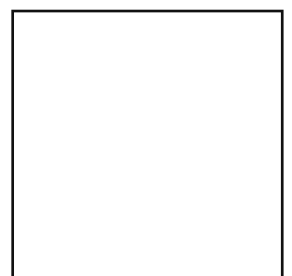
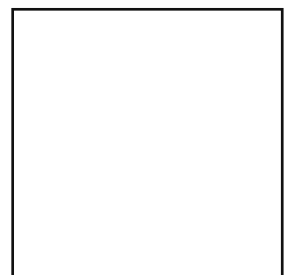
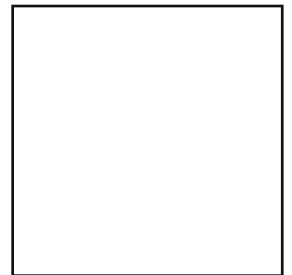


**Nelson Thornes  
Distance Learning**

# **AS Law WJEC**

**Clare Anderson**



Nelson Thornes

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Contact Numbers  
Tel: 01242 267111 Fax: 01242 267294

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# Study Calendar



Study week	Unit start date	Unit	Internally assessed assignment	Work due date
1		Introduction		
2				
3		Unit 1.1 Common Law and Equity	<b>Assignment 1.1</b>	
4		Unit 1.2 The Doctrine of Judicial Precedent		
5		Unit 1.2 The Doctrine of Judicial Precedent	<b>Assignment 1.2</b>	
6		Unit 1.3 Legislative Process and Law Reform		
7		Unit 1.4 Delegated Legislation	<b>Assignment 1.4</b>	
8		Unit 1.5 Statutory Interpretation		
9		Unit 1.5 Statutory Interpretation	<b>Assignment 1.5</b>	
10		Unit 4.18 Human Rights		
11		Unit 1.6 European Union Law	<b>Assignment 1.6</b>	
12		Unit 2.7 The Criminal Process and Criminal Courts		
13		Unit 2.8 The Civil Courts and Process		

Study week	Unit start date	Unit	Internally assessed assignment	Work due date
14		Unit 2.9 Alternative Dispute resolution and Tribunals	<b>Assignment 2.9</b>	
15		Unit 2.10 Crown Prosecution Service		
16		Unit 2.11 Bail	<b>Assignment 2.11</b>	
17		Unit 2.12 Jury	<b>Assignment 2.12</b>	
18		Unit 2.13 Access to justice		
19		Unit 3.14 Solicitors and Barristers		
20		Unit 3.15 Judges	<b>Assignment 3.15</b>	
21		Unit 3.16 Magistrates		
22		Unit 4.17 Rule of Law and Morality	<b>Assignment 4.17</b>	
23		Revision		

**Notes:**

- All the assignments for AS Law can be found in the relevant units of the Nelson Thornes Distance Learning Student Course Materials.
- Students should also take their mock exam at some point during weeks 13–18, to be agreed between Nelson Thornes Distance Learning tutor and Link Teacher.

# Introduction



## **Hello and welcome to AS Law at a Distance**

Over the next two years we shall be studying the English Legal System with in-depth consideration of Criminal Law and the Criminal Justice System in Year 2.

The information set out below will help you through the course and shows you exactly what we will be covering each week and what work you need to prepare. As this is a distance learning course, you are responsible for your own learning – something that you are probably not used to. The more time and effort you put into this course, the more you will get out of it.

Tutorials are very different from lessons – you will not be lectured or spoon-fed information. Each week you will be set a certain amount of work to prepare for the next tutorials. During tutorials we will go over what you have learnt during your preparation time and answer any questions or queries you may have. This will help you with any points you have not understood while going through the work by yourself. You will learn in a number of different ways and you will be required to play an active part. It is therefore essential that you prepare ALL of the set work thoroughly so that you can participate fully. If you get behind at any stage it will be very difficult to catch up, and will affect your ability to succeed with this course.

Distance learning will only work for you if you are prepared to work for yourself. If you are struggling with any of the work that you have been asked to cover, you can access your tutor via email at any time during the week. You can also speak to the Link Teacher at your school who will contact your tutor on your behalf.

REMEMBER, your tutor is there for you! Ask for help, rather than allow yourself to get to the stage of wanting to give up or feeling that you just cannot do the work.

At the start of your AS Law pack (pages v and vi) you will find a table which sets out the work we will be covering week by week. You should ensure that you keep this information with you so that if, for any reason, you miss a tutorial you can see exactly what is required of you for the next week and so be able to keep up.

If you do miss a tutorial, it is your responsibility to ensure that you get any additional notes from your fellow students.

## **Submission of Assignments**

Assignments should be submitted on or before the deadline set in the tutorials. You can submit assignments by email or by post.

If you do not understand part of the assignment or are struggling with it in any way, then ASK. Your tutor will give you all the help possible to enable you to complete the work. Don't be afraid to ask as that is what your tutor is there for.

Assignments generally require essay style responses and there are a few points that you should always remember when writing:

- ALWAYS answer the question in the way that it is set – i.e. if it is asked in part (a) and part (b), then provide full answers to each part, clearly showing where each part starts and finishes.

- If you are using cases or statutes, then you should get into the habit of underlining them. Again, this is good practice for your exam.
- Do not use headings, lists or diagrams as the examiner will not appreciate you doing this in the exam. It is a good idea to develop good habits from this stage.
- Do not write in red pen.

Failure to submit assignments will be reported directly to the Link Teacher at your school. This may affect your ability to continue with the course, your predicted grade, your exam success and your UCAS reference. Deadlines are important as they are an assessment of your understanding and progress. Your tutor will be aware of any additional information that you require or assistance that you may need in understanding certain subject areas when assignments are marked. It is therefore in your best interests to ensure you do the work.

## Other important information

- Your tutor will visit you during the year. They will spend two hours with you. This will be an opportunity for you to ask any questions, have an individual discussion with your tutor, revise any particular areas of the course, etc. Your tutor will be visiting schools for two weeks so you will have a week where there will be no formal tutorial but you will be set work to do during this time.
- Your tutor will communicate with you via email with tips for assignments, deadline reminders and relevant legal updates, throughout the year. Please provide the correct email address and ensure that you let your tutor know should you change your address. You will receive emails on a regular basis, so please provide an email address that you use regularly to ensure that you are kept up-to-date.
- After Christmas, you will be set a mock exam. This will give you a good idea of what the actual exams will be like in June. It will show you how much information you need to get down in the time available and also how much revision you will need to do.
- Once we have completed all of the course material, we will move on to revision for the exams. If you have kept up with the revision sheets set throughout the year, revision will be made much easier for you so this, again, is in your best interests. Also, ensure that all your notes are completed and that you check you have any extra handouts/additional information that you have been provided with.
- Attendance at tutorials is compulsory, as is good behaviour and doing the work. Attendance, behaviour and performance are reported to the Link Teacher at your school after each session. Your Link Teacher will be told whether you have completed your preparation work for the session and whether you have submitted assignments by the deadline. If your behaviour becomes a problem during tutorials you will be removed to enable other students to work. Please be considerate to your fellow students.

We hope that you really enjoy your distance learning course this year. Throughout the course you will use valuable learning tools that will help you in the future, particularly as you apply to university. You will be able to show that you are very able to work on your own, that you are organised, that you are good at time management and that you can meet set deadlines. In addition, the assignment work will help you to develop and refine skills for constructing valid arguments, evaluation and assimilation.

Good luck!

### GCSE grades and dates of birth

In order for your tutor to assess your capabilities at this early stage he/she will need to know how you did in your GCSEs. From this your tutor will be able to give you a predicted grade as a baseline. Do not be alarmed at this as nearly all students far exceed this predicted grade as they progress through their AS and onto A2.

# Activity 1



- List how many GCSEs you did with their grades.
- Write down your date of birth.

Your tutor will then take this during the first session.

Over the first year we shall study the English Legal System. At the end of this you will sit two examinations which will give you an AS in Law.

In Year 2 we shall study Criminal Law and the Criminal Justice System. At the end of Year 2 you will sit two examinations which combined with the AS will give you an A Level in Law.

