

THE RULE OF LAW

1.1 What is law?

Law can affect many aspects of our lives, yet most people living in England and Wales have little understanding of the legal system that operates in these countries. For many their main awareness comes from newspaper articles with headlines such as 'Murderer jailed for life'; 'Young offender goes free'; 'Burglar caught'. This type of headline appears so frequently that it is not surprising that, when law is mentioned, many people only think of the criminal law and the courts that deal with this type of case. In reality the law covers an enormous range of situations and the legal system in England and Wales has a variety of courts and methods for dealing with different types of cases.

1.1.1 Different types of law

Since the law does cover such a wide variety of matters it can be helpful to divide it into different categories. The first distinction is that between international and national (municipal) law; national law can then be classified into public and private law; finally these classifications can be subdivided into a number of different categories. These divisions are explained below.

International and national law

International law is concerned with disputes between nations; much of this law comes from treaties which have been agreed by the governments of the countries.

National law is the law which applies within a country: each country will have its own national law and there are often wide differences between

the law of individual countries. This can be shown by the fact that Scotland has its own law and legal system which are quite separate from the law and legal system which operate in England and Wales. For example, while serious criminal cases are tried by jury in both systems, the Scottish jury has 15 members and the decision can be made by a simple majority of 8–7. In contrast the jury in England and Wales has 12 members, at least 10 of whom must agree on the decision.

Public and private law

Within national law there is usually a clear distinction between public and private law. Public law involves the state or government in some way, while private law is concerned with disputes between private individuals or businesses. Both public and private law can be subdivided into different categories.

Public law

There are three main types of law in this category. These are:

1. Constitutional law

This controls the method of government and any disputes which arise over such matters as who is entitled to vote in an election, or who is allowed to become a Member of Parliament, or whether an election was carried out by the correct procedure.

2. Administrative law

This controls how ministers of state and public bodies such as local councils should operate. An important part of this is the right to judicial review of certain decisions. Judicial review allows

judges to consider whether a decision (or a refusal to make a decision) is reasonable. If it is not, then the decision is reconsidered.

3. Criminal law

This sets out the types of behaviour which are forbidden at risk of punishment. A person who commits a crime is said to have offended against the state, and so the state has the right to prosecute them. This is so even though there is often an individual victim of a crime as well. For example, if a defendant commits the crime of burglary by breaking into a house and stealing, the state prosecutes the defendant for that burglary, although it is also possible for the victim to bring a private prosecution if the state does not take proceedings. However, if there is a private prosecution, the state still has the right to intervene and take over the matter. At the end of the case, if the defendant is found guilty, the court will punish the defendant for the offence, because he or she has broken the criminal law set down by the state. The victim will not necessarily be given any compensation, since the case is not viewed as a dispute between the burglar and the householder. However, the criminal courts have the power to order that the offender pays the victim compensation and can make such an order, as well as punishing the offender.

Private law

This is usually called civil law and has many different branches. The main ones are contract, tort, family law, law of succession, company law and employment law. This book does not deal with the actual legal rules of any of these areas, only with the system for dealing with disputes. However, it is sensible to have some idea of what types of dispute may be involved in these areas of law, so look at the following situations:

- A family complain that their package holiday did not match what was promised by the tour operator and that they were put into a lower-grade hotel than the one they had paid for.
- A woman has bought a new car and discovers the engine is faulty.
- A man who bought a new car on hire purchase has failed to pay the instalments due to the hire-purchase company.

All these situations come under the law of contract. There are, of course, many other situations in which contracts can be involved. Now look at the next list of situations; they are also civil matters, but of a different type.

- A child passenger in a car is injured in a collision (the tort of negligence).
- A family complain that their health is being affected by the noise and dust from a factory which has just been built near their house (the tort of nuisance).
- A woman is injured by faulty machinery at work (the tort of negligence, but may also involve occupiers' liability and/or employer's duty under health and safety regulations).
- A man complains that a newspaper has written an untrue article about him, which has affected his reputation (the tort of defamation).

All these cases come under the law of tort. A tort occurs where the civil law holds that, even though there is no contract between them, one person owes a legal responsibility of some kind to another person, and there has been a breach of that responsibility. There are many different types of tort, and the above examples demonstrate only some of them. Many cases arise from road traffic crashes, since drivers owe a duty of care to anyone who might be injured by their negligent driving.

