PART 1

THE ENGLISH LEGAL SYSTEM

Chapter 1 The Nature of English Law

Chapter 2 The Court System and Alternative Dispute Resolution

Chapter 3 Sources of English Law

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The Nature of English Law



Introduction

All legitimate businesses need to operate within the framework of the law. It is essential for persons working within the business world to have an understanding of how law works and affects their businesses, for example a contract will only be of value to a business if it is legally enforceable. The law sets down rules for the setting up and administration of certain types of business and governs areas of employment of staff. Although specialist legal advice is usually obtained on specific legal issues, it is essential to understand the core principles of business law and to know when to seek legal advice.

The United Kingdom of Great Britain and Northern Ireland (UK) has three distinct legal systems and sets of laws, those relating to England and Wales, those relating to Scotland, and those relating to Northern Ireland. Although there are many similarities between them, this book is concerned with the laws of England and Wales. References in this book to Acts of Parliament refer to Acts made by Parliament sitting in Westminster London, which is the supreme law-making authority in the UK and can pass laws relating to the whole of the UK. However, students should be aware that the Scottish Parliament sitting in Edinburgh may pass Acts of the Scottish Parliament which relate only to Scotland.

The UK has been a member of the European Union (EU) since 1 January 1973 and as such has agreed to be bound by EU law. Each of the 27 member states of the EU has its own domestic laws in addition to being bound by EU law. The UK is also a signatory to the human rights treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 which was incorporated into English law by the Human Rights Act 1998.

Learning Objectives

After studying this chapter you should be able to:

- Explain what is meant by law.
- Outline the historical development and characteristics of English law.
- Understand the difference between Public and Private Law and the difference between Civil and Criminal Law.

What is Law?

All societies or groups require rules in order to regulate the behaviour of their members. Although people in society have a right to freedoms, those freedoms cannot be absolute because one person's use of freedom may adversely affect another person's freedom or rights. Usually one looks for justice and fairness in laws; however, justice and fairness is subjective; for example, in looking at the tax burden one might ask how far the employed hardworking person should support the poor unemployed.

Laws are rules and regulations which govern the activities of persons within a country. They provide necessary rules, and balance the various interests of different members of the community. Both natural persons (human beings) and legal persons (companies) are bound by laws of the country they reside in. From these laws they can ascertain what they are permitted to do and what they are not permitted to do. Some laws prohibit certain actions, such as theft and murder, while other laws state that persons must fulfil conditions before commencing certain activities or must comply with specified regulations. For example, a special licence must be obtained prior to legally running a riding school, and a company must have a registered office. Laws are not the same in every country around the world, although often countries will have similar laws. The law of each country is only binding within its territory.



Viewpoint Alexey Petrov, Accounts Manager, Google

The knowledge of law is very important in a modern business environment—it allows for a better planning ahead and predicting consequences of any decisions made. It also structures the approach to any sort of business project—and I can say this confidently having done an industrial placement in Intel in the UK and currently being an Account Manager at Google in Ireland straight after graduation. However, the legal knowledge can come handy in the

variety of personal situations. Having just completed my second year of a Degree at the University of Brighton, I was unfortunate enough to be involved in a motorcycle accident which wasn't my fault. I had to pursue the claim myself from the other party's insurer, which resulted in the County Court action, preparing the claim form and witness statements. I won the action, despite representing myself against a major legal company representing the insurer. Hearing 'the claimant won his case' from the District Judge was the best possible reward for the effort.

Nature of English Law

In England and Wales, laws are composed of three main elements: legislation which is created through Parliament, common law, and directly enforceable EU law. An **Act of Parliament**, sometimes referred to as a statute, is the highest form of UK law. Some of the characteristics of English law differ from the domestic law of other EU countries; however, English law does share some similarities with countries such as New Zealand, the United States of America, and Australia which have a historical connection with the UK.

The Characteristics of English Law

Continuity

English law has developed over many centuries and its origins can be traced back to the Norman era in the 11th century. There have been numerous important developments and changes in the law but these have been brought into effect in a piecemeal fashion through **case law** and legislation. English laws do not become inoperative due to old age and even **statutes** (laws made by Parliament) dating back to the 13th and 14th century may still be effective today. The Treason Act 1351 was cited in a case decided in 2003, *R (on the application of Rustbridge) v AG* (2003).

