Common law reasoning and institutions

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**Learning outcomes**

When you have completed this chapter (and the relevant readings) you should be able to:

- approach the study of *Common law reasoning and institutions* in a systematic way
- understand what the various elements of the subject guide are designed to do
- appreciate the London package or materials and begin your studies through analysing what is meant by different perspectives
- understand the limits of the London package and the role of other learning resources, such as the tuition provided by private institutions
- explain the relevance of learning concepts (such as the idea of ‘learning objectives’ and in text activities), the use of the online resources and the assessment process.
1.1 Welcome message

This subject guide is designed to help you study the foundational subject: Common law reasoning and institutions (CLRI).

We hope that you will be successful in your studies.

The London LLB and Diploma are studied by many people worldwide and we in London are ambitious for you to achieve success. There are various factors influencing success:

- some relate to achieving a balance in your personal circumstances (such as work or family commitments) which make it difficult to put in the degree of application the course of study requires, while

- some relate to understanding the demands and techniques of study.

This opening chapter outlines our expectations on studying this subject and explains what you need to do to achieve success.

Why study this subject? The content specific answer to this seems simple:

1. Since many countries in the world today have a ‘common law’ heritage, studying this subject will help you understand common features of reasoning and institutional operations in these legal systems.

2. All common law countries derive their legal systems from contact (in imperial or colonial times) with the English legal system. Therefore looking at the institutions and processes that comprise the English legal system – which deal with the disputes involving citizens, companies, public bodies and the state in areas of criminal, administrative, family, civil and commercial law for England and Wales – will enable you to understand the operation of the substantive law you study in other subjects and help you look at how other legal systems deal with similar issues.

But there are additional reasons to do with orientation to study either on the LLB or the Diploma:

3. This course – CLRI – is fundamental to your broader legal studies. The skills involved in legal research, identifying the sources and statements making the ‘law’ and reading cases and interpreting statutes are called upon in all the substantive areas of study for a common law degree. Appreciating the functions of courts and the judiciary, as well as the context in which substantive law doctrines are to operate, i.e. criminal, civil, administrative or family law processes, is crucial to understanding law as a living phenomenon rather than as a collection of dead words. Substantive law texts may emphasise legal doctrine and the nature of legal reasoning, but the quality of justice is also a product of the quality of the institutional arrangements in place and the personnel involved.

The role of assessment

If one balance to be aimed at is that of work/family life and study, another is preparation for assessment versus understanding the subject.

We want you to go far beyond playing the game of preparing for examinations.

We emphasise that examinations are the main mode of assessment for how well you have studied; but a mode of assessment is all that they are. The course is not a ‘prepare for an examination’ course. Instead the learning outcomes and objectives of the course should be carefully considered and if you have achieved those the assessment will be easy!
To achieve these goals we provide a rich resource environment involving written/printed materials, an extensive Online Library and a virtual learning environment (VLE). The core learning tool is this subject guide. We assume that you will start at the beginning and work through the guide sequentially, doing the readings supplied either in the textbook or the study pack, accessing the Online Library and doing the activities as directed. It may be tempting to start with, say, the idea of rights or the operation of the criminal justice system, but this is not a good idea. The topics should not be treated in isolation. It is obvious to the Examiners which students have made the interconnections and developed a critical awareness. We presume you will blend together a range of activities to gain substantive knowledge with acquisition of skills:

- reading and recognition of the issues involved; each chapter will highlight the most important aspects of the topic and give guidance about essential and further reading, much of which will be found in the provided textbook or the readings in the study pack
- doing activities; within each chapter you will find exercises (activities) designed to enhance your learning by doing, and conducting legal research
- analysing research findings and engaging in basic numerical interpretation
- answering research findings and engaging in basic numerical interpretation
- reviewing sample examination questions with advice on possible approaches to the questions.

What do we want you to achieve?

We are looking for deep learning – understanding, application, analysis, reflection – not rote-learning.

In addition we want you to develop self-reflection, both on your understanding of the subject matter and on the learning process you are engaged upon. CLRI is not a subject that has a core syllabus that you can find reproduced in a range of textbooks. In fact, there are a very large number of topics that could be studied and a large number of perspectives by which they could be viewed. The topics and list of materials to read are deliberately chosen by the course teams to provide a particular type of emphasis on the subject and to cover skills as well as subject content. Please understand at the beginning the approach we want you to adopt. You may already have a common sense ‘knowledge’ of the legal system that you are living within and perhaps the first approach we want you to adopt is a questioning of basic, ‘taken-for-granted’, assumptions. You will be expected not only to grasp how certain processes and institutions cohere and interact, but also to have an opinion about their functioning and development. Remember that academic study is more than descriptive learning – it involves asking: what is the meaning of all the material and how do things interrelate?

Note the frequency of change and reform

The contemporary English legal system is in a process of constant change and it would be helpful if you followed changes by reading a British daily broadsheet newspaper (The Times, Daily Telegraph, the Independent or the Guardian) and followed current affairs through journals and the media. In the past year there have been controversial proposals to create a Supreme Court and abolish the highest judicial post in the legal system. It is, however, essential to grasp fundamental issues and conflicts between the different demands made of the legal system. Students sometimes try to follow all the latest changes without understanding the reason for them or their impact.
1.2 Outline structure of the topics

This subject guide has been structured to enable you to proceed from the basic foundations through to a detailed understanding of the different topics that rest on these foundations. The guide follows a particular structure of study and focuses specifically on:

- thinking about the nature of legal systems generally
- identifying criteria by which to judge the operation of the English legal system
- identifying key features of the common law tradition and the way they have developed within the English legal system
- the principles of legal research and identifying the sources of law
- being able to use the legal resources in the online library as well as paper based resources
- the nature of social science research methods in social-legal studies and being able to critically read research articles/findings
- the nature of courts and alternative decision-making bodies
- becoming familiar with case law, being able to critically read case reports and understand the forms of legal reasoning involved in the development of the common law
- understanding the legal reasoning involved in the application of statute law
- the issues surrounding the judiciary and the selection of suitable persons to become judges
- the criminal justice system in outline, with particular reference to the jury and miscarriages of justice
- the idea of rights in the legal system
- the civil justice system, with particular reference to reform
- the political economy of justice, including legal aid, access to justice and the legal profession

These are the topics; what is more difficult to describe is the attitude to study and the skills required for success.

1.3 How to be successful with the London Programme

There are a number of vital factors you need to consider.

1.3.1 Activities, SAQs and sample examination questions

‘Activities’ are an important feature of this guide, as with the other guides within the learning package of the London programme. What do we mean by them generally and how are they to be used in this particular guide?

Generally ‘activities’ take the form of questions or tasks inviting the reader – you – to do something. Some of the activities will be located on the VLE. The basic idea is that you learn by doing, not just by passively receiving information. Knowledge is knowing how, not just knowing what. For example, legal research is an essential skill of any lawyer, but it can not be learnt by memorising some list of the ‘sources of Law’ and some abstract principles of legal research, but only by doing. In the case of CLRI, the ‘doing’ involves using the extensive online resources that the University provides via the Online Laws Library.

The big problem with activities is that the view and expectations of the course designer as to the role of activities may not be shared by the student (or the tutors in the many third party institutions that offer support).
Activities are designed to reflect some of the processes involved in on-campus study. These activities are designed to help you learn. They cover some of the learning processes on which you will be assessed, however, in the past students have been asked if they have done the activities and many have not. They have even said they are too busy learning the subject to do the activities!

Activities are meant to help you by encouraging the learning process in which you encounter ideas, and as a result (hopefully) you will:

- remember ideas in the package of material supplied to you
- understand the ideas in the package
- make use of the ideas in the package
- practise towards certain objectives
- reflect upon your own thoughts and feelings
- monitor your progress.

Activities will not generally have simple ‘yes’ or ‘no’ answers: often you will need to write down a few sentences, or notes. Activities also give you useful practice in using legal English. In some cases, feedback is provided at the end of the chapter, but it is essential to do the activities before you look at the feedback.

Do each activity to the best of your ability, then check the feedback. How well did you do? If your answer to the activity was incorrect or incomplete, think carefully about what went wrong. Do you need to re-read part of the textbook, or work through the subject guide chapter again?

Self-assessment questions (SAQs) are different. These are factual questions designed to test your memory of the chapter you have just worked through. You may find it useful to ask a friend, fellow student or family member to test you on these questions. No feedback is given with SAQs because you can always find the answers somewhere in the text of the subject guide chapter, or in the readings.

Sample examination questions

Some chapters contain one or two sample examination questions. These are examples of the kind of examination questions that have been asked on the particular topic in previous years.

You should answer the examination questions fully. This will give you practice in presenting your knowledge and understanding of the topic in a thorough and integrated way. Think about each question. Ask yourself:

- What does this question relate to?
- How does this topic relate to the overall issues of the legal system?
- What data do I need to answer it, in terms of theoretical approaches or criteria of judgment?
- Is this a topic on which there are differing academic views?
- What is an appropriate, balanced solution to the question?

Then read the ‘advice on answering the questions’ that follows. This will help you put together an effective answer. Spend 30–40 minutes writing your answer.

By writing down answers you will develop the skill of expressing yourself clearly and logically on paper. It will also help you to approach the examination at the end of the year. You need as much practice as possible in writing fluently and lucidly throughout the academic year as preparation for your examination.
Cases
A number of cases are mentioned in the text and several of the activities involve working with large extracts from cases. Since developing the skills of reading case law is a fundamental part of the skills needed for your study of the common law, studying these cases will help you in your other subjects too. We hope that you will begin to appreciate the complexity of cases and will read in full a number of the leading cases. Make use of our Online Library facilities containing the Law Reports. Case books can only convey a selection of the real detail found in the reports themselves.

Further reading
When you have completed your study of a section or chapter of the guide and textbook, check whether any ‘useful further reading’ is recommended.

1.3.2 Skills
The common law tradition emphasises oral presentation, arguments and the marshalling of large bodies of text for the purpose of defending or presenting your clients’ interests.

Key skills or competencies that are needed include:
- to discern themes and patterns in large amounts of disparate information
- to scan large amounts of written materials to draw out argumentative threads
- the ability to explain the different sides of a controversial issue
- to make, apply and criticise precise distinctions
- to separate rapidly the relevant from the irrelevant
- to think logically
- to think critically
- to research
- to plan
- to communicate; to argue fluently, concisely and persuasively, both orally and on paper
- to concentrate, working with speed and stamina.

Self-reflective skills are also essential:
- to learn from experience
- to gauge how the learning experience is working and to identify weaknesses
- to use the above skills to evaluate knowledge
- to use those skills to analyse and solve problems
- to work independently with initiative and self confidence
- to work co-operatively; to lead and to support with sensitivity.

Roger Burridge (2002: 25) suggests we need ‘a holistic approach that seeks to understand the efficacy of law as a process for regulating human relationships and resolving disputes’. Thus involving:
- How law is made and the forces contributing to its formation.
- What the roles and functions of the law might be.
- What the social, political, economic and other contexts are in which the law operates.
What are the moral, economic and other concepts by which the law is criticised.

What the law is in chosen subjects, that is:

a. to understand basic concepts
b. to know where to look for detail
c. to know how to apply (a) and (b)
d. to know how (a) and (b) could be criticised
e. to know the likely developments in (a) and (b).

Requirement and aims of the legal system of legal education and training

What are the general aims of legal education and training? The Ormerod report (Report of the Committee on Legal Education, 1971, para 100) provided a fairly detailed analysis of the characteristics of professional work generally, and of the requirement for work as a barrister and solicitor:

the professional lawyer requires a sufficiently general and broad-based education to enable him to adapt himself successfully to new and different situations as his career develops; an adequate knowledge of the more important branches of the law and its principles; the ability to handle fact, both analytically and synthetically, and to apply the law to situation of fact; and the capacity to work, not only with clients, but also with experts in different disciplines. He must also acquire the professional skills and techniques which are essential to practice, and a grasp of the ethos of the profession; he must also cultivate a critical approach to existing law, an appreciation of its social consequences, and an interest in, and positive attitude to, appropriate development and change.

1.3.3 Learning autonomy

A big one! For many of you this is no problem at all, your choice to study the London programme is itself proof of this. But we need to consider the difficulties of distance learning – many of you will receive tuition from a third party institution. You will need to be conscious of the teaching styles of that institution and not be a passive receiver of information! We look to create a blended learning environment consisting of the resources supplied by London and the tutoring in the institutions, but you are at the centre: you will face the assessment at the end of the year and the more active and reflective you are, the larger your potential reward!

1.3.4 The elements in the ‘London Package’

The ‘package’ refers to the whole set of self-study materials that we provide – and it is quite a package. In London we somewhat jokingly call this the ‘box’ as you will have received a (large) box of materials for studying this subject. The box contains:

- this subject guide Common law reasoning and institutions
- the textbooks
- the study pack for Common law reasoning and institutions
- information on the VLE (Virtual Learning Environment, including CMAs [Computer Marked Assessments], discussion boards, newsletters)
- guidance on the Online Library
- the guide to Studying English law with the University of London
- the Learning skills for law guide.

The package is not just materials – it is about attitude! In particular your attitude and communication.
The package is complemented by the human element. Many of you will not rely upon the package alone but work, with and within, one or other of the many private institutions that provide support for external law students. What proportion of your learning will come from the package and what proportion will come through contact with an institution is up to you.

You should receive considerable benefits from participation in an institution but you must also access the London materials and messages: you are our student!

1.3.5 The reading required

We supply various readings, either through the supplied textbook, the study pack or the Online Library. In addition, various other readings may be referred to as additional reading.

**Primary textbooks**


  *Learning legal rules* should be your companion for the first part of the course. We provide this text for you to work through and hope that you will also undertake the exercises contained therein.


- **International Laws Programme** *Common law reasoning and institutions study pack*.

  This is a set of collected extracts from book chapters or articles for selected courses (some of which have been specifically written for our purpose). The CLRI study pack is an extensive resource pack.

**Important supplementary texts**


**Sources of further reading**


**Statute book**

No statute book is required for this course.

**Legal journals**

In addition to the essential texts, you should consult a range of legal journals to keep yourself up-to-date with academic writing on the subject, in particular see the:

- **New law journal**.
1.3.6 Portfolio/Learning Journal

Throughout this guide you will notice certain portfolio prompts. In the London programme we have a specific portfolio – the Skills Portfolio – that any student registering after September 1, 2007 who wishes to obtain a Qualifying Law Degree (QLD) for England and Wales must develop and present for assessment in their final year. This is to ‘demonstrate’ the subject specific and transferable skills students will attain. We are not saying that students who do not complete a portfolio do not have these skills but such students will not formally have demonstrated these skills in an assessed mode. From your second year you should think of your research project and compile your evidence base and reflection on your evidence. However, by portfolio we also mean something more simple – a learning journal. This can be as simple as a ring leaf folder; making entries in this will give the opportunity to reflect on your learning, to map out the process and gauge whether you are meeting the learning objective for the subject.

The important aspect here is reflection: in the other first year subject guides you may find reflection prompts rather than portfolio prompts, but what unites these is the belief that reflection is necessary for authentic self-understanding and learning processes that last.

1.3.7 Learning objectives

Objectives have a particular role in distance learning. Traditional syllabuses talked only of the content to be covered; lecturers/tutors spoke of the dates that topics would be covered. The role of objectives is to make clear what learners are expected to be able to do and what they are expected to achieve.

In our materials you will be told the intended objectives, which are stated at the beginning of each chapter. Here is an example from Chapter 2:

By the end of this chapter and the relevant readings you should be able to:

- identify several key features of the English legal system that differentiate it from others.

Presenting such objectives, or outcomes as they are sometimes called, has the aim of making clear what needs to be done so that you can be confident in approaching the assessment.

Learning skills

This is important, though mostly underemphasised. Please refer to the guide Learning skills for law.

We can not stress enough how many of the answers we receive in the assessment every year appear to reflect surface learning and not deep learning. Are you prepared to take on the challenge?

Invitation to reflect

Some matters for reflection:

- Do the comments made in this welcome and introduction seem relevant? Or are they condescending and irrelevant?
- Does the comment about the need to improve student learning (and thinking), which admittedly rests on the past performance of students – in a less resource-rich environment – apply to your approach and circumstances?
- What data would you need to give a valid answer to the previous question?
- Do you have that data?
- If not, how can you obtain it and from whom?
1.4 Styles of learning and preparing for assessment

1.4.1 How do we assess the quality of learning and thinking?

What are the criteria against which we look to judge your cognitive performances? At first sight it is tempting to make an easy distinction between a student’s mastery of the content of a subject and the thought processes they display or have learnt. We ask ourselves:

- Is the student engaging in critical thinking to the depth or extent required?
- How thorough is their attempt to apply and evaluate ideas and theories?
- Are they showing sufficient inventiveness and flexibility?
- Do they really understand basic concepts?
- Is the quality of their thinking meeting subject and academic expectations?

The problem is that the distinction between learning and thinking soon disappears, as the level of mastery of the subject actually is a reflection of the thinking and learning process.

1.4.2 Distinguishing deep and surface approaches to learning

In the literature of learning and teaching, one useful benchmark for judging the quality of student thinking and learning is the notion of a deep approach to learning, a concept generated by Marton and Saljo (1976). This concept describes the way competent students go about a particular learning task. A useful way of describing a deep approach is to do so in terms of three concepts:

- study motives
- strategies
- conceptions of learning.

Students who adopt a deep approach are motivated by:

- an intrinsic desire to develop a personal understanding of the content, academic and professional competence relating to the subject matter
- new ways of looking at problems or events in the world
- an interest in the content, and enjoyment of study.

The strategies they use involve:

- focusing on the author’s intention and meaning
- relating new content to their own experiences and work contexts
- developing frameworks for making sense of, and assimilating, the material
- seeking a personal integration of the content.

The use of these strategies involves higher-order thinking such as:

- testing ideas conceptually or in practical situations
- critical thinking
- identifying and solving problems
- generating ideas, questions, answers and theories
- evaluating the ideas encountered or created.

Therefore, the conception of learning, which underlies a deep approach, is that of a process which ranges from understanding and applying ideas, through to the development of new perspectives or new ways of looking at the world, to building new models and theories.
A deep approach to learning stands in stark contrast to a surface approach, also identified by Marton and Saljo (1976).

Those students who adopt a surface approach are:

- extrinsically motivated, principally by desires to satisfy assessment requirements set by others and to complete compulsory tasks in the subject
- satisfiers, prepared only to do enough to satisfy minimal requirements for a passing grade.

They see learning as:

- memorization
- reproduction of content.

The strategies they rely on include identifying discrete elements in the material to be learnt and committing them to memory by rote means. They do not seek to understand or apply what they’re studying and show no inclination to place their own interpretations on the new material by reflecting on, or reorganising, it.

The outcomes of a deep approach to learning usually include an in-depth understanding of content, the ability to use what has been learnt to describe, interpret, predict and theorise about events and the ability to formulate new insights and new ways of defining and approaching problems. These are usually regarded as the proper outcomes of a tertiary education. As Entwistle and Marton (1984) report, research has established a set of relationships between conceptions of learning, approaches to learning and outcomes which come close to logical inevitability.

If learning is seen as ‘memorisation’... then the student inevitably perceives the task as an external imposition, and adopts a surface approach, which in turn excludes the possibility of reaching a deep level of understanding (pp.222–23).

In other words, surface conceptions of learning and surface approaches lead to surface outcomes; deep outcomes can only come about through the adoption of deep conceptions of learning and deep approaches.

Does this sound off-putting and irrelevant?

We are pragmatic in many respects and appreciate that a deep approach may not always be necessary. This may be because a particular learning goal, task or activity may not require it. Some of our learning will include some activities which require a surface approach and others which require a deep approach. You need, therefore, to be able to adopt either approach as required and, better still, know when each is required. You may also think this is overly idealistic. The educational writer Harris noted in 1995 that a commitment to deep learning as the only proper form of learning may be too closely aligned with a form of pedagogic idealism. Hence, he warns that, in conceptions of deep learning, there may not be sufficient account taken of the realities in which distance learners study and learn, and of the coping strategies they need to adopt. What this implies is that there are probably variations of the deep approach which could be recommended. In fact, a third approach to learning which requires use of some deep strategies and which is adopted by students who are strongly achievement-oriented has been described by Biggs (1987).
1.4.3 Guidelines for studying

1. Learn each topic as you study it and look for how topics and issues connect to each other. Common law reasoning and institutions is not a subject that you can ‘cram in’ at the last minute. Be aware of the interconnectedness of the subject: the subject guide is constructed so that certain fundamental issues are covered first, and you should return to these frequently.

2. Read each chapter in your textbook and study pack at least twice. What is unclear at first reading will often become clear on a second or subsequent reading.

3. Engage in the activities in this subject guide and in the exercises in Learning legal rules.

Legal reasoning can not be learnt by rote, it should be activity based. Learning how to think like a lawyer is knowledge of how to do, how to argue and how to present a case.

Again the Examiners have noted many instances of answers to questions on statutory interpretation or on the general area of how judges handle case law in which it is clear the student is relying on material learnt without any engagement in activities. It is usually clear that the student’s knowledge is superficial – at best a recounting of a story he or she has not really engaged with.

4. Read as many of the important cases as you can. Textbooks have to summarise cases succinctly, and summarising can be an obstacle to understanding. You are more likely to understand a decision in a particular case if you have read the case itself. Cases are available from the Online Library.

5. Read the material in the study pack. This will be important for the mainly essay-type questions that make up the examination.

6. Take notes of what you read – chapters in textbooks, articles and cases. If there are particular paragraphs or sentences that you like, copy them; they may be invaluable to you later on for illustrating your arguments and giving ‘weight’ to your assertions (but please attribute them† in your examination answers). Keep these notes in a loose-leaf file so that you can add new material to each section as the need arises. If you are at a private institution offering study material, incorporate that material but link it to what the guide recommends.

7. Take control of the material. What do we mean by this? Remember that your Examiners will want to assess your understanding, your ability and not the understanding or the ability of the writers you have read or any tutors who may have guided you. You may wish to work with other students and certainly as much peer support as possible is valuable; other students may help by providing a different ‘take’ on the material and/or other notes. In time you might want to condense your own full notes into a skeleton set of notes or condensed material directed at potential examination topics, but make the organisation of these your own. Having your own control over your material will be infinitely more valuable to you, and it is essential to ensure that you are getting the transferable skills that university level education strives for.

8. Practise answering the sample examination questions. Begin by looking up as much as you need to answer the question. Make any notes you think necessary, including a framework for an answer. Then put your notes aside and try to write your answer in 35–40 minutes. Later, choose another question and try to answer it in the same period of time, but without any preliminary reading. Make a plan for your answer as part of the ‘unseen’ exercise within the 30–40 minute period.

† That is, state in what case, statute or publication your arguments originated.
9. Keep up-to-date. To some extent, every textbook is out-of-date as soon as it appears in the bookshops because the law is constantly changing.

10. Follow the London Laws VLE (Virtual Learning Environment), undergo the formative online assessments and read the recent developments. (Note: these are only available online).

11. See the law in action. What you read in books will often make more sense if you can go to see proceedings in Court. If this is possible you may wish to compare what you observe with the processes outlined in your studies.

1.4.4 Study time

You should set aside a specific amount of time each week to study this subject, increasing the amount in the six weeks before the examination. Remember, though, that individuals vary greatly in their needs; the time to stop studying is when you know the topic thoroughly, and not until then. It is very important to plan your time carefully. Do not forget to leave time every week and month for revision in addition to the period before the examination. Revision must be a continuous process.