Other divisions of private (civil) law concentrate on particular topics. Family law covers such

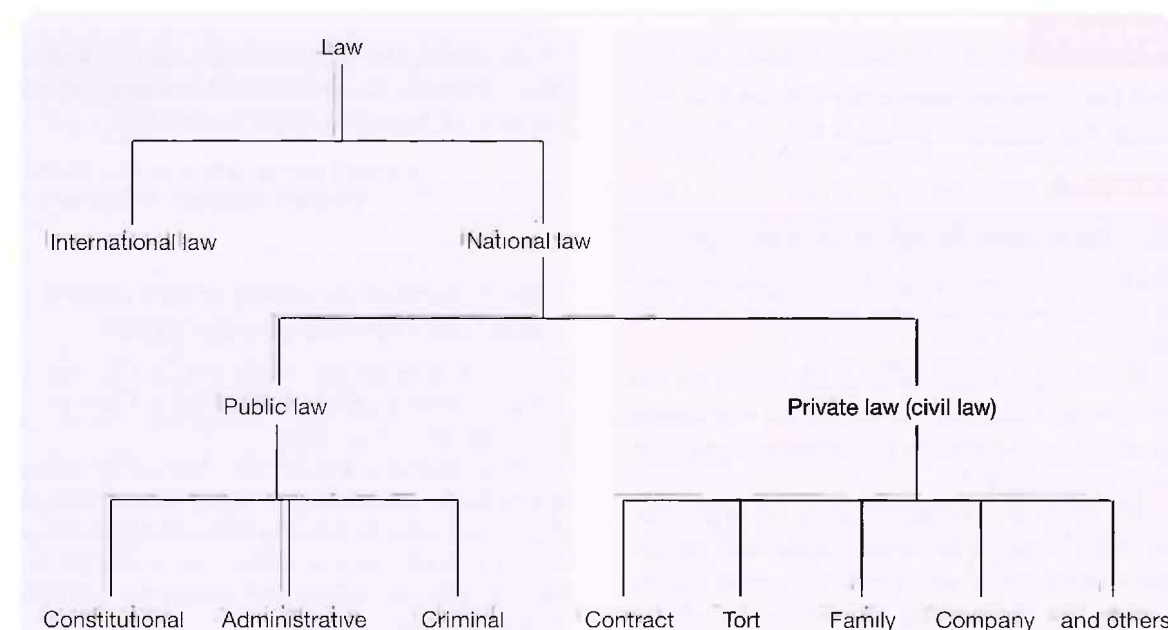


Figure 1.1 Summary of the different categories of law

matters as whether a marriage is valid, what the rules are for divorce and who should have the day-to-day care of any children of the family. The law of succession is concerned both with regulating who inherits property when a person dies without making a will, and also what the rules are for making a valid will. Company law is very important in the business world: it regulates how a company should be formed, sets out formal rules for running companies, and deals with the rights and duties of shareholders and directors. Employment law covers all aspects of employment, from the original formation of a contract of employment to situations of redundancy or unfair dismissal. As well as these areas of private law, there are also laws relating to land, to copyright and patents, to marine law and many other topics, so it can be seen that civil law covers a wide variety of situations.

Distinguishing between civil and criminal law

It is important to realise that civil law is very different from criminal law. The first point is shown in Figure 1.1 above. Criminal law is part of public law while civil law is the separate category of private law. The reason that criminal law is part of public law is that crime is regarded as an action against the state and society as a whole. Civil law is called private law because the issues it deals with are between two individuals. The two types of law have different aims and are dealt with in different courts.

On the next two pages there are five newspaper articles. Some are about civil law and some are about criminal law. Do the activity based on these and then read section 1.1.2 to get a clearer understanding of the differences between the two.

ACTIVITY

Read the following newspaper articles and answer the questions on page 5.

SOURCE A

High Court uses Twitter to issue injunction

The High Court has ordered an injunction to be served through the social networking site Twitter for the first time.

In yesterday's ruling, the court said issuing the writ over the micro-blogging site was the best way to get to an anonymous tweeter who was impersonating a right-wing commentator.

The Twitter account, blaneysbarney, was impersonating Donal Blaney, a lawyer and Conservative blogger. The account, which was opened last month, features a photograph of Mr Blaney followed by a number of messages purporting to be by him.

The Court said that the unknown imposter should stop their activities and that they should reveal themselves to the court. The owner of the fake account will receive the writ next time they enter the site.

Taken from an article in *The Times*, 2 October 2009

SOURCE B

Couple sue wedding photographer

A newly married couple have successfully sued their wedding photographer after paying £1,450 for a 'woefully inadequate' service.

Marc and Sylvia Day were presented with a disc full of pictures from the big day with heads chopped off, inattentive guests and random close-ups of vehicles. The cutting of the cake was missed and of the 400 images they were sent, only 22 met with their approval.

They have now been awarded compensation by a judge after winning a case for breach of contract against the photographer.