A criminal offence set out in a statute was used two hundred years later in *R v Duncan* (1944). In the 1940s Helen Duncan was convicted of fortune telling under the Witchcraft Act 1735 despite the fact that there had not been any prosecutions under the Act for over a hundred years. The Witchcraft Act 1735 had not been repealed and was still effective. (Note, the Witchcraft Act 1735 has now been repealed.)

It is not only statutes that remain good law until they are repealed; cases (decided by judges) may be referred to and followed in later cases even though they may date back centuries. The rule in *Pinnel's Case* (1602) was cited and followed in *Foakes v Beer* (1884), which in turn was cited and applied in *National Westminster Bank v Boanas* (2003). These

cases all concerned promises made by creditors to debtors to accept a smaller sum of money than was actually owed in settlement of a debt. Following the law set out in the old cases, the debtors could not enforce the creditors' promises, and were bound to pay off the full amount of the debt.

Absence of a legal code

English law is uncodified. This means that unlike other European countries the laws have not been systemised into codes. In Spain there is a Code of Commerce, a Civil Code, and a Criminal Code. A Code is a systematic collection of laws designed to deal with main areas of law.

A codified system of laws should not be confused with codification of the law into a statute which does happen in English law. Codification into a statute is where English law has been developed by judges through the medium of case law and is then collected together and restated in a statute. The common law relating to the sale of goods was originally codified in the Sale of Goods Act 1893. The principal duties of company directors, previously found in case law, have recently been codified in the Companies Act 2006.

Law-making role of judges

Although the traditional view is that the role of English judges is to decide cases according to existing laws, it is accepted that judges do make and change the law. Judges make law when deciding both criminal and civil cases in two main ways:

(a) *Interpreting statutes*

On occasions the meaning of a statute will be unclear and a judge will be called upon in a case to interpret it. There are various rules and presumptions that judges use in interpretation of statutes (see Chapter 2). Such interpretation is often, arguably, tantamount to law-making.

(b) *Developing the common law*

There are significant areas of Civil Law, for example early contract law, and the law of torts, where the courts have developed the law through decisions in cases. Criminal Law has also developed in part through decisions in cases. Murder is a common law crime and there is no definition of what constitutes murder in a statute. However, if Parliament chooses to legislate in an area which is already covered by case law, the provisions of the statute will take precedence over the case law.

Doctrine of binding precedent

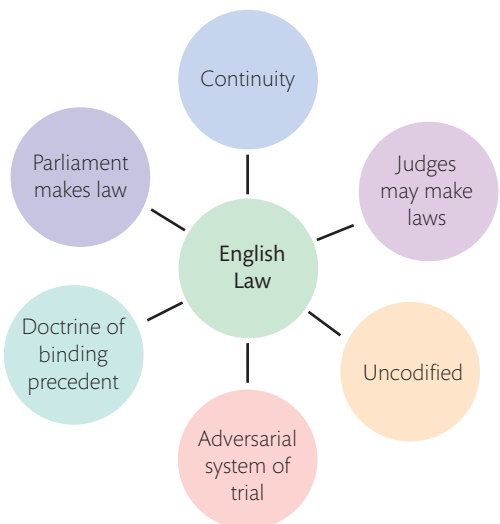
The doctrine of binding **precedent** means that in deciding a case an English judge does not just look at earlier decisions of judges in similar cases for guidance, but is actually

bound to apply the law decided by those earlier cases, if the earlier cases were heard in a court of superior status (and sometimes one of equal status) and have involved similar facts in that area of the law. In other European countries, judges are guided as opposed to being bound by previous cases. The doctrine of judicial precedent is also known as '*stare decisis*' meaning to stand by decisions. The earlier decisions of previous courts which are relied upon are known as precedents.

Adversarial system of trial

The usual type of procedure in English courts is described as adversarial. In both civil and criminal cases each side presents their case to the judge, who supervises the proceedings. The judge remains neutral and, rather like an unbiased umpire, decides the case on the evidence presented to him by the parties' lawyers. Where courts use an inquisitorial procedure a judge plays a more active role in the proceedings, which may involve cross-examining the defendant and questioning witnesses himself.

Figure 1.1 Characteristics of the English Law



Key Concept The doctrine of binding precedent is part of English law which means that judges must apply the law as set out in relevant decisions of previous superior courts and sometimes courts of the same status. This is different from other European countries where judges are guided rather than bound by previous cases.