The subjects covered in Year 1 are:

## **Understanding Legal Structures and Processes**

- Common law and equity
- Judicial precedent
- Legislative process and law reform
- Delegated legislation
- Statutory interpretation
- European Union Institutions and sources of law

## **Introduction**

### **Machinery of justice**

- The criminal courts process and criminal courts
- Civil process and civil courts
- Alternative dispute resolution and tribunals
- Crown Prosecution Service
- Bail
- Jury trial
- Access to justice: sources of funding

### **Legal personnel**

- Solicitors and barristers
- Judges
- Magistrates

### **Legal values**

- Rule of law and morality
- Human rights

Law is a subject which is changing all the time. It is important that, as a student of law, you keep up to date with the major changes in the law. You can do this by watching the news and current affairs programmes and reading the newspapers. It is also a good idea to cut out and keep any articles which you think will be relevant to the course. Examiners are always impressed by students who show

they are aware of changes. *The Times* and *The Guardian* both have legal sections. You may find them of use when writing essays.

**The main textbook for Year 1 and Year 2 is:**

*The English Legal System*, 11th Edition by Elliott and Quinn, published by Longman. It is essential to have an up-to-date copy of this book. Page references are provided for the 10th Edition.

AS Law is a new subject where you will come across many new terms. You may find *The Complete A–Z Law Handbook* by Jaqueline Martin and Mary Gibbons (published by Hodder & Stoughton) useful.

During the two years we shall be looking at the court system and the work of those connected with the law. Try to visit your local courts, i.e. Magistrates, Crown and County Courts. When you do, make notes on the people you see and the cases being heard. Any visit to a law court will be useful for understanding the topics on the courts and legal profession and will help answering questions. If you get the chance why not visit the most famous criminal court in the UK, the Old Bailey in London; or the Royal Courts of Justice in London, which houses the High Court and Court of Appeal.

For those of you interested in a career in the law try to get work experience with the police, Crown Prosecution Service, courts or with a firm of solicitors or chamber of barristers. This will give you first-hand knowledge of how the law works in practice.

As mentioned, we shall be studying the law of England and Wales (Scotland has its own laws). It is a fascinating subject as it affects each and every one of us, every day of our lives and even in death. Just look at any newspaper on any given day to see how important the law is. Watch any news, current affairs programmes, dramas and even soaps and you will find references to the law. How many police and detective programmes are on the television? This shows just how relevant the law is to us. However, although when we think of the law we picture 'The Bill' chasing villains, that is only one small part of the law. We shall study the criminal law in Year 2 but first we need to discover why we have the law, who makes it and what form it takes.

## Classifications of law

Here you need to have a basic understanding of the legal differences between Public Law and Private Law.

*Public Law*—refers to criminal law, constitutional and administrative law.

**a. Criminal law.** This is the law which we most often see in newspapers and on television. It is the law concerned with the wellbeing of the public. It is there to protect us. If someone breaks the criminal law they will be tried, convicted and punished. Criminal proceedings may be taken against someone accused of an offence. It is then up to the Crown Prosecution Service (CPS) to prove that a person is guilty beyond reasonable doubt. If they are successful, the offender will be convicted and sentenced. The purpose of sentencing is to punish the offender and to deter him and others from criminal activities. In the UK we have a vast range of punishments, ranging from absolute discharge to life imprisonment.

The criminal courts are: the Magistrates' Court, Crown Court, Court of Appeal (Criminal Division) and the House of Lords. The busiest is the Magistrates, which deals with minor criminal offences such as speeding. The more serious offences such as murder are tried in the Crown Court by judge and jury. The Court of Appeal and House of Lords both hear appeals from the other two courts against conviction and/or sentence. We shall consider the criminal courts and the processes in more detail over the next two years.

**b. Constitutional law.** This is the law of the British Constitution, i.e. how laws are made, the role of Parliament in the legal system and the rules that regulate Government, police and courts. We shall learn how Acts of Parliament are passed and how other bodies can pass new laws. In Year 2 we shall concentrate on the police and courts and their powers with regard to those accused or suspected of criminal offences.

c. **Administrative law.** This is the law which relates to public authorities, their formation, powers and duties. Here we shall learn how bylaws are made and challenged.

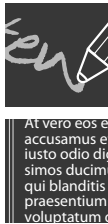
**Private Law**

This is often referred to as the **civil law**. There are far more rules of civil law than criminal law and more court cases about breaches of civil law than criminal. This is because the State prosecutes those who have committed a criminal offence so it relies on funding from the Government, whereas it is up to individuals to sue where there has been a breach of the civil law.

Civil law is concerned with individual rights and duties. It is called private law because it is concerned with disputes between private individuals or entities. The civil court system is more complex than the criminal side. The Magistrates deal with minor civil matters such as issuing licences to pubs, clubs and betting shops. The first court for those seeking redress through the courts is the County Court. Why not visit your local County Court and observe the law in action. The next court up is the High Court, which deals with more complex and high value cases. The Court of Appeal has a Civil Division which hears appeals from both the County Court and High Court as does the House of Lords. We shall find out more about the courts during the year.

**Activity  
2**

For next week find a newspaper or internet article on a legal issue. Write a short report about the article explaining the facts and outcome. In your report state whether you think the matter is criminal or civil.



Both branches of the law have different terminology. This helps us to know which branch we are dealing with. A list is attached at the end of this unit for reference (page xix).

### Civil law

The person bringing the case is called the **claimant**. The **claimant sues** the **defendant** (i.e. person defending themselves against the allegations made). The outcome of the case is given by the judge and is called the **judgment**. Note, there is **usually no jury**. What does this tell us? That there sometimes is a jury. Juries are not often found in civil cases but there are exceptions such as defamation cases.

## Activity 3

Look up and write down the definition of defamation.



In civil cases it is up to the claimant to prove his case in court. The standard of proof in civil cases is:

**On the balance of probabilities**, which means that the **claimant** must prove to the court, i.e. the judge, that it is more likely than not that the defendant did what is alleged. This is called the **burden** and **standard** of proof. The **burden** is on the claimant and the **standard** is **on the balance of probabilities**.

The reason for the **claimant** bringing a case is to obtain **judgment** in his favour. If successful, the court will award him a **remedy**, the point of which is to compensate him for the civil wrong which the **defendant** has been shown **on the balance of probabilities** to have done.

The most common **remedy** is **damages**, which is monetary compensation. There are other remedies but as we shall find out they are discretionary.

## Activity 4

In the space below write down why one person might sue another.



At the end of the case after hearing both sides, the judge will make a **decision for or against the claimant**.

The case is started with a document in which the claimant sets out the reasons for his claim and what **remedy** he is seeking. The document is called a claim form. Unfortunately, even if the claimant is successful his troubles do not stop there. His next problem is getting money from the defendant, hence the fact that the successful claimant has to enforce judgment. You should note that cases involving civil matters are between two individuals and the case will refer to those people, e.g. *Jones v Smith* (2006) In civil cases the 'v' is pronounced 'and', so when discussing a civil case lawyers would say Jones and Smith.

### **Criminal law**

Here the individual affected by the criminal activity does not participate in the case except as a witness. The person who has committed a criminal offence will be arrested either with a warrant or without, by the police or private citizen. The powers of arrest and detention of suspects will be covered in Year 2. The police decide whether to seek prosecution. It is the Crown Prosecution Service (CPS), a government department, who decides whether to prosecute or not. The lawyer working for the CPS is called the **prosecutor** (more about this organisation later in the pack). Once charged, the criminal is known as the **defendant** or **accused**. The busiest court is the magistrates'. Here the magistrates decide the innocence or guilt and sentence the defendant. In the Crown Court, which deals with the more serious cases, the jury decide the innocence or guilt. After hearing all the evidence, they retire to reach their **verdict**. The **jury** must be convinced of the accused's guilt **beyond reasonable doubt**. This is the standard of proof. It is up to the prosecutor to prove to the jury that the accused is guilty beyond all reasonable doubt.

If the accused is found guilty then he or she will be punished. This can be anything from a conditional discharge to life imprisonment. A point to note is that the judge cannot exceed the maximum sentence laid down by Parliament for the offence. For example, if a person is convicted of theft in the Magistrates' Court the maximum sentence is 6 months and/or a £5,000 fine, whereas if a person is convicted of theft in a Crown Court the maximum sentence is 10 years and/or an unlimited fine. More about sentencing in A2. Keep an eye on the newspapers, especially the local ones, for the different types of offences and punishments given.