Deputy District Judge Keith Nightingale found in favour of the Days at Pontefract County Court and criticised the photographer Gareth Bowers for providing 'inappropriate' photos and a 'woefully inadequate' service.

He ordered him [Bowers] to pay back £500 from the £1,450 to the Days with £450 in damages, £100 for their loss of earnings and £170 in court fees.

Adapted from an article by Paul Stokes in the *Daily Telegraph*, 5 October 2009

SOURCE C

Rip-off plumber danced jig of joy in OAP's garden after overcharging her £6,000

A ROGUE plumber was spotted dancing a jig outside a frail pensioner's house after he conned her out of nearly £8,000, a court heard.

Dodgy tradesman Russell Lane, 38, made no attempt to hide his joy after shamelessly ripping off Patricia Binks, 72, who had called for help after suffering a blocked drain.

But yesterday he was counting the cost of his dishonesty after the company he worked for was fined £15,000 in fines and costs.

Lane was also found guilty of fraud and is due to be sentenced in March. Bournemouth Crown Court heard Mrs Binks contacted Plumbers 24/7 Ltd after finding the number in Yellow Pages.

Lane, who was with a second unnamed man, produced paperwork he ordered Mrs Binks sign. It had no prices on and the men told her that if she didn't sign they wouldn't be able to carry out the work.

The men worked on the drains for five hours – then handed Mrs Binks a bill for £7,800. They produced a card machine and ordered her to pay the full amount immediately.

... Officials called in an expert to examine the work who found Lane overcharged Mrs Binks by £6,000.

The jury agreed the price charged by Lane was so significantly above a reasonable charge that the demand to pay that amount could only have been made dishonestly.

Adapted from an article by David Pilditch, in the *Daily Express* online, 21 January 2016

SOURCE D

High Court awards £10m compensation to girl after NHS blunders left her brain damaged and blind from birth

A girl left with catastrophic brain damage by NHS blunders at her birth has won more than £10million in compensation.

Ayla Ellison, who is now seven, suffered a severe haemorrhage in the womb as a result of staff negligence at Furness General Hospital in Barrow, Cumbria.

She has severe quadriplegic spastic cerebral palsy, the High Court in London heard. She also has epilepsy, is effectively blind and has to be fed using a tube.

Ayla was born at Furness General Hospital in Barrow, Cumbria in April 2007.

Awarding the payment, Mr Justice Warby said: 'Ayla is totally immobile, with virtually no spontaneous ability to use her hands and arms.'

The award includes the £1.7 million cost of relocating and buying a home with a hydrotherapy pool.

She also gets more than £300,000 in general damages for her pain and suffering and loss of amenity. And annual payments rising from £125,000 to £290,000 a year to cover the increasing cost of care.

Adapted from an article in *The Mail Online*, 19 February 2015

SOURCE E

Air hostess, 46, who arrived back from Amsterdam drunk 'staggered to her car and had to be stopped from driving off'

An alcoholic air hostess who arrived back from Amsterdam drunk 'staggered' to her car and had to be stopped from driving off by her colleagues. Leeds Magistrates Court heard that Young caught a shuttle bus to a car park in the airport before getting in her car and starting the engine.

Angela Young, 46, was over four times over the limit when she arrived at Leeds Bradford Airport, West Yorkshire, and airport staff blocked her car in before calling police.

Young admitted 'performing an aviation function' while over the limit and being in charge of a vehicle whilst over the drink drive limit.

Young, who has no previous convictions, was sentenced to a 12-month community order with a nine-month alcohol treatment requirement, 20 rehabilitation activity days and 40 hours unpaid work.

She was also given a 12-month driving ban.

Adapted from an article by Alex Matthews for *The Mail Online*, 14 January 2016

Questions

1. Identify which of these articles is referring to civil cases and which to criminal cases. (If you wish to check that you are right before continuing with the rest of the questions, turn to the start of Appendix 1 at the back of the book.)
2. Look at the articles which you have identified as criminal cases and state in which courts the defendants were tried.
3. Look at the articles which you have identified as civil cases and state which courts are mentioned.
4. One of the defendants in the criminal cases pleaded guilty. Which one was this?
5. The defendants in the other criminal case were found guilty because they were dishonest. Who made this decision?
6. In the criminal cases one defendant was sentenced on the day. List the different punishments used in the case. What was going to happen about sentencing the defendants in the other case?
7. In the civil cases two different types of remedy are mentioned. What are they?