The Historical Development of Common Law and Equity

Prior to the Norman conquest of England in 1066 there was no national legal system, and the laws, administered through local courts, were based on what appears to have been the local custom of particular regions of the country. When William the Conqueror (1066–1087) came to the throne in England he began a process of centralisation, by imposing national government over the country. Later Norman monarchs recognised that in order to achieve strong national government there was a need to have a system of national law and order.

Henry II (1154–1189) began the process of applying the same law to the whole country. Royal Commissions, who later became known as circuit judges, travelled from London to all parts of the country hearing cases, checking on the procedure of the local courts, and applying the same laws to each region. This national law became known as common law as it was common to all parts of the country, as opposed to the local customs which applied to the different regions. Over a period of time the decisions of circuit judges were recorded and followed in subsequent cases.

Originally the King's courts were part of the King's Council, *Curia Regis*, but in time the courts developed into three district courts: the Courts of Exchequer, Common Pleas, and King's Bench. The rules of evidence and procedures of these courts became very rigid and formalistic. There were limited types of claims and if there was no appropriate claim for the type of action a citizen wanted to commence, then no action could be started. Even small mistakes made on a claim form would mean the action would fail, and if an action was successful the only remedy available was payment of damages (monetary compensation).

Citizens unable to gain access to the Common Law Courts or a suitable remedy in the courts sought to petition the King. The Lord Chancellor, as the King's most senior clergyman, dealt with the petitions. Clergymen were trained in church law which was based on the ideals of conscience, morality, and justice. There were no complex rules of procedure and the Chancellor could dispense justice in accordance what he considered to be fair in the circumstances. As the number of petitions increased the Lord Chancellor set up a specific court, the Court of Chancery, to deal directly with the petitions and administer justice on principles of equity (fairness). Decisions of the Court of Chancery became as important as the decisions of the Common Law Courts and a body of equitable laws developed. Equity did not provide a complete system of laws. It only covered certain areas, and it was intended to supplement the common law where the common law was inadequate. It gave new rights in areas where the common law had provided no right, and did not have the strict time limits that applied to common law claims. There were additional remedies provided under the law of equity, other than the common law remedy of damages (compensation) that could be awarded to a successful party. But these equitable remedies were not available to a party as a right even if they won their case. Judges in a Court of Equity had discretion to award a remedy, such as specific performance (forcing a party to carry out their part of a

contract), if they considered the winning party had acted fairly and it was just in all the circumstances. However, there were areas of overlap and conflict between common law and equity. In the *Earl of Oxford's Case* it was decided that in a conflict between equity and common law then equity would prevail and be used in preference to common law.

The two court systems ran along side each other for several hundred years, until eventually the two systems were merged in the Judicature Acts 1893–5 which created one court system but provided that all courts had the power to decide cases in accordance with both common law and equity. Today the two systems co-exist, and a court may, at the judge's discretion, use principles of equity where common law principles or remedies cause injustice. Both the rules from common law and equity are known as case law today although they are often referred to under the one term of 'common law'.

Meanings of the term 'common law'

The term **'common law'** has several different meanings. It is usually used to mean the law that is not the result of legislation but is the law created by the decisions of the judges. When common law is given this meaning it encompasses cases that have used both, or either, equity and common law.

An alternative meaning of the term common law is when it is used to distinguish common law from equity, and refers to case law that has been developed through the old Common Law Courts as opposed to the old Chancery Courts.

An archaic meaning of the term common law is law that is common to the whole of England as opposed to local law. However this is no longer the usual meaning of the term.

Finally, the term may mean the law that is not foreign law; in other words, the law of England, or of other countries (such as America) that have adopted English law as a starting point. In this sense it may be contrasted with Roman, Islamic, or French law, and here it includes the whole of English law; even local customs, legislation, and equity.

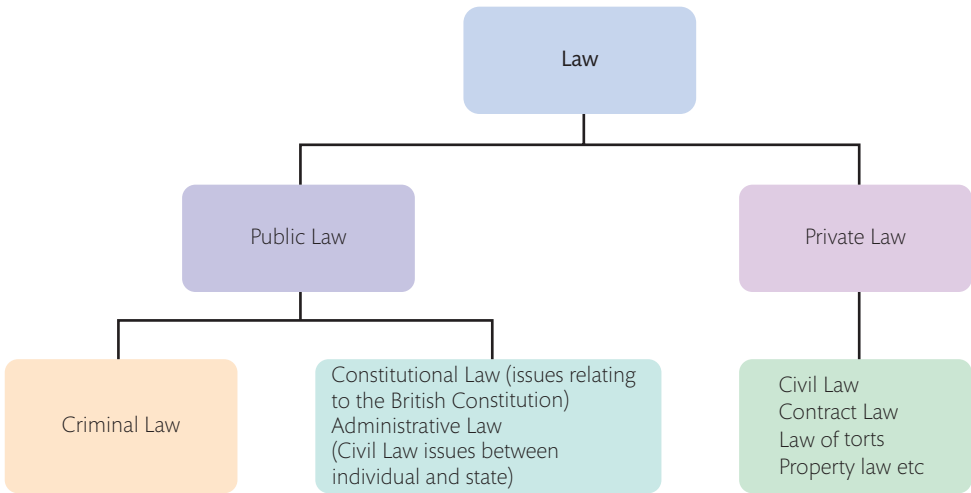
Classification of Different Types of Laws