Unlike civil cases where the claimant receives damages if successful, unless the court orders the defendant to pay compensation, the victim will only have the satisfaction of seeing the accused punished. Even if the defendant is fined, it does not go to the victim but to the court. Punishment is enforced by the police, prison or probation service depending on the sentence.

Criminal cases will be written as: *R v Campbell* (2008)

In criminal cases the 'v' is pronounced 'against'. Lawyers discussing the case would say R against Campbell.

The R stands for Regina. This is because in the criminal law the State prosecutes wrongdoers and the Head of State is the Queen, which is Regina in Latin.

Before completing Activity 4, refer to the 'Differences in terminology' at the end of the unit (page xix).

## Activity 5



Quite often one action can give rise to both types of legal liability—criminal and civil. Read the case study and answer the following questions:

Jane Jones is on her way to her last A Level examination. Her parents have lent her their car so that she can drive home straight afterwards. She is a bit late and nervous about her examination. Trying to find a good tape amongst Dad's opera and Mum's jazz, she is distracted, just for a second and does not notice Simon Brown on the zebra crossing. Looking up, she brakes but hits Simon who is also on his way to the examination. Simon has to be taken to hospital to be treated for a broken arm and cuts and bruises. He is also very shaken and upset at having missed his last examination. Jane is also shocked and misses the examination. The police arrive and take a statement from Jane and charge her with careless driving. Simon wants compensation for his injuries and loss of earnings from his summer job of picking fruit in the South of France and the shock and disappointment of missing his final examination.

### *Criminal liability*

- 1 In which court do you think Jane's case will be heard?
- 2 Whilst in court what will she be referred to as?
- 3 The prosecution will be brought by the CPS. How will her case be referred to?
- 4 In English law everyone is innocent until proven guilty. Who has the burden of proving guilt? To what standard must they prove this guilt?
- 5 If she is found guilty she will be ..... and .....
- 6 What do you think her punishment is likely to be?





## Activity 7

Find out the current holder of the following positions and explain what they do.

1 The Lord Chancellor and Secretary of State for Justice.



2 The Home Secretary.

3 The Director of Public Prosecutions.



## Activity 8

Throughout the AS and A2 you will come across The Law Commission, The Crown Prosecution Service and The Supreme Court. Go to the following websites and make some notes on what they do. Save the websites to your favourites.

1 [www.supremecourt.gov.uk](http://www.supremecourt.gov.uk)



2 [www.cps.gov.uk](http://www.cps.gov.uk)

3 [www.lawcom.gov.uk](http://www.lawcom.gov.uk)



## Differences in terminology

Table 1

Civil	Criminal
Sues	Prosecutes
Claimant	Prosecutor
Defendant	Defendant/accused
Judgment	Verdict
Usually no jury	Jury in Crown Court
On the balance of probabilities	Beyond reasonable doubt
Remedies/damages	Fine/compensation
Decision for/against	Guilty/not guilty
Claim form	Summons/warrant/arrest
Successful claimant to enforce judgement	Punishment enforced by police, prison or probation service
Cases referred to as: <i>Jones v Smith</i> 2008	Cases referred to as: <i>R v Campbell</i> 2008

## The different courts

Table 2

Civil	Criminal
County Court	Magistrates' Court
High Court	Crown Court
Court of Appeal (Civil Division)	Court of Appeal (criminal Division)
House of Lords	House of Lords

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# Module 1 Sources of Law

## Unit 1 Common Law and Equity

---

**On completion of this unit, you should:**

- Understand the historical development of English law
- Know how equity came to supplement the common law
- Know what equitable remedies are available
- Be aware of modern developments in equity and their application

**Key terms:**

- *Curia Regis*
- Common law
- Equity
- The maxims of equity
- Specific performance
- Injunction
- Rectification
- Rescission
- Promissory *estoppel*
- Anton Piller Orders (now called searching orders)
- Mareva Injunctions (now called freezing orders)

## Historical development of law

The English legal system is based on Norman law and is a **common law** system, unlike that of most continental countries whose law is based on Roman law and is a set of codes. The principles of the common law are used in creating case law. The law which developed since the time of William I in 1066 contains many of what are now basic points of English law; for example, the fact that murder is a crime. Most textbooks consider that the English legal system as we know it today began with the invasion of England by the Normans – William I (Conqueror) – in 1066. Whilst this is in a sense true, it is important to look briefly at what ‘legal system’ if any existed before William set foot on English soil.

William found England with no single system of law common to the whole country. The law was mainly sets of customary rules which differed from area to area and the legal system consisted of local courts known as the borough, shire and hundred courts and there was no such thing as ‘English law’. The invasion in 1066 was to mark the beginning of the development of the law as we know it today. The political and administrative contribution of the Normans was to have a lasting effect. William did not get rid of all the customary laws that he found; in many instances, he preserved them, and although they gradually became of secondary importance, customary law was used as a foundation for the common law.

William slowly gained control of the country using subtle tactics. He introduced what came to be known as the feudal system, under which all land belonged to the King. He granted areas of land to those people who supported him and who were willing to help him and grant him services; for example, the barons. These people in their turn granted land to their followers, and slowly in this way the King gained control over the whole country.

William made himself available to any landholder who had a dispute or problem and who could not get redress from his lord. This idea of applying directly to the King became known as the **King’s Justice** and was made available to individuals irrespective of where they lived. In the beginning, this King’s Justice was administered by the **Curia Regis** (King’s Court), which was a body of advisers to the King and not a law court in the way we think of today. The Curia Regis would apply a system of rules which applied to the whole of the country and became known as the common law.

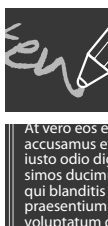
Various central courts began to develop and the Royal Courts (the King’s Courts), which originally sat in London (Westminster), began a procedure of sending judges into the provincial areas on ‘assize’. The judges would try the matter in the area to which they were sent and then return to London to give their verdict.

Whenever a new problem of law had to be decided, the judges’ decision formed a rule to be followed in all similar cases, which made the law more predictable and consistent. This is now known as the system of **Judicial Precedent** (see Unit 2.2).

The King’s Justice was very popular and was used by many in litigation. It was expensive and would only be used by those who could afford it. But, by the time of Henry II 1154–1189, there were many advantages to be gained by taking a dispute to court. The Royal Courts were impartial and had great authority. They, in essence, could decide a dispute and enforce a judgment quickly. In comparison local courts, by their very nature, were slow and often found it difficult to enforce judgments. The Royal Courts had Royal Authority and developed its Bench of Judges and its Bar of Advocates, which, it must be said, had distinct advantages over the parochial courts. From the 13th century, written records were kept and this put a definitive stamp on any judgment since no one could argue with the authority of the court.

The result of all this was by about 1250 a ‘common law’ had developed that applied to the whole of the country.

# Activity 1



After reading the above notes in the pack, and Elliott and Quinn 116–117 (10th)/12 and 121–122 (11th) answer the following.

- 1 What exactly is 'common law'?
- 2 Briefly describe how William laid the basis for the development of the 'common law.'

Today the term 'common law' is used to describe the law that comes from cases decided by judges.

## Common law

### The development of common law

Following the Norman conquest of England in 1066, the law was administered by itinerant judges who travelled the length and breadth of the country settling disputes. At first, they used the system of local courts based on the traditional shires and hundreds and applied local rules and customs to the cases before them.

The Normans were keen however to impose a unified government and legal system on their new domain, and gradually they combined the best of the local systems, creating a law which was 'common' to all England and which they applied in a series of Royal Courts.

At first, it was considered to be a fair system but soon it became rigid and fixed.

### The problems with the common law

A civil action could only be started by way of a 'writ' which set out the cause of the action and the grounds for the litigant's claim, i.e. explaining why and on what legal basis the person was being sued. The circumstances of the writ had to be made to fit an existing writ. Initially, when circumstances arose that were not covered by an existing writ, a new one was created but, by the end of the 13th century, that system was stopped and no new writs were issued. So if the circumstances of your case did not fit an existing writ you might not have been able to pursue your case. The only remedy available from the common law courts was damages, i.e. monetary compensation. This was not always satisfactory or adequate.