1.5 The examination

1.5.1 General advice

At the end of the academic year there is, of course, the examination. If you have worked consistently and well throughout the year, this should not be too daunting. All you are being asked to do is to demonstrate to the Examiners that you have mastered the subject to the required standard; you will be able to do this if you have undertaken sufficient study throughout the year. Many students go wrong because they think that they only have to study and revise four, five or six topics from a course. That is a mistake. The topic you were relying on may not appear on the examination paper, or it may appear, but in a way which you have not expected. You may therefore not have the confidence to attempt an answer. Or one topic might be combined with another and you find that you have only revised half the question. If you have worked conscientiously and covered the syllabus fully, you will not have any of these difficulties.

In the lead-up to the examination, you should return to the early chapters, thinking particularly of the nature of the common law system and the criteria by which to judge the operation of the contemporary English legal system. You may wish to concentrate on certain key areas, but do not forget to consider the overall general perspective too.

Examination preparation is a chance to consolidate your knowledge of context – the interaction between context and topic. In revising, keep the context of the topic in mind. The particular topic under consideration may only make sense when viewed in relation to the larger issues.
1.5.2 Ten golden rules for developing examination technique

1. Prepare thoroughly. In particular, practise doing the sample examination questions at the end of each chapter of this subject guide.

2. Read the examination paper carefully. Then choose the questions that you want to answer, and make a rough allocation of time.

3. Once you have chosen your questions, make rough notes on the answers before you begin to write a full answer to any of the questions. We do not always remember at once all the information that we have learned. If you adopt this plan, you give your memory the maximum opportunity to remember what you need for all the questions. Pieces of information can be recalled, apparently as the result of subconscious mental activity, while the mind is concentrating on something else. But you need to have stimulated the memory by trying to plan all your questions first.

4. Answer the question as set. This is particularly applicable to essay questions, and it involves two prohibitions:
   - First, do not just write all you know about the topic. Very little, if any, credit will be given for that. Each question will have a particular ‘slant’ or ‘angle’, which requires careful thought and the selection of relevant information and knowledge.
   - Second, do not write an essay about a different topic. At the root of both these faults is a failure to prepare properly. You do not prepare properly by ‘question-spotting’.

5. Write tidily and legibly. If you practise writing questions under examination conditions during your studies, you should find that you are able to write at speed, but also tidily and legibly, in the examination.

6. Follow the instructions on the front page of the answer book. The instruction that candidates most commonly fail to obey is that which tells them to tie in any extra pages at the end of the book, inside the back cover. Do not write in the space reserved for Examiners. Remember that you are asked to fill in a space that sets out the numbers of the questions you have attempted in the order in which you attempted them – not in numerical order.

7. Do not write notes to the Examiner. It is pointless to write, for example, ‘No time for more’ at the end of the last question; the Examiners can see that for themselves.

8. Do not write too much or too little. Good planning of your time at the start of the examination should prevent you from writing too much. So should attention to the question, which itself will impose limits on what has to be covered. Of course, the careless or badly-prepared student who settles down to write all she or he knows about a particular subject is likely to end up writing far too much – and failing. As a rough guide, approximately three to four pages should be enough for a good answer. This, of course, assumes that you write, as you should, on every line, and that your handwriting is not overly large.

9. Refer appropriately to sources to support your arguments. You are expected to adopt a critical attitude and to express arguments that you are in control of. However, that does not mean that you create everything anew every time you write. When you write you build on the work of others including, in the common law, the great heritage of decided cases. You are expected to show command of your sources, the books and articles, and the cases that you have read: give quotes and refer to lines of arguments. In doing so, you must authenticate your sources by referring to the book, article or case you use.

10. The final piece of advice on the examination is a reminder to read the question carefully. You must answer the question the examiner has asked, not some variation on this. Irrelevant material will not earn you any marks.

Begin your portfolio or learning log by putting down some notes as to the main messages in this chapter. In distance learning the institution – here, London – teaches through the learning resources. We try to communicate with you through the messages in this and the other texts and online materials we make available to you. What are the main messages in this chapter?
References


- Marton and Saljo (1976) ‘On Qualitative Differences in Learning I: Outcomes and Processes’ British Journal of Educational Psychology, 46, 4–11; and ‘On Qualitative Differences in Learning II: Outcome as a function of the learner’s conception of the risk’ British Journal of Educational Psychology, 46, 115–127.

- Ormerod Report (Committee on Legal Education, 1971) CMND. No. 4595.
2 The English legal system and the common law tradition

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**Introduction**

This chapter covers considerable ground and refers to a wide range of features and concepts. The **material introduced in this chapter is not examinable as such.** However, it is important that you read and understand it, as it informs a great deal of the later discussions in the subject guide.

The first thing to note is that CLRI at first appears to consist of a lot of detail and covers a wide range of features and concepts. What is the focus of the subject: A set of institutions? A history of the English common law? Does the focus of the course rest on civil or criminal justice? What is the role of human rights? All of these are valid questions, and, if there is a fundamental theme that runs through the subject, it can perhaps be expressed as follows: the common law is in a state of change, and change brings with it a certain degree of tension.

So, in this chapter, we want to try and overview some themes that are of general, overarching relevance to your study of law.

**Learning outcomes:**

By the end of this chapter and the relevant readings you should be able to:

- understand the role of the judge in law making
- identify several key features of the English legal system that differentiate it from others
- begin to use fundamental concepts and questions as reference points in further reading
- have a basic understanding of the history of common law
- have a basic understanding of human rights
- have a basic understanding of EU law
- understand the courses' concerns with civil and criminal procedure.
2.1 Studying the common law today

**Essential Reading**
- Read Gearey et al., pp.6–7.

From the contemporary perspective, the most important concerns in relation to the modern common law are perhaps the Human Rights Act 1998 (HRA) and the European Communities Act 1972 (ECA 1972). You are beginning your study of the common law in a period of unprecedented change.

The HRA makes the European Convention on Human Rights part of English law. This means that the rights in the Convention are now available in English Courts; it is no longer necessary to take the UK to the Court of Human Rights in Strasburg if one's human rights have been infringed. One of the consequences of the HRA is thus to increase the influence of European Human Rights Law on common law. Throughout the course of this guide we will try to assess the impact of these changes on the areas that we will study.

The ECA 1972 makes the law of the European Union (EU) part of the law of the UK. This is because the UK is part of the European Union.

To summarise, there have been at least two fundamental events in the recent history of the common law: in 1972, when the UK joined the European Economic Community (now the EU), and in 1998 when the law of the European Convention on Human Rights was made part of English law. Diverse consequences have flowed from these events.

Since 1972, it is no longer possible to think of the common law as somehow separate from the civilian law traditions of continental Europe. The common law and European forms of civil law are now linked together in the law of the EU. The Human Rights Act of 1998 'domesticated' the European Convention. This means that Convention rights are part of English law. Prior to 1998, the Convention was only binding on the UK as an international treaty. Convention rights could not be relied upon in English courts. The important consequence of the domestication of the Convention is that we can now begin to speak of an indigenous law of human rights.

It is also necessary to know something about the history of the common law. In this chapter we will outline some of the important changes to common law institutions that provide the general background for our more contemporary concerns about the nature of the common law.

**Further Reading**

2.2 Judges, courts, cases and statutes

2.2.1 Common law and statute law distinguished

The phrase ‘common law’ is also used to denote the law applied by the courts as developed through the system of precedent without reference to legislation passed by parliament. It is only since the late nineteenth century that statutes have become the most prolific source of law in England and Wales. For most of the development of the common law system, the majority of the law was applied by the courts independently of any statutory source. The constitutional fiction was that the judges merely declared what the law was, as though it was already there and merely needed to be discovered. It is more usual today to admit that the courts create law, although there are jurisprudential scholars, such as Ronald Dworkin (Law’s empire (1986)), who hold to complex arguments that judges evolve the law out of existing principles and constructive interpretation of existing sources (see 2.2.2 below). An important aspect is the argument that the common law is a tradition of judicial responsibility and a barrier to arbitrary decision-making.
2.2.2 Do judges make law?

This is one of the themes in our consideration of the role of the common law judge.

A traditional picture of common law presents the source of law as being found in the texts of individual judgments. There was never, therefore, a single authoritative statement of the common law. It was thus, in important aspects, always ‘unwritten’ yet ‘written’. What does it mean to talk of law being both written yet unwritten? It is crucial to keep emphasising the nature of the common law tradition. In his Commentaries on the Laws of England (1765−69), Blackstone was careful to describe the common law as ‘unwritten law’ in contrast with the written law of statutes or codes. He was familiar with the common law as a form of oral tradition derived from general customs, principles and rules handed down from generation to generation by the court lawyers and judges, who participated in a common life by eating and drinking in one of the Inns of Courts to which all had to belong. Eventually this oral tradition was reflected in the reports of the decisions of the important courts and the ‘knowledge’ was then stored in a ‘written’ form, namely the Law or Case Reports. You should note, however, that there was no organised system of court reporting until the late nineteenth century and prior to that all reports were private initiatives (made by barristers who were in the courts and circulated privately for a fee to supplement the barrister’s income). Moreover, the relationship of the Law Reports and the common law is not straightforward. For it was traditionally held that the words of the Law Reports themselves were not the common law, but that the decisions of the courts as reflected in the Law Reports provide authorities for what the common law can be argued to be. In other words – and this is the ‘mysterious’ bit – the common law is always something more than what is written down! What is written down are pragmatic instances of judges articulating what they take the law to be. So when one is looking for the law in a case one reads the words, but the law is always something more than the words that one reads! It is always accepted that the law is open to development and better articulation.

Our starting point for a consideration of this theme is Lord Scarman’s speech in McLoughlin Appellant v O’Brien (1983). Lord Scarman argues that judges do create law:

Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path [at 70].

The law making power of the judge is subordinate to that of parliament. We will see that judges try to limit their law making. In order to understand what judges are doing we will suggest that judicial reasoning can be understood as practice – a way of arguing. This means that it can involve something other than legal rules and principles. Judges use what we could call ‘interpretative discretion’. How could we understand discretion? The American jurist Felix Cohen argued that a legal rule is ‘derived’ from the judge’s interpretative ‘choice.’ The decision can be thought of as a ‘dough’ that can be worked into the desired shape. The success, the shape of the ‘dough’, will be determined by the views that the interpreter brings to bear on a case. This approach rejects the possibility of a final ‘right’ answer.

Other legal philosophers have argued a different position:

Even when no settled rule disposes of the case, one party may nevertheless have a right to win. It remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively (Dworkin, 1977, 81).

It is hard to resolve this dispute – indeed, it will be one of the concerns to which you turn in the study of jurisprudence. However, the starting point as far as this course is concerned is the acceptance that judges are law makers; the critical issue is the extent to which this practice can be kept within legitimate boundaries. It is an issue that can also be thought about through the lens of human rights; we will examine this point briefly below and return to it in our discussion of precedent.

The role of the common law judge

Historically, the common law tradition has always placed the judiciary at the centre of things. Judicial decisions are seen as constituting the written law – as a body of maxims, precedents and reported decisions that constantly need to be rationalised and developed into a coherent ‘system’.

The authority of the common law is found in the judgments of courts deliberately given in cases argued and decided. As Lord Coke put it in the preface to his ninth Report:

it is one amongst others of the great honors of the common law that cases of great difficulty are never adjudged or resolved in tenebris or sub silentio suppressis relationibus, but in open court: and there upon solemn and elaborate arguments, first at the bar by the counsel learned of either party, (and if the case depend in the court of common pleas, then by the sergeants at law only); and after at the bench by the judges, where they argue (the presiding judge beginning first) seriatim, upon certain days openly and purposely prefixed, delivering at large the authorities, reasons, and causes of their judgments and resolutions in every such particular case, (habet enim nesio quid energia viva vox:) a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction and direction to the attentive and studious hearers.

This bedrock of judicial activity is contrasted with the legislative process of making statute law and those decisions that constitute judicial interpretations of statutes and other forms of legislation.

The common law tradition entails a particular approach to the discovery, interpretation, and (where necessary) the making of law as practised in contra-distinction to the jurisprudence of countries influenced by Roman law and the later European codes (such as the Code Napoléon).

Consider this further extract from Cotterrell (1989, p.25):

According to the declaratory doctrine of common law, judges do not make law. They are in Blackstone’s† words, ‘the depositaries of the laws, the living oracles who must decide in all cases of doubt’ […]

The authority of law is seen as a traditional authority. The judge expresses a part of the total, immanent wisdom of law which is assumed to be already existent before his decision. The judge works from within the law which is ‘the repository of the experience of the community over the ages’. Thus, even though he may reach a decision on a legal problem never before addressed by a common law court, he does so not as an original author of new legal ideas, but as a representative of a collective wisdom greater than his own. He interprets and applies the law but does not create it, for the law has no individual authors. It is the product of the community grounded in its history. Judicial decisions, according to Matthew Hale writing in the seventeenth century, do not make law ‘for that only the King and parliament can do’, but are evidence of law, and ‘though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whosoever [...]’. Thus the judge is spokesman for the community about its law – a particularly authoritative spokesman.

The argument presented in Gearey et al. as to whether judges make law is discussed later in Chapter 9 (see section 9.2.1).

2.3 Procedure

2.3.1 The importance of procedure

ESSENTIAL READING

- Gearey et al., pp.8–18.

The distinction between substantive law and procedure is, in simple terms, the distinction between the rules applicable to the merits of a dispute (substantive law)
and the rules governing the manner of resolution of a dispute (procedure). For those who practise law the rules of procedure are very important, but at the academic stage of legal studies the focus is on the substantive rules. It is nevertheless important to have some understanding of procedure, because procedure can affect the application of the substantive rules. In fact, the rules of procedure were in the past of great significance in shaping the substantive rules, since English law, from the time when it was necessary to frame one's action within the form of an existing writ, has proceeded from the existence of a remedy to the establishment of a right. It might almost be said that procedure came before substantive rights.

Traditionally, the common law judge had limited power over the direction or substance of the case; reaching a conclusion and writing a judgment was limited by the facts presented and the arguments raised by the parties. In comparison, the judge in a conventional civil law inquisitorial model is expected to pursue actively whatever avenues will result in resolution of the disputes, in a continuous process of inquiry encompassing trial and pre-trial stages. Judges in several common law jurisdictions – such as those of New Zealand and Australia – are becoming more active in defining the issues in dispute and moving cases forward to a hearing. As we shall see when we look at reforms in the civil justice process (see Chapter 11 of this guide and the associated reading), there has recently been a development of process management discourse and case management techniques in common law courts. In part these are reactions to the procedural excesses of adversarial litigation.

**Alternative dispute resolution processes**

The development of judicial activism has been mirrored by an increased use of court-related alternative dispute resolution (ADR) processes. The main forms of ADR are:

- arbitration
- conciliation/mediation
- early independent evaluation and report.

Arbitration and expert referral are adjudicative in nature. With arbitration, the parties to the dispute choose an arbitrator to determine their dispute. The process is private and does not result in the legal announcement of principles to guide parties not involved in the proceedings. Other processes are facilitative and involve assisting parties to reach a decision. Some processes, such as conciliation, may be facilitative in the information gathering stages and adjudicative or evaluative in the final stages. Sometimes these processes are regarded as external to the court system; but often they are used to resolve disputes commenced within the court system. Some commentators believe that the growing use of these processes has an additional effect, in that exposure to these processes may be changing the model of judicial determination so that there is more emphasis on facilitative communication.

**2.3.2 Proceedings of an English court**

At the apex of this adversarial system lies the traditional picture of the English court – an arena wherein a contest is waged between parties in which one emerges the winner. In the inquisitorial procedure the court takes charge of the case even to the extent of framing the legal and factual issues to be disputed. In the adversarial system the parties dictate, within the constraints of traditional forms and packages (such as writs, forms of action and pleadings), the form, content and pace of proceedings. The pre-trial proceedings are arranged such that by the time of the trial, each side should have gained as much information as possible both to support their own case and to exploit any weaknesses in the opposition’s arguments. The agent of the court (i.e. the judge) should stand back and wait for the case to proceed to trial. During the trial, the judge in civil cases, and the judge and jury in criminal cases, should allow him/herself to be guided, at least initially, as to the relevance of questions of fact and law by the parties’ advocates. The judge should take a procedural ‘back seat’ and intervene only to ensure that fair play is operating – or where the public interest is at stake.
The proceedings are dominated by the advocates for the parties with, as in the case of criminal cases, the prosecution trying to build a strong case against the defendant and the defence, in turn, endeavouring to demolish the prosecution's case. Throughout this procedure, witnesses are examined and cross-examined, using a variety of tactics available to the skilled advocate. Some use subtle means to cause witnesses to react in a certain way, others use bullying tactics to obtain the same result from nervous participants. The success of a case, therefore, often rests upon the ability of an advocate to manipulate proceedings and not just the weight of evidence. As the eminent English commentator, Jacob (The Fabric of English Civil Justice (1987), p.16) stated with respect to civil cases, the adversarial system ‘introduces an element of sportsmanship or gamesmanship into the conduct of civil proceedings, and it develops the propensity on the part of lawyers to indulge in procedural manoeuvres’.

The system rests upon a number of assumptions – specifically that:

- both parties are represented
- the lawyers representing each party are efficient and equally matched
- the lawyers will promote their clients’ interests.

English lawyers† do not owe a general duty to ensure that justice is done or to enable the court to find the truth. Their only obligation to the court is not to mislead the court on questions of law or fact. How then does the truth emerge? Only as a consequence of the fact that each side is intent on winning the case.

But the adversarial system often produces unexpected and, according to some observers, unjust results due to the manner in which evidence can be presented. The outcome, therefore, hinges upon the events of the trial itself as much as the gathering of evidence beforehand, since the courts only judge what is presented before them and, especially when juries are present, the way it is presented. With the exception of the Coroner’s Court, proceedings in the English courts do not take the form of investigations into the matters brought before them, unlike the inquisitorial system, which essentially entails an examining judge conducting his or her own investigation, often in conjunction with organisations such as the police, before any trial takes place. The inquisitorial procedure appears more obviously oriented as a search for the truth, taking into account all aspects of the matter, and consequently a substantial number of cases do not reach the trial stage. Those that do go to trial often reach that point with far greater certainty as to the outcome than in courts using the adversarial system.

2.4 The common law, human rights and the judges

Up to the HRA 1998, it would probably have been inaccurate to refer to human rights at common law in the UK. Indeed, British common lawyers preferred the language of civil liberties to that of human rights. Since 1998, however, a positive catalogue of human rights exists at common law. Certain judges have seized upon the possibilities that this offers. It is outside the scope of this chapter (and this course) to give a catalogue of the effects of the HRA 1998. Suffice to say that there are very few areas of public law that the HRA has not touched. Perhaps one of the most interesting areas of law is the development of a privacy rights at common law – an area of protection that was traditionally rather weak. The Act is also having an interesting effect on the relationship between parliament and the judges.

The HRA 1998 was meant to re-dress the balance between the courts and parliament. The Act allows judges to protect human rights against executive power. The difficult question is: has judicial power now begun to trespass on the power of parliament (in order to become the ‘ultimate controlling factor’ in the constitution)? The judges have argued that they should be less deferential to parliament, and more willing to use their enhanced powers to protect human rights. This is because parliament itself has become too powerful and has, on occasions, not governed within the law.

† All lawyers are officers of the court and are under a number of general duties as a consequence. Ethically, there is only one overriding duty, that of candour. A lawyer must never knowingly deceive or mislead the court. This serves the crucial role of binding together the lawyers and the judges in a common trust. But although some commentators may wish to argue that this gives the lawyers a positive duty to strive for justice, in fact it only gives a negative and procedural duty, not to strive for creating injustice.
These points can be illustrated by reference to some recent cases. In *R (on the application of ProLife Alliance) v BBC* (2003) Laws LJ argued that the courts had a ‘constitutional duty to protect and enhance the democratic process’. In *Regina (Jackson and others) v Attorney General* (2005) Lord Bingham pointed out that the constitutional balance has been thrown out, and the ‘Commons, dominated by the executive, [has become] the ultimately unconstrained power in the state’ [50]. The courts appear to be asserting their constitutional competence against the executive. Other cases show similar evidence of judicial activism. *Director of Public Prosecutions of Jamaica v Mollison* (2003) shows that the independence of the judiciary is a ‘constitutional fundamental’ and cannot be trespassed upon by other branches of government. In *Anufrijeva* (2003) the House of Lords held that the executive could not make unilateral determinations of people’s rights which bypassed the scrutiny of the courts. This right of ‘access to justice’ could also be considered a ‘fundamental’ constitutional principle. In the *Belmarsh case* (2004) the House of Lords stated that indefinite detention of foreign terrorism suspects was in breach of the European Convention on Human Rights (ECHR). In so doing, the House of Lords was giving effect to s.6 of the HRA.

Tensions between the courts and parliament over their respective roles have recently become more pronounced. Although divided on the issue, certain members of the Coalition Government want to either repeal or limit the HRA. Conservative backbench Members of Parliament (MPs) are particularly angry over rulings of the Strasbourg court and the Attorney General, Dominic Grieve, has stated that the European Court of Human Rights has become too intrusive.

These themes clearly connect with those considered in public law. The focus of our thinking about human rights on this course is in Chapter 10 where we revisit some of these themes. We will also make references to human rights in our concerns with civil and criminal justice. This does not necessarily mean that these areas of procedural law operate with ideas of human rights – it does mean, though, that we can use human rights, and especially Article 6 (the Right to a Fair Trial) as a way of thinking about common law institutions. This provides certain challenges. Whilst not all common law institutions fail to measure up to the bar of international human rights, such an approach might require us to think more carefully about the merits of certain ‘hallowed’ institutions. For instance, from one perspective of Article 6, the jury could be seen to be wanting in terms of its transparency and accountability.

In addition, modern common law legal systems have substantial bodies of highly detailed legislation, which comprise another primary source of law.

### 2.5 A brief note on the civil law tradition

In contrast with the common law, the continent of Europe has been directly or indirectly influenced by Roman law (civil law), with its emphasis upon a code. Civil law is said to be ‘deductive’ in nature because it proceeds from an exhaustive code of propositions in accordance with which all subsequent experience must be judged. In this picture, the civil lawyers of Europe are said to favour accessibility over certainty. They stress that the law should be available to all, easily understandable, and kept (so far as possible) out of the hands of a priestly class. Precedent is not dispensed with but its hold is looser than in the English legal system.

Civil law systems tend to use a career judiciary who operate more courts, including inexpensive tribunals (staffed by younger judges) which can informally hear disputes involving smaller amounts than the English system. A broad ‘purposive’ approach is encouraged towards the interpretation of enacted words and phrases, and consistency is considered less important than doing justice to the individual parties. It is not uncommon for codes to be deliberately vague and general in their choice of language, the better to allow individual cases to be decided upon their merits.
Activity 2.1
State five characteristic differences between the common law (English) legal systems and the civil law (Roman law) systems.

No feedback provided.

2.6 The contemporary contexts of the common law

Essential reading
- Read Gearey et al., pp. 24–46.