Laws can be classified in different ways, for example they can be classified into Private and Public Law, or into Civil and Criminal Law. Civil Law may be either Public or Private Law. Criminal Law is part of Public Law. Sometimes it is important to know whether a civil matter is a Public Law issue as opposed to a Private Law issue, as there are different court procedures for civil Public Law issues.

Public and Private Law

Public Law involves the relationship between individuals and the state and is concerned with the decisions by, and control of, government bodies. Public Law is made up of

Figure 1.2 Classification of law into Public and Private Law



Criminal Law, Constitutional Law, and Administrative Law. Criminal Law makes certain types of behaviour against the law and gives the state power to prosecute persons who disobey the law. The term 'person' refers to both individuals (human beings) and legal persons such as companies. A legal person is an organisation that has a separate legal identity from the persons running or owning the organisation. Constitutional Laws are the laws relating to the British Constitution. An example of a Constitutional Law is the House of Lords Act 1999 which restricts the number of hereditary peers allowed to sit in the House of Lords to 92.

Administrative Law is concerned with the powers and duties of government bodies and ensuring that the government acts within its legal powers. Disputes may arise between a citizen and a government body; for example, if a citizen's house has been compulsory purchased by a government department in order to build a motorway, the citizen may take the government department to court alleging that the action taken by the government department was outside the powers given to it by Parliament.

Private Law is concerned with the rights and duties between individuals and covers areas of law such as contract, tort, property, company, and family law. The individuals may be private persons, companies, or even a state body such as a local authority if, for example, a citizen has a contract with that local authority.

Criminal Law and Civil Law

An alternative method of classifying English law is into Civil Law and Criminal Law. The distinction between Civil Law and Criminal Law is important in terms of which court a case is heard in and the burden of proof that is required. There is also different terminology for civil and criminal issues.

In Civil Law, an aggrieved person commences court action and is called the **claimant** (prior to April 1999 a claimant was known as a **plaintiff**). The other party is called the **defendant**. A claimant taking the action before a court is said to sue a defendant. A claimant must prove his case on the balance of probabilities which means the claimant must show the court that the evidence is more in his favour than in the defendant's favour. A civil action is commenced in either a County Court or the High Court. If a claimant successfully wins the case, judgment will be entered in favour of the claimant. The purpose of a civil action is to compensate the person who has incurred a loss or an injury, or to provide some other remedy, such as an order to ensure the other party carries out their contractual obligations or an order to prevent the other party from acting in a wrongful manner.

In Criminal Law, both natural persons and legal persons, such as companies, can be prosecuted. In England and Wales a child reaches the age of criminal responsibility at the age of 10 and therefore children cannot face prosecution for crimes committed when they were younger than 10. The person who is being prosecuted is called the defendant or is sometimes referred to as the accused. A crime is regarded by society as a crime against the state and prosecutions are usually commenced by the state prosecution body, the Crown Prosecution Service (CPS). The police will pass the file on to the CPS who will decide whether to start an action. There are other state bodies, for example, County Councils and District Councils (part of local government) which also have prosecuting powers in areas such as trading standards. In addition, ordinary persons may bring private prosecutions against defendants, if the CPS declines to mount a prosecution. Some crimes, such as manslaughter, assault, and burglary have specific victims whereas other crimes, such as carrying an offensive weapon and breach of the Official Secrets Act, have no specific victims.