## Activity 2

Can you think of other remedies a claimant might want?



As a result, many became dissatisfied with the system and began to petition the King, as the '**fountain of justice**' for a remedy. The petitions were originally dealt with by the King and his Court but soon they were so numerous that he delegated responsibility to his most senior official, the Chancellor.

So, whenever the common law was unable to offer a remedy, the Chancellor would intervene. Unlike the common law system, there were no rigid rules that the Chancellor had to follow in settling a case, his jurisdiction was very flexible and he would decide cases on the basis of what he thought was fair or 'equitable'. Critics of the system said it was too flexible, lacked certainty and depended too much on the Chancellor's personal opinion. It was said that: '**Equity** varied with the length of the Chancellor's foot'. Gradually, however, over the years he built up a large body of principles which gave rise to what is now called equity.

Equity can be simply thought of as 'fairness'. Proceedings in the **Court of Chancery**, that is the court where the Chancellor exercised his jurisdiction, were started by a 'bill' or 'petition' not by a writ as at common law. Equity, historically, was a very important source of law. It overcame the problems associated with the common law.

Equity's importance today lies in the additional remedies it offers and has been described as the '**gloss on the common law**' and as '**common law's safety valve**'.

## Activity 3

What do you think the terms 'gloss on the common' law and 'common law's safety valve' mean?



# Activity 4

After reading the pack and Elliott and Quinn pages 121–122 (11th) answer the following questions.

1 What were the two major problems with the common law?



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2 How did equity help counter these problems?

## The conflict with the common law

In the reign of James I, there had been considerable conflict between the common law courts and the Court of Chancery. The common law lawyers argued that, because of its flexible approach, the Chancellor's decisions lacked consistency while the Chancery lawyers argued that the common law was so inflexible that it was unfair. The dispute between the two systems was eventually resolved as a result of the **Earl of Oxford's Case 1616**.

# Activity 5

Read the Earl of Oxford's Case, which can be found at the end of the unit on p.10, and pages 117–118 (10th)/122–123 (11th) and answer the following questions.

1 Why were the common law and equity in conflict?



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2 What was the outcome of the case?

3 Why was this an important decision?

Although a number of earlier statutes had paved the way for the administration of the two systems to be fused, it was as a result of the **Judicature Acts 1873–1875** that the court systems were eventually combined. Prior to this, litigants who wanted an equitable and common law remedy had to use two courts.

It is important to appreciate however that although the courts administering the two systems were fused, the rules of the two systems remain and they continue to be distinct systems, each with its own principles. It has been said that ‘the two streams have met and now run in the same channel but their waters do not mix’. Now, all courts administer both systems concurrently and any court can apply both equitable and common law principles to the cases that come before them and award either common law or equitable remedies. It is still the position however, that when conflict arises between the two systems, the *Earl of Oxford’s Case* applies and equity will prevail.

## Activity 6

Read Elliott and Quinn page 118 (10th)/123 (11th) and answer the following questions.

- 1 Common law and equity are often described as the ‘twin pillars’ of English law. What does this mean?
- 2 What was the significance of the Judicature Acts 1873–1875?



### The maxims of equity

In any law course you will inevitably come across the **maxims of equity**. Both common law and equity follow **precedents**, i.e. previous decisions. Equity’s previous decisions also created maxims which must be satisfied before a person can claim an equitable remedy. The idea behind these maxims is to ensure decisions are morally fair. The use of these maxims has somewhat curtailed the application of equity by limiting the times when a court may apply an equitable remedy. At common law if a claimant proves his case he is entitled to the remedy of damages; the courts are not concerned with his own conduct, any delays in seeking relief or that the outcome is unfair to the defendant. Equity, however, having a discretion over the granting of remedies, is interested in the conduct of the parties. A remedy will be refused if it breaks one of the maxims.

Here are *some* of the more common maxims:

- He who comes to equity must come with clean hands.
- Delay defeats equity.
- He who seeks equity must do equity.

# Activity 7



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Read Elliott and Quinn pages 118–119 (10th)/123–124 (11th). Choose one of the maxims and explain:

- a. What it means, and
- b. Using a case, illustrate how it works.

The development of these and other maxims such as ‘equity does nothing in vain’ means that a person claiming an equitable remedy will only be granted it if the maxims are satisfied. This has curtailed the application of equity. The common law does not have any such limits. Despite the limits placed by the use of maxims, equity has had a great impact on the law, allowing relief where the common law has failed. It must be remembered that equity’s role both past and present is an addition to the common law and only available if the common law remedy is inadequate.

### Equitable remedies

At common law the remedy was damages; damages being monetary compensation designed to put the claimant in the position as if the wrong had not been done. As society developed, damages as a remedy often became inadequate. For example, imagine someone who has longed to buy a particular house, say his childhood home, and who, having entered into an agreement to purchase it, finds that the owner changes his mind. What the purchaser wants is not damages but to have the court order the seller to convey the property to him. At common law, such an order was not available. Or, to take another example, a person might find himself living next door to a factory from which thick black smoke emanates, regularly covering his house, car and garden with soot particles. At common law, the person would have to sue on each and every occurrence of the ‘nuisance’ as damages were again the only remedy available. The common law offered no remedy that could order the nuisance to be discontinued.

Historically and today equity is able to offer a greater variety of remedies.

# Activity 8



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Read Elliott and Quinn pages 119–120 (10th)/124–125 (11th).

- 1 List and explain the four most important equitable remedies.

- 2 Give an example to illustrate each remedy in action.
  
- 3 It states that equitable remedies are discretionary – what does this mean?
  
- 4 Upon which areas of law has equity had the most impact?



### **New developments in equity – equity today**

Although, in the early stages of its development, equity retained its flexibility and was able to create new principles of justice where they were needed, by the middle of the 17th century the judges began more and more to follow the decisions of their predecessors and by the end of that century there was a marked attempt to reduce equity to a more fixed system. The fixing of the principles of equity continued and, by 1948, the Court of Appeal was saying, in the case of **Re Diplock**, that any claim in equity: ‘... must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that, because we may think that the justice of the present case requires it, we should invent such a jurisdiction for the first time’.

However, Lord Denning, one of the most well known judges of the 20th century, gave a lecture in 1952 entitled ‘The Need for a New Equity’ in which he regretted the fact that since the Acts of Judicature, equity seemed to have lost its power. He was concerned that judges were unable to adapt the law to changing conditions. He himself, in the **High Trees Case**, had been responsible for developing the new equitable principle of **promissory estoppel** which introduced an element of fairness into contract law. Estoppel is a rule of law that prevents a person from going back on a promise not to enforce their rights under a contract.



## Activity 9

Read the attached law report *Central London Property Trust Ltd v High Trees House Ltd* [1947] on page 10 of this unit in which Lord Denning introduced the new equitable concept of ‘promissory estoppel’.

- 1 What was the Central London Property Trust suing for?
  
- 2 Was the action successful?





- Consider the *Earl of Oxford's Case* and its importance.
  - Explain the effect of the Judicature Acts 1873–1875.
- b) Discuss the remedies of equity.
- Discuss the maxims of equity.
  - Discuss the modern developments in equity.
  - Remember to use examples and cases to illustrate.



## The Earl of Oxford's Case (1615)

### Facts

This was a very important case because it was the dispute which prompted King James I to make the ruling that when the common law and equity are in conflict, equity shall prevail.

The lease to Covent Garden had been purchased by Merton College, Oxford. The college eventually sold the remainder of the lease to the Earl of Oxford. Using an Elizabethan statute which forbade the sale of ecclesiastical and college land, the college reclaimed Covent Garden, saying the sale had been void and was not legally binding. The common law court refused to allow the Earl to remove the land from the college because the statute did state that college land could not be sold. The Earl then filed a bill of equity which was granted by Lord Ellesmere in the Court of Chancery who felt that it would be 'against all good conscience' to find in favour of the college, which had acted unfairly.

These two findings totally contradicted one another so it was left to the King to decide which should be accepted.