The English legal system was exported around the world during the colonial period. The legal systems of the USA, Australia, New Zealand, Singapore, Malaysia and most of the Commonwealth countries for example, are all based on English common law although they may mix in local customary law, religious-based law or other influences. Each country has its own unique characteristics. Hong Kong, for example, is a special administrative region of the People’s Republic of China (PRC) and its legal system is guaranteed by the Basic Law to be a common law system for 50 years after the hand over to the PRC. The PRC itself is a mixed civil law system with a socialist political organisation, yet it is adding common law features as it seeks to develop a more robust ‘rule of law’.

What makes these different jurisdictions part of the common law legal family is not exactly similar rules or propositions, but, rather, a working jurisprudence. As Justice Story declared in Van Ness v Pacard (1829, 2 Pet. at 137) in respect of the US:

The common law of England is not taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright: but they brought with them and adopted only that portion which was applicable to their situation.

In the view of Chief Justice Shaw of Massachusetts, in Norway Plains Co v Boston & Maine Railroad (1845, 1 Gray, at 263), the flexibility of the common law ensured its adaptation in different countries:

It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy.

It is not necessary to agree with his precise listing of the basis of the common law in order to agree with the image of flexibility.

Today we can talk of two great secular legal families. The legal systems of continental European countries, which were also exported around the world, gave rise to the civil law systems. The most influential of these has been that of France, because, by introducing the Code civil in 1804, Napoleon Bonaparte gave to France the first modern European legal system, which was copied elsewhere. In practice, each jurisdiction may mix their secular legal tradition with local customary or religious traditions.

2.7 A brief summary of the features of common law

- It applies to all legal persons including the state (traditionally there is no division between public and private law).
- The adoption of an inductive form of legal reasoning whereby legal principles are derived from the texts of many single judgments.
- A litigation system in which the trial is the distinct and separate climax to the litigation process.
Courtroom practice which may be subject to rigid and technical rules.

- The fact that the parties to the dispute essentially control proceedings and that there is an emphasis on the presentation of oral argument by counsel. The role of the judiciary is more reactive than proactive. Given the parties’ opportunity and responsibility for mounting their own case, the system is more participatory.

- The fact that the judiciary possesses an inherent power to adjudicate separately from the executive or political process. While the judiciary may be paid by the state, they exercise a separate power free from political interference.

- The fact that the expense and effort of determination of disputes through litigation falls largely on the parties.

2.8 The history of English law

The rest of this chapter moves away from the introduction to, and explanation of, common law and focuses on the history of the law in England, as well as a brief history of the jury.

A knowledge of the history of the law in England will improve your understanding of this course but is not central to the exam.

2.8.1 The development of the law of England

The traditional picture of the development of English law begins with the customs of Anglo-Saxon society (that is, before 1066). Custom is said to have its roots in the life of the people and reflect the social structure of that way of life. The daily conditions of life were rather grim: most of England was covered by dense forests and the population was largely illiterate. Hence law was local custom, largely unwritten and understood as a set of orally transmitted rules. As a body of rules, their content seems to have been directed at preventing bloodshed by recognising elementary rights to property and personal freedom and substituting compensation for the rigours of blood feud as revenge for injury. Stating who had what rights to occupy and use land was a crucial task. Christianity had also been introduced, and was having an impact.

In 1066, the Norman French baron William defeated the Saxon King Harold at the battle of Hastings and conquered England, becoming King William I. The historians Pollock and Maitland (*History of English Law* (1923), Vol.1, p.79) said:

> The Norman Conquest is a catastrophe which determined the whole future of English Law. We can make but the vaguest guesses as to the kind of law that would have prevailed in the England of the thirteenth century or the nineteenth had Harold repelled the invader.

Subsequent legal mythology often presents a narrative that claims that William was a political conqueror but left the local laws alone.

In reality, after the Norman conquest, local laws – however slowly – gave way to a general law of the country, which became known as the common law. Immediate effects involved:

- the introduction of the official languages of continental Europe, namely Latin and the official and popular hybrids known as Norman-French and Anglo-Norman
- separate Ecclesiastical courts (dealing with religious matters and people in religious service)
- a general principle of landholding.

William insisted that all land was held by his grace (which still persists in the notion of ‘freehold’). As communications improved, so did the spread of central administration and a centrally administered ‘law’. The fact that a central body was attempting to develop law as a means of administering the country changed the character of law and the legal institutions.

Over time, the king’s courts became the most important forum for the resolution of disputes.
of disputes between citizens (as we see in Chapter 3). The law of the king’s judges became the Common Law (Commune Ley) as distinct from the local customs. The judges, however, tried to recognise ‘general’ customs, a wise move in terms of getting acceptance of their decisions. Where there was no general custom the decisions of these judges came to form new law (as indeed was the case when they adopted custom). The development of the common law was linked to procedure. An action could only be brought in these courts by obtaining (purchasing) a writ. Soon, however, the forms of such writs became fixed, and only parliament could approve a new type of writ designed to meet a claim that could not be accommodated within the existing writs and forms of action. If there was no writ to cover your precise problem, unfortunately it was very difficult for the courts to listen to you. (This was recognised by the Latin phrase ubi remedium ibi jus, which translated in practice, as no right could be recognised in the common law, unless a writ existed that provided a remedy for its breach.) This created a rigid legal system and caused considerable hardship to many individual litigants. In response a practice grew of petitioning the king (as the ‘fountain of justice’) for justice in the individual case. The petitions were dealt with by the chancellor, who, in this period, was a man of the church and who was regarded as the ‘conscience’ of the king. In due course a formal procedure for such petitions evolved, culminating in a Court of Chancery, presided over by the Lord Chancellor, applying a system of rules known as ‘equity’ rather than the common law of the ordinary courts.

2.8.2 The development of equity

Essential reading

Gearey et al., pp.47–70.

The Court of Chancery was often called a ‘court of conscience’ (there was and still remains a key phrase that a man must come to equity ‘with clean hands’, that is, not himself guilty of wrongdoing in the case). It is true that it was often effective in remedying injustices, but the existence of parallel jurisdictions brought problems and injustices of its own. Chancery developed procedures separate from, but at least as complex as, those of the common law courts. It also accepted the operation of its own precedents. Hence it is actually wrong to consider that equity depended on a free discretion by the particular judges; instead it is best to see judges dealing in equity exercising a particular aspect of the normal ‘judicial discretion’ (see Chapter 5). Certainly procedure again became important and a litigant had to be sure of the classification of the rule he sought to have applied, in order to commence his action in the right court. The equity of the Chancery Court became a set of rules almost as precise as those of the common law. In the case of conflict between the two systems, the rules of equity prevailed. Parliament sought to put an end to these divisions with the Judicature Acts 1873−1875, which established a unified system of courts that were charged with applying both the common law and equity.

Students who later come to study equity as a particular module sometimes confuse ‘equity’ with the idea of natural justice. Although that was the origin of the Chancery jurisdiction, it has long since disappeared from the rules of equity. The rules of equity are just as capable today as those of the common law of producing resolutions of disputes that may be viewed as just or unjust.

Indeed the Court of Chancery has been historically an object of great criticism. Take the words of C.K. Allen (from Law in the Making (1958), p.403):

The history of the Court of Chancery is one of the least creditable in our legal records. Existing nominally for the promotion of liberal justice, it was for long corrupt, obstructive, and reactionary, prolonging litigation for the most unworthy motives and obstinately resisting all efforts at reform. Charles Dickens did not exaggerate the desolation which the cold hand of the old Court of Chancery could spread among those who came to it ‘for the love of God and in the way of charity’.

Today, since the two types of rules are applied by the same courts, it may be apt to see equity as simply another form of the law.

1 Writ: a document carrying the royal seal that was, in effect, an order of the sovereign commanding the performance of some act.

1 Famous nineteenth century novelist Dickens was himself a court reporter for some years. He was extremely critical of many aspects of the legal and prison system, and the Court of Chancery comes in for a particular battering in his great novel Bleak House.
There are, nevertheless, certain distinctive features. Firstly, while common law rules are available to plaintiffs as of right, equitable remedies are discretionary in the sense that they are subject to some general conditions of availability. For example, there is no absolute right to specific performance of a contract. Secondly, the existence of parallel systems of rules, the one based on formal procedures, the other based originally on the idea of substantial justice, has allowed some judges to invoke the tension between the two systems as a source of judicial creativity in developing the law to meet new situations. For example, Lord Denning has used this device in relation to the enforceability of promises and in relation to contracts affected by mistake.

Self-assessment questions
When did the Anglo-Saxon period of English legal history come to an end?
Has there ever been a successful attempt to codify English law?
No feedback is provided, as you can find the answers to all these questions by looking back through the text.

2.8.3 The courts and the common law
There has been a unique interaction between the courts and the development of the common law. Historically the birth and development of the common law was a product of the arrival of a particular court – the king’s court, the site of the king’s justice.

Origins of the courts
We have stressed that English law is described as having a particular identity – that of the common law. The traditional accounts of the common law stress that this identity was not created by imposition. This is understandable for, after all, when William I assumed the throne after the Norman Conquest in 1066, there was very little ‘unity’ to England and transport and communication were difficult affairs. However, the organisational framework for the common law arose out of a progressive centralisation of certain administrative functions in the wake of the Conquest. Its legal method arose from a process of trying to justify and rationalise particular outcomes, in particular the granting or refusal of a remedy by specific courts and the ease with which a subject could gain access to a particular court.

Thus some commentators point out that the organisation of the English legal system owes its roots to its paradoxical un-Englishness. For, seen from this perspective of the history of the types of action taken in the royal courts:

the common law... was originally not English at all. It was a species of continental feudal law developed into an English system by kings and justices of continental extraction (Van Caenegem (1973), p.110).

For some time a confusing plurality of courts existed, but in time the royal court became pre-eminent.

The central figure of the narratives is the early lawyer-king Henry II, who used the vaguely defined jurisdiction of the Curia Regis to establish and develop Royal Courts, which gradually centralised the ‘administration of justice’ and in so doing reduced the role of alternative decision-making bodies.

The king’s court (the Curia Regis) was legitimated in two ways:

- the king could hold a court as feudal lord for his tenants as the ultimate landholder
- the king could exercise a residuary justice inherited from the general principle of kingship which had existed in rather weak form during the Anglo-Saxon period.

Even before the Conquest, the king was accorded a certain authority over persons generally: first, he was at least theoretically ultimately responsible for maintaining order, and, secondly, all (free) men were to look to him for justice, if it was denied elsewhere. Thus he had both a right and a duty to ensure that no subject of his was denied a proper trial in any dispute and that justice should be done without delay.
Henry II worked on establishing the king’s court and encouraging its usage. He invoked the vague legislative capacity that was inherent in the king, or the king with the consent of the Curia Regis, to introduce certain forms of machinery for deciding legal questions. He also drew very largely on his inherent executive powers to give men speedier and more efficient justice.

The procedure of this centralised justice lay with the development of the writ system and the ensuing forms of action. A writ was a command from the king, which would be enforced against the offender by the punishment of imprisonment. This principle of contempt of the king’s writ may be the most important of all the contributory causes to the centralisation of justice. For any complaint the subject might purchase a writ that brought the matter before the king’s Justices. The strong arm of the king’s sheriff would enforce the decision of the Court. In all matters of sufficient gravity, to warrant the time and expenses the subject would go to the king’s Chancery for his writ.

The centralisation of Royal Justice

Pollock and Maitland (1923) proposed six principles to cover the process whereby the Royal Courts usurped or ousted the jurisdiction of the local courts.

1. The Court of the king was the court to which his subjects should go in default of justice elsewhere. The king could issue a writ commanding a case to come before him upon a plea that default of justice had been made. This he would do upon payment, and this increase of revenue encouraged the kings in their course. Under the Norman kings, a practice grew up whereby a litigant, anxious to obtain justice from his lord, purchased from the king a writ directing the lord to hear his plea and containing a threat that in default the king’s sheriff would do so.

2. Under Henry II, the Writ of Right became compulsory for all pleas relating to freehold land. Although in the initial stages the Writ of Right did not take away the jurisdiction of the Feudal Courts, only bringing it under royal control, it effectively did so later.

3. When an action relating to land was fought in the Feudal Courts, after the Conquest, the appropriate method of trial was judicial combat. Even though the fighting was done by hired ‘champions’, a litigant who was convinced of the legality of his cause naturally preferred the alternative of trial by Grand Assize introduced by Henry II. For the chanciness of armed conflicts, he substituted the verdict of neighbour witnesses. The verdict was taken by the king’s Justice, and so the trial came into the king’s court.

4. The Writ of Right commenced proceedings that were very technical and their technicality increased with time. Henry II introduced in the Petty Assizes what was at first a summary remedy for the recovery of seisin (or possession) of land, which depended upon the king’s writ, and was obtained by a verdict returnable before the king’s Justices. This soon greatly diminished the number of cases tried on a Writ of Right.

5. Pleas of the Crown were from their nature determined before the royal justices. Apart from recovery of land, the pleas of the Crown represented the most important cases that formed the basis of the common law. On the one hand, criminal law became the province of the royal justices. On the other hand, the seeds of much of the civil law lay in trespass. The foundation of a centralised administration of justice was well and truly laid.

6. Although trespass undoubtedly played the largest part in the ultimate development of the common law, the Royal Courts tried other disputes if they were brought before them by means of a writ purchased from the Chancery. The basis of this jurisdiction appears to lie in that special plea of the Crown, contempt of the king’s writ.

The early judges had an interest in increasing the amount of work since their fees varied with the amount of business done. Suitors had a number of reasons to prefer the royal process; the royal courts were faster and they had increasing power to obtain
witnesses and enforce their decisions. The Petty Assizes, for example, were a much more summary remedy for the recovery of land than could otherwise be obtained. In all cases the suitors no doubt realised the advantages to be derived from appealing to a relatively strong central government, with power to compel attendance before the Court and to enforce execution of the judgements when given. Moreover, the Royal Courts were the only tribunals which could satisfactorily place at the disposal of suitors the novel and highly desirable method of proof, which became known as trial by jury, in the place of other older and more archaic forms.

Of equal importance, though a less direct result of these principles, was the effect they had on the law itself. Whether he sought the advantage of trial by grand or petty assize, or whether he claimed a remedy for an alleged trespass or other wrong, the suitor purchased a writ from Chancery. The basis, then, of this entire jurisdiction was the king’s writ. Upon this foundation the Common Law Courts were built. Where there was a writ the Common Law Courts had jurisdiction, but where there was not, they had none. When the number of writs became limited in law, the common law was forced into a defined channel, which could be widened but remained within bounds. It is the essential feature of the English legal system. In fact until the fourteenth century, use of the Royal Court was extraordinary and not ordinary justice. Ordinary justice was carried out in the communal and feudal Courts, which were based upon traditional local custom, declared as such by the suitors to the Court.

It is not necessary to trace the detailed history of the courts, but we need to remember that the institutional structure of the English legal system is not the result of some coherent ‘design’, but of historical overlays and piecemeal reforms. The conservative character of English political thought has tended to make proposals for far-reaching redesigns few and far between.

The most radical reforms to the division of the courts occurred in 1875. The 1988 Civil Justice Review was the most important source of reform in modern years (and its recommendations resulted in several changes in the division of work between the County Court and the High Court). For the civil process, the scale of change increased with the 1996 Woolf Report, while the criminal justice process has been the subject of several reports.

**Formality of the common law proceedings**

As indicated above, in order to seek the aid of the royal Justices it was necessary to obtain a writ from the king’s Chancery. This writ was a royal command based upon the king’s special authority. It specified the injury complained of and directed that the person named should right the wrong, or show cause before the king’s Justices why he should not. In the course of time it was natural that the clerks of the Chancery, who drew up the writs, expressed injuries of comparatively common occurrence in the same terms. When a writ thus acquired a common form, it became known as a ‘writ of course’ (brevium de corse). For example, non-payment of a debt was one of the earliest of the cases, which became so stereotyped, and gave rise to the Writ of Debt. Each writ, which thus became formal, gave rise to a form of action, and, in the course of time, each action tended to have its own peculiarities in the proceedings attached to it, such as, for example, the method of proof for supporting or rebutting the claim. So, in a writ of covenant, the covenant could only be proved if the covenant was made by a sealed writing, and this had to be produced. This extreme formality was seen as a great handicap to access to justice and was done away with in the course of the nineteenth century. Access to justice, however, remains a contested issue, as we will see in later chapters.

### 2.8.4 The rise of statute law

In early times there were few statutes. The bulk of law was case law, and statutes were of secondary importance – they were regulations originally made by the King in Council. It is relatively easy in reading early English legislation to see it as an instrument of the Sovereign’s will and understand the purpose behind the regulation. For example, in 1285, by the Statute of Winchester, Edward I ordained:

† Note: this statute has been ‘translated’ into modern English.
The highways leading from one market town to another shall be widened. Where there are trees, or hedges, or ditches within a distance of two hundred feet on either side of the way, they shall be removed, so that no one may make use of their cover to lurk by the wayside with criminal intent. But oaks and large trees shall not be felled, provided there is a clear space between them. If a lord fails in his duty and wilfully refuses to fill in ditches or clear undergrowth and bushes, and robberies are then committed, he shall be liable for damages; and if it is a case of murder, he shall be fined at the King’s pleasure... It is the King’s will that ways through his own demesne lands and woods, whether within a forest or not, shall be similarly widened. If a Lord’s park comes close to the highway, he shall take back the park boundary until it is clear from the highway by the required two hundred feet, or else he shall build a wall, or make a hedge or ditch which is so substantial that evildoers cannot escape across it or come back over it to commit an offence.

From the Tudor period onwards, parliament became more and more independent and the practice of law making by statute increased. But statutes did not become an important source of law until the beginning of the nineteenth century. At the present time, although there is a great deal of legislation, statutes still form a comparatively small part of the law as a whole. However, the impact of this huge growth of statutes on the working jurisprudence of the common law cannot be denied and some commentators now refer to our shared context of the various legal systems in the common law legal family as ‘common law in an age of statutes’.

The different approaches to the interpretation of statutes developed by the English judiciary need to be understood against this context of change. How are we to understand the relationship between the Judiciary (who for much of the history of the common law had their social roots in the rural land-owning classes) and the growing power of parliament?

As the English legal system does not have a written constitution, ‘conventions’, informal linkages and traditional understandings, have proved vital. Since the late eighteenth century, the doctrine of parliamentary supremacy has been accepted; it states that parliament is omni-competent and even omnipotent, that is, it can command everything and anything that is not logically impossible.

The idea of parliament as an absolutely sovereign legislature relies upon two understandings:

1. That no parliament can bind a future parliament or be bound by a previous one. There are no laws that parliament cannot make or unmake and no considerations of natural law can prevail against a clear statute coming from parliament.

2. That no judge can condemn a law and refuse to apply it on the ground that it is incompatible with the constitution or the fundamental principles of the common law. That would be a usurpation of the legislative function by the judiciary.

Two political factors place the relationship of the judiciary and the parliament into question:

- Parliament changed its composition and changed from being a body of ‘landed gentry’ into a democratically elected chamber. The upper House, comprised of representatives of the aristocracy (the House of Lords), has lost power. The fact that the main part of parliament now consists of a powerful single chamber has posed the issue of an ‘elected dictatorship’ in many minds.

- Notions of social engineering and reforming social relations grew in importance, particularly from the mid-nineteenth century. Legislation appeared the obvious method of guidance and regulation. In addition, the increasing complexity of social life gives an increased need for statutes. For example some aspects of law are so complicated or so novel that they can only be laid down in this form. It is not likely that they would come into existence through the submission of cases in court.

Yet the judiciary will not simply apply statutes. They have adopted methods of relating to statutes that have preserved the power of the judiciary as the oracles of the law.
2.9 A brief history of the jury

It is important to have a sense of the jury’s historical development. However, it is also essential to understand more recent issues about the jury and its role in criminal trials. Make sure that you have looked at past exam papers, and dealt with the issues that tend to be examined.

2.9.1 The historical perspective

According to the historian Maitland, the jury began as a body of neighbours summoned by some public officer to give upon oath a true answer to some question. It was a procedure that was brought to England by William of Normandy after the conquest of 1066. They had found this procedure in use in the (Continental) provinces that they had conquered from the Carolingian kings, who had adapted to their own uses the Roman procedure of accounting for local wealth and raising revenue. So instead of being an institution that has risen up with local English customs, as it is sometimes assumed, it began as a royal prerogative or procedure. The facts appear to be that the crown took considerable power in conquered England, and the Norman and Angevin kings used these powers to construct a central government and a common law. The jury became part of the mode of governance and the way that English law and the mixture of local and central government that evolved explains why it developed in a manner which is unique to England and Wales. The jury has had a huge impact on English law, public and private, and on English life. Holdsworth (1928) states that it is not going too far to say that there are large parts of English legal and constitutional history that are not understandable without some knowledge of the role and influence of the jury. While it is not necessary to understand the details of this history it is important to have a broad appreciation of this, in order to see behind many of the often overstated or banal claims made for its role.

Until relatively recently in England (and still in the USA) there was a distinction between a grand jury, or a jury of presentment, which worked out whether there really had been an offence or a case to answer, and a trial jury, which decided the guilt or innocence of the accused, or whether the facts of the suit had been proved.

The jury of presentment

The earliest recorded juries were employed to discover and present facts in answer to enquiries addressed to them by royal officials. We can trace a direct line from these juries to the jury of presentment. It probably began regular use at the Assize of Clarendon in 1166. This variety of jury had great influence in the development of criminal procedure and played a strong role in the operation of local government. Since 1166, the jury of presentment was responsible for presenting persons to the court whom it suspected of crime. It did this either from its own knowledge or by endorsing evidence brought before it by others as a ‘true bill’ to be presented, or by ignoring the bill. Over time, changes in criminal procedure destroyed much of the usefulness of this safeguard against groundless prosecutions. But historically it was of great importance and there are a number of famous instances where a jury prevented the powerful from bringing malicious and unfounded accusations. Moreover, in the days before parliament was reformed and there was no active press to advertise grievances, the grand jury was useful in calling attention to infringements of the law by officials, and to abuses in the administration of the government. But the same machinery was used to call attention to all kinds of abuses – small as well as great; and it was constantly used. Holt (A complete collection of state trials and proceedings for high treason, and other crimes and misdemeanors) wrote in 1684:

It is the constant universal practice of grand juries, after they have dispatched the bills that are brought to them in form, they go and consult amongst themselves what they know of their own knowledge, or are informed of concerning any of the matters relating to the business of the county within their charge and authority, and according as upon enquiry they find matter to present, they do present it to the court; and that very often without the strict form, in paper and in English; this is done by them every assizes and sessions.
This practice was closely connected with the influence of the grand jury upon local government and it changed and ultimately became redundant as local government developed. However, in the Middle Ages, and down to the middle of the seventeenth century, the whole system of local government in theory centred on the presentments of juries. For the purposes of running criminal trials the justices of the Peace basically adopted aspects of the local administrative and information provided by it. This medieval ordering of the business of local government was gradually superseded during the seventeenth century.

The criminal trial, distinction between grand jury (presentment) and petty jury (trial jury)

The Assizes of Clarendon and Northampton provided that 12 legales homines from every locality (in practice, 12 representatives from groupings of a ‘hundred’ local people) must present (basically report) the crimes about which they knew or had heard. They did not speak of their own knowledge only, but of what was reputed in their neighbourhood. As we have seen, this was in substance the jury of presentment – the origin of the grand jury – although, as the organisation of local meetings changed, the sheriff was directed to summon 24 persons from the body of the county generally. This may be one of the reasons why the grand jury ceased to make a presentment based upon reputation, but heard evidence (brought by others) for the prosecution and admitted or refused a prima facie case.