1.1.2 Differences between criminal cases and civil cases

There are many differences between criminal cases and civil cases (you should already have noticed some from the articles):

- **The cases take place in different courts.** In general, criminal cases will be tried in either the Magistrates' Court or the Crown Court, while civil cases are heard in the High Court or the County Court. (Note that some civil matters,

- can be dealt with in the Magistrates' Court – see sections 13.1.1 and 17.5 for further details.)
- **The person starting the case is given a different name.**
In criminal cases they are referred to as the prosecutor, while in civil cases they are called the claimant (pre-1999, the plaintiff). As already stated, the criminal case is taken on behalf of the state and there is a Crown Prosecution Service responsible for conducting cases, though there are other state agencies that may prosecute certain types of crime; for example, the Environment Agency which can prosecute cases of pollution. Civil cases are started by the person (or business) who is making the claim.
 - **The terminology used is different.**
A defendant in a criminal case is found guilty or not guilty (an alternative way of putting it is to say the defendant is convicted or acquitted), whereas a defendant in a civil case is found liable or not liable. At the end of a criminal case those who are found guilty of breaking the law may be punished, while at the end of a civil case

EXAMPLE

Judgment overtakes Brink's-Mat accused 11 years later

Eleven years after a man was acquitted of the £26 million Brink's-Mat bullion robbery, a High Court judge ruled that he was involved and must repay the value of the gold.

Anthony White, acquitted at the Old Bailey in 1984 of taking part in Britain's biggest gold robbery, was ordered to repay the £26,369,778 value and £2,188,600 in compensation. His wife Margaret was ordered to pay £1,084,344. Insurers for Brink's-Mat had sued the couple for the value of the proceeds.

Mr Justice Rimmer told Mr White that his acquittal did not mean that the Old Bailey jury

anyone found liable will be ordered to put right the matter as far as possible. This is usually done by an award of money in compensation, known as damages, though the court can make other orders such as an injunction to prevent similar actions in the future, or an order for specific performance where the defendant who broke a contract is ordered to complete that contract.

- **The standard of proof is different.**
Criminal cases must be proved 'beyond reasonable doubt'. This is a very high standard of proof, and is necessary since a conviction could result in a defendant serving a long prison sentence. Civil cases have only to be proved 'on the balance of probabilities', a lower standard in which the judge decides who is most likely to be right. This difference in the standard to which a case has to be proved means that even though a defendant in a criminal case has been acquitted, a civil case based on the same facts against that defendant can still be successful. Such situations are not common, but one is illustrated in the article below.

had been satisfied he was innocent; only that he was not guilty according to the standard of proof required in criminal cases . . .

The case against the Whites is the latest and almost the last in a series of actions since the 1983 robbery brought by insurers for Brink's-Mat against people either convicted or suspected of taking part in the robbery and of handling the proceeds.

Using the lower standards of proof in civil courts and in actions for seizure of assets, lawyers believe that they will recoup at least £20 million.

Taken from an article by Stewart Tendler in *The Times*, 2 August 1995

	CIVIL CASES	CRIMINAL CASES
Purpose of the law	To uphold the rights of individuals	To maintain law and order; to protect society
Person starting the case	The individual whose rights have been affected	Usually the state through the Crown Prosecution Service
Legal name for that person	County Court or High Court Some cases dealt with in tribunals	Magistrates' Court or Crown Court
Standard of proof	The balance of probability	Beyond reasonable doubt
Person/s making the decision	Judge Very rarely a jury	Magistrates OR jury
Decision	Liable or not liable	Guilty or not guilty
Powers of the court	Usually an award of damages, also possible: injunction, specific performance of a contract, rescission or rectification	Prison, fine, community order, discharge, etc. (see Chapter 14)

Figure 1.2 Distinctions between civil and criminal cases

Other situations in which a civil action may follow a successful criminal case are road accident cases. A defendant may be found guilty of a driving offence, such as going through a red traffic light or driving without due care and attention; this is a criminal case. Anyone who was injured or had property damaged as a result of the incident could bring a civil action to claim compensation. The fact that the defendant had already been convicted of a driving offence will make it easier to prove the civil case.

In the English legal system an understanding of these basic distinctions between civil and criminal cases is important. To help you, a chart of the main differences is provided in Figure 1.2.

1.1.3 Definition of 'law'

So far we have considered only some divisions of law, and briefly introduced the system which applies in England and Wales. It is now necessary to look more widely at, and to discuss what is meant by, law in general terms and to compare it with concepts of morality and justice.

It is not easy to give a simple one-sentence definition of law – however, legal theorists have tried to provide such a definition. John Austin,

writing in the early 19th century, defined law as being a command issued from a superior (the state) to an inferior (the individual) and enforced by sanctions. This definition, however, does not truly apply to regulatory law such as that setting out how a will should be made; nor does it cover the concept of judicial review, where individuals may challenge the 'command' made by a minister of state. Austin was writing at a time when the law was much less developed than it is today, so it is not surprising that his definition does not cover all types of law today.