### Point of law

Where the rules of common law and equity conflict, equity prevails.

## ***Central London Property Trust Ltd v High Trees House Ltd*** **[1947] KB 130 High Court (Denning J)**

### Facts

In 1937, the claimants leased a block of flats to the defendants for 99 years at a rent of £2,500 p.a. With the advent of war and many vacancies in the flats, the claimants agreed in 1940 to reduce the rent by 50%. No time limit was set for the reduction. By 1945 the flats were full again. The claimants' company wrote to the defendants, asking for the full amount of rent plus arrears. The present case was to test the legal position. The claimants claimed the full rent for the last two quarters of 1945, the time when the flats became full. In defence, the defendants claimed that the agreement of 1940 related to the whole term of the lease.

### Held

The claimants' claim was successful and they could put the rent back up, on the basis that the agreement was only intended to last until the flats were full. However, the court stated that had they tried to go back on their promise to reduce the rent from 1940 to 1945, they would have been stopped from doing so as the promise was intended to be binding until such time as the flats were full. This new concept is known as promissory estoppel.

1. In relation to 1066 what is meant by the common law?
2. What two problems existed with the common law?
3. If denied justice in the common law courts where did people turn?
4. The Court of Chancery operated on the principles of natural justice and fairness, not – precedent. What does this mean?
5. Remember equity arose to fill the gaps left by the common law. Inevitably these two systems conflicted. Name the case which finally resolved years of conflict between the two systems.

There were several problems with equity; one being that if a person wanted an equitable remedy and a common law remedy they had to take a case to both courts.

6. How did the Judicature Acts 1873–1875 reform this?
7. Another problem was that ‘equity varied with the length of the Chancellor’s foot’. What is meant by this?

Note however, that equity, once established, became rather like the common law, i.e. it started to follow precedent so became rigid and was criticised for being too slow. Charles Dickens’s novel *Bleak House* illustrates the many years cases took under the Court of Chancery.

8. The Judicature Acts 1873–1875 helped overcome the problem of having to use two courts for two different remedies. However, it is said that common law and equity run together but do not mix. What is meant by this?
9. List and explain the additional remedies available under equity.  
Give an example of when a claimant may request an equitable remedy.
10. Equitable remedies are ‘discretionary’ whereas the common law remedy is ‘of right’. Explain this.

Historically, equity allowed a person to take their case to court even though it did not fit an existing writ and offered alternative remedies to damages. Following the Judicature Acts all cases were brought in one court and therefore the role of equity today is to offer remedies where damages are not adequate.

11. Give an example of when the common law remedy of damages would not be adequate.

As stated, equity is discretionary. This means that the remedy must be specifically requested and may be awarded at the discretion of the court. The court will not award an equitable remedy if one of the maxims of equity has been broken.

12. What do we mean by the ‘maxims’ of equity?
13. Give an example of a ‘maxim’ with a case to illustrate it.

There is no equivalent to the ‘maxim’ in common law: this means that if you win your case you will be awarded damages. This also illustrates that the common law system remains the dominant one, with equity merely filling in where justice demands.

Remember, when discussing equity it generally affects the civil law. Often essays in the examination ask about the development of equity in the 20th/21st centuries. Here you will be expected to show how equity has developed to offer new remedies where the common law is inadequate.

14. What are Anton Piller Orders and Mareva injunctions? What are their new names?

Use these to illustrate the development of equity.

## Revision Sheet

Another case would be the *High Trees Case* in which Lord Denning introduced the concept of promissory estoppel.

15. Write out the facts of the case and explain how this equitable principle works.

Equity has been important in the development of trusts and mortgages, which are very important areas of law in today's society.

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# Module 1 Sources of Law

## Unit 2 The Doctrine of Judicial Precedent

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### On completion of this unit, you should:

- Understand the importance of the doctrine of judicial precedent
- Know why the hierarchy of the court system is critical to the doctrine
- Understand how rigidity is avoided
- Understand the significance of the 1966 Practice Direction
- Understand the concept of Judge-made Law

### Key terms:

- *Stare decisis*
- *Ratio decidendi*
- *Obiter dicta*
- Binding precedent
- Persuasive precedent
- Distinguishing, reversing and overruling
- Declaratory theory

### Useful websites

[www.publications.parliament.uk](http://www.publications.parliament.uk)

[www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk)

# The doctrine of precedent

## Introduction

Case law comes from the decisions made by judges in the cases they try. The decision is known as the **judgment**. The doctrine of judicial precedent is of comparatively recent origin and means that a judge must normally always follow earlier decisions of a higher court and sometimes those of courts with equal standing. Even though the idea of judicial consistency was developed from the late 13th century, it was not until modern printing methods and a reliable system of reporting cases had been established that the doctrine of precedence assumed the importance it has today. By the 19th century, previous cases were referred to frequently and in 1833 Baron Parke, an important judge of that era, said that precedents **must** be regarded in subsequent cases and it was not open to the courts: 'to reject them and to abandon all analogy to them' (*Mirehouse v Rennell*).

The rules that determine which courts bind others are the rules of **stare decisis** or 'stand by what is decided'. The doctrine is dependent for its operation on the hierarchical system of the English courts in which all courts stand in a definite relationship to one another and the decisions of the superior courts are binding on those of inferior courts.

### Activity 1

Read Elliott and Quinn pages 12–21 (10th)/15–24 (11th) and refer to the Hierarchy of the Courts on page 20 of this unit.

- 1 Go through each court stating:
  - a. Which court must follow its decisions.



- b.** Whether it is bound by itself (pay particular attention to the House of Lords (Now the Supreme Court) and Court of Appeal, Privy Council and European Court of Human Rights).



d. Persuasive precedent

- 2 Go back to Activity 9 in Unit 1.1 and read the *High Trees Case*. Explain what the ratio and obiter of the case are.



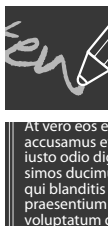
When a case comes before the court with apparently similar facts to one decided previously by a higher court or itself (if bound) then it must follow that previous decision if the facts are sufficiently similar. If, however, on closer examination the facts are sufficiently different it can **distinguish** the earlier case and will not be bound by the previous decision. This is one of the easiest and therefore most often used methods to avoid precedent. This can, however, lead to problems as judges might distinguish on spurious grounds in order to avoid having to follow binding precedent. Also if it occurs too often it can lead to illogical decisions where judges make minute distinctions between the facts of one case and another. Although it allows the courts to be **flexible** it leads to a mass of cases which all establish different precedent on similar facts. This makes it difficult for lawyers to advise their clients. When **distinguishing** judges must make a balance between certainty and flexibility.

Activity  
3



Read Elliott and Quinn pages 20–21 (10th)/24–25 (11th).

List and briefly explain ways a judge may avoid an awkward precedent.



The law that comes from cases has helped shape many areas of law such as contract and criminal law. It has many advantages but is not without its critics.

## Activity 4

Read Elliott and Quinn pages 30–34 (10th)/33–36 (11th).

In tabular form list and briefly explain the advantages and disadvantages of the system of judicial precedent. Consider why the suggested advantage of ‘free market in legal ideas’ is not really an actual advantage.



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## Activity 5

Read E & Q pages 13–17 and 30–34 (10th)/11–16 and 33–36 (11th).

Read the Practice Direction (below) and answer questions 1–4 below.

### The 1966 Practice Direction

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what the law is and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely upon in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than ‘in this House’.

- 1 To which court (or courts) does this Practice Direction apply and how did it change the practice of the court(s)?

2 It states in the Practice Direction that The House of Lords (Supreme Court) intended to 'modify their present practice and while, treating former decisions as normally binding, to depart from previous decisions when it appears right to do so.' Explain what they mean by using the terms 'modify' and 'normally binding'.

3 The Practice Direction refers to the major advantages and disadvantages of judicial precedent. Identify and explain them.

4 Read Case A which set the precedent. Explain whether and on what grounds, the courts in Case B, in situations i) to iii) below could depart from Case A.

**Case A**

Cecilia, a 21 year old human rights campaigner, was serving a prison sentence for a public order offence. She refused to take any food or drink in protest at her imprisonment. The prison doctor fed her against her will. The court held that the doctor had not committed an offence.

