I have mentioned these examples from a serious conviction that we have been here before. Family law started life in the shadow of contemporary preoccupations. It was grafted onto an adversarial system that had been forged for different uses and its anomalous position was epitomised in the Probate, Divorce and Admiralty Division, a refuge for subjects that had no other home. The pressure on family law to conform has been considerable, but it has withstood it and developed the degree of flexibility that is necessary for sound and principled decisions.

To practise family law well demands fortitude, forensic acuity and an understanding of human nature. Whether you are a Mortimer *père*, textbook writer, or a Mortimer *fils*, trial advocate, it is an ideal home for an able lawyer with a concern for people, in other words for someone like Nicholas Wall. Nicholas made his contribution as editor of *Rayden* in his turn, and as a particularly influential judge in the early years of the Children Act and the Adoption and Children Act. He was the quintessential family lawyer and a good lawyer by any definition.

He would still find many things to dispirit him in the family justice system but his response would not be purist, but practical and principled, developing the law to meet people's needs.

So finally, back to the question. My answer to it is this: *Family law is law, and law is itself a family*. Its branches are relatives, sharing the same legal DNA but differing in age and personality. They have a huge amount in common but they are not clones of each other or of some venerable ancestor. At all events, the days when family law could fairly be described as a poor relation are long gone. Far from it, family law is rich in interest and importance, and can be confident in its identity. When family cases throw up distinctive problems, family law may need to find distinctive solutions.

It would be wrong of me to leave you with the belief that this lecture has been my own unaided work. Its last section was prompted by thoughts about some judgments and extra-judicial writings of Mr Justice Mostyn, another great Nicholas of the Family Division, who will be hanging up his wig far too soon. There is much here with which he might disagree, but I want to acknowledge Nick's signal contribution to English family law with admiration and respect.

I end on a flight of fancy. In describing family law as having reached a state of maturity, my vision is not that it should carry on ageing like the rest of us until it becomes senile. Family law has already experienced its old age in past centuries, with their narrow range of concerns and sclerotic procedural rules. We need to learn from the wisdom of years, embodied in great practitioners and judges of the past, who were no less well-intentioned than we are today. But, looking to the future, we should not be telling family law to grow up and behave like everyone else. Rather we should be encouraging it to become simpler, more flexible, and more open to new ideas and experiences, in fact to become younger.