In a criminal trial, the case is heard either in a Magistrates' Court by three non-legally qualified magistrates or by a legally qualified District Judge (Magistrates' Court), or the trial is heard in a Crown Court before a judge and jury. A prosecutor prosecutes a defendant and the prosecutor must prove the facts of the case beyond reasonable doubt. This is a very high standard of proof and, unless the prosecution meets this standard of proof, then the defendant must be acquitted. The defendant does not have to prove his innocence; in fact a defendant does not have to give evidence at his own trial. A defendant is convicted if he is found guilty and acquitted if found not guilty. The purpose of a criminal prosecution is to determine the guilt of the defendant. If a guilty verdict is pronounced, the defendant will be sentenced by the judge. The purpose of imposing the sentence may include punishment of the defendant.

In both criminal and civil cases, if the losing party has grounds for an appeal then in the appeal case the party who brings the appeal will be known as the **appellant** and the other party will be called the **respondent**.

Certain circumstances will give rise to both criminal and civil actions. For example, a car accident caused through careless driving may give rise to both a criminal prosecution of the careless driver and a civil claim in the tort of negligence against the careless driver by the other driver.



Business Insight Laws tightened to prevent businesses gaining advantages through corruption

Old anti-bribery laws have been replaced by a suite of offences under the new Bribery Act 2010 (in force 2011). This Act is intended to make it easier to bring successful prosecutions against UK corporate bodies for corruption offences committed at home and abroad. The Act also establishes a new offence for commercial organisations of failure to prevent bribery. An organisation can be prosecuted if a person working on their behalf bribes another (in the UK or overseas), to obtain a business advantage for that commercial organisation. The organisation will only have a defence if it can show it had adequate procedures in place designed to prevent such bribery occurring. The aim is to ensure that businesses take responsibility for establishing an anti-corruption culture.

Table 1.1 Difference between Civil and Criminal Law

Civil Law	Criminal Law
Disputes between persons.	Offences committed by persons.
Action taken by the claimant (one of the parties).	Action taken by the state (the state body responsible for prosecutions is the Crown Prosecution Service).
The action is first heard either in the County Court or the High Court.	The trial of the defendant is heard in either the Magistrates' Court or the Crown Court.
Case is cited by the names of the parties: *Claimant's name v Defendant's name.*	Case is usually cited: *R v Defendant's name.*
A claimant (previously called a plaintiff) sues a defendant.	A prosecutor prosecutes a defendant.
The claimant must prove his case on the balance of probabilities, i.e. he must show that he has a greater right than the defendant.	A prosecutor must prove the defendant is guilty beyond reasonable doubt. The defendant does not have to prove his innocence.
Judgment will be entered for the claimant where the defendant is found to be liable, or if the defendant is found to be not liable, judgment will be entered for the defendant.	A defendant must be convicted if he is found guilty and acquitted if found not guilty.
In an appeal, the person bringing the appeal (who lost the case in the first court) is called the appellant and the other party (who won the case in the first court) is called the respondent.	In an appeal, the person bringing the appeal (who lost the case in the first court) is called the appellant and the other party (who won the case in the first court) is called the respondent.
The purpose of a civil action is to provide a remedy for a civil wrong and is not to punish the person who loses the action, and therefore remedies include court orders that the losing party pays damages to the other party or carries out the contract as previously agreed.	The purpose of a criminal case is to determine the guilt of the defendant. Sentences such as imprisonment or fines may be imposed on conviction.

Case Names

In a civil action, the parties' names are used with the claimant's name first followed by 'v' and the defendant's name, e.g. *Fisher v Bell*. The 'v' is pronounced 'and', therefore the case would be read as *Fisher and Bell*. In an appeal case, the original claimant's name is still shown first even though the appeal may have been commenced by the original defendant.

Criminal prosecutions taken by state (sometimes called the Crown) will usually be brought in the name of the Queen against the defendant. A prosecution against John Brown will be known as *R v Brown*. 'R' stands for *Regina* which means queen in Latin. (If there is a king on the throne then the 'R' will stand for *Rex* which means king in Latin). Just as in civil cases, although written 'v' this should be spoken as 'and'.

In certain complex cases and some specific offences, the prosecution is brought in the name of the head of the Crown Prosecution Service, namely the Director of Public Prosecutions (DPP) or the Attorney General (AG); therefore, the case is cited *Director of Public Prosecutions* (*DPP) v Defendant's name*, or *Attorney General (AG) v Defendant's name*.