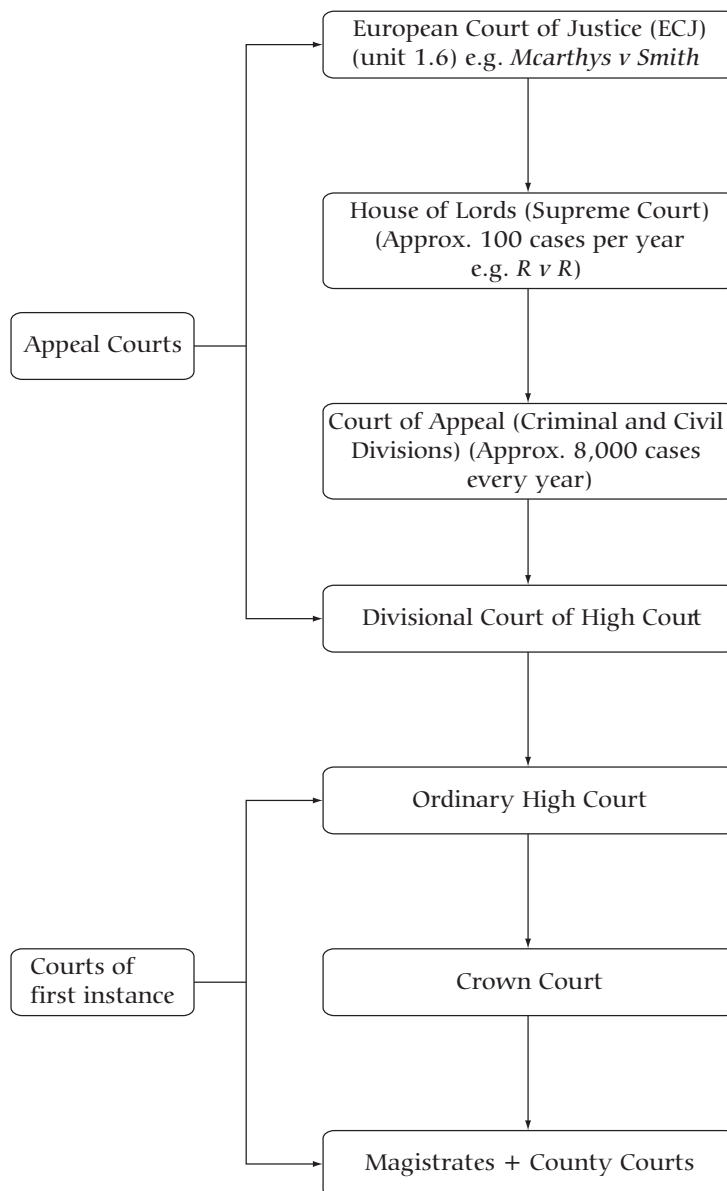
**Case B**

Alice was a 50 year old woman who was suffering from an incurable disease. She decided to refuse all food and drink. Her doctor decided to feed her against her will.

- i. Case A was decided by the House of Lords (Supreme Court) in 1925. Case B comes before the House of Lords (Supreme Court) in 1964.
- ii. Case A was decided by the House of Lords (Supreme Court) in 1925. Case B comes before the House of Lords (Supreme Court) in 1996.
- iii. Case A was decided by the Court of Appeal in 1925. Case B comes before the Court of Appeal in 1996.



**The hierarchy of the courts**



## Judge-made law

In a democracy, it is argued, law making should be the exclusive preserve of Parliament. MPs are elected by the people and it is they and not unelected judges who should pass laws which affect our everyday lives.

However, such an argument ignores the fact that until the end of the 17th century, English law was largely 'judge made' and it is still true that a great deal of English law is and always has been 'case law' or 'judge-made' law.

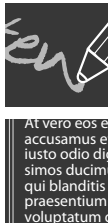
The argument as to whether judges make law or not has been dismissed by Lord Radcliffe as 'sterile'; he said: 'There never was a more sterile controversy than that upon the question whether a Judge makes law. Of course, he does. How can he help it?'

In the 1991 House of Lords (Supreme Court) case of *R v R*, a man had been accused of raping his wife. It was claimed in his defence that a husband benefited from an immunity from the law of rape based on a statement made in 1736 that: '(a) husband cannot be guilty of rape ... upon his lawful wife'. The House of Lords (Supreme Court) said that such a rule was 'an anachronistic and offensive common law fiction which no longer represented the position of a wife in present-day society'. The result was that the House of Lords (Supreme Court) effectively overturned the law thought to be existing up to that point.

### Activity 6

Read Elliott and Quinn pages 21–25 (10th)/24–25 (11th).

Explain William Blackstone's '**declaratory theory**'. Do you agree with this theory?



Nowadays, it is probably true that the courts rarely come across a set of circumstances that are totally outside the scope of previous case law or where there is no statute dealing with it. When, however, such a situation arises and the judges are unable to turn to judicial precedent or to statute for assistance, is it not inevitable that they will still be making new law even though they may deny it?

## Activity 7



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Read Elliott and Quinn pages 25–27 and 29–30 (10th)/28–29 and 32 (11th).

1 What were the facts and outcome of *Airedale NHS v Bland* (1993)? Explain what type of precedent you think this case set and why.

2 What were the facts and outcome of *Gillick v West Norfolk and Wisbech Area Health Authority* (1985)? Explain what type of precedent you think this case set and why.

3 Explain why the courts refused to change the law in *C v DPP* (1995).

## Activity 8



There are two areas of law **not** subject to judicial precedent. They are:

- a. Sentencing, and
- b. Jury verdicts.

1 Why do you think they do not have to follow judicial precedent?

- 2 If a jury does not follow precedent explain how you think precedent works in the Crown Court?

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## Activity 9

Read the following article 'The Law Explored: when the Lords changes its mind' on page 24.

- 1 How did the House of Lords (Supreme Court) change the law in *The Lotto Rapist Case*?



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- 2 Why did they feel it necessary to reach this decision?

- 3 What do you think Lord Atkin meant by 'finality is a good thing but justice is a better'?

## The Law Explored: when the Lords changes its mind

### Last week, in the so-called Lotto rapist case, the law lords said the law was wrong and changed it. How can they do that?

The House of Lords, the highest court in the UK, changed the law last week when it allowed the victim of the so-called Lotto rapist to bring a civil claim 15 years after the attack.

To make that change, the law lords had to overrule a decision that the court had made in 1993 barring the victims of a sexual attack from bringing a claim more than six years after the event. In order to allow the victim, Mrs A, to proceed, the law lords had to rule that the law was wrong. But how can they just change the law like that?

On one hand, you want a legal system under which, when the top court decides what the law is on something, it sticks to it. That way you get certainty, not flip-flopping in the lower courts. But on the other hand, the law should be organic and grow with society, not fossilised and inert.

What the House of Lords did last week was to use a special rule known as 'the 1966 Practice Statement' that enables it to depart from an earlier ruling of the law lords if the circumstances demand it.

The House of Lords used to be bound by its own previous decisions. Once it declared what the law was, it was sometimes stuck that way for over a century. The justification was that decisions of the highest court in the land should be final. However, a special statement of new principle was given by Lord Gardiner, the Lord Chancellor, in 1966.

He said that in general the use of precedent is 'an indispensable foundation' on which to decide the law. He noted, though, that 'too rigid adherence to precedent' can cause injustice in a case and unduly restrict 'the proper development of the law'. He argued that while treating their former decisions as normally binding, the Lords should depart from a previous decision 'when it appears right to do so'.

Since 1966, the law lords have used this power sparingly. It won't overrule its own previous decision just because some of today's law lords disagree with the legal analysis of their predecessors. A 'material change' of social circumstances must usually be shown.

In *Herrington v British Railway Board* (1972), the House of Lords overruled its earlier version of the law as put in *Addy and Sons v Dumbreck* (1929). In the 1929 case, the law lords decided that an occupier of premises was only liable for the injury to a trespassing child if that child was hurt intentionally or recklessly. In the 1972 decision, the Lords changed the law in line with the way social and physical conditions had changed since 1929. They said that even a trespasser was entitled to some small degree of care, which they expressed as a test of 'common humanity'. They said that with the increase in population and more people living in cities, there was less playing space for children and so a greater temptation to trespass. Occupiers, therefore, should owe some duty to guard tempting but perilous premises – not so as they would have to pay out huge sums to all children injured while doing dangerous things they knew were wrong, but to manage premises with an eye to avoiding predictable death or injury to 'innocent' trespassers.