Sir John Salmond defined law as being 'the body of principles recognised and applied by the state in the administration of justice'. This is a much broader definition than Austin's and is probably the nearest that one can get to a workable 'one-sentence' definition. Law could also be described as a formal mechanism of social control. It is formal because the rules set down in the law can be enforced through the courts and legal system, while in a broad sense all law could be said to be involved in some area of social control.

Law and rules

Law applies throughout a country to the people generally. There are other rules that apply only to

certain groups or in limited situations: for example, all sports have a set of rules to be followed, and the sanction applied for breaking the rules may be that a free kick is given to the other side, or that a player is sent off, or in serious cases a player is banned from competing for a certain number of weeks or months.

There are also unwritten 'rules' within communities. These come from local custom or practice, or they may be connected to religious beliefs. They enforce what is regarded by the community as the norm for behaviour. If you break such rules, others in the community may disapprove of your behaviour, but there is no legal sanction to force you to comply or to punish you if you refuse to do so. Such normative values are often connected with sexual behaviour and the concept of morality. The relationship of law and morality is explored in the next section of this chapter.

Codes of law

In some civilisations or countries, an effort has been made to produce a complete set of rules designed to deal with every possible situation that might arise. Some of the early major civilisations attempted this, notably the code of Justinian in Roman times. In the 18th century, Frederick the Great of Prussia compiled a code of 17,000 'rules' which he saw as a complete and ideal set of laws. In France, Napoleon also codified the law, and this Napoleonic Code is still the basis of French law today. In theory this idea of a complete code is attractive. It makes the law more accessible so that everyone knows exactly what their rights and duties are; however, law needs to be able to change and develop with the needs of society, and a fully codified system would prevent any such change.

1.2 Law and morality

The moral values of communities lay down a framework for how people should behave. Concepts of morality differ from culture to culture, although most will outlaw extreme behaviour such as murder. Often morality is based on religious ideas: the Bible teachings provide a moral code for Christian communities and the teachings in

the Koran for Muslims. The law of a country will usually reflect the moral values accepted by the majority of the country, but the law is unlikely to be exactly the same as the common religious moral code. One example is adultery: this is against the moral code for both Christians and Muslims but is not considered a crime in Christian countries; however, in some Muslim countries (though not all) it is against the criminal law.

The moral standards of a community are recognised as having a profound influence on the development of law, but in complex societies, morality and law are never likely to be co-extensive. Major breaches of a moral code (such as murder and robbery) will also be against the law, but in other matters there may not be consensus.

In England and Wales there has been a move away from religious belief and the way that the law has developed reflects this. Abortion was legalised in 1967, yet many people still believe it is morally wrong. A limited form of euthanasia has been accepted as legal with the ruling in *Airedale NHS Trust v Bland* (1993), where it was ruled that medical staff could withdraw life-support systems from a patient who could breathe unaided, but who was in a persistent vegetative state. This ruling meant that they could withdraw the feeding tubes of the patient, despite the fact that this would inevitably cause him to die. Again, many groups believe that this is immoral as it denies the sanctity of human life.

ACTIVITY

In *Re A (conjoined twins)* (2000) the Court of Appeal had to decide whether doctors should operate to separate Siamese twins when it was certain that the operation would kill one twin as she could not exist without being linked to her twin.

- a) Search on the Internet for a report of this case. Try www.bailii.org and look under the England and Wales reports and search

using the case citation (reference) of [2000] EWCA (Civ) 254.

b) Discuss:

- 1. Whether this sort of decision should be made by judges.
- 2. Whether you think that, knowing one child would die, it was right for the operation to go ahead.

Differences between law and morality

There are also differences between law and morality in the way the two develop and the sanctions imposed. The following is a suggested list of such differences.

- 1. Morality cannot be deliberately changed; it evolves slowly and changes according to the will of the people. Law can be altered deliberately by legislation: this means that behaviour which was against the law can be 'decriminalised' overnight. Equally, behaviour which was lawful can be declared unlawful.
- 2. Morality is voluntary with consequences, but generally carrying no official sanction (though some religions may 'excommunicate'); morality relies for its effectiveness on the individual's sense of shame or guilt. Law makes certain behaviour obligatory with legal sanctions to enforce it.
- 3. Breaches of morality are not usually subject to formal adjudication; breaches of law will be ruled on by a formal legal system.

