Chapter 6 – The Common Law

In the previous chapter we looked at the court system and saw that there is a hierarchy, with lower courts at the "bottom" of the chain such as the Magistrates' Court and the County Court, leading up through the Crown Court and High Court to the Court of Appeal and the Supreme Court. The question for us to think about now is what it is that the courts do that is so important in terms of developing English law.

The starting point is to think back to chapter 4 which was about legislation. In that chapter we saw that most new law is made in Parliament and a law made in this way is referred to as a piece of legislation or a statute or an act of Parliament.

However, there are many laws that exist today that are not based on any legislation. One of the most obvious is the law of murder. There is no "Murder Act" in the same way as there is a "Theft Act". The Theft Act 1968 tells us what the law is on theft and covers various different types of theft. It explains what the requirements are for those offences and what punishments the courts can order if someone is found guilty. Murder, on the other hand, is what we call a common law offence. This means it has been created and developed by the courts over the course of hundreds of years. Murder generally occurs where someone causes the death of another person and either intends to kill them or intends to inflict very serious harm. These are terms which the courts have defined and re-defined over the years as cases of murder have come before them. Each case brings its own set of facts and judges apply the law to each case as it arises and new or unusual factual scenarios may result in the definitions being changed or expanded or otherwise modified in some way. Another example of a common law offence is common assault. The Law Commission, which is a body set up by Parliament to keep English law under review, has a programme to legislate for each common law offence in order to try to clarify some of the vagaries of those offences. In other words the intention is to pass a piece of legislation through Parliament to cover each offence, setting out clearly what the requirements are for each such offence.

Moving away from the criminal law to the civil law, a good example of an area of law which relies heavily on the common law is contract law. This body of law governs how contracts are made and how they can be broken, together with the remedies which are available to someone who suffers

a breach of contract. Again, there is no “Contract Law Act” and so the majority of the rules remain “hidden” in the case decisions made by judges. Parts of the law of contract can be found in various pieces of legislation, but generally the law of contract is founded in common law.

We have looked at a couple of examples of major areas of law which are grounded in common law, but how does this actually work? The answer is that as each case is decided by the courts it adds to the body of rules in that area. Clearly there may be many cases about contract law each year, and there may be many (though hopefully fewer) cases about murder. Not every case will change or add to the law however. That is due to the system of precedent, which is key to English law.

The system of precedent basically means that a court must consider the decisions made in previous court cases. If a court has already decided that it is an offence for a man to rape his wife (as it did in *R v R* (1992)), then if the same situation comes before the court again, the court must generally follow the previous ruling. This ensures that the system is fair and applied equally in each case; it gives the advantage of consistency.

There are a few things to note about this system however. Firstly, it is generally the higher courts which set the precedents in the first place. Decisions made in the highest court, the Supreme Court, bind all lower courts. That means that the Court of Appeal (Criminal Division), the Crown Courts and the Magistrates’ Courts all need to follow the principle decided in the Supreme Court decision if it is a criminal matter. If it is a civil matter, then the Court of Appeal (Civil Division), the High Courts and the County Courts will all need to follow the decision. A decision in the Court of Appeal similarly binds all courts below it, and in most cases will also bind future Court of Appeal decision (with some exceptions). Lower down the hierarchy, High Court decisions can bind the County Court but the County Court itself, and the Crown Court and Magistrates’ Court cannot generally make a decision which binds any future court.

The second thing to note about the system of precedent is that it is not the whole case that sets a precedent. Only the main legal principle coming out of the case will become part of the precedent which is then set for other cases to follow. Judges tend to write fairly long judgments when they decide important cases in higher courts. Not everything they say becomes a precedent and it is the job of a skilled lawyer to pick out from that judgment the particular principles that form the precedent.

It is these principles which then build, develop and change the law as the years go by. Judges can only decide on cases that actually come before them, and can therefore only influence the law when a suitable and relevant case appears in their court. There may be areas of law which judges would like to amend, but they have no mechanism for doing so until and unless a relevant case comes before them. The common law, made up of a series of case decisions which bind other courts, therefore develops in a rather piecemeal fashion. This can be contrasted to legislation which Parliament can change at any time by passing a new piece of legislation. It is also worth noting here that Parliament can of course pass a piece of legislation at any time to change the common law positon. For example, if it does not like the way that the law of murder is being developed by the courts, it could pass a Murder Act to change it. The courts have no power to change what is set down clearly in legislation. In this way we can see that Parliament is the supreme law making body for England and Wales.

Another point to keep in mind about the system of precedent is that judges can use the facts of a case to reach a different result. Two cases which at first sight appear to be very similar may in fact involve significant factual differences and therefore a judge can ***distinguish*** one case from the other. That means that whilst there has been an earlier case which has set a precedent about a particular legal point, a judge in a later case might be able to avoid applying that principle to that later case on the basis that the facts are significantly different. This allows judges some flexibility in how they apply the law in their aim to do justice to the people involved in the case. A higher court can, of course, simply overrule a decision from a previous case which was decided by a lower court. This would have the effect of removing that precedent from the law and replacing it with the new decision from the higher court.

Finally on the general system of precedent, it is clear that the body of case decisions (case law) which has built up over the past several hundred years is huge. There are literally thousands and thousands of precedents in hundreds of different areas of law on all kinds of legal issues. Working out what the law is can therefore be problematic. It is essential to have a very clear method of law reporting. A law report is a report of a case, consisting mainly of the judgment as written or delivered by the judge or judges in the case. Finding the current law is a task which has, thankfully, vastly improved by the use of electronic databases. Searches on these databases using appropriate keywords will usually bring up a list of the relevant cases fairly quickly, although that is a skill in itself and some knowledge of the

relevant legal area will obviously help with that.

The final issue I want to look at in this chapter is the task of statutory interpretation. Whilst it is true that statutes produced by Parliament go through a fairly rigorous process before they receive Royal Assent, it is true that many pieces of legislation contain provisions which are open to interpretation. Everyday words such as “building” or “vehicle” can cause problems. Is a caravan a building or a vehicle? What about a boat? Is a tent a building? If legislation were drafted to include a full definition of every term used, then it would be unimaginably long and probably very difficult to read or use.

Another important role of judges is therefore to interpret what is meant by a particular phrase in a piece of legislation. Many cases come before the courts which require this exercise to be undertaken. A classic example often used here is the case of ***Brock v DPP*** (1993). This focused on the meaning of the words “type of pit bull terrier” used in the Dangerous Dogs Act 1991. The court was required to decide whether the word “type” had the same meaning as “breed”. If so, then only pit bull terriers were covered by the particular provision. The court actually decided that the word “type” had a wider meaning than just including a breed, and so other dogs, with