On the whole, people are happy with the idea that the law can be modernised by the most senior judges (as opposed to elected members of a legislature) but when judges will change the law is unpredictable. And it can be seen as problematic if the judiciary is an unpredictable law-giver. In some cases, such as the recent one on sexual assault and damages, the lords have boldly made new law in line with changing social expectations. In *R v R* (1992), the House of Lords confidently saw fit to abolish the then 256 year-old rule against a charge of marital rape. Since then it has been possible for a man to be charged with raping his wife. In other cases, though, the law lords have declined to change the law, saying that that sort of thing should be left to parliament. In 1995 it refused to change the law

regarding the criminal liability of 10-14 year olds (to make it easier to prosecute them); Parliament did so three years later.

The fact that the House of Lords *can* now change its mind when it wants to isn't nearly as bad as when, before 1966, it couldn't change its mind at all. As Lord Atkin observed in 1933: 'Finality is a good thing, but justice is a better'.

*Professor Gary Slapper is Director of the Centre for Law at The Open University*

Gary Slapper, *The Times*, 6 February 2008

## Use of the practice direction

The 1966 Practice Direction allows the House of Lords (Supreme Court) to change the law in later cases if it believes that the earlier case was wrongly decided. It does not, however, often use this power as it feels the certainty aspect of judicial precedent is very important. In ***Jindal Iron and Steel Co. Ltd v Islamic Solidarity Shipping Co. Jordan Inc (2004)*** the House of Lords (Supreme Court) was invited to overrule itself but declined to overturn a 1957 precedent, because it had stood for 50 years, had worked satisfactorily, had not produced unfair results and an enormous number of transactions had taken place assuming that it was the law. The first major use of the Direction was in the case of ***British Railways Board v Herrington (1972)***. In this case the House of Lords (Supreme Court) overruled a previous decision which stated that occupiers do not owe a duty of care to child trespassers.

Until 1976 the law stated that damages could only be paid in sterling. In ***Miliangos v George Frank (Textiles) Ltd (1976)*** the House of Lords (Supreme Court) overruled this using the power in the 1966 Practice Direction.

The House of Lords (Supreme Court) has been more reluctant to use it with regard to criminal cases. This is because it believes there is a special need for certainty in criminal cases. However, it has been used, the first time being in 1986 (20 years since the Practice Direction).

In ***R v Shivpuri (1987)*** the House of Lords (Supreme Court) overruled ***Anderton v Ryan (1985)*** and said that a person could be convicted of attempting to commit a crime which it was impossible to commit. Shivpuri was convicted of attempting to import a prohibited drug, when all he had in his case was harmless vegetable matter.

# Activity 10



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Read Elliott and Quinn pages 28–29 (10th)/31 (11th), the following update and attached case ‘Same sex partner can succeed to tenancy’ on page 28 of this unit.

## **Fitzpatrick v Sterling Housing Association Ltd (1999)**

This case reached the Court of Appeal in 1997. Mr F had lived with his partner Mr T for 18 years and cared for him after an accident. They lived in rented accommodation covered by the Rent Act 1977. Under this Act, if a tenant dies the tenancy can be taken over by a spouse or common law husband or wife. As Mr F was the homosexual partner of Mr T he did not come under either category.

Although the Court of Appeal recognised that times have changed it felt it was up to Parliament and not it to change the law so that the definition in the Rent Act include same-sex couples. This case went to the House of Lords (Supreme Court), who reversed the decision of the Court of Appeal – see attached article below (page 27).

The House of Lords (Supreme Court) held that a same-sex partner of a tenant was capable under the Rent Act 1977 of being a member of the tenant’s family. This means that in certain cases a same-sex partner may now inherit the tenancy on the death in the same way as an opposite sex partner would. This is another good example of the House of Lords (Supreme Court) changing the law to bring it in line with modern thinking.

This case is also interesting in terms of statutory interpretation. The court considered the meaning of the words ‘spouse’ and ‘family’. The county court and Court of Appeal held that Mr F was not a spouse nor family. The House of Lords (Supreme Court) agreed that Mr F could not be interpreted as being a spouse but did give a wider interpretation to ‘family’, which included Mr F.

- 1 Why did the Court of Appeal refuse to change the law?
- 2 How did the House of Lords (Supreme Court) interpret the word ‘family’ to overturn the Court of Appeal’s decision?
- 3 Why do you think the House of Lords (Supreme Court) reached the decision it did? And do you agree with them?



- Use cases to illustrate when (and why) the House of Lords (Supreme Court) has used the Practice Statement
  - Use cases to illustrate when (and why) the House of Lords (Supreme Court) have not used the Practice Statement
  - Conclude by discussing the role of the House of Lords (Supreme Court) generally in the system of precedent.
2. Explain the position of the Court of Appeal in the hierarchy
- Discuss whether the Court of Appeal could over turn their previous decision
  - Consider other ways the Court of Appeal could come to a different outcome in the case of Susan (Look at ways of avoiding awkward precedent).



## Same-sex partner can succeed to tenancy

A same-sex partner of a tenant was capable, for the purposes of paragraph 3(1) of Schedule 1 to the Rent Act 1977, of being a member of the tenant's family so as to succeed to the tenancy on his death.

The House of Lords so held (Lord Hutton and Lord Hobhouse dissenting) in allowing an appeal by the plaintiff, Martin Fitzpatrick, from the Court of Appeal (Lord Justice Waite and Lord Justice Roch; Lord Justice Ward dissenting) (*The Times* July 31, 1997; [1998] 1 Ch 305) which had upheld the order of Judge Colin Smith, QC, at West London County Court, to dismiss the plaintiff's application for a declaration that he had succeeded to the tenancy of 75A Ravenscourt Road, Hammersmith, London.

Mr Fitzpatrick had lived, since 1976, at the premises in a homosexual relationship with John Thompson, the protected tenant. On Mr Thompson's death in 1994, Mr Fitzpatrick had applied to take over the tenancy but the landlord, Sterling Housing Association Ltd, although willing to provide smaller accommodation, refused.

The judge held that the plaintiff neither qualified as a 'surviving spouse' as having lived with 'the original tenant as his ... wife or husband' within paragraph 2(2) of Schedule 1 to the Rent Act 1977, as amended by section 39(2) of and paragraphs 2 and 3 of Part I of Schedule 4 to the Housing Act 1988, nor was 'a member of the original tenant's family' within paragraph 3(1).

Mr Nicholas Blake, QC and Mr Jan Luba for the plaintiff; Mr Vivian Chapman for the landlord. LORD SLYNN said that the plaintiff had relied in the first place on paragraph 2. 'Spouse', he said 'was to be interpreted in the present climate as including two persons of the same sex intimately linked in a relationship which was not merely transient and which had all the indicia of a marriage save that the parties could not have children'.

In his Lordship's opinion, in the context of the 1977 Act, as amended, 'spouse' meant legally a husband or wife. The 1988 amendment had extended the meaning to include a person living with the original tenant as his or her wife or husband. That was obviously intended to include persons not legally husband and wife who lived as such without being married.

That, *prima facie*, meant a man and a woman. The man had to show that the woman was living with him as 'his' wife; the woman that he was living with 'her' as her husband.

His Lordship did not think that Parliament, as recently as 1988, intended those words to be read as 'my same sex partner' rather than specifically 'my husband' or 'my wife'. If that had been the intention it would have been spelled out. The words could not be read as the plaintiff contended. In the second place, the plaintiff had said that the intimacy of the relationship of two persons living together as he and the deceased had was such that they should be regarded as constituting a family.

His Lordship said that the word 'family' was used in a number of different senses, some wider, some narrower. 'Do you have any family?' usually meant 'Do you have children?'