The duty of this jury of presentment was originally to bring criminal cases to the judges’ notice, in order that justice might be done after proof of guilt. It did not adjudicate upon that guilt, although in its early days it frequently did form the trial jury as well. Roger D. Groot (‘The early Thirteenth-Century Criminal Trial’, in Cockburn and Green (eds) (1988), extracts pp.6–7), explains what happened from the evidence of early records of the Lincolnshire assizes (1202–1209). After the jurors had reported their findings on the ‘articles’, or list of matters on which they were required to report to the justices, the suspect could then confess to the officials or be manifestly guilty. In all other cases where the accused denied, proof would be by ordeal. The records give brief accounts of the findings, for example:

Gilbert of Sausthorpe, accused of [burglary], offers himself and is not suspected by the jurors and therefore let him be under pledges.

In that case, the accused had come forward and cooperated and the jurors were satisfied that he was innocent: he was simply asked to give assurances of his good behaviour. But:

Andrew of Burwarton is suspected by the jurors of the death of a certain Hervey because he concealed himself on account of that death, and therefore let him purge himself by the judgement of water.†

In that case the suspect had tried to hide. Groot explains:

The jurors’ statement about Andrew’s concealment may have been spontaneously reported or may have been discovered when the justices, after accusation and suspicion, inquired into the basis of the suspicion. If those inquiries did not produce supporting evidence, the [larger number] were consulted. If they joined the… jurors in suspecting the defendant he… went to the ordeal. If they did not join in the… suspicion, the defendant avoided the ordeal.

Over time the grand jury became a method of preventing the indiscriminate prosecution of accused persons. They heard evidence in private, and if convinced that there was ground for trial, left it to the Court to bring the case before a petty jury on indictment.

The grand jury only presented cases triable on indictment. In the UK the grand jury was abolished for nearly all purposes by the Administration of Justice Act 1933. It had become unnecessary because virtually no person is put on trial on indictment, unless there has been a preliminary hearing before the justices. If no prima facie case is made out, the justices dismiss the charge.

† Under the ordeal of water, the suspect was put in a situation where he was likely to drown; if he survived (which was unlikely) he would be judged innocent.
By contrast, the petty jury does not present the reputation of criminality but decides whether in fact the accused is guilty of the offence alleged. It originated through the abolition of the ordeal as a mode of proof after the Lateran Council of 1215. Before 1215, crimes presented by the grand jury were sent to the ordeal by virtue of the Assizes of Clarendon and Northampton, though if the accused came clean from the ordeal he was required to leave the country.

The king obviously could not personally engage trial by battle, so after the abolition of the ordeal there was no suitable proof for the graver crimes, apart from trial by battle in certain cases of ‘private prosecution’ between important persons. Consequently, the judges sought to persuade the alleged criminal to put himself on his country, that is, to abide the decision of 12 of his neighbours. At first judges such as Pateshull and Raleigh were inclined to compel the accused to go to trial by jury, but later this gave place to an alternative – either such trial or the peine forte et dure.

The peine forte et dure was a form of torture legalised by 3 Edw. 1, c.12 (Statute of Westminster I, 1275), vividly described in the Year Books: 'Justice, take him back to prison and load him with as heavy weight of iron as he can bear, etc.'

Bereford J, remitted him to his penance, seeing that he refused to submit himself to the common law; and charged the gaoler that the cell should be bare and without litter, and that on the day whereon Allan had bit to eat he should eat barley bread, and of that but half of what would suffice a man, and should have naught to drink, and on the day when he had sup to drink on that he should eat naught.†

The object of this torture was to compel the prisoner to submit to the common law trial by jury. If he did not submit, he could not be tried.

It is, therefore, not surprising to find that by degrees trial by jury became the only course, the ‘common law,’ as it became known in the writings of the commentators of that time – though as late as 1658 a prisoner was pressed to death. The advantage gained was that he died without being convicted and so avoided forfeiture,† but there were few who could, or had, occasion to show such hardihood.

In 1772, the peine forte et dure was replaced by a plea of guilty, and in 1827 this was again replaced by a provision that if the prisoner remains mute, a plea of not guilty shall be entered.

There is little doubt that, at first, the presenting and trying juries were the same. One explanation of this is that some members of the presenting jury were also on the trying jury, in order that they might be punished if the trying jury acquitted the accused. In 1351 it was enacted that no person who had been on the jury of presentment should also serve on the petty jury in cases of felony or trespass.

The control of juries

At different times there have been various ways of controlling the jury. The earliest method was by a writ called attaint. Twenty-four jurors were summoned to say whether the 12 jurors on the trying jury had lied. If the 24 said so, the 12 would be punished. The severity of the penalties in this writ may have led to it falling into disuse, but the Star Chamber (loosely described as an ‘administrative court’, and with a rather dubious reputation) took upon itself the task of controlling the verdicts of jurors, and punishing those who seemed to make a wrongful decision or act improperly, with fine and imprisonment. The Star Chamber was abolished in 1641, but even before this date the judges had arrogated to themselves the power of dealing out fines and imprisonment to jurors who gave perverse verdicts. In 1670 this practice of the judges was held to be illegal in Bushell’s case. Since that date juries are controlled only by the power vested in the judge to discharge a jury which disagrees, and by the power in an Appellate Court to grant a new trial where the verdict is against the weight of the evidence.

† Thus on alternate days the prisoner would have an inadequate amount of food, but no water, and an inadequate supply of water, but no food.

† Forfeiture meant that the prisoner’s assets were seized by the Crown; by avoiding forfeiture he could still bequeath them to his wife and children.
The operation of the jury in criminal trials in the seventeenth and eighteenth centuries

Criminal trials have undergone substantial changes over the centuries. Considerable scholarly effort has gone into researching the various changes, the composition of the jury and the relations between jurors and the judges (the Bench).

Scholars are not united in their opinions. Was the jury the light that shows that freedom lives? Or was it of symbolic value but little real protection of liberties?

Consider the contrast between the following two opinions on the jury in the seventeenth and eighteenth centuries. First from J.M. Beattie (‘London Juries in the 1690s’, in Cockburn and Green (eds) (1988), extract p.214):

The late seventeenth century was the heroic age of the English jury, for in the political and constitutional struggles of the reigns of Charles II and James II, trial by jury emerged as the principal defence of English liberties. The grand jury that refused to indict the earl of Shaftesbury and the trial jury of twelve citizens who acquitted the Seven Bishops were to be celebrated as saviours who had prevented the establishment of tyrannical government and had confirmed the jury, as Blackstone was to say, as the ‘sacred bulwark of the nation’. But the constitutional significance of the right to trial by jury went much deeper than that. The jury was also seen as protecting ordinary individuals from arbitrary power and from malicious and unfounded charges, and as supporting a form of trial that gave English subjects a much fairer hearing when they were brought before a criminal court than the subjects of less happy regimes across the Channel. Trial by jury was thus widely thought to be crucial to the defence of the most basic and fundamental of English liberties, a view that was to be asserted frequently in the eighteenth century, particularly when the role of the jury was seen as being unfairly limited and restricted, as in trials for seditious libel.

Such was the view of a ‘liberal’ historian. But the Marxist Douglas Hay sees matters rather differently. He viewed the property qualification – that is, the need for members of a jury to be owners of property, supposedly to ensure that they were men of substance who would perform their duties diligently – as a tactic to ensure that the juries would enforce the radically unjust criminal laws. The jury, for Hay (‘The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century’, in Cockburn and Green (eds) (1988), extract p.356), ‘embodies part of the history of class in England’:

The eighteenth-century ruling class admitted men of moderate property to the jury box but protected itself from the decisions of such men. In the interest of the enforcement of the criminal law, gentlemen also ensured that moderate property would be protected against any participation by the labouring poor in the forging of unanimous verdicts. The whole was concealed in a cloud of rhetorical effusions about liberty and justice, made somewhat plausible by the role that courageous jurymen had played in resisting the executive in state trials.

The fact that the English jury was moulded to sustain the structure of power in eighteenth-century England through a complex of still imperfectly understood decisions under the terms of a very complicated body of law has helped to obscure from historians the extent of the inequality it protected and embodied. The evident independence of jurymen to decide, without appeal, to acquit the accused, as well as to convict, has seemed to some a powerful argument against the portrayal of juries as expressions of class power. It is, of course, no such thing. Probably jurors rarely decided entirely against the evidence, rarely perverted the course of English justice in overtly class-biased ways in the eighteenth century. They had no need to do so. The criminal law of England also shaped, and was shaped by, carefully structured class inequality. The juries so carefully created by Parliament, sheriffs, constables, and wealth were the procedural corollary to the inequality embodied in the substantive criminal law and in English society itself.

Hay is not alone in pointing to the fact that the property requirement meant that the jurors were not representative of the people generally (in addition they were all men), but had more in common with the upper classes. P.G. Lawson (‘Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573–1624’, in Cockburn and Green (eds) (1988), quotes pp.156–157) argued that jurors would feel sympathetic towards
certain types of accused but be distanced from the masses of the people brought to trial. When one looked at the social consequences of the trials, one realised that ‘the principal task of the jurors continued to be the selection of prisoners whose execution would provide an appropriate, and therefore deterrent, example.’ But their vision was a consequence of their social position:

... the jurors were themselves men of property; they occupied positions of importance within the prevailing structure of wealth and power. Moreover, the patterns of sixteenth- and seventeenth century economic and cultural polarisation ensured that their natural social alignment was with the larger landowners immediately above them in the social structure rather than with the landless and near-landless mass that stretched out below them – and that supplied the bulk of the prisoners who stood before them in court.

The conduct of the criminal trial in the late seventeenth, eighteenth and early nineteenth centuries has been the focus of research. John Langbein of the University of Chicago for example, developed a picture of the criminal trial from the reports in the Old Bailey Sessions Papers for the period 1670 to 1730 (see Langbein, 1983). These were published accounts of trials that provide data on how the trials operated. The Old Bailey sat eight times a year and a Sessions paper was produced for each session. Session papers are obviously not an ideal source of information, but they reveal an interesting picture of trials operating in a manner greatly at odds with today’s ideas of proper procedure.

**Langbein: the Old Bailey Papers**

A single jury was empanelled to hear a large number of cases. Typically there were only two 12-man juries for the whole sessions – a London jury and a Middlesex jury. The session lasted several days and processed 50–100 felony cases. In December 1678, for instance, there was a two-day session and between them the two juries returned verdicts in cases involving no less than 36 accused!

A mid-eighteenth century assize judge would preside over more felony trials in a day or so than a modern judge would see in a whole year! Various factors explained this rapid turnover:

The scheduling of trials close to the happening of the crimes, sometimes within a few days; prompt pre-trial evidence-gathering and shifting by the JPs; the virtual absence of lawyers for the prosecution or the defence; the conversational informality of the trial; the constant resort to the accused as a testimonial resource; the recurrent use of jurors who were long experienced in jury work, men who needed comparatively little formal instruction on the essentials of the criminal law and procedure; and the guidance that the jury received from the judge, who exercised an unrestricted power to comment on the merits of the case.’ (Langbein, 1983)

It was common for the cases to be tried and decided in batches. The jury would hear a number of trials and would then go off to deliberate on all the cases together. In the assizes in December 1678, for instance, the Middlesex jury dealt with 21 cases but deliberated only three times. The first batch consisted of seven cases, the second of eight cases, and the last of six cases.

The jurors were usually veterans of earlier sessions. It appears that jurors were selected from a small group. This was in part due to the property qualification.

Trials took place at amazing speed. Most cases were not-guilty pleas but they were disposed of in short order. Typically a jury heard 12–20 cases in a day. Partly this was because many of the not-guilty pleas were half-hearted. The accused made no plea or offered no evidence or brought only character witnesses. One reason for the striking speed of events was that trials tended to take place within a few weeks of the event and the events were recent and easily remembered. The committal procedure often resulted in the accused making a statement or confession and the not-guilty plea that then followed was more pro forma than real. The prosecution was at least allowed to have a barrister whereas the defence was not. The trial looked very different from today because without lawyers, there was no opening and closing speech, no examination or cross-examination of witnesses and no motions on points of
evidence. Questioning of witnesses was done by the judge himself or by the accused. The accused could not give sworn evidence, but he could both question prosecution witnesses and call and question defence witnesses. He would be asked by the judge what reply he made to prosecution evidence and it was normal for him to respond rather than to rely on any right of silence or right not to incriminate himself. (Langbein says that in the entire 60-year period from the 1670s he did not come across a single case in which an accused person refused to speak in reliance on the right of silence.) Also the judge gave few instructions to the jury about each case. Jury deliberations were often perfunctory. Sometimes the jury did not even retire to reach a verdict.

The judge played a far more directing role than would be permissible today. Although Bushell’s case in 1670 had established the principle that jurors could not be fined for returning a verdict contrary to the trial judge’s instructions, that case was not typical. The Old Bailey Sessions papers show the judge normally exercising so much influence over the jury that Langbein suggests ‘it is difficult to characterise the jury as functioning autonomously’ (at p.285). The judge often served in effect as examiner-in-chief of both the witnesses and the accused. In this capacity, as well as in summing up to the jury, he exercised what seems to have been a wholly unrestricted power to comment on the merits of the case. Sometimes the judge did not bother to use the power. But when he felt like it he would tell the jury what verdict to find, and normally the jury followed the judge’s indications.

Sometimes if the judge did not think the evidence for one side or the other was sufficient, he would stop the trial and tell the party in question to get evidence on the point in question and start again. Today the double-jeopardy rule prevents the prosecution from stopping a case that is going badly and starting afresh. But in the seventeenth and eighteenth centuries this occurred not infrequently. The power seems to have been used mainly in order to assist the prosecution rather than the defence.

There is evidence in the reports of some instances of exchanges between the judge and the jury as the case was proceeding. The jury would comment as the case was developing, or would ask questions or would ask for certain witnesses to be called. Moreover it often gave reasons for its decisions and sometimes would be questioned about the verdict by the judge.

In some instances the judge rejected a verdict, probed the jury’s reasoning, argued with the jury, gave further instructions, and told it to go away to deliberate afresh. If the judge did not agree with a jury’s conviction of the defendant, it was common for him to recommend a pardon or commutation of sentence and such recommendations were often influential.

The Old Bailey Sessions Papers also threw light on the rules of evidence that were then applied. Hearsay evidence seemed to be admitted quite commonly. If the judge ruled that hearsay evidence should be excluded, no warning was normally given to the jury to disregard the excluded evidence. Nor was the jury sent out of the courtroom while the argument went on as to the admissibility of the evidence. Since there was normally no lawyer for either side, this was not appropriate.

The Sessions papers also show that, contrary to the modern rules, evidence of previous convictions was frequently considered by the jury as part of the evidence.

Langbein suggests that the modern concept of fairness to the accused, requiring exclusion of evidence that would taint the jury, had not developed by that time. At a time when the judge dominated the jury, there was little thought of keeping prejudicial evidence away from them. The law of evidence, with its modern exclusionary rules, developed not in order to control the judges but as part of the rise of the lawyer as a participant in the criminal process. The rise of lawyers cost the judges their commanding role and thereby made the jury more dangerous, since the judge could not control it so well.
The arrival of lawyers

The rule that the accused could not have a lawyer started to break down in about the 1730s. Until then, according to Langbein, the absence of defence counsel was justified by three main arguments. First, the trial judge was supposed to serve as defence counsel. Second, the requirement of a high degree of proof was regarded as a safeguard. If proof of that level could be mustered against the prisoner, it would be useless for him to have a lawyer since he would plainly be guilty. Third, the accused knew more about the case than anyone else and could not therefore be properly served by an intermediary. On the other hand, curiously, lawyers were allowed for misdemeanour cases though not normally for felonies. Lawyers were also permitted if there was some point of law to argue. If the court did not see the point, however, it was left for the accused himself to raise it and to persuade the judge to allow him to have a lawyer. Defence lawyers began to play a role in examining and cross-examining witnesses in the 1730s, though the accused himself continued to play the same role as before as well. There was no real differentiation of function between counsel and the accused. But gradually the role of the lawyer developed and, as Langbein puts it, the lawyers eventually broke up the ancient working relationship between judge and jury ‘and cost the judge his mastery of the proceedings’ (at p.314).

In the period covered by the Sessions Papers studied by Langbein, the accused in effect therefore lacked the safeguards both of the inquisitorial and of the adversarial systems. There was neither proper investigation of claims of non-guilt nor rules of evidence, the assistance of counsel nor appropriate rules for the selection, instruction and control of the jury.

Another American scholar, Professor Malcolm Feeley of the University of California, conducted a study of 3,500 cases at the Old Bailey from 1687 to 1912. He found that in the 1830s, trials accounted for no less than 95 per cent of all adjudications. But trials were completely different from what we now think of when we use that word:

Typically defendants were not represented by lawyers; they rarely confronted witnesses in any meaningful way; they rarely challenged evidence or offered defences of any kind. And when the accused or someone in his or her behalf did occasionally take the stand, more often than not, they did not offer a spirited defence, but offered perfunctory excuses or defences, pleas for mercy, or in the case of witnesses, offered testimony as to good character or mitigating factors. Indeed the eighteenth and early nineteenth century trial (and earlier) more closely resembled the modern sentence hearing or plea bargaining process than it does a full-fledged modern jury trial (Feeley, 1997).

Establishing the rule of law

In his huge study of the use of capital punishment in England, which forms the basis for the discussion on the next two pages, V.A.C. Gatrell (The hanging tree: execution and the English people 1770–1868 (1994)) paints a sometimes appalling picture of injustice as operating in the criminal courts. He tells of judges who sometimes were a combination of drunkards, and sexual predators, who abused suspects and any persons who spoke up for them, who visited the houses of those who wished to organise petitions of mercy1 advising against it.

Old Bailey justice was especially well lubricated. In the course of each sessions day in the 1830s, two luxurious dinners were provided, one at three o’clock, the other at five... The scenes in the evening may be imagined, the actors in them having generally dined at the first dinner... One cannot but look back with a feeling of disgust to the mode in which eating and drinking, transporting and hanging, were shuffled together... [with] the City judges rushing from the table to take their seats upon the bench, the leading counsel scurrying after them, the jokes of the table scarcely out of their lips, and the amount of wine drunk, not rendered less apparent from having been drunk quickly. [quoting...] As the 1836 Royal Commission delicately put it, ‘instances may be adduced, in which the learned judge, towards the conclusion of a long trial, has been so much affected by the fatigue he has undergone, as to be incapacitated not only from commenting upon, but even from summing up the evidence.’

1 After a sentence of death, it was common for petitions to be organised asking the Crown for mercy for the condemned.
Nor had procedural order improved by then. An assize day was more like a market day than a solemn moment of state:

the witnesses, totally unacquainted with, and equally uncertain of the hour when, and the place where, they are required to be in attendance, are first dragged into court through a crowd of persons (who are as much at a loss as themselves where to go, some being present from idle curiosity, and others, from want of knowledge, wandering about the avenues and purlieus of the court), to be sworn to the evidence to be given by them upon the bill of indictment before the grand jury; from thence they are taken back, through the crowd, to the entrance of the grand jury chamber, to await their being called on the bill, after which they are required to be in readiness to give evidence in court on the trial; but at what hour, or even on what day, they know not; nor is the attorney, on whom they rely for information, able, with any degree of certainty, to assist them. Idlers occupied the witnesses’ waiting-rooms, converting them to the same uses as alehouses ‘for drinking and smoking at pleasure’; no respectable person would willingly enter them.’

There seemed to be clear bias against the prisoners and Gatrell stresses that these images do not encourage the notion that courts were places in which even-handed decision-making was palpable either.

Was the rule of law operating in criminal process at that time? Three factors were the jury, the independence of the judiciary and the Home Office in its judicial role dealing with petitions of mercy. Each was not perfect, but even if they were operating ‘impartially’ the criminal law at this time clearly defended the interests of the property owners and was responsive to the interests of statute-makers in a parliament elected only by people with property. Independent juries and judges could check the overweening interest of lay elites in the trial and sentencing process at least. But we should remember where the jurors came from – jurors had to own property and many commentators see a general agreement between judges and juries about the purposes of the criminal law throughout the eighteenth century. Additionally, in most trials, jury deliberations were casual to a high degree allowing judges to draw ‘crafty distinctions and ensnaring eloquence’ to ‘throw dust in the eyes, and confound the sense of a well-meaning jury’, determining outcomes with little difficulty. Judges bullied juries with directions which ‘were brief, but pointed and leading, if not coercive’. They had no compunction about shaping verdicts through their dominance in court and, especially before the arrival of the lawyers, their control of trial evidence. They ignored jury recommendations to mercy when it suited them. What was the popular conception of the jury? Many radicals praised the jury, but some did not.

Growing independence of juries

This was a developing situation, however, and the self-confidence and independence of juries increased. Bushel’s case in 1670 gave freedom from judicial coercion and this was not doubted except in trials for seditious libel, but this was remedied by Fox’s Libel Act of 1792. Juries provided an obstacle to those who sought expediential justice as noted even by their critics. The social status of these farmers, tradesmen, publicans, and yeomen biased them, some thought, against clergymen, revenue officers, bailiffs, ‘and other low administrators of the law’. They annoyingly favoured tenants over landlords and estate-holders over lords of manors. And they were easily inflamed by ‘political dissensions or religious hatred: these prejudices act most powerfully upon the common people, of which order juries are made up’. Ensuing battles over sedition revealed real tensions between juries and judges in which London juries did stand up for themselves. Elites knew that it was better to live with the jury than not, but their mistrust suggests that it could upset apple-carts. Its popular standing after its victories over ministerial diktat in the 1780s deepened its self-esteem, while increasingly systematic presentation of trial evidence facilitated independent decision-making too. Peter King (referred to in Gatrell) has found that by the later eighteenth century, Essex juries were more experienced in law than hitherto, and more independent. By the 1820s Beattie notes a ‘mental shift’ in the acknowledgement of jury independence, in Phillips’s Golden Rules for Jurymen (1820), for example, which exhorted jurors to give the benefit of the doubt to the accused and to stand up against judges. Juries’ undervaluing of stolen goods to avoid a capital sentence had a longer history than reformers knew.
or admitted in the 1810s; pious perjury might have been decreasing in the early
nineteenth century rather than otherwise. Still, the fact that reformers’ claims on this
score were taken seriously speaks not only for a sensitivity to the jury’s independence
but also a suspicion that with time it could only grow.

Gatrell adds that the appeal archive of the 1820s also reflects jury confidence. Vexed
judges frequently blamed juries for delivering verdicts against their advice. Juries
protested conversely when their mercy recommendations were ignored by judges.
Their protests often turned on unease about the proof of guilt or distaste for capital
sentences. The distaste may have been there before, but now it was overtly expressed.

Very occasionally a lone juror would refuse to accept the foreman’s insistence that
the defendant was guilty and force long discussions. Some even joined petitions for
mercy when a person was convicted and sentenced to hang. But these were usually
unsuccessful.

We are a long way from the time when the Court of Appeal would quash convictions
because a trial judge had been wrong to allow evidence of interviews because these
were oppressive and the confession obtained was unreliable (as in *R v Miller and others
[1992] CA*). However, Gatrell warns not to overstate the idea of progress: ‘there is little
point in lamenting the absence of better structures and procedures whose time had
not yet come and still has not come’.