1.3 Law and justice

It is often said that the law provides justice, yet this is not always so. Justice is probably the ultimate goal towards which the law should strive, but it is unlikely that law will ever produce 'justice' in every case. First there is the problem of what is meant by 'justice'. The difficulty of defining justice was commented on by Lord Wright, who said:

'the guiding principle of a judge in deciding cases is to do justice; that is justice according to the law, but still justice. I have not found any satisfactory definition of justice . . . what is just in a particular case is what appears just to the just man, in the same way as what is reasonable appears to be reasonable to the reasonable man.'

In some situations people's concept of what is justice may not be the same. Justice can be seen as applying the rules in the same way to all people, but even this may lead to perceived injustices – indeed rigid application of rules may actually produce injustice.

An area in which there has been a lot of discussion is the amount of force that a householder can use on a burglar who enters that person's home. What is fair and just for both parties? Should the householder be allowed to seriously injure, or even kill, the burglar? Should the burglar be able to claim compensation for any injuries suffered?

The activity on page 10 is based on a similar situation.

Conclusion

From sections 1.2 and 1.3 it is clear that the three concepts of law, morality and justice are quite distinct. There is, however, a large overlap between law and morality, law and justice and also morality and justice. This idea of the overlapping of the three is illustrated in diagram form in Figure 1.3.

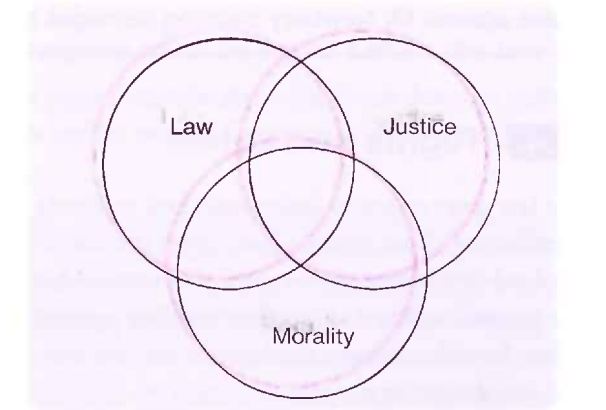


Figure 1.3 Diagram of the relationship of law, morality and justice

ACTIVITY

Read the facts of the following case and use the questions below as the basis of a discussion on the concept of justice.

CASE REVILL V NEWBERY (1996)

Facts: Mark Revill, aged 21, with another man attempted to break into a brick shed on William Newbery's allotment at about 2 o'clock in the morning. Mr Revill and his companion had already that night stolen cars and caused criminal damage elsewhere, and intended to steal items from the shed. Mr Newbery, who was aged 76, was sleeping in the shed in order to protect his property after earlier thefts and vandalism. He had with him an air rifle and a single-barrelled 12-bore shotgun and ammunition for both guns. When he was awakened by the noise of the two men trying to break in, he loaded the shotgun, poked it through a small hole in the door and fired. The shot hit Mr Revill on the right upper arm and chest.

Criminal proceedings: Mr Revill was prosecuted for various criminal offences he had committed that night, pleaded guilty and was sentenced. Mr Newbery was prosecuted for wounding Mr Revill, but was found not guilty by the jury at the Crown Court.

Civil proceedings: Mr Revill then brought a civil case against Mr Newbery claiming damages for

the injuries he had suffered from the shotgun blast. In this case the judge awarded Mr Revill damages of £12,100 but reduced the amount to £4,033 because the judge held that Mr Revill was two-thirds to blame for what had happened. This meant that Mr Newbery was ordered to pay Mr Revill £4,033.

Mr Newbery appealed against this order but the Court of Appeal dismissed his appeal saying that his conduct was 'clearly dangerous and bordered on the reckless'. One of the judges pointed out that: 'Violence may be returned with necessary violence but the force used must not exceed the limits of what is reasonable in the circumstances.'

Questions

- 1. Should a criminal be able to use the legal rules to claim for injuries caused by another person? Is it justice to award damages to someone who was injured while carrying out criminal activities?
- 2. Bearing in mind the fact that Mr Newbery had fired without warning, was the decision in the civil case brought by Mr Revill, that Mr Newbery should pay a reduced amount of damages to Mr Revill for the injuries, a just one?
- 3. Mr Newbery was found not guilty of a criminal charge of wounding Mr Revill. Was this a 'just' decision?

1.4 Rights and duties

The law gives rights to individuals and methods of enforcing those rights. Quite often the law is involved in a balancing act, trying to ensure that one person's rights do not affect another person's rights. In order to keep the balance the law also imposes duties on people.

This is more easily understood by looking at examples. In the law of contract, where one

person buys a digital television from a shop each party will have rights and duties under this contract. For example, the shop has the right to be paid the agreed price for the TV, while the buyer has the right to have a set which is in working order.