'We're having a family gathering' might include distant relatives and even very close friends. The family of nations', the 'Christian family' were very wide. If 'family' could only mean a legal relationship, of blood or by legal ceremony of marriage or by legal adoption, then the plaintiff had obviously to fail. Over the years, however, the courts had held that that was not so. The word was to be applied flexibly and did not cover only legally binding relationships. The intention in 1920, when the provision was first enacted, was that not just the legal wife but also the other members of the family unit occupying the property on the death of the tenant with him should qualify for the succession.

If more than one person qualified then if no agreement could be reached between them the court decided who should succeed.

The hallmarks of the relationship were essentially that there should be a degree of mutual interdependence, of the sharing of lives, of caring and love, of commitment and support.

In respect of legal relationships, those were presumed, although evidently were not always present, as the family law and criminal courts knew only too well. In de facto relationships those were capable, if proved, of creating membership of the tenant's family. If that was the purpose of the legislation, the question was then who in 1994, the date of the tenant's death, or today were capable in law of being members of the tenant's family. It was not who would have been so considered in 1920.

In considering that question, it was necessary to have regard to changes in attitude towards same-sex relationships: see *R v Ministry of Defence, Ex parte Smith* ((1996) 1 QB 517,552554) and *Barclays Bank plc v O'Brien* ((1994) 1 AC 180, 198).

His Lordship would hold that as a matter of law a same-sex partner of a deceased tenant could establish the necessary familial link. It was then a question of fact as to whether he or she did establish the necessary link. His Lordship was aware that, in relation to the references to family and family life in articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), the European Court of Human Rights had not so far accepted claims by same-sex partners to family rights.

Leaving aside the fact that those cases were still in an early stage of development of the law and that attitudes might change as to what was acceptable throughout Europe, those decisions did not impinge on the decision which the House had to take on a specific statutory provision.

The onus on one person claiming that he or she was a member of the same-sex original tenant's family would involve that person establishing rather than merely asserting the necessary indicia of the relationship.

A transient superficial relationship would not do even if it was intimate. Mere cohabitation by friends as a matter of convenience would not do.

The result was in accordance with contemporary notions of social justice. In other statutes, in other contexts, the same meaning might or might not be the right one. Such a result in this statute did not undermine the traditional, whether religious or social, concept of marriage and the family.

It merely recognised that, for the purposes of the Act, two people of the same sex could be regarded as having established membership of a family, one of the most significant of human relationships, which both gave benefits and imposed obligations.

It was plain on the findings of the judge that in the present case, on the view of the law which his Lordship had accepted, on the facts the plaintiff succeeded as a member of the tenants family living with him at his death.

Lord Nicholls and Lord Clyde delivered concurring opinions. LORD HUTTON, dissenting, said that Schedule 1 dealt separately with the surviving spouse of the tenant and a person living with the tenant as his or her wife or husband on the one hand, paragraph 2, and with a member of the tenants family on the other hand, paragraph 3.

If the plaintiff were entitled to claim the protection given by Schedule 1 it would appear appropriate that he should obtain protection under paragraph 2 and not under paragraph 3, because the essence of his claim was that the relationship which he shared with the tenant was the same relationship as that shared between a husband and wife or a couple living together as husband and wife, save that the relationship was homosexual and not heterosexual.

Therefore if, as his Lordship agreed, Parliament did not intend that a homosexual partner should obtain protection under paragraph 2, it would appear to be a somewhat strained and artificial construction to hold that the plaintiff was entitled to obtain protection under paragraph 3.

Mr Blake had relied on *Dyson Holdings Ltd v Fox* ((1976) 1 QB 503), where a woman who had lived with the tenant for 21 years as if she was his wife was held to be a member of his family, in support of the submission that the term 'family' was a word of flexible meaning which could change with the passage of the years, and that in the light of the changed public attitude to homosexuality the term should now include a stable and lasting homosexual relationship. However, Parliament had recognised the decision in *Dyson* but did so in 1988 in paragraph 2(2) by words which expressly confined the relationship outside marriage to a heterosexual relationship.

A further difficulty which confronted the argument on behalf of the plaintiff was that if the underlying purpose of the legislation was to provide a secure home for a person who shared his or her life with the tenant in a relationship of mutual affection, commitment and support, it was difficult to see why two elderly spinsters who lived together for mutual support and companionship without any sexual element in their relationship and who gave each other devoted care should not qualify as members of the same family.

In his Lordship's opinion the decision whether for the purposes of the Rent Act a homosexual was now to be regarded as a member of his partner's family or whether the law should be changed in some other way to protect a homosexual partner on the death of the tenant was a matter for Parliament to decide.

Lord Hobhouse also delivered a dissenting opinion.

Solicitors: John Ford, Islington; Belvederes

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***Fitzpatrick v Sterling Housing Association Ltd***

Before Lord Slynn of Hadley, Lord Nicholls of Birkenhead, Lord Clyde, Lord Hutton and Lord Hobhouse of Woodborough

House of Lords

Judgment October 28, 1999

1. Explain the meaning of the phrase 'common law' both:
  - a. historically; and
  - b. today.
2. The system of judicial precedent is based on the concept of 'stare decisis'. Explain what this means and briefly how it works in practice.
3. With regard to precedent explain the meaning and significance of the following terms:
  - a. ratio decidendi; and
  - b. obiter dicta.
4. Both your pack and the textbooks refer to binding and persuasive precedent. Explain what these two terms mean and give examples to illustrate both. Central to the system of judicial precedent is the hierarchy of the courts, the general rule being that higher courts bind those below and often themselves. In any essay on judicial precedent the examiner will expect you to show thorough knowledge of the courts and their status within the hierarchy.
5. Although the European Court of Justice is not a UK court how does it affect our courts?
6. The House of Lords (Supreme Court) in 1898 stated that it was bound by its own previous decisions. Name the case and explain why this caused rigidity within the system.
7. What was the effect of the 1966 Practice Direction issued by the House of Lords (Supreme Court) with regard to precedent and why did it feel the change was required?
8. As you will notice, the House of Lords (Supreme Court) is reluctant to use the Practice Direction too often. Why is this?
9. Find a case to illustrate when the House of Lords (Supreme Court) has:
  - a. used the Practice Direction of 1966; and
  - b. refused to use the Practice Direction of 1966.
10. The Court of Appeal is generally bound by its own previous decisions. However, in *Young v Bristol Aeroplane Co.* (1944) it held that it could depart from its own previous decisions in three circumstances. List those three circumstances. Lord Denning always maintained that the Court of Appeal should be able to depart from its own previous decisions. In the case of *Broome v Cassell* (1971) he went so far as to refuse to follow an earlier House of Lords (Supreme Court) decision. His argument was that most cases never reach the House of Lords (Supreme Court) so the Court of Appeal should have the same power to depart as the House of Lords (Supreme Court).
11. Do you agree with his view? Or do you agree with Lord Hailsham, who when the case reached the House of Lords (*Cassell v Broome* (1972)) stated: 'It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords'.
12. The Court of Appeal (Criminal Division) may also depart from previous decisions if it feels the law in the previous case was wrongly applied. Why is there more leniency on the criminal side?  
The next courts are the Divisional Courts of the High Court. They deal with appeals from the lower courts. They are bound by their own previous decisions subject to the same exceptions as the Court of Appeal.
13. The High Court, Crown Court, County and Magistrates' Court are all courts of first instance. What does this mean?
14. Decisions of the High Court and Crown Court are merely persuasive. What do we mean by this?

15. When studying the system of judicial precedent you will have learnt a great deal of new terminology. Briefly explain the following terms:
  - a. distinguishing
  - b. **overruling**
  - c. **reversing**.
16. Give a case to illustrate how judicial precedent has helped to develop or change the law.

As with any system there are advantages and disadvantages. One of your activities was to list and explain these.
17. Which of the advantages do you think is the most significant and why?
18. If you were looking for ammunition to abolish the system, which is the most striking disadvantage and why?

Judicial precedent often comes up in the examination and one key point that needs to be considered is how judges can avoid precedents without breaking the rules.
19. From your textbook and notes select two examples to illustrate how a judge could avoid awkward precedents.
20. Find a case which illustrates the point that judges do make law rather than merely declare it.
21. Finally, from memory draw a diagram of the hierarchy of the courts and make a list of the cases you are going to learn for the examination.