**Summary**

This historical material allows us to see the current debates over the jury in a different
perspective. It should not be automatically assumed that they have always functioned
as a protection against tyranny. Instead the context the jury fits into and operates
within should be appreciated. What functions are they performing? What is the
operating balance between the different professionals involved and their ideological
beliefs as to their function and the system’s requirements?

**Self-assessment questions**

3. Is it usual to expect a judge in an English trial to intervene in the proceedings?

4. What is the distinction between the ‘inductive’ reasoning used in common law
   systems and the ‘deductive’ reasoning of civil law systems?

5. Give three arguments in support of the adversarial system of proceeding in
   trials.

6. Give two examples of alternative dispute resolution (ADR).

7. Sum up what you understand by the ‘common law’ in no more than 50 words.

8. In the English legal system, only one kind of court carries out investigations into
   the matters before it. Which kind?

9. In the adversarial common law trial, what duties are the parties’ advocates
   under?

10. State three grounds for thinking that there is convergence between common
    law and civil law approaches.

**Summary**

Enough has been said above that it should seem obvious to repeat that studying
English law is joining a tradition, that of the common law with its own language and
ways of doing things. However, many of the features of your legal study will remain a
dark mystery without this fundamental awareness!

Given the centrality of courts to the development of the common law, the next
chapter will look at the role of courts before moving on to ideas of precedent and the
interaction of the court hierarchy.
**SAMPLE EXAMINATION QUESTION**

Look back at the question:

‘What do we mean when we speak of the common law?’

The complexity of the answer should be clear! It is perhaps unwise at this stage of reading to demarcate a separate examination question on the common law, as it cannot be repeated enough that it is essential to appreciate the tradition of the common law as the foundation of all your legal studies on English law.

**REFERENCES**

- Aubert, V. *In search of law*. (Oxford: Martin Robertson, 1983).
Reflect and review

Look through the points listed below.

Are you ready to move on to the next chapter?

**Ready to move on** = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first** = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again** = I found many, or all, of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

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3 Courts, tribunals and other decision-making bodies

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Introduction

Although courts have particular significance in common law systems, they play a central role in both popular conceptions and the operational reality of all legal systems. While popular rhetoric gives every Englishman (and woman) the right to their ‘day in court’, in practice only a small fraction of proceedings result in a court appearance. Courts, however, have a number of functions and their particular location within the separation of powers needs to be noted. There are various courts within the English legal system and you need to understand their respective jurisdictions and operation.

This chapter contains a general, historical overview of the courts which will help you to understand how the courts function within the English legal system. Some parts of this chapter, (as indicated), also provide a more focused consideration of themes that feed into the concerns of later chapters (civil justice, for instance). It is worth remembering this point, and perhaps turning back to these themes, when you are considering the later chapters in the subject guide.

Essential reading

- Holland and Webb, Chapter 1: ‘Understanding the Law’.

Useful further reading


Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- explain the essential nature of a court, its functions and its particular kind of decision-making
- outline the early development of the royal courts
- list the main types of courts currently used in the English legal system and outline the nature of their jurisdiction
- explain the main characteristics and functions of tribunals and the differences between a tribunal and a court
- distinguish the operation of a court from arbitration and mediation
- explain the main advantages and disadvantages of court decision-making and alternative dispute resolution
- debate whether there are circumstances where disputes go to court where arbitration or mediation would be a preferable mode of dealing with the dispute
- explain in outline the doctrine of precedence and show how precedence operates between the various types of courts
- outline the effects of the Human Rights Act 1998 on the operations of the courts
- understand the role of the Supreme Court.
3.1 The role of courts in a ‘modern’ legal system

The common law arose with the idea of the judges of the English royal courts deciding cases (or, in the older terminology, adjudicating upon the ‘causes’) and the subsequent recording of those decisions. Courts have always been central to the development of the English legal system. Consider the following definitions:

...law is what the courts do in fact (Oliver Wendell Holmes, one-time Dean of the Harvard Law School and American jurist).

The Law of the State or any organised body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties. (John Chipman Grey, another famous American jurist, 1909).

The role and operation of the courts is a valid topic of scrutiny. Take the idea of the ‘Rule of Law’, which is central to the idea of British constitutional behaviour. The constitutional and administrative lawyer, Wade (1977), defines this in terms of an injunction that ‘government should be conducted within a framework of recognised rules and principles which restrict discretionary powers’. How and by whom should these discretionary powers be restricted? Wade gives the courts a central function:

Disputes as to the legality of acts are to be decided by judges who are wholly independent of the executive... The right to carry a dispute with the government before the ordinary courts, manned by judges of the highest independence, is a common element in the Anglo-American concept of the rule of law (p.25).

However, the role of the courts clearly extends beyond public law. The following exercise should give you some sense of the broader issues with which courts are concerned.

Activity 3.1

Read Cownie and Bradney, Chapter 2: ‘The Significance of Courts’, included in the Common law reasoning and institutions study pack and answer the following questions.

a. How do the authors define courts?

b. Why do courts seem central to our images of a legal system?

c. What functions do the authors say courts have?

d. What authority do they give to courts?

e. How do courts function as ‘rule-makers’ and as legislature?

f. What limits do the authors give to these processes?

Reflective issue: If courts do not in fact handle the majority of disputes in civil justice, for example, should we be changing the emphasis in legal education away from an image of law that has court room conflict at its centre to one of process where settlement, ADR and compromise are central legal realities?

Feedback: see end of guide.

3.2 The structure of courts in the contemporary legal system

Essential reading

- Holland and Webb, Chapter 1: ‘Understanding the Law’ – Section 1.5.3 ‘The Court Structure’.

Further reading

- Cownie and Bradney, Chapter 3: ‘Courts in the English legal system’.

A working knowledge of the court structure is required for the understanding of the location of adjudication, the types of dispute handled and the interaction of culture and personnel. You should learn the jurisdiction of each type of court (i.e. what kinds of case it can deal with), how it fits into the hierarchy of courts, how it compares with other courts in terms of workload and how it is organised (e.g. where it sits; who the judges are). The relevant courts are, beginning with the lowest:

- Magistrates’ Courts
- County Courts
- the Crown Court
- the High Court
- the Court of Appeal
- the Supreme Court
- the Judicial Committee of the Privy Council
- the European Court of Justice.

You can gain some idea of their relative location from Figure 3.1 (see below).

### 3.2.1 The courts

**Magistrates’ Courts**

Magistrates’ Courts have a wide and varied jurisdiction. They are involved in some way in virtually all criminal prosecutions; magistrates hear cases concerning young persons (when constituted as a Youth Court), family or ‘domestic’ proceedings, as well as enforcement of income tax or local tax. Magistrates’ Courts are therefore of enormous importance in the criminal justice decision-making process. They also grant (or refuse) licences for the sale of alcoholic liquor, betting, etc. Aside from their breadth of jurisdiction, the most important feature of Magistrates’ Courts is the extensive involvement of lay† people (non-professionals) as judges.

There are approximately 26,000 magistrates who sit as unpaid, part-time lay judges; in inner London, by contrast, there are professional ‘stipendiary magistrates’ (recently renamed District judges, Magistrates’ Court), advised by a professionally qualified clerk. The fact that professional judges sit in Magistrates’ Courts in inner London is largely an accident of history.

**Reflection point**

In the provinces and outer London the task is in the hands of a panel of lay magistrates – does this result in different degrees of professionalism and a different dispensation of justice?

**The County Courts**

There are almost 250 County Courts in England and Wales. As a result most medium-sized and large towns contain this court of first instance in the civil justice process. The bulk of cases heard before them are routine attempts at debt collection. The modern County Courts date from 1846, owing to the demand for a less expensive method of recovering debts and other civil matters previously tied up in expensive and complex proceedings in the higher courts. Their jurisdiction has always been subject to both financial and geographical limits, but within those limits, jurisdiction has generally been concurrent with that of the High Court, which has led to suggestions that, since the two courts hear similar types of cases, they should be amalgamated.

The Civil Justice Review conducted in the late 1980s, however, considered the structure and work of the civil courts and recommended that the two courts should remain separate. That recommendation was followed in the Courts and Legal Services Act 1990. The changes recommended by the Civil Justice Review and implemented in the Courts and Legal Services Act 1990 were based on the premise that the business of the

† Lay – members of the public
civil courts should be handled at the ‘lowest level appropriate to each case’. While this has allowed increasing numbers of more expensive claims to be heard in the County Court, the question of what criteria constitutes ‘the level appropriate to each case’ has been mainly the amount of the claim, not the difficulty of law involved (with certain exceptions for obviously ‘complex areas of law’ and judicial review).

As of January 1999, the County Court will normally hear cases on contract and tort to a limit of £25,000, and certain property and other matters to a limit of £30,000. Claims in contract or tort between £25,000 and £50,000 can either be heard in the County Court or High Court, while claims over £50,000 will be heard in the High Court. Most of the work in the County Court is conducted by District Judges, of whom there are around 370 in England and Wales.

**The Crown Court**

Although predominantly a court of first instance for the trial of the more serious criminal offences, the Crown Court also has significant appellate and civil business. The most controversial aspect of the Crown Court’s jurisdiction concerns the extent to which an accused person should have the right to insist upon trial by jury.

The relationship between the Crown Court and Magistrates’ Courts as higher and lower trial courts for criminal cases raises questions similar to those mentioned above relating to civil courts. But the relationship between the criminal courts is more complex, because jury trial is available in criminal cases only in the Crown Court; any proposal to adjust this relationship will necessarily raise sensitive questions about extending/removing the right to jury trial.

**The High Court**

The High Court is based in London, with various provincial ‘branches’. Some knowledge of its historical development is essential to understand the modern arrangement of the High Court. Note that the High Court is merely one part of the Supreme Court of England and Wales (see section 3.2.2 below).

The High Court has three branches:

- the Chancery (the historic successor to the Chancellor’s Court) dispensing equity. It mainly deals with trust matters, conveyancing, mortgages, contested probate, intellectual property other than that covered by the Patents Court (one of the four specialist courts of the High Court) bankruptcy and appeals from decisions of Commissioners of Inland Revenue
- the Queen’s Bench, which mainly deals with personal injury, contract and tort claims
- the Family Division, which hears divorce cases and ancillary matters, and Children Act cases.

**The Court of Appeal**

It is only necessary for you to understand what decisions may be the subject of an appeal to the Court of Appeal Civil Division or to the Court of Appeal Criminal Division, and how the Court is constituted to hear them.

**The House of Lords [Judicial Committee]**

Now replaced by the Supreme Court. In this subject guide we continue to refer to the House of Lords if dealing with cases decided by it or issues relating to it. It is important to note however that it is now no longer in existence and has been replaced by the Supreme Court.

**The Supreme Court**

The Supreme Court came into being in October 2009, replacing the Appellate Committee of the House of Lords, and assuming the devolution jurisdiction of the Judicial Committee of the Privy Council. The Supreme Court is now the highest court
in the UK. The court is staffed by 12 ‘independently appointed judges’ – Justices of the Supreme Court.

The Court’s jurisdiction extends over appeals on matters of law raising issues of ‘great public importance’ in civil cases from the UK. It also has a similar jurisdiction over criminal law in cases from England, Wales and Northern Ireland. The powers of the court also cover issues raised by devolution – as specified under the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 2006 (www.supremecourt.gov.uk/about/the-supreme-court.html).

**The Judicial Committee of the Privy Council**

Primarily a Commonwealth court, the Judicial Committee is of interest mainly in relation to the doctrine of precedent. It has played an important role in drawing together the common law legal family, although the number of common law countries that have it as their highest court is declining.

**The European Courts**

An important recent feature of the English legal system is the increasing use made of two courts, the first of which – the European Court of Justice (ECJ) – takes its jurisdiction from the United Kingdom’s entry into the European Union, while the second – the European Court of Human Rights (ECtHR) – takes its jurisdiction from the United Kingdom’s signing the European Convention on Human Rights.

**The European Court of Justice**

This court hears:

- applications from member states’ courts for preliminary rulings under Article 177 EEC [European Economic Convention]
- direct actions against member states or EU institutions
- requests for opinions on international law and the European Treaty
- tort claims
- certain actions for judicial review.

**The European Court of Human Rights**

The European Court of Human Rights enforces the European Convention on Human Rights, which includes such rights as liberty, security, fair trial, freedom of thought, conscience, assembly, right to life, right not to be subjected to torture or inhuman or degrading treatment, etc. The United Kingdom has been taken to this court on many occasions, necessitating amendments in domestic law.
Common law reasoning and institutions

For the nature of precedent, which we will look at later in this chapter. Throughout

Figure 3.1 The contemporary court structure (adapted from Holland and Webb (2010), p.13)

SELF-ASSESSMENT QUESTIONS

1. Arrange these courts in order of seniority, starting with the lowest:
   - Court of Appeal Criminal Division; Crown Court; High Court Chancery Division; the Supreme Court
2. What are the three divisions of the High Court and what do they deal with?
3. What is a puisné judge?
4. What sorts of cases does the County Court mainly deal with?
5. What is the difference between a lay magistrate and a stipendiary magistrate?
6. How many Lords Justice of Appeal are there?
7. Who heads the Civil Division of the Court of Appeal?
8. What was the *curia regis*?
9. In earlier times, how was a writ obtained?

Summary

The different courts are arranged in a hierarchical framework on the basis of seniority; the higher the level of seniority, the greater the court’s authority. This is essential for the nature of precedent, which we will look at later in this chapter. Throughout
the common law world each jurisdiction has its own system of court organisation. Although there are differences there are also great similarities in structure.

In general there are trial courts and appellate courts. The former are the courts where the trial is heard (sometimes referred to as ‘courts of first instance’). It is here where the parties appear, witnesses testify, and the evidence is presented. The trial court usually determines any questions of fact in dispute and then applies the relevant points of law. Usually once the trial court reaches a decision, the losing party has a right to appeal to an appellate court.

Generally the appellate court can only decide questions of law, and its decision in each case is based on the record made during the trial. Appellate courts do not receive new testimony or decide questions of fact, and in a lot of jurisdictions the appellate courts only issue written opinions. All jurisdictions have a final court of appeal (usually called the Supreme Court) or have recourse to the Judicial Committee of the Privy Council.

### 3.2.2 A new Supreme Court for the United Kingdom

There are sound constitutional reasons for the creation of a Supreme Court. Official publications describe the court as making for greater clarity in the separation of powers between the legislature and the judiciary. They elaborate this by noting that:

> The Supreme Court has been established to achieve a complete separation between the United Kingdom’s senior Judges and the Upper House of Parliament, emphasising the independence of the Law Lords and increasing the transparency between Parliament and the courts. (www.supremecourt.gov.uk/about/significance-to-the-uk.html)

The court’s publicity makes a great deal of the physical location of the institution. It is:

> highly symbolic of the United Kingdom’s separation of powers, balancing judiciary and legislature across the open space of Parliament Square, with the other two sides occupied by the executive (the Treasury building) and the church (Westminster Abbey).

(www.supremecourt.gov.uk/about/history.html)

Jack Straw, speaking at the official opening of the Court, noted that it represented a culmination of a long process of institutional reform. Indeed, this slow process of constitutional reform and revision is true to the ‘spirit’ of the Constitution and the incremental development of British democracy. Early attempts to create a Supreme Court can be dated to the 1830s. The celebrated writer on the English constitution, Walter Bagehot, noted that the nation’s highest court ‘ought not to be hidden beneath the robes of the legislative assembly’ but ‘ought to be a great conspicuous tribunal’.

Towards the end of the period when William Gladstone was prime minister, an Act was passed that would have ‘removed the jurisdiction of the House of Lords’ had the liberals won the 1874 election.

However, not all commentators have been so valedictory. In a recent article Conor Gearty has been critical of the new Supreme Court (www.conorgearty.co.uk/pdfs/ SUPREME_COURTOctober2009.pdf). He notes that the Supreme Court does not have the power to strike down Acts of Parliament or to champion the Human Rights Act. Compared to other supreme courts, in nations with a sovereign constitution, the Supreme Court of the UK thus appears a rather feeble body. However, might the Court grow beyond its rather limited beginnings? Gearty stresses that – in its composition – the court represents a break with the past: the Supreme Court Justices are not ‘anachronistic’ but more in keeping with their ‘American, Canadian, Irish, South African, Indian colleagues’. However, they lack the powers their colleagues have. Gearty argues that this might inspire the Supreme Court Justices to develop the powers of the Court ‘as a matter of corporate pride as much as constitutional principle’.

This begs some interesting constitutional questions. The Supreme Court is limited by Parliamentary sovereignty. This is why it cannot challenge Acts created by the Parliament as the supreme law making body. However, it might be possible to turn the tables on Parliament, by arguing that ‘parliamentary sovereignty is itself a legal artifice’ (Gearty, p.2). Parliament is supreme because the judges recognise it as such: ‘what the judges have made, they can unmake, or at least vary’. Evidence is supplied by the
ruling in 2005 on the fox hunting ban. The House of Lords suggested that ‘there may be basic values... which not even an Act of Parliament could lawfully contradict’. But, what are these basic values? One might speculate that they are ‘respect for human rights say as well as a right of access to the courts and perhaps also a commitment to the rule of law’ (Gearty, p.2).

These critical comments clearly go beyond the official discourse on the Supreme Court. They envisage a role for the Supreme Court that links it to a constitutional ‘revolution’ – where judges effectively assert a common law constitution founded on human rights. This would clearly be a significant shift in the balance of power away from parliament and to unelected judges. Whilst this is not necessarily incompatible with an idea of democracy and – given the present public mood which distrusts politicians – such a political and legal development might not be too farfetched.

3.3 Tribunal adjudication and alternative dispute resolution

USEFUL FURTHER READING
- Cownie and Bradney, Chapter 4: ‘Tribunals’.
- Slapper and Kelly, Chapter 12: ‘Arbitration, Tribunal Adjudication and Alternative Dispute Resolution’.

The use of specialist tribunals to resolve disputes over a wide range of issues has a long history within the English legal system. Since World War II (1939–1945), in large part owing to the development of new forms of law (such as ‘social security law’), the range and volume of cases heard each year by tribunals has dramatically increased. Currently, tribunals deal with over a quarter of a million cases annually – which represents more than the combined total of all County Court and High Court cases. Tribunals are therefore important in the English court system because of the quantity of cases handled by them. They are also important because of their distinctive procedures and methods of adjudication.

It is not necessary for you to acquire knowledge of all the different practices and procedures of tribunals, but you should understand the general aims and objectives of tribunals, and the ways in which they differ from traditional civil and criminal courts.

3.3.1 The difference between courts and tribunals

It is not easy to distinguish between a ‘court’ and a ‘tribunal’; a tribunal is established by Parliament in the manner of a court to hear particular grievances or specialist matters of dispute. Common disputes are those between individuals and a government department, for example an individual claiming a social security benefit and the Department of Social Security denying that she or he is entitled to it. Such tribunals are called administrative tribunals, while some other tribunals are established to deal with disputes of a specialist nature where the government is not normally going to be a party, for example, industrial tribunals (which may deal with claims for ‘unfair dismissal’ of employees).

In Attorney-General v British Broadcasting Corporation [1980] 3 All ER 61, the House of Lords stated that the essential difference between a tribunal and a court is that a tribunal does not administer any part of the ‘judicial power of the state’. It has a specific jurisdiction as allocated by Parliament and does not enjoy a broad jurisdiction defined in general terms.

The chairman of the more important tribunals is usually a lawyer who sits with at least two lay members (typically representing the sorts of interest groups familiar with the parties and issues most commonly coming before the tribunal).

Important issues for consideration fall under three headings:
1. the objectives and distinctive characteristics of tribunals
2. adjudication in tribunals
3. representation at tribunals.
3.3.2 The work and characteristics of tribunals

There is great variety in the organisation, location and procedures of tribunals.

**Activity 3.2**

Re-read Chapter 4 of Cownie and Bradney and Chapter 12 of Slapper and Kelly, and write brief notes on the following:

a. the nature of the work dealt with by tribunals
b. the reasons for allocating particular work to a tribunal rather than a body called a court
c. the advantages and disadvantages of tribunals as machinery for resolving particular types of dispute
d. the extent to which rules of civil or criminal evidence apply to tribunal proceedings
e. the potential conflict between the requirements of justice and the desire to deal with cases quickly, cheaply and informally.

No feedback provided.

In doing the recommended reading, other questions to ask yourself include:

- In what ways are tribunals ‘expert’?
- What approaches to the investigation of cases are tribunals supposed to adopt?
- How difficult is it likely to be for tribunals to preserve informality, while arriving at accurate and consistent decisions?
- If a balance is to be struck between formality and informality, how should the tribunal achieve this balance?

Another theme involves representation in tribunals. Due to lack of legal aid most persons either represent themselves, or rely on friends or members of Law Centres or other interested organisations as law advocates.

In March 2003, the government announced the biggest shake-up of the tribunal system for 40 years. A unified tribunals service will bring together at least 10 tribunals, with responsibility now split among five government departments, under the aegis of the Lord Chancellor. The then Lord Chancellor, Lord Irvine, said the change would reform the ‘third great pillar’ of the justice system, following changes to criminal and civil justice. The unified service will take in the 10 large tribunals, covering areas including employment, pensions, immigration, criminal injuries compensation, mental health, social security benefits, tax and disability. Smaller tribunals may be added later. The reforms were recommended in a review of the system by Sir Andrew Leggatt, a senior judge. A White Paper filling in the details was published in late 2003.

### 3.3.3 Arbitration

It has been said that today arbitration is the commercial world’s realistic response to the shortfalls of the traditional court system. Usually the dispute is settled by an individual expert in the subject matter or a specially trained lawyer. In contrast to a judge in a court, the arbitrator tries to effect a settlement between the parties and needs each party to want to achieve a fair settlement to succeed. However, you will have noted from your earlier reading of Cownie and Bradney (Chapter 1) that arguments that arbitration and other non-court forms of dispute resolution arise either because of the failure of the formal system, or as extensions of the formal system, may be misplaced. Instead they suggest that the informal system is an integral part of the totality of law and not an alternative to it. The ways in which this totality takes shape is open to debate.
Summary

Tribunals provide a highly important arena for settling disputes. They are diverse in their areas of expertise and in their operating rules. In general they span a range from being almost like a court to being like non-state dispute-processing mechanisms. However, they have a different culture from the formal courts and this allows them greater flexibility.

Cownie and Bradney (2003, p.84) put it in the following terms:

As we move from courts through various kinds of tribunals so the emphasis shifts from the parties presenting their cases and the judges selecting winners and losers to a more general search for the issues which separate the parties with the dispute settling body itself taking on a more formal role in ensuring that those issues are uncovered and, where possible, settled between the parties... The work of the tribunals merges into the work of other non-state dispute settlement procedures...

Sample Examination Question

Consider the following:

One of the major problems with understanding the civil justice process in the UK is the focus on the courts as the only way in which disputes can be resolved.

Discuss.

Advice on answering the question

This was not answered particularly well. Some students simply took this question as an excuse to write out all they knew on civil justice. However, the correct approach would start with looking at the question and analysing the key words. The question is asking you to consider whether or not courts are the best place for resolving disputes. Only a couple of students really demonstrated that they could relate the whole idea of a court, as a forum for the handling of disputes, to problems in civil justice. A few more – who received good marks – went through the Woolf reforms and indicated the extent to which Lord Woolf contested the idea that the courts were the only way to resolve disputes and his backing to alternative dispute resolution (ADR).