The idea of rights and duties can also be seen clearly in employment law. An employer has a duty to pay wages to the employee, while the employee

has the right to sue for any wages which are owed. An employee has a duty to obey reasonable lawful orders while an employer has a right to expect this and may be able to dismiss the employee if there is a serious breach. An employer has a duty to provide a safe system of work for all employees, while an employee has the right to claim compensation if he is injured because the employer has broken this duty. These are just a few of the rights and duties of employers and employees and this balancing of their rights and duties is also shown in Figure 1.4.

Even where there is no contract or agreement between the parties, the law can impose rights and duties on people. An example of this is the right to use one's own land (this includes a house or a flat) as one wants to. The law recognises that people have the right to enjoy the use of their own property, but this right is balanced by the right of other land users to enjoy the use of their properties. So the tort of nuisance allows a claim to be made if one's enjoyment of land is affected by too much noise, smoke, smells or other nuisances coming from another person's land.

Even in the criminal law this idea of rights and duties can be seen. The criminal law imposes a duty on all citizens to obey the law or face possible punishment. This duty is imposed to protect other citizens or society as a whole. In this way the law upholds the rights of people not to be assaulted or to have their possessions stolen or whatever else the particular crime involves.

1.5 The rule of law

The 'rule of law' is a symbolic idea. It is difficult to give a precise meaning to the concept. The best-known explanation of the 'rule of law' was given by Dicey in the 19th century, but there have been other important writers on the topic since. These include FA von Hayek and Joseph Raz.

1.5.1 Dicey

Dicey thought that the rule of law was an important feature that distinguished English law from law in other countries in Europe. He held that there were three elements that created the rule of law.

These were:

- an absence of arbitrary power on the part of the state
- equality before the law
- supremacy of ordinary law.

An absence of arbitrary power of the state

The state's power must be controlled by the law. The law must set limits on what the state can or cannot do. In our legal system actions of, and decisions by, government ministers can be challenged by judicial review. One of the main aims of the rule of law is to avoid the state having wide discretionary powers. Dicey recognised that discretion can be exercised in an arbitrary way and this should be avoided to comply with the rule of law.

Everyone must be equal before the law

No person must be above the law. It does not matter how rich or powerful a person is, the law must deal

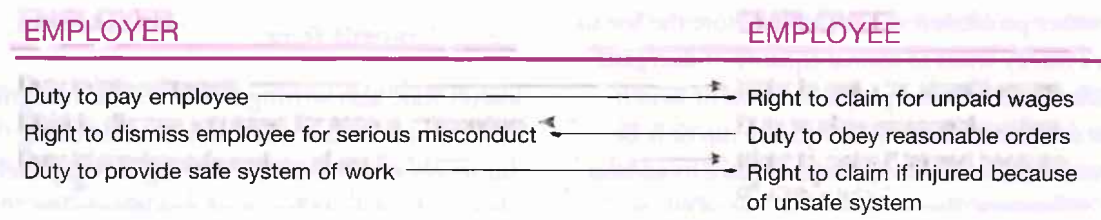


Figure 1.4 Balancing rights and duties in employment law

with them in the same way as it would anyone else. Another side of this part of the rule of law is that those who carry out functions of state must be accountable under the law for their actions.

The law must be supreme

This is particularly true in the law of England and Wales in the time of Dicey, as many of the main developments up to that time were through judicial decisions rather than being created by the executive. Today most laws are through legislation, that is Acts of Parliament and delegated legislation, though judicial decisions do still create law.

Problems with Dicey's views

A major problem with Dicey's view of the rule of law is that it conflicts with another fundamental principle, that of Parliamentary supremacy. This concept holds that an Act of Parliament can overrule any other law. The concept also holds that no other body has the right to override or set aside an Act of Parliament. (See 4.7 for fuller details of the concept of Parliamentary supremacy.) So under the rule of law there should be no arbitrary power on the part of the state, yet under Parliamentary supremacy Parliament has the right to make any law it wishes and these can include granting arbitrary powers to the state. Also, laws passed by Parliament cannot be challenged through judicial review. This is different from some other countries where the legislative body is subject to the rule of law, so that laws passed by them can be challenged in the courts.

Another problem is that equality before the law in Dicey's theory refers to formal equality. It disregards the differences between people in terms of wealth, power and connections. Real equality can only be achieved if there are mechanisms in place to address these differences. For example, the cost of taking legal cases to court is very high. In order to allow the

poorest in society to be able to enforce their rights and so be equal under the law, it is necessary to have some form of state help in financing their case.