The Legal Profession

The English legal profession is divided into two branches, barristers and solicitors. Traditionally, barristers were viewed as professional advocates and solicitors were viewed as general practitioners dealing with a wide variety of legal matters. However, that is not the case today. There are over 117,000 practising solicitors working in the UK (Solicitors Regulation Authority, Performance Report June 2010). Solicitors carry out a wide range of legal work including conveyancing, divorce, wills, corporate issues, and litigation although individual solicitors often specialise in one area of law. They have had the right to represent clients in the lower courts, i.e. the Magistrates' Courts and County Courts, for many years; however, since the 1990s solicitors have the right to appear in the higher courts provided they have certain additional qualifications.

There are approximately 12,000 self-employed barristers (Bar Council, Annual Statistics, December 2009). Their work includes advocacy in all courts and giving written opinions on legal issues. Prior to 1990, a barrister could only take instructions from a solicitor; however now certain professionals such as accountants may seek the advice of barristers directly. A lawyer cannot practise as a solicitor and barrister at the same time although it is possible to transfer from one profession to the other. Historically, judges, apart from those in the lower courts, were only drawn from the ranks of barristers and, although that changed in 1990 allowing for the appointment of former solicitors as judges at all levels depending on qualifications, the majority of higher court judges at present are former barristers.

For an online flashcard glossary scan here or visit [URL]

Basic Terminology

Act of Parliament Statute, law made by Parliament.

Appellant The name given to the person bringing an appeal against a decision of a lower court.

Case law Law developed in the higher courts through a series of judge-made decisions.

Claimant The name used for a person who commences a civil action.

Common law Generally means law developed by judges through decisions in courts as opposed to laws created by Parliament.

Defendant In civil cases, it is the name given to the person who is being sued by the claimant. In criminal cases, it is the name given to the person who is being prosecuted for the crime.

Plaintiff The name used for a person who commenced a civil action prior to 2000. (The word used now is claimant.)

Precedent A decision of an earlier court case used as authority for deciding a later case with similar facts.

Respondent The name given in an appeal case to the party who has not brought the appeal case.

Statute Law that is set down in an Act of Parliament.

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Summary

After studying this chapter students should be able to:

Explain what is meant by law

- Laws are rules and regulations which govern the activities of persons within a country.
- Some laws prohibit actions, other laws state conditions that must be fulfilled or complied with.

Outline the historical development and characteristics of English law

- In England and Wales, laws are composed of three main elements: legislation which is created through Parliament, common law, and directly enforceable EU law.
- Since the 11th century, English common law has developed partly through the decision of judges and it is accepted that judges do make and change the law.
- English law is uncodified, which means that unlike other European countries, the laws have not been systemised into code.
- The usual type of procedure in English courts is described as adversarial.
- The doctrine of binding precedence means that, in deciding a case, a judge is bound to apply the law decided by earlier cases heard in courts of superior status (and sometimes one of equal status).

Understand the difference between Public and Private Law and the difference between Civil and Criminal Law

- Public Law concerns the relationship between individuals and the state and is concerned with the decisions by, and control of, government bodies.
- Private Law is concerned with the rights and duties between individuals.
- In Civil Law an aggrieved person, the claimant, commences court action against the defendant and must prove his case on the balance of probabilities.
- In Criminal Law, action is usually taken by the state (CPS). A prosecutor must prove the defendant is guilty beyond reasonable doubt. The defendant does not have to prove his innocence.

- The purpose of a civil action is to provide a remedy for a civil wrong.
- The purpose of a criminal case is to punish the offender.

Questions

For outline answers scan here or visit the ORC



1. Consider the following cases and decide whether criminal or civil proceedings would result, and make a note of the parties in the action.

a) Ali is being prosecuted for careless driving.

b) Joe returns a faulty stereo to the shop where he bought it but the shop manager refuses to give him a refund.

c) Kurt drives his car at 70 mph through town one Saturday night. He fails to see Gita on a zebra crossing and knocks her down.

d) Sally is being sued by her landlord for non-payment of rent for three months.

e) Jane is an alcoholic. She is pregnant and continues to drink heavily throughout her pregnancy and as a result her child is born with foetal alcohol syndrome.

2. Explain what is meant by the term 'common law'.

Further Reading

Cownie, Bradney, and Burton, *English Legal System in Context*, 5th edn (Oxford University Press, 2010) Chapter 1.

Elliot and Quinn, *The English Legal System*, 11th edn (Pearson, 2010) Chapter 1.

Slapper and Kelly, *The English Legal System*, 11th edn (Routledge, 2010) Chapter 1.

Wilson, Mitchell, Storey, and Wortley, *English Legal System Directions*, 1st edn (Oxford University Press, 2009) Chapter 1.

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