3.4 The decision-making of the courts and the doctrine of precedent

Essential Reading


Useful Further Reading

- Slapper and Kelly, Chapter 10: ‘Judicial Reasoning and Politics’.

To understand the nature of precedent fully, you need to understand:

- the nature of judicial reasoning in the common law
- the constitutional role of the courts and the judiciary
- the nature of a case
- the role of the propositions of law developed therein.

Therefore the material in Chapters 4 and 5 of this unit is as relevant as our considerations of the judiciary. In this area, as in others, no topic can be seen as some discrete object of study; instead an interactional perspective towards the material needs to be developed.
3.4.1 Judicial decision-making and the stabilisation of the law

You should consider generally the fine balancing act that must be accomplished by the judiciary. In carrying out the judicial function, a number of factors will influence decision-making and judges must determine what weight to give to these factors, which include:

- the need for stability and certainty in law
- the wish to do justice to both the parties
- the need not to usurp the role of Parliament
- the need to justify a decision by reasoned argument
- the need to base a decision on at least one of the issues raised by the parties.

Although judges are required to perform many tasks during the course of legal proceedings, when considering the ‘judicial function’, attention is usually focused primarily upon the way in which judges determine disputed questions of law (i.e. adjudication). In arriving at their determinations, courts are expected to be consistent with decisions in previous cases and to provide certainty for the future. These requirements are reflected in the English system of judicial precedent.

3.4.2 Is there a tension between certainty and flexibility?

Statutes bind judges because of the doctrines of separation of powers and legislative supremacy. Case law is binding because of the doctrine of precedent or stare decisis (this term is from the Latin phrase stare decisis et non quieta movere, meaning to ‘to stand by decisions and not disturb that which is settled’), thus judges are expected to decide ‘like’ cases in the same way.

It is relatively easy to give an outline of the doctrine of precedent. The more important task is to consider how precedent works, what freedom it offers to individual judges and how it binds together the court structure. Thus the contemporary legal philosopher Ronald Dworkin (Law’s Empire (1986)) speaks of legal judgments as looking both backwards and forwards. Legal judgments must keep faith with the decisions of the past (and thus we ask for a degree of consistency and certainty) while fitting with the circumstances of the present (and thus we ask for the decision to be just to the demands of the actual circumstances). Flexibility plays off against certainty. We also need mechanisms to change decisions should they fail to do justice in the individual case or the line of decisions appears no longer to provide an apt solution to the issue in light of changing social and economic circumstances.

Individual judges need to fit into a tradition in which the propensity to make arbitrary decisions is controlled; the doctrine of precedent or stare decisis safeguards against the notion that judges make arbitrary decisions. The principle of stare decisis asks judges to follow the doctrinal rules laid down in identifying and controlling the use of precedents: like cases are decided alike, thus providing parties with some degree of certainty regarding the outcome of a proposed case.

It is, therefore, the general rule that judges will follow judgments made in earlier cases that are sufficiently similar to cases brought before them, unless there are very good reasons to disagree.

3.4.3 When is a precedent binding?

The development of the common law through a system of binding precedent and a tradition of recognising prior ratios depends upon a technology of language which both captures the ‘reason of law’ and enables it to be recalled for present consideration.

The history of the common law is of a movement from an oral tradition to a mass of written records of various cases. In some jurisdictions, such as the USA, the current mass of other state and federal precedents can be confusing; the English legal system, by contrast, is structured by the court hierarchy. In understanding the role of
precedent, we therefore need to note the interaction of the court hierarchy, as well as the nature of the particular earlier decision. The binding power of earlier decisions or precedents varies, from those that are merely ‘persuasive’ to those that are strictly ‘binding’.

While we may wish to ‘let the decision stand’ (the doctrine of *stare decisis*) the decision in an earlier case will only be binding upon any later case if:

- it contains a statement of law
- it forms part of the *ratio decidendi* of the later case
- it was decided by a superior court whose decisions are binding upon the court dealing with the later case
- it does not contain any significant difference to the later case.

Sometimes judges may make a proposition of law that is not specifically directed towards the final judgment. This is called an *obiter dictum*, meaning ‘words said in passing or by the way’.

### 3.4.4 The interaction of the court hierarchy and the doctrine of precedent

It is the general rule that decisions made in higher courts are binding upon courts below them, and to a certain extent on courts at the same level. The way in which the court hierarchy structures the working of judicial precedent is described as follows.†

#### Magistrates’ Courts and County Courts

These courts are bound by decisions of the High Court, the Court of Appeal and the Supreme Court. Magistrates’ and County Courts are not bound by their own decisions, neither do they bind any other court, although they are expected to exercise consistent decision-making.

#### The Crown Court

This court is bound by decisions of the Court of Appeal and the House of Lords/Supreme Court. Its decisions – at least those reported as of interest – are generally regarded as persuasive and worthy of being used in argument, particularly those made by High Court judges sitting in the Crown Court.

#### The High Court

The decisions of this court are binding upon all inferior courts, but not upon other High Court judges, although in practice they rarely go against each other’s decisions. High Court decisions are not binding upon the Divisional Court (civil or criminal), where two or more High Court judges sit together. All Court of Appeal and House of Lords/Supreme Court decisions are binding upon the High Court.

#### The Divisional Courts of the High Court

The decisions of the Divisional Courts of the High Court are binding upon High Court judges sitting alone and also the inferior courts, except the Employment Appeal Tribunal. The Divisional Courts are bound by the Court of Appeal and the Supreme Court and also by its own decisions.

#### The Court of Appeal (Civil Division)

Generally, its decisions are binding upon the Divisional Courts of the High Court, individual High Court judges and the inferior courts, including the Employment Appeal Tribunal. It must follow decisions of the House of Lords/Supreme Court. In *Young v Bristol Aeroplane Co. Ltd* [1944] KB 718, it was held that the Court of Appeal (CA) is bound by its own decisions unless:

- it is a Court of Appeal decision given *per incuriam* (i.e. with the omission of a very important component which subsequently flaws the decision)

† You may find it useful to draw a diagram showing how the authority of precedent flows between different courts in different circumstances.
• it involves an earlier conflicting decision by the Court of Appeal, when the CA may then choose which case to follow

• the earlier Court of Appeal decision has been expressly or impliedly overruled by the Supreme Court.

The Court of Appeal (Criminal Division)

This appellate court is bound by House of Lords/Supreme Court decisions and is generally bound by its own decisions, but not so rigidly as in the Civil Division, since the liberty of the appellant is often at stake.

The House of Lords

Between 1966 and 2009 (when it was replaced by the Supreme Court), the House of Lords no longer needed to be bound by its own decisions, although it was stated in the Practice Statement Judicial Procedure (1966) that this rule was to be used cautiously, especially in property and taxation matters and also the criminal law. Great weight is attached to statements made in the House of Lords even when they are said obiter. Any House of Lords decision can be overridden by an Act of Parliament.

Precedents in other courts may be persuasive depending upon the status of the court, the reputation of the judge and the country in which it was established.

The 1966 Practice Statement and the Supreme Court

Does the 1966 Practice Statement apply to the Supreme Court? In Austin v Mayor and Burgesses of the London Borough of Southwark [2010] UKSC 28 Lord Hope argued (at para 25) that:

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, it is probably the case that the Supreme Court can depart from its previous decisions and previous decisions of the House of Lords when it considers that ‘it would be right for it to do so’ (Lord Hope, para 25).

3.5 The effects of the Human Rights Act 1998

Essential reading

• Gearey et al., pp.266–270.

The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law. One of the most significant features of its provisions, but which has received relatively little attention, is its impact on the system of precedent. Under s.2, when deciding on questions under the Convention, courts must ‘take into account’ the case law of the European Court of Human Rights. They are therefore not explicitly bound by those decisions, but are under a duty to consider them. However, under s.6 it is unlawful for the courts (as public authorities) to act in a way which is incompatible with the Convention.

Taken together, these provisions mean that when any court is considering a case which raises human rights issues, it must look at the case law from the European Court of Human Rights sitting in Strasbourg and interpret the requirements of the Convention in the light of that case law. If an earlier binding decision of the domestic courts would, in the view of the court, breach the Convention, the court is not bound to follow that decision since to do so would cause the court to breach s.6 and act unlawfully.

Under s.3 of the Act, the courts are obliged to interpret legislation ‘in so far as it is possible’ in a way which is compatible with the European Convention on Human
Rights. This requirement means that the rules of interpretation by which the courts have been guided up until now, must take second place to the requirement that statutory provisions should be compatible with the Convention. Even if Parliament’s intention in passing the Act was clear, the courts must try to interpret the Act in a way which is compatible with the Convention, regardless of the intention of Parliament.

Summary

The traditional approach to precedent and statutory interpretation has been modified by the Human Rights Act 1998. The Act requires the courts to ensure that statutes and case law are compliant with the provisions of the European Convention on Human Rights. This new obligation has changed the approach of the courts in some important recent cases.

Self-assessment questions

1. What courts’ decisions are binding on the High Court?
2. Is the House of Lords bound by its own decisions?
3. How can House of Lords’ decisions be overruled?
4. On whom are the decisions of the High Court binding?
5. What power do decisions of the Crown Court have?
6. What in outline is the doctrine of stare decisis?
7. In which courts may obiter dicta have persuasive power?

Advice on answering examination questions

You should not expect to be able to answer examination questions on precedent and stare decisis on the reading you have done so far. This is a common failing in the examination answers given. The operation of precedent is a complex interaction of court hierarchy and authority. An important issue is what exactly the nature of the authority of a court’s decision is. It is only part of the answer to look at the court structure. We need to look at the nature of the reason for decisions and the different techniques that common law lawyers use in arguing for a precedent or against one. This is the subject of Chapter 5 and in Chapter 4 we lay out the issues of legal research and of understanding the legal sources that common law lawyers have to deal with.

Useful further reading


References

Reflect and review

Look through the points listed below.

Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

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Introduction

Lay people encounter the legal system in a variety of ways on a variety of occasions. Whether they are seeking redress or are being accused of something, the legal system appears as something ‘other’ – something that is the preserve of professionals. These professionals are assumed to have particular skills and a knowledge that the lay person is then prepared to pay a fee to use. There is, however, some debate as to what exactly these skills are and the nature of this knowledge. These issues reoccur with questions over the judicial function.

The law student, on the other hand, encounters the legal system predominantly through texts and words. How to work with those words, how to approach the way they are collected (in case reports, statutes, textbooks, articles, and so forth) is an essential skill to be learnt. Learning the law is, in this respect at least, like learning a new language. Learning to be a lawyer is accordingly partly akin to learning the location of meanings, the grammar and structure of this language.

This chapter refers you to readings and contains a number of exercises. It has a logical progression: first it introduces basic principles or the process of legal research as it impacts on the professional task of finding and arguing the law; it then moves on to consider the sources of English law and, finally, asks you to engage in dealing with these sources in action.

Through such engagement these exercises also offer a way into some of the complicated ideas and processes involved with understanding a legal system and the operation of the rule of law and legal research. The exercises on case law fit with the material in Chapter 6 and may be undertaken in conjunction with the readings from that chapter. The exercises on statutory interpretation similarly fit with both Chapter 6 and Chapter 7. We also see how issues of statutory interpretation and the use of cases overlap.

Learning Outcomes

By the end of this chapter and relevant readings you should be able to:

- outline the principles of legal research
- explain what is meant by the term ‘sources of English law’
- discuss the interaction between ‘law’ and ‘facts’
- read a case as a lawyer would
- appreciate the argumentative nature of ‘law’
- argue why judges’ decisions need to be justified.

Essential Reading

4.1 Principles of legal research

Legal research is at the centre of professional legal skills, but what do we mean by this term?

In simple terms legal research is the search for material necessary to support legal argument and decision-making.

In a broader sense legal research is a process that begins with:

- analysing the facts of a problem that is brought to a lawyer,

and moves on to:

- identifying the relevant legal issues to be addressed, including:

- separating factual and legal problems to be resolved, then:

- finding the law that is relevant to the legal problems,

and concludes with:

- applying and communicating the results of the search and analysis.

Although we may want – for analytical purposes at least – to separate out the process and treat it as if it was wholly ‘legal’, in reality decision-making occurs in economic, social, historical, cultural and political contexts. Hence not only can these factors influence decision-making, but legal decisions are often dependent on economic, business, scientific, medical, psychological and technical information. Additionally, legal research should not be seen as merely preparatory. Law is an argumentative process and research is directed to an argument. The results of the research need to be communicated effectively and put into an argumentative structure.

For example, a person who has suffered loss as a result of an injury may want to know if they can claim damages. They outline a chain of events to a lawyer, who seeks to identify if there are indeed grounds to launch a claim and who it would be against. The lawyer is looking to identify a ‘cause of action’, and this might be due to a breach of contract, negligence or some other claim. In the broad area of tort (that is, obligations between parties independent of contract), a common claim is that the loss was occasioned by the negligence of a third party.

The lawyer will have a working set of assumptions as to the state of the law of negligence and where to find the precise articulations of the law that will serve as his/her working knowledge, as he or she listens to the client. Importantly, he or she will understand that the third party must owe some form of a ‘duty of care’ towards his/her client†.

The lawyer will know that the basic principles of the law of negligence are such that where an injury has been caused by the negligent behaviour of another person, the injured person may bring an action for damages against that third party. Perhaps this should be put more precisely, because the lawyer will be remedy-orientated. In other words, the lawyer will be interested in what the courts have previously done, so that he or she can use this information in the service of his/her client. Thus the lawyer will be conscious of the need to find out those situations that can be argued to be similar to that of his or her client, where the courts have found that that third party owed a duty of care to the plaintiff and allowed (with appropriate proof of the factual linkages) a remedy. If the lawyer thinks there are grounds for a claim, he or she will try to explain to the client that they believe that there may well be a case in negligence and set out the procedure to be followed.

The lawyer will be primarily interested in the law as it has worked out for other lawyers. Of course, he or she may have other interests of an ethical, moral or political nature (such as striving for justice, helping weaker clients, or simply making a name as a successful lawyer!). Certainly tort actions have moral and economic purposes behind them, namely, that it is just and fair to compel the negligent third party to reimburse the injured party for any losses suffered as a result of their injury and to compensate them for the pain suffered. It is also considered that deterrence (giving a message to others of the consequences that will befall them if they do not exercise due care) and retribution (a form of punishment for the act done) are also acceptable functions of the law of negligence.

† All modern common law lawyers will have covered in their legal studies certain classic or leading common law cases. In this area the leading case is Donoghue v Stevenson [1932] AC 562, which will provide our major case study in Chapter 6. In the leading judgment, Lord Atkin articulated a principle often termed the ‘neighbour’ principle: “The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer’s question, “Who is my neighbour?” receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”
For the action to succeed, the lawyer must establish a set of claims as to:

- the law accepted as valid
- the facts accepted as true
- how the events were interconnected (this must be proved according to the degree of 'proof' required, which in civil cases is 'on the balance of probability').

Specifically for negligence, the lawyer must show:

- that the other person owed a duty of care recognised by the law to the plaintiff
- that the third party was in breach of that duty
- that the injury suffered by the plaintiff was caused by the breach of duty.

But how will this be achieved?

The process of legal research is usually laid out in a series of steps. These involve separating facts from law. The lawyer will need to:

- identify and analyse the significant facts
- frame the legal issues to be researched
- research the issues.

This will often seem very strange and off-putting to the client. People coming to the law will have their own mixture of personal, moral and common-sense perceptions of what they have suffered and what should be done about it. They may be surprised to find that they must then fit their situation within the language and tactics that the lawyer then employs. We have already mentioned the historical hold of the forms of action whereby a claim had to be fitted precisely within a set formula to be proceeded with and any deviation meant that there was no chance of success. Today it is the law that is meant to provide the reference point, but the facts still need to be fitted into some cause of action (or ground of defence) and the issues need to be framed in the particular conceptual language of that area of law.

In the course of your studies, preparing for problem questions will presuppose the steps of legal research.

4.2 What are the sources of English law?

4.2.1 The sources of English law

The three main sources are:

- case law
- national statute law
- transnational law (the law of the European Union and other international conventions and treaties)

to which can be added two less easily recognisable sources:

- custom
- academic commentary and interpretation.

When we look at this list of 'sources', are we confronted by another dualism?

We have referred to certain dualisms in the study of law and legal system. For much of the late nineteenth and twentieth centuries, it was common to refer to a dualism in sources of law. Thus Allen (in a book which for decades was the major text in legal method, *Law in the Making* (1958), Chapter 1) defined the issue of identifying law and its sources in terms of a profound duality†:

† Re-read this extract until you are confident that you thoroughly understand the point that Allen is making.
The term ‘sources’ is here used to connote those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and, above all, compulsory.

Many artificial classifications of the sources of law have been attempted – e.g. into ‘formal’ and ‘material’; but for our present discussion we need consider only two antithetic conceptions of the growth of law, and it is still necessary for every student of jurisprudence to define his attitude towards these two conflicting views. In the one, the essence of law is that it is imposed upon society by a sovereign will. In the other, the essence of law is that it develops within society of its own vitality. In the one case, law is artificial: the picture is that of an omnipotent authority standing high above society, and issuing downwards its behests. In the other case, law is spontaneous, growing upwards, independently of any dominant will. The second view does not exclude the notion of sanction or enforcement by a supreme established authority. This, in most societies, becomes necessary at some stage in the ordinary course of social growth. But authority so set up and obeyed by agreement is not the sole and indispensable source of all law. It is itself a creation of law. In the other view, it is and must be the creator of law. It enforces law, so to say, because it has the right to do what it likes with its own.

Briefly, the common law tradition has emphasised the community aspect of law, while, by contrast, those whom we may see as adopting a political ‘realist’ view have emphasised a top-down or ‘command’ view of sources.

We have largely lost sight of this traditional ‘organic’ or community idea that so dominated traditional common law thought.

Indeed it is now almost impossible for us in the twenty-first century to understand the need that Blackstone felt, writing in 1765, to repeatedly stress the role of custom as the ultimate foundation of the common law†:

... it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people. (Commentaries, I, 74.)

We prefer to see easily recognisable, objective sources. However, as we shall see in this chapter, all sources need interpretation.

4.2.2 Is there a settled way of ‘recognising’ law and identifying the ‘sources of law’?

In this part we have been working on the assumption that law is a very practical matter. The common law tradition emphasises the way in which law is given, meaning through the practices of seeking redress and the system granting or refusing a remedy (or a successful prosecution or a defence). Someone has a grievance or problem and they ‘turn to the law for help’. That is, they assume that somewhere there is law that covers their situation and can help them get compensation, performance on the contract that they entered into, or simply punish the person that hurt them. But how do we identify valid claims that something is ‘covered by the law’, or that a statement that ‘this is the law’ is a genuine or authoritative statement, rather than a false claim?

In jurisprudence, a range of writers in the tradition of ‘legal positivism’ have set out various theories of what counts as processes of validity; these processes are concerned with cutting down on arguments identifying valid law. Legal positivist accounts stress the need to have a relatively simple process of recognition (that is a social practice of identifying valid law or an operational ‘rule of recognition’ as H.L.A. Hart, a leading legal positivist, put it). Using that process of recognition, one can identify valid sources and thereafter trace a ‘chain of validity’ for claims that such and such a ‘rule’ or ‘principle’ should be applied to the ‘facts’ of the particular ‘case’ before the court.

The rule of recognition, however, is a complex social practice. When we read the law, either in cases or in statutes, we soon learn that this reading is no simple affair.

† In 1612, Sir John Davis in the Introduction to his Irish Reports, stated that the common law of England was ‘nothing else but the Common Custome of the Realm… consisting in use and practice’ handed down by tradition and experience, and thus was ‘recorded and registered no-where but in the memory of the people’. (Quoted by J. Pocock in The Ancient Constitution and the Feudal Law. (Cambridge: Cambridge University Press, 1957) pp.32–33.)
Summary

Finding the law on a particular topic or issue is said to be a key skill of the lawyer. The common saying ‘a lawyer does not know the law but she or he knows where to find it’ expresses the importance of this reference or research ability.

The process of legal research is one of the human elements that provides glue for the legal system. We have already referred to the difficulty of expressing in what exact way the legal system exists as a system. Certainly there is broad agreement that all too often it seems that law is a system only in a vague or quasi-logical sense. A legal system is in constant danger of being anything but a ‘system’! Like many judges, the legal theorist Ronald Dworkin argues that it is the task of legal personnel, including legislators, to uphold and develop the systematic aspect to law in order to achieve consistency, due process and deal with people in ways that achieve substantive fairness. How is this achieved? In some part by developing techniques of interpretation and relating to the texts that we call law (case reports, statutes and ‘briefs’ or legal arguments) that constrain the range of meanings that can be ‘read’ into them.

Another aspect is process: how the institutions respond and handle cases. A legal system is consistent or inconsistent, according to the way it responds to complaints. A person believes that he or she has been unjustly treated – perhaps a contract has not been honoured in the way the person expected, or the goods purchased are defective. Or the person believes that he or she has suffered harm. The person wants a remedy.

Maybe he or she also wants public recognition of the ‘facts’. We understand this in the common saying that ‘she wants her day in court’. By that we mean that the person wants an authoritative body – the court, the judge – to agree that she has been wronged and for the rest of the world to accept that fact. So it is important that the legal system has a set of processes that allow the complaint to be investigated, and that these processes are open and understandable to the citizens of that society.

4.3 Finding and reading the law

Essential reading

■ Holland and Webb, Chapter 3: ‘Reading the Law’.

4.3.1 The lawyer’s skill? Distinguishing law and facts, and applying law

Consider the following extract from Farrar and Dugdale (1990) on law and facts. (Do not be confused by the simplicity of the extract. The authors are deliberately presenting a simplified version of what Dworkin calls the ‘plain fact’ view of law in order that you may come to see that ‘practice’ is more complicated.)

Law is applied to facts. The law is to be found in statutes and court decision. It can be looked up in textbooks. The facts are to be found from the evidence, by hearing the witnesses and the experts’ opinions. The lawyer then applies the law to the facts and produces the legal decision rather like a computer applying a program to the data. This is often the layman’s picture of the relationship of law and fact. It seems simple enough and indeed it does fit the simplest situations. A solicitor advising a client who has purchased defective goods may have little difficulty determining the law and the facts and concluding that his client has been wronged. His difficulty will be the practical one of deciding upon the best tactics to remedy the wrong without putting his client to the trouble of going to court. Such simple situations are not likely to reach court. Where disputes do reach court, there is likely to be some uncertainty concerning the facts or the law or both. It may be that whilst certain facts are clear others are a matter of inference, that whilst the basic principle of law is clear its scope and application to the facts are not. It is at this point that the simple law/fact distinction breaks down, that the line between questions of law and fact becomes blurred.
But how does this work in practice? Consider the cases of Cantley v Barton and Morley v Police (below) and the questions that relate to them. No matter which common law jurisdiction you are located within, there will be a similar approach to dealing with case reports and understanding:

- the hierarchy of the courts
- the format of a judgment
- judicial decisions as a source of law
- the meaning of ‘issue’, ‘material facts’ and ‘ratio decidendi’
- the difference between the civil and the criminal jurisdiction of the courts.