Dicey's view of the rule of law is based on abstract ideas. This makes it difficult to apply in real-life situations.

1.5.2 von Hayek

FA von Hayek agreed with Dicey that the key component of the rule of law is the absence of any arbitrary power on the part of the state. Writing in 1971, he put it this way:

'Stripped of all technicalities the Rule of Law means that the government in all its actions is bound by rules fixed and announced in advance.'

He thought that the rule of law had become weaker because, provided actions of the state were authorised by legislation, then any act in accordance with this legislation was lawful. Hayek was an economist and was particularly concerned with the increasing intervention of the state and the replacement of a free-market economy with a planned economy, regulated by an interventionist state.

The modern state no longer just provides a legal framework for the conduct of economic activity but is directly involved in regulating and coordinating such activity. In the 21st century this intervention has increased due to banking problems, with the collapse of some banks and also scandals such as interest-rate fixing that have occurred. In view of these, this intervention seems justified but it conflicts with the concept of the rule of law.

1.5.3 Joseph Raz

Joseph Raz, also writing in the 1970s, recognised that the rule of law was a way of controlling discretion rather than preventing it completely. He saw the rule of law as of negative value, acting to minimise the danger of the use of discretionary

power in an arbitrary way. He thought that the key point which emerged from the rule of law was that the law must be capable of guiding the individual's behaviour.

He set out a number of principles which come from this wider idea. Some of these are:

- There should be clear rules and procedures for making laws.
- The independence of the judiciary must be guaranteed.
- The principles of natural justice should be observed; these require an open and fair hearing with all parties being given the opportunity to put their case.
- The courts should have the power to review the way in which the other principles are implemented to ensure that they are being operated as demanded by the rule of law.

Within our legal system there have been changes in the 21st century which support these principles. A major example is the Constitutional Reform Act 2005 which recognised the rule of law and the importance of the independence of the judiciary. Section 1 of that Act states:

'This Act does not adversely affect –

- (a) the existing constitutional principle of the rule of law; or*
- (b) the Lord Chancellor's existing constitutional role in relation to that principle'*

While s 3(1) states:

'The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.'

For more on the independence of the judiciary see section 16.10.

In our modern legal system human rights are as important as the rule of law and this is the next topic to be considered.

1.6 Human rights and the English legal system

Under the Human Rights Act 1998, the European Convention on Human Rights was incorporated into our law. This has affected many areas of the English legal system. This section gives a brief summary of some of the key effects. There is fuller detail about the European Convention and the Human Rights Act 1998 in Chapter 20.

Precedent

Section 2(1)(a) of the Human Rights Act states that our courts must take into account any judgment or decision of the European Court of Human Rights. This means that judges when deciding a case must look at human rights cases, as well as our own English law.

Statutory interpretation

Section 3 of the Act states that, so far as it is possible to do so, all legislation (that is Acts of Parliament and other laws made in this country) must be given effect so that it is compatible with the European Convention. For example, if the wording of an Act of Parliament has two possible meanings, then the meaning which fits with the European Convention is the one that must be used.

Trials

Article 6 of the European Convention gives the right to a fair trial. This means that all aspects of the trial must be fair. For example, the way in which juvenile offenders are tried was changed after the case of *T v United Kingdom; V v United Kingdom* (1999). In this case a boy of 10 and a boy of 11 were tried for murder in the Crown Court. The European Court of Human Rights held that the formality of a Crown Court trial would have made it difficult for the boys to understand what was happening. This meant that the trial was

not fair and there was a breach of the European Convention. In order to comply with the convention, there are now more flexible procedures for trials of juveniles in the Crown Court. For example, juveniles do not have to sit in the dock but sit alongside their legal advisers. Also, the court sits for shorter hours to allow for the shorter attention span of children.

Sentencing

Where an offender is sentenced to prison for life, it is usual to set a minimum period which must be served before the offender can be considered for parole. This minimum sentence used to be set by the Home Secretary (a government minister). The European Court of Human Rights held that this was a breach of the European Convention. This has been changed so that judges are now responsible for setting any minimum period.

Judicial appointment

Part-time judges in this country used to be appointed for a period of three years. After

this time they could then be appointed for further periods of three years. In addition, the appointment was by the Lord Chancellor (a government minister). The length of appointment was changed to five years, as it was thought that the shorter period meant that there was a risk of the judges not being sufficiently independent from the government. This would have been a breach of the European Convention.

Conclusion

The above points are not the only way in which the English legal system has been affected by the European Convention on Human Rights. However, they are an illustration of how wide-ranging the effect on our legal system has been.

EXTENSION ESSAY

'The rule of law is an ideal, but one which can never be fully achieved.' Discuss.