Note: as this is an international law programme and students are studying this throughout the common law world, the exercise that follows involves a non-English court. The exercise is adapted from the Legal System course offered by Richard Scragg of the Faculty of Law of the University of Canterbury, New Zealand.

A preliminary point: the problem of time

To achieve consistency, commentators stress that in dealing with the common law, we have to move between the past and the present. The judge usually does not say that he or she is making up law, but will claim to be applying the law. But the very fact that a case has come before him or her demonstrates that the law was not easy to find! If the law was easy to find, why is there a case? Yet the participants believe that there is an answer to the issue, to the (social) problem, and that the answer is a legal one. As the famous commentator on the common law, William Blackstone put it (Commentaries (1765), Vol. I) – and this is the accepted phraseology – the legal system draws heavily upon past practice as a guide to solving present problems, and the Law Reports are our most important record of earlier experience.

As a source of law, past decisions vary enormously in their complexity, their relevance, and their authority. Cases may also involve several issues (several different questions for the court to decide as steps on the way to its final decision on the outcome), only one of which might be relevant to the present problem. Some of the questions which need to be decided in cases may be straightforward (in the guiding light of past precedents) while others may be totally novel (with past experience offering no sensible guide). The explanatory reasoning of the court in a past decision may be lucid or confused, concise or deliberately vague. In working with decided cases as precedents, lawyers are typically interested in questions such as:

- In what court was the case decided?
- Who were the parties to the proceedings and what remedy or outcome was being sought from the court?
- What were the important (or material) facts?
- What were the issues?
- What were the arguments?
- What was the decision?
- What is the holding of law (the ratio decidendi) of which the case is an example?

Note: before attempting the following activity, make sure that you have read Holland and Webb Chapter 3: ‘Reading the Law’, and understand the layout of a case report (see Section 3.2 ‘Reading cases’). Most common law system case reports follow a very similar layout.
Activity 4.1

Read the cases from New Zealand of (a) Cantley v Barton and (b) Morley v Police and answer the questions that follow.

Cantley v Barton

High Court, Hamilton (AP127/90) 17 December 1990 Anderson J

Summary offences – Reckless management – ‘In his care’ – Calves on public highway – Farmer knew the calves were on highway but allegedly tended to another chore – Section 13 applies to things that have escaped into a public place as well as those that have been taken to a public place following lapse of duty and responsibility – Someone may have a thing under their care without having it under their control – No immunity for reckless leaving of dangerous things which ought not to be there when reasonable person would perceive fault – ‘In his care’ where defendant has responsibility for management of the things in issue – Summary Offences Act 1981, s.13.

A bus carrying school children was forced to take evasive action to avoid a number of calves which were on a public highway. Inadequate fencing had allowed the calves to gain access to the road. The person allegedly having care or control of the animals knew the calves were on the road and could have taken steps to remove them but attended to another farm chore. The District Court judge held that the section did not extend to offences caused by the thing escaping into the public place.

Held, it is too narrow an interpretation of s.13 to hold that the section only applies to things that have been taken to a public place, and not to things that have escaped into a public place. A person may have a thing in their care, without having it under their control. Care therefore specifically envisages a situation where control is not being exercised. There exists criminal liability for the reckless management of things under actual control. There should also be criminal liability for the reckless leaving of dangerous things on a highway when those things ought not to be there. Any reasonable person would perceive fault on the part of the person who ought to have ensured that the danger was not created.

Case referred to:
Meikle v Police (1985) 1 CRNZ 510

Appeal

Appeal by way of case stated† against determination.

P Morgan for appellant

R A Craven for respondent

Anderson J (orally): This is an appeal by way of case stated from a determination of the District Court at Morrinsville in connection with s.13 Summary Offences Act 1981. That section is as follows:

Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $1,000 who, having in his care or under his control in any public place any thing (whether animate or inanimate) that in the absence of precaution or care is likely to cause injury, with reckless disregard for the safety of others and without reasonable excuse does anything to or with, or leaves, that thing.

A bare reading of that section discloses the semantic awkwardness which prompts this appeal by the informant, brought in order to clarify the meaning of the section. The appellant does not seek, if successful, to have this matter remitted to the District Court but rather that this Court should reserve the determination in respect of which the case has been stated.

† A ‘case stated’ is a request either from a lower court, or from one of the original parties to a higher court to give a determination upon a point of law that the lower court felt needed the determination of a higher court.
The prosecution arose from the presence on a public highway of calves which bolted and required such evasive action from the driver of a school bus that the bus overturned causing fortunately minor injuries to the children on board. The evidence disclosed that the defendant, the person allegedly having the care or control of the beasts, knew they were on the roadway, could have taken steps to remove them, but attended to another farming chore instead.

The case stated discloses that ‘it was proved upon the hearing by the informant that the defendant allowed three calves to have access to Valentines Road through his farm property through quite inadequate fences’. The learned District Court Judge determined that:

... the Legislature intended that it should be an offence for people to do things to or with things or to leave things that they have under their control in public. It was my view that the section was properly interpreted on the basis that it is designed to ensure that people who have potentially dangerous things in their control or their care in public must make sure that they are responsible with those things for the sake of the safety of the public in public places. I do not think that it extends to a situation where the thing is in a public place, but gets there, not as a result of it being taken there under control, but by reason of it having escaped into the public place. I think the section requires the care or the control to have been initially exercised in the public place and then for there to have been a lapse of duty and responsibility with regard to looking after the thing which has been taken into the public place.

The learned District Court Judge stated the question for the opinion of this Court as to whether the decision was erroneous in point of law and, in particular, whether his decision that the section did not apply to things that have escaped into a public place, but only to things that have been taken to a public place following which there has been a subsequent lapse of duty and responsibility, was too narrow.

I approach the issue of interpretation mindful of the provisions of s.5(j) Acts Interpretation Act 1924. This section is clearly directed to public safety and to charging with responsibility those who ought be responsible for hazards created on the highway. I also adopt the continuous sense of ‘leaves’ which the High Court found to be appropriate in Meikle v Police (1985) 1 CRNZ 510. That meaning is consonant with the definition in the Shorter Oxford Dictionary (third edition), p.1192, meaning No. 3:

To allow to remain in a certain place or condition; to abstain from taking or dealing with.

There may be cases, however, where the more immediate sense of the verb is appropriate, but both the instantaneous and continuous sense is envisaged by the section.

The juxtaposition of the terms ‘having in his care’ and ‘under his control’ indicate that someone may have a thing in his care, for the purpose of this section, without having it under his control. Thus, the term ‘in his care’ specifically envisages a situation where control is not in fact being exercised. I think it plain from a consideration of the remedial object of the section, the words used, and the concepts plainly envisaged, that the term ‘in his care’ contemplates a condition of having responsibility for the management of the thing in issue.

One of the ordinary meanings of the word ‘care’ is ‘charge’ (Shorter Oxford Dictionary [third edition]). Just as in ordinary parlance, a person in charge of a person or thing does not necessarily have to be exercising proximate physical control over that person or thing, so in relation to the present section the Legislature contemplates responsibility to control and actual control. The awkward terminology is really attributable to a drafting desire to be comprehensive with the smallest number of words.
I am of the view that there would be no rational basis for imposing criminal liability for the reckless management of things on the highway in a context of actual control, but immunity for the reckless leaving of dangerous things on the highway when those things ought not be there in the first place and when any reasonable person would perceive fault on the part of a person who ought to have ensured that the danger was not created and having once been made aware of the existence of that danger completely ignored it. For these various reasons I hold that the term 'in his care' contemplates a factual situation where a particular defendant has responsibility for the management of the things in issue, is charged with such responsibility; and that the words 'under his control' contemplate a situation of actual management. For these reasons I express the opinion that the decision of the learned District Court Judge was wrong in law and that the interpretation adopted in the District Court was too narrow. Accordingly, I reverse the determination in respect of which the case has been stated, pursuant to s.112 (a) Summary Proceedings Act 1957.

Appeal allowed.

**Activity 4.1 (A)**

In the case of *Cantley v Barton*:

a. Was the state of the law clear before these cases were decided by the court?

b. If not, what was the reason for any uncertainty? What was the 'case stated' for the judges to decide?

c. Does the case clarify the law, making it more certain, or does it merely apply the law?

d. Do you agree that the definition and distinctions adopted by the judge of first instance were wrong with the result that they imposed too narrow a basis of liability?

Feedback provided on a and b at end of guide. No feedback on c and d.

**Morley v Police**

1 NZLR 551

*Morley v Police*

High Court Christchurch 12 October 1995; 2 February 1996 Williamson J


The appellant, a juggler, rode a unicycle across a footpath and collided with a pedestrian who was shaken by the experience but not injured. In the District Court the appellant was convicted of the offence against s.13 of the Summary Proceedings Act 1981. That section makes anyone liable who 'having in his care or under his control in any public place any thing (whether animate or inanimate) that in the absence of precaution or care is likely to cause injury, with reckless disregard for the safety of others and without reasonable excuse does anything to or with, or leaves, that thing'. On appeal against conviction it was submitted for the appellant that the section applied only to things which were inherently dangerous and that a unicycle was not. The respondent submitted that the section referred to 'any thing'.

**Held:**

Section 13 of the Summary Offences Act 1981 applied to things which themselves had a particular property, namely the propensity to cause injury in the absence of precaution or care. In other words the things referred to must be inherently dangerous or injurious. The section did not apply to things not of that kind which are nevertheless used in a dangerous way. Here, a unicycle was not a thing which was inherently dangerous. It was not an object which was likely to cause injury in the absence of precaution or care. Therefore s.13 did not apply to it, and the conviction would be quashed (see p.554 line 42; p.554 line 48).
Other cases mentioned in judgment

- Cantley v Barton (1990) 6 CRNZ 665.
- Meikle v Police (1985) 1 CRNZ 510.
- R v Pratt [1990] 2 NZLR 129 (CA).
- Timbu Kolian (1968) 42 ALJR 295.

Appeal

This was an appeal against conviction for endangering safety.

Neville Taylor for the appellant

Craig Hyde for the respondent

Cur adv vult

Williamson J: Sugra Morley is a juggler. He entertains the public, particularly school children, by juggling. During his acts he often uses a unicycle as one of his props. To maintain his skill in the use of the unicycle he rides it in the central city area and to and from his home.

On 12 April 1995 he rode it out of the Square in Christchurch, along Strand Lane towards Hereford Street. As he crossed the Hereford Street footpath he came into collision with a pedestrian by bumping her bag against her leg. When he was called out to by another member of the public he said he was sorry but proceeded on. The pedestrian was shaken by the experience but no injury was proven to have arisen from the incident.

The charge laid against Morley was under s.13 of the Summary Offences Act 1981. This section states:

13. Things endangering safety – Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $1,000 who, having in his care or under his control in any public place any thing (whether animate or inanimate) that in the absence of precaution or care is likely to cause injury, with reckless disregard for the safety of others and without reasonable excuse does anything to or with, or leaves, that thing.

At the hearing on 22 August 1995 in the District Court there were two principal matters at issue:

1. Whether the unicycle was a ‘thing … that in the absence of precaution or care is likely to cause injury’; and
2. Whether Morley did an act with reckless disregard for the safety of others and without reasonable excuse.

On the first issue the District Court Judge concluded that a ‘thing’ described in s.13 included any object which, in the course of its use, may be likely to cause injury. He determined that an object which was not potentially dangerous when static could become so when in use. He accepted that a unicycle was not potentially dangerous when not in use but concluded that it had a potential danger of colliding with other persons when it was in use.
Three decisions of this Court were referred to by the Judge, namely, *Meikle v Police* (1985) 1 CRNZ 510; *Hilder v Police* (1989) 4 CRNZ 232, and *Cantley v Barton* (1990) 6 CRNZ 665. The District Court judge considered that those decisions were in conflict and consequently that he was entitled to reject the views expressed by Wylie J in the *Hilder* case. There the learned Judge, when considering para-flying apparatus and a speedboat, had said at p 235:

> It seems to me that the Judge was there directing his mind principally, if not solely, to the nature of the use made of the ‘thing’ in the circumstances at the time rather than to the nature of the ‘thing’ itself. It is not every ‘thing’ the reckless use (to adopt a compendious term for the proscribed conduct) of which will constitute an offence against s.13. The ‘thing’ itself must first have a particular quality — the propensity to cause injury in the absence of precaution or care to come within the section at all. In other words it must be inherently dangerous or injurious and require precaution or care in its use. Examples are obvious — explosives, loaded firearms, sharp objects, such as knives or broken glass, toxic substances, exposed electric writing, articles deceptive because of a hidden defect such as a broken chair or an inadequate cover over a manhole. The reckless use of some of those things is proscribed because of the danger that use may cause. The more neutral ‘leaving’ of some of the examples I have given is also proscribed because of the hidden danger thus created. But there must first be an inherent dangerous quality about the article itself. It is difficult to conceive of any article which, improperly used, is not capable of causing injury. Something as harmless as a bag of feathers could smother a child. Something as innocuous as a cabbage could cause injury if hurled at a person. Clearly the legislature did not intend the reckless use of every ‘thing’ to be caught by the section. If it had so intended why qualify ‘thing’ in the way it has?

In the absence of evidence of some inherently dangerous or injurious quality about the para-flying apparatus and the speedboat — as opposed to the risk attaching to the use of them — I do not think such a quality can be assumed, unless it is one so obvious and universally known in relation to a particular thing that judicial notice might be taken. That is certainly not the case with the para-flying apparatus and speedboat the subject of this prosecution. So in my opinion the prosecution failed on that point. I realise that what I have said may be difficult to reconcile with the result of *Meikle v Police* [1985] 1 CRNZ 510 where, after an accident, the unsuccessful appellant had left his car blocking both traffic lanes on a bridge in the dark in the early hours of the morning. The case turned on the issues of recklessness and reasonable excuse and the point I have discussed does not seem to have been raised or considered. If I am right then it would seem difficult to regard a car as a thing inherently likely in itself apart from the manner of its use or its leaving, to cause injury in the absence of precaution or care. Had the point been taken the case may have been decided differently.

In my view this reasoning by Wylie J is correct and I have no hesitation in applying it.

The provision in s.13 is a penal one and should be interpreted with a consciousness not only of the purpose of the legislation (*R v Pratt* [1990] 2 NZLR 129) but also its penal effect (*Perkins v Police* [1988] 1 NZLR 257). As Lord Reid said in *R v Ottewell* [1970] AC 642, 649 the ‘principle that in doubtful cases a penal provision ought to be given that interpretation which is least unfavourable to the accused’ only applies where after full inquiry and consideration there is a real doubt. If the legislature had intended to include the concept of use in s.13, then I believe it would have said so. Push chairs, prams, sporting trundlers, supermarket trolleys may frequently bump a person or cause them to stumble but would not reasonably be considered as things ‘that in the absence of precaution or care are likely to cause injury’. I note that they are excluded from the definition of a vehicle in the Transport Act 1962. Since any thing may be used to cause injury the above underlined descriptive words would be unnecessary if use rather than inherent nature was the test.

An immobile car was involved in the *Meikle* case and bolting calves in the *Cantley* case. In my view those cases are not in conflict with the *Hilder* case because the issue of the nature of the ‘thing’ described in s.13 was not raised. It was apparently never argued that the things in those previous cases were not, in the circumstances, things which in the absence of precaution or care were likely to cause injury and consequently no decision was arrived at on this issue.
In arriving at my conclusion I have been conscious of the decision of the Court of Appeal in the case of R v Turner (Court of Appeal, Wellington, LA 170/94 22 June 1995). It was not cited to the District Court Judge but is generally supportive of his reasoning. In that case the Court, when considering the nature of the thing, referred to in a similar but not identical provision in s.156 of the Crimes Act 1961, stated (per Tompkins J, p.12):

Mr Panckhurst and Mr Tuohy submitted that the section only applied where the thing itself was intrinsically or inherently dangerous so as to constitute a danger to human life if care is not taken. By way of illustration, they referred to the can of petrol in Primrose v Police [1985] 1 CRNZ 621 and to the paraglider in Hilder v Police [1989] 4 CRNZ 232. They went on to submit that a fish packing-house was not of itself a danger to human life. What became so was the product that emerged from the packing-house. This, they said, is properly a case of product liability. It was their submission that a charge relying on this section was inappropriate – any charge arising out of the appellants’ involvement in the fish packing-house should have been brought under the appropriate statutory provisions such as, for example, the Health Act 1956, the Food Act 1981 or any other Act or regulations governing the production of food for human consumption.

The section has long been construed as including things that are not inherently dangerous but are dangerous if operated without reasonable care. A motor car is a prime example: R v Storey [1931] NZLR 417 was concerned with the equivalent of s.156. It is difficult, and indeed unnecessary, to disassociate a thing from its use. So the section contemplates both a thing inherently dangerous in its static condition or a thing dangerous in the course of its operation. One is not looking at the operating process as such but at the nature of the thing in operation. In the present case the factory may endanger human life in the absence of precaution or care because it can become an environment for the spread of LM and the resulting contamination of food. The duty imposed by the section is then to control the environment and hence the presence of LM and the risk of contamination by the exercise of reasonable care.

I find difficulty with the statement that the section has been construed as including things that are not inherently dangerous. The only case referred to in the above extract in support of that proposition is R v Storey [1931] NZLR 417. In that case a person had been charged with manslaughter as a result of negligent driving of a motor vehicle. The essence of the Court’s decision related to the degree of negligence which it was necessary to prove and causation. The nature of the thing was not an issue considered by the Court. The section was not construed in that respect. The point was considered by Windeyer J in the case of Timbu Kolian [1968] 42 ALJR 295, 299. He said that the corresponding provision in the Queensland code may apply only to:

… the use of things which are in their nature dangerous in ordinary use. I would not myself have read the section as referring to the use in a dangerous way of a thing of any sort or kind.

In any event, different words are used in s.156 of the Crimes Act namely ‘anything whatever’ to those used in s.13. They clearly encompass a wider range of objects than a specific thing as described in s.13 of the Summary Offences Act 1981.

My conclusion is that Hilder v Police contains a clear, reasoned and specific definition of the words used in s.13. I consider Wylie J’s decision is correct and accordingly that the Hilder test should be applied in this case. A unicycle is not a thing which is inherently dangerous. It is not an object which is likely to cause injury in the absence of precaution or care. Accordingly I do not consider s.13 applies to it.

For these reasons I allow the appeal and quash the conviction.

The definition of vehicle in s.2 of the Transport Act 1962 refers to wheels and does not include a unicycle which has only one wheel. Also the definition of cycle in reg.2 of the Traffic Regulations 1976 (SR 1976/227) is ‘a vehicle having at least 2 wheels’. If a unicycle is used on the roadway for transport then it would seem appropriate for it to be included in the definitions of a vehicle and a cycle so that the usual road rules would apply.

There is no need for me to consider the second issue of recklessness.
For the sake of completeness, I record that even if I were wrong in relation to the first issue, I would have applied s.19 of the Criminal Justice Act 1985 and discharged the appellant without conviction.

Appeal allowed: conviction quashed.

Solicitors for the appellant: P J Doody (Christchurch).

Solicitor for the respondent: Crown Solicitor (Christchurch).

Reported by: Don Mathias, Barrister

**Activity 4.1 (b)**

In the case of *Morley v Police*:

a. Was the state of the law clear before these cases were decided by the court?

b. If not, what was the reason for any uncertainty? What was the ‘case stated’ for the judges to decide?

c. Does the case clarify the law, making it more certain, or does it merely apply the law?

Feedback on b: see end of guide. No feedback on a or c provided.

4.3.2 Law, fact and language

**Essential reading**

- Holland and Webb, Chapter 4: ‘Law, fact and language’.

It is clear from the above cases that the application of law may depend on subtle variations in the meaning of words. The ‘indeterminacy’ of language (its ability to carry a range of meanings depending on the context and the interpretative strategy used) means that it is often no simple matter to use the law that, the lawyer argues, covers the case. In outlining the principles of legal research, we distinguished questions of law from questions of fact. However necessary this is analytically, in practice this becomes more difficult. First consider the following case of *Brutus v Cozens*.

Read the extract from *Brutus v Cozens* and answer the questions that follow in Activity 4.3.

*Brutus v Cozens [1972]*

2 All ER 1297, HL.

**Lord Reid:** My Lords, the charge against the appellant is that on 28 June 1971, during the annual tournament at the All England Lawn Tennis Club, Wimbledon, he used insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to section 5 of the Public Order Act 1936, as amended.

While a match was in progress on no. 2 court he went on to the court, blew a whistle and threw leaflets around. On the whistle being blown nine or ten others invaded the court with banners and placards. I shall assume that they did this at the instigation of the appellant although this was not made very clear in the case stated by the justices. Then the appellant sat down and had to be forcibly removed by the police. The incident lasted for two or three minutes. This is said to have been insulting behaviour.

It appears that the object of this demonstration was to protest against the apartheid policy of the government of South Africa. But it is not said that that government was insulted. The insult is said to have been offered to or directed at the spectators. The spectators at no. 2 court were upset; they made loud shouts, gesticulated and shook their fists and while the appellant was being removed some showed hostility and attempted to strike him. The justices came to the conclusion that the appellant’s behaviour was not insulting within the terms of the offence alleged. They did not consider the other points raised in argument but dismissed the information without calling on the appellant.
... a Divisional Court set aside the judgment of the justices and remitted the case to them to continue the hearing of the case. They certified as a point of law of general public importance:

Whether conduct which evidences a disrespect for the rights of others so that it is likely to cause their resentment or give rise to protests from them is insulting behaviour within the meaning of s.5 of the Public Order Act 1936.

Section 5 is in these terms:

Any person who in any public place or at any public meeting – (a) uses threatening, abusive or insulting words or behaviour... with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.

Subsequent amendments do not affect the question which we have to consider.

It is not clear to me what precisely is the point of law which we have to decide. The question in the case stated for the opinion of the court is 'Whether, on the above statements of facts, we came to a correct determination and decision in point of law'. This seems to assume that the meaning of the word 'insulting' in s.5 is a matter of law. And the Divisional Court appear to have proceeded on that footing.

In my judgment that is not right. The meaning of an ordinary word of the English language is not a question of law. The proper construction\(^1\) of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word 'insulting' being used in any unusual sense. It appears to me ... to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reach that decision...

We were referred to a number of dictionary meanings of 'insult', such as treating with insolence, contempt, indignity, derision, dishonour or offensive disrespect. Many things otherwise unobjectionable may be said or done in an insulting way. There can be no definition. But an ordinary sensible man knows an insult when he sees or hears it. ... If the view of the Divisional Court was that in this section the word 'insulting' has some special or unusually wide meaning, then I do not agree. Parliament has given no indication that the word is to be given any unusual meaning. Insulting means insulting and nothing else.

If I had to decide, which I do not, whether the appellant's conduct insulted the spectators in this case, I would agree with the justices. The spectators may have been very angry and justly so. The appellant's conduct was deplorable. Probably it ought to be punishable. But I cannot see how it insulted the spectators.

I would allow the appeal with costs.

[Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Diplock, and Lord Kilbrandon agreed that the appeal should be allowed].

**Activity 4.2**

In the case of *Brutus v Cozens*:

a. What was the case stated that the judges were called upon to decide?

b. How was meaning given to the concept of ‘insulting’?

c. Why did Lord Reid say that he did not have to decide if the appellant’s behaviour was insulting? What distinction is he drawing between questions of law and fact?

d. How was the target group confined to the spectators?
e. Could it have been open to the court to consider wider issues concerning the South African government’s policy of apartheid, or the legitimacy of the appellant’s strategy of protest?

**Feedback:** see end of guide.

**Activity 4.3**

Read Holland and Webb, Chapter 4: ‘Law, fact and language’, paying particular attention to Exercise 5 in section 4.1.3.

How easy would it be to jump to wrong assumptions as to the basic facts?

Consider the case of William Wallace: was this nearly a terrible miscarriage of justice? How does this reflect upon the use of the jury? (For further comment on the operation of the jury and miscarriages of justice, see Chapter 8 of this guide.)

Who should control the meaning given to language?

No feedback provided. However, please note that the answers should be a matter of your opinion, based on careful reading of the chapter.

#### 4.3.3 From legal research to outcome: legal knowledge and skill

Law concerns words. Lawyers are skilled at using words and phrases in a particular way. Specifically they are trained to develop arguments. Arguments, which in turn are orientated towards achieving objectives, gaining their client a remedy, obtaining a prosecution, or defending their client’s interest. Access to that skill is in turn part of the notion of equality before the law or making the rule of law work in practice (this issue is considered in Chapter 12, when we look at legal aid and the topic of access to justice). This can be viewed as part of the battle over resources and access to justice, which is often portrayed as a ‘welfare’ right.

Who is the final arbiter in deciding the meaning of words? The judges appear at the top of the legal hierarchy. How they react to the arguments and tie together the different strands is crucial. Ronald Dworkin defines law as ‘an argumentative attitude’. But where legal skills are involved with techniques of argumentation – and as we have noted the common law has been characterised by an adversarial process – Aubert (1981) explains law as ‘a weapon in the hands of combating parties’. The sources of law, legislation, precedents, claims as to customs, and so forth, become arsenals from which munition is selected in accordance with partisan interests. Aubert does go on, however, to say that in the resultant judgment the judicial opinion is expected to be ‘delivered with an intent to serve non-partisan societal interests’. In the following example, we see how different judges handled certain conflicts, applying legal language to factual events, with completely different opinions between different judges in each case.

#### 4.4 Applying legal discourse in criminal law: an example

Criminal law is one of the intermediate subjects that it is compulsory to study for the LLB degree. It is a subject that has immediate appeal to students who often bring a range of everyday perceptions (and perhaps biases) to their studies. But criminal law is a difficult area. Perhaps part of the difficulty lies in the abstract nature of a crime. While many people will be able to claim that certain behaviours ‘just are’ – or at least ‘should be’ – a crime, what is treated as a crime may vary across history and between different cultures. The only certain definition of a crime is procedural, that is to say, a crime is some conduct (an act or omission) which, when it leads to a certain state of affairs, is treated in that jurisdiction as being capable of leading to prosecution and punishment.
Glanville Williams defined crime as:

an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings (‘The definition of crime’, 8 Current Legal Problems (1955) p.107).

A key element in the operation of courts is objectivity. A legitimate decision is regarded as one in which the judgment is arrived at through the impartial and objective assessment of the law and facts.

In a criminal trial – with a few minor exceptions – both the actual existence of an event or state of affairs (called in the common law tradition the *actus reus*) and a particular state of mind (called the *mens rea*), must be proved. As Smith and Hogan (1988, p.31) put it:

It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a) that he has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs.

**Activity 4.4**

Read the conflicting judgments in the cases of *Fagan* and *Ryan* and answer the questions that follow.

**Feedback**: see end of guide.

*Fagan v Metropolitan Police Commissioner (1968)*

3 All ER 442, Queen’s Bench Division

(Lord Parker CJ Bridge and James JJ)

The defendant was directed by a constable to park his car close to the kerb. He drove his car on to the constable’s foot. The constable said, ‘Get off, you are on my foot’. The defendant replied, ‘Fuck you, you can wait’, and turned off the ignition. He was convicted by the magistrates of assaulting the constable in the execution of his duty and his appeal was dismissed by Quarter Sessions who were in doubt whether the driving on to the foot was intentional or accidental but were satisfied that he ‘knowingly, unnecessarily and provocatively’ allowed the car to remain on the foot.

James J (with whom Lord Parker CJ concurred): In our judgement, the question arising, which has been argued on general principles, falls to be decided on the facts of the particular case. An assault is any act which intentionally – or possibly recklessly – causes another person to apprehend immediate and unlawful personal violence. Although ‘assault’ is an independent crime and is to be treated as such, for practical purposes today ‘assault’ is generally synonymous with the term ‘battery’, and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case, the ‘assault’ alleged involved a ‘battery’. Where an assault involved a battery, it matters not, in our judgement, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand on another, and the action does not cease to be an assault if it is a stick held in the hand and not the hand itself which is laid on the person of the victim. So, for our part, we see no difference in principle between the action of stepping on to a person’s toe and maintaining that position and the action of driving a car on to a person’s foot and sitting the car while its position on the foot is maintained.
To constitute this offence, some intentional act must have been performed: a mere omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault: they can only shed a light on the appellant’s action. For our part, we think that the crucial question is whether, in this case, the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot, or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgement, a distinction is to be drawn between acts which are complete – though results may continue to flow – and those acts which are continuing. Once the act is complete, it cannot thereafter be said to be a threat to inflict unlawful force on the victim. If the act, as distinct from the results thereof, is a continuing act, there is a continuing threat to unlawful force. If the assault involves a battery and that battery continues, there is a continuing act of assault. For an assault to be committed, both the elements of \textit{actus reus} and \textit{mens rea} must be present at the same time. The \textit{actus reus} is the action causing the effect on the victim’s mind: see the observations of Parke B in \textit{R v St. George [1840] 9 C & P 483} at pp 490, 493. The \textit{mens rea} is the intention to cause that effect. It is not necessary that \textit{mens rea} should be present at the inception of the \textit{actus reus}: it can be superimposed on an existing act. On the other hand, the subsequent inception of \textit{mens rea} cannot convert an act which has been completed with \textit{mens rea} into an assault.

In our judgement, the justices at Willesden and Quarter Sessions were right in law. On the facts found, the action of the appellant may have been initially unintentional, but the time came when, knowing that the wheel was on the Officer’s foot, the appellant (i) remained seated in the car so that his body through the medium of the car was in contact with the Officer, (ii) switched off the ignition of the car, (iii) maintained the wheel of the car on the foot, and (iv) used words indicating the intention of keeping the wheel in that position. For our part, we cannot regard such conduct as mere omission or inactivity. There was an act constituting a battery which at its inception was not criminal because there was no element of intention, but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act. The fallacy of the appellant’s argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.

\textbf{Bridge J:} I fully agree with my lords as to the relevant principles to be applied. No mere omission to act can amount to an assault. Both the elements of \textit{actus reus} and \textit{mens rea} must be present at the same time, but the one may be superimposed on the other. It is in the application of these principles to the highly unusual facts of this case that I have, with regret, reached a different conclusion from the majority of the court. I have no sympathy at all for the appellant, who behaved disgracefully; but I have been unable to find any way of regarding the facts which satisfied me that they amounted to the crime of assault. This has not been for want of trying; but at every attempt I have encountered the inescapable questions: after the wheel of the appellant’s car had accidentally come to rest on the constable’s foot, what was it that the appellant did which constituted the act of assault? However the question is approached, the answer which I feel obliged to give is: precisely nothing. The car rested on the foot by its own weight and remained stationary by its own inertia. The appellant’s fault was that he omitted to manipulate the controls to set it in motion again.

Neither the fact that the appellant remained in the driver’s seat nor that he switched off the ignition seem to me to be of any relevance. The constable’s plight would have been no better, but might well have been worse, if the appellant had alighted from the car leaving the ignition switched on. Similarly, I can get no help from the suggested analogies. If one man accidentally treads on another’s toe or touches him with a stick, but deliberately maintains pressure with foot or stick after the victim protests, there is clearly an assault; but there is no true parallel between such cases and the present case. It is not, to my mind, a legitimate use of language to speak of the appellant ‘holding’ or
'maintaining' the car wheel on the constable's foot. The expression which corresponds to the reality is that used by the justices in the Case Stated. They say, quite rightly, that he 'allowed' the wheel to remain.

With a reluctantly dissenting voice, I would allow this appeal and quash the appellant's conviction.

**Appeal dismissed.**

Leave to appeal to the House of Lords refused.

### Activity 4.4 (A)

In the case of *Fagan*:

a. Which of the conflicting judgments did you find most persuasive?

b. What made it persuasive?

Feedback: see end of guide

*Ryan v The Queen* (1967)

121 CLR 205, High Court of Australia (Barwick CJ, Taylor, Menzies, Windeyer and Owen JJ).

Ryan entered a service station, pointed a sawn-off rifle at the attendant and demanded money. The rifle was loaded and cocked with the safety catch off. The attendant placed money on the counter. Still pointing a rifle with one hand, Ryan attempted to tie the attendant up. When the attendant moved suddenly Ryan pressed the trigger and shot him dead. By the law of New south Wales killing, by an act done in the course of committing a felony (in this case, robbery) was murder - but the act had to be a voluntary act. At his trial for murder, Ryan’s defence was that he pressed the trigger involuntarily. He was convicted and his appeal to the High Court of Australia was dismissed.

Barwick CJ (having held that a jury could not dismiss Ryan’s account as incredible):

There were therefore, in my opinion, at least four possible and distinctly different views of the discharge of the gun which, upon all the material before them, could be taken by the jury. First, the applicant’s explanation could be disbelieved, and it could be concluded that he had fired the gun intentionally – that is to say, both as a voluntary act and with the intention to do the deceased harm. Second, that he fired the gun voluntarily, not intending to do any harm to the deceased but merely to frighten him as a means of self-protection. Third, that being startled, he voluntarily but in a panic, pressed the trigger but with no specific intent either to do the deceased any harm or to frighten him. Fourth, that being startled, so as to move slightly off his balance, the trigger was pressed in a reflex or convulsive, unwilled movement of his hand or of its muscles. I shall later refer to these conclusions of fact as the possible views identifying each by number...

An occasion such as the fourth view of the evidence in the instant case (ante) would, in my opinion, be an instance of a deed not the result of a culpable exercise of the will to act. But such an occasion is in sharp contrast to the third view of those facts from which it needs carefully to be distinguished. If voluntariness is not conceded and the material to be submitted to the jury wheresoever derived provides a substantial basis for doubting whether the deed in question was a voluntary or willed act of the accused, the jury’s attention must be specifically drawn to the necessity of deciding beyond all reasonable doubt that the deed charged as a crime was the voluntary or willed act of the accused. If it was not then for that reason, there being no defence of insanity, the accused must be acquitted. No doubt care will be taken by the presiding judge that the available material warrants the raising of this specific issue. In doing so, he will of course have in mind that the question for him is whether upon that material a jury would be entitled to entertain a reasonable doubt as to the voluntary quality of the act attributed to the accused. Also, the presiding judge where the circumstances of the case are like those of the instant case will explain the difference between the third and fourth views (ante) so that the jury are given to understand
the precise question to which they have relevantly to address themselves. Although a claim of involuntariness is no doubt easily raised, and may involve nice distinctions, the accused, if the material adduced warrants that course, is entitled to have the issue properly put to the jury.

Windeyer J: ...That an act is only punishable as a crime when it is the voluntary act of the accused is a statement satisfying in its simplicity. But what does it mean? What is a voluntary act? The answer is far from simple, partly because of ambiguities in the word ‘voluntary’ and its supposed synonyms, partly because of imprecise, but inveterate, distinctions which have long dominated men’s ideas concerning the working of the human mind. These distinctions, between will and intellect, between voluntary and involuntary action, may be unscientific and too simple for philosophy and psychology today. However that may be, the difficulty of expressing them in language is obvious and may be illustrated. The word ‘involuntary’ is sometimes used as meaning an act done seemingly without the conscious exercise of the will, an ‘unwilled’ act: sometimes as meaning an act done ‘unwillingly’, that is by the conscious exercise of the will, but reluctantly or under duress so that it was not a ‘wilful’ act. Words and phrases such as involuntary, unintentional, inadvertent, accidental, unmediated, unthinking, not deliberate, unwilled and so forth are used by different writers. Their connotations often depend upon their context, and they are used in discussions which seem to drift easily off into psychological questions of consciousness, sanity and insanity and philosophical doctrines of free-will and of events uncontrolled by will. There is a discussion of some aspects of this subject in the American work, ‘Reflex Action, a Study in the History of Physiological Psychology’. I mention it, not because I profess any knowledge in this field, but because of the readiness with which the phrase ‘reflex action’ was used in the course of the argument as a presumably exculpatory description of the act of the applicant when he pressed the trigger of the firearm.

The conduct which caused the death was of course a complex of acts all done by applicant – loading the rifle, cocking it, presenting it, pressing the trigger. But it was the final act, pressing the trigger of the loaded and levelled rifle, which made conduct lethal. When this was said to be a reflex action, the word ‘reflex’ was not used strictly in the sense it ordinarily has in neurology as denoting a specific muscle reaction to a particular stimulus of a physical character. The phrase was, as I understood the argument, used to denote rather the probable but unpredictable reaction of a man when startled. He starts. In doing so he may drop something which he is holding, or grasp it more firmly. Doctor Johnson in his Dictionary – and his communication has been in substance repeated by others – said that ‘to start’ means ‘to feign’ sudden and involuntary twitch or motion of the animal frame on the apprehension of danger. The Oxford Dictionary speaks of a start as a ‘sudden involuntary movement of the body occasioned by surprise, terror, joy or grief …’. But assume that the applicant’s act was involuntary, in the sense in which the lexicographers use the word, would that, as a matter of law, absolve him from criminal responsibility for the consequences? I do not think so. I do not think that, for present purposes, such a thing bears any true analogy to one done under duress, which, although done by an exercise of the will, is said to be involuntary because it was compelled. Neither does it I think bear any true analogy to an act done in convulsions or an epileptic seizure which is said to be involuntary because by no exercise of the will could the actor refrain from doing it. Neither does it, I think, bear any true analogy to any act done by a sleep-walker or a person for some other reason rendered unconscious whose act is said to be involuntary because he knew not what he was doing.

Such phrases as ‘reflex action’ and ‘automatic reaction’ can, if used imprecisely and unscientifically, be, like ‘blackout’, mere excuses. They seem to me to have no real application to the case of a fully conscious man who has put himself in a situation which he has his finger on the trigger of a loaded rifle levelled at another man. If he then presses the trigger in immediate response to a sudden threat or apprehension of danger, as is said to have occurred in this case, his doing so is, it seems to me, a consequence probable and foreseeable of a conscious apprehension of danger, and in that sense a voluntary act. The latent time is no doubt barely appreciable, and what
was done might not have been done had the actor had time to think. But is an act so called involuntary merely because the mind worked quickly and impulsively?

(Material extracted from the Case Reports reproduced from Smith and Hogan Criminal Law: Cases and Materials (1993), pp.9–11 and pp.68–69.)

**ACTIVITY 4.4 (B)**

a. In the case of Ryan, which of the conflicting judgments did you find most persuasive? What made it persuasive?

b. On the basis of both Fagan and Ryan, what does it mean to say a law was decided ‘logically’?

c. Do you think that considerations other than those of logic entered the judge’s ‘decisions’?

**Feedback:** see end of guide.

### 4.5 Judicial impartiality and the ‘objectivity’ of legal reasoning

A feature of the rule of law is **objectivity**. Even if the law is interpretative, open to argument, and dispute, what does it mean to say that judicial decisions ought to be justifiable?

Certainly they should not be seen as arbitrary, that a claim was refused because of the personal characteristics of the claimant or the state of the judge’s digestion. But what if a commentator suspects that the decision was actually made because the judge sympathises with one party, made his or her mind up, and then constructed an argument in their judgement to justify that decision?

One sometimes reads such suggestions in textbooks. Take the following opinion by Peter Cane, a leading public lawyer in the UK, referring to a decision in *R v Gaming Board for Great Britain, ex parte Benain & Khaida* [1970] 2 QB 417.

There were hints in this case of a certain antipathy on the part of the court to the merits and substance of the applicant’s case, but it is, to say the least, unsatisfactory that a desire that the applicants should not succeed should lead to a denial of procedural safeguards.

Cane goes on to suggest:

Perhaps a better justification for Ld. Denning’s approach was a desire to protect confidential sources of information, the identity of which might have been revealed if reasons had been given. (An Introduction to Administrative Law (1986), p.111).

Consider Ronald Dworkin’s picture of justification:

A successful interpretation [of the proposition of law in an earlier case] must not only fit but also justify the practice it interprets. The judicial decisions [in this particular area of discussion tort cases] force some people to compensate others for losses suffered because their otherwise lawful activities conflicted, and since these decisions are made after the event, they are justified only if it is reasonable to suppose that people held in damages should have acted in some other way or should have accepted responsibility for the damage they caused. So the decisions can be justified only by deploying some general scheme of moral responsibility the members of the community might properly be deemed to have, about not injuring others or about taking financial responsibility for their acts. (*Law’s Empire* (1986), p.285)

So it is not just legal reasoning that is involved with legal justification, but a wider set of ideas about the role of legal system and of the judiciary. As Dworkin says:

According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice. (*Law’s Empire*, p.225).
4.6 Case noting

Case noting is an advanced skill that students will not be able to accomplish until they are familiar with the specific techniques of legal methodology introduced in Common law reasoning and institutions. Case noting concerns one of the two primary texts of law: cases. Cases are vital in the common law system, as it is through cases that statutes are given their specific meaning and, where statutes do not cover an area of law, cases give the primary definitions.

Legal discourse is to a large extent a discourse of authority. This means that decisions are based on previously authorised definitions and interpretations, as given in case law. Legal arguments proceed through citing such case law authorities. Not all cases have equal weight: the court level at which a case is decided is crucial. Thus students must be aware, in making notes of cases, what level of court made the decision in question. Equally, they must make themselves aware of any subsequent over-rulings, appeals or decisions at a higher level. Case noting involves making note of all these aspects, as well as noting the basics of the case decision itself.

The competent construction of a case note is an essential skill for law students and lawyers. As you can imagine, a case note written by an experienced barrister may be somewhat different from a case note by a first-year law student. However, there are two situations in which the approach does not differ.

One is in the great importance given to previous cases of the senior courts (Court of Appeal and House of Lords (now the Supreme Court)) worked out in practice through the doctrine of precedent. We have noted the outlines of the doctrine, namely that:

a. English judges must follow cases decided in superior courts
b. with only very limited exceptions, judges in the Court of Appeal must follow other previous decisions in the Court of Appeal
c. in exceptional cases, judges in the Supreme Court may decline to follow their own previous decisions.

It is therefore essential to know what other cases that may be binding have said. This is where the importance of case notes arises.

Once students have familiarised themselves with the basics of case law interpretation through the Common law reasoning and institutions course, they should begin to keep case notes for each subject studied.

Essential data

Identification of the case

1. The official citation of the case, so that you or anyone else can find it again. You will usually be making a record from a written source – so note it. Some reports are weekly and tend to emphasise speed rather than correctness. Other reports are monthly or quarterly, etc. Sometimes these reports are checked by the judges concerned; sometimes they are not. Citations are used throughout your subject guides. They are the details at the end of references to cases such as these:
   - Airedale NHS Trust v Bland [1993] 1 ALL ER 821
2. The Court (so that it can be immediately located in the hierarchy of the courts).
3. The date (so that it can be placed in the stream of development of an area of law, etc.).
4. The names of:
   ▶ the parties
   ▶ the judges (so that the decision can be placed in relation to the seniority and authority of the judge)
   ▶ (optionally) the solicitors/barristers acting for the parties.

Contents of the case
5. The material facts of the case.
6. The procedural history of the case – in which courts has the case been heard in before, if any?
7. A note of every judgment or opinion in the case. This note must include:
   ▶ the decision reached by each individual judge
   ▶ the reason for the decision reached by the individual judge
   ▶ whether the individual judgment/opinion falls into one of the following categories: Majority, Minority, Leading or Dissenting judgment/opinion.
8. An overall summary of the majority decision (there are invariably several judges in Appeal cases and these tend to be the cases determining important aspects of the law). This summary should:
   ▶ draw out similarities between judgments
   ▶ state how many of the judges reached their decision for the same reasons
   ▶ indicate where there were differences between the majority judgments.
9. An overall summary of dissenting judgments and whether you think the argument put forward by any dissenting judge is important. Often in English courts the dissenting judgments of leading judges in the Court of Appeal become the rationale for a change in the law by the House of Lords.
10. An overall view of whether the case is a strong case in terms of the doctrine of precedent:
    ▶ Only when the majority of judges agree on both the outcome and the reason for outcome can it be said that the precedent created is strong.
    ▶ This does not affect the decision between the parties in the actual case. If the plaintiff won, she still wins. However, agreement on outcome and reason for outcome affects the potential usefulness of the case, according to the doctrine of precedent. A weak precedent is one where there is no general agreement as to the reason for the outcome. This is an important issue and one illustration of why it is not enough to know just the outcome of the case.

Finally the case note is meant to be usable, and as you may collect many of them during your studies, it must be brief! Some of the cases in the law reports that you will be noting may be two or three pages long, but some could be 50 or 80 pages or longer. For an example see R v Savage, R v Parmenter in your Criminal law study pack. A summary case note should ideally be only a page or two in length. You need to make tactical decisions about what to include and what to exclude.† This is one of the techniques that excellent lawyers need to develop.

Identifying arguments
Reading cases also introduces you to the different practical methods of creating arguments that the judiciary use. So you need to know something about how to identify arguments. It is not necessarily appropriate, for example, to just summarise the judgment or opinion in the order that you read it in the text. The judge may speak in a circular way, and use irrelevant discussions to set a scene useful for the litigants, but not useful for lawyers summarising the case.

† In English law you must know the reason for deciding the case (the ratio decidendi).
In many of your subjects your textbook writers, or even the compilers of your casebooks, will give you a summary of the case in the text. You can also buy materials and books that claim to give you pages of small case notes. All these have their place, but cannot substitute for knowing how to competently produce your own case notes.

There are no models that are more right than others. There are just case notes where the noting of the reasons is more thorough or more competent. You will find a variety of styles used. Look into some of your casebooks for demonstrations of this. Often your textbook writers will give a one-sentence rationale for the precedent created by a case. This may represent the judgement of the writer of the case note, or a subsequent reader of that case note. But if that is all that you know about the case, this could be a problem.

It is not sufficient always to rely on what others have said about a case – you must learn how to read for yourself, and make your own judgement of the case, of the relationship between different judgements/opinions in the same case, and of the bigger relationship between cases.

Of course it is not possible or necessary to read all cases, but you should read the leading cases in full. Otherwise you are relying on others to interpret the law for you.

The core of the good case note lies in the competent reading of the judgments (Appeal Court) or opinions (House of Lords).

**SAMPLE EXAMINATION QUESTIONS**

In the case of the Common law reasoning and institutions examination, the specific questions that this chapter’s material covers will be presented in Chapters 5 and 6. However, you should note that the material in this chapter is basic to all problem examination questions across your LLB subjects.

**References**

Reflect and review

Look through the points listed below.

Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

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<th>I can outline the principles of legal research.</th>
<th>Ready to move on</th>
<th>Need to revise first</th>
<th>Need to study again</th>
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If you ticked ‘need to revise first’, which sections of the chapter are you going to revise?

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<td>4.2 What are the sources of English law?</td>
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<td>4.3 Finding and reading the law</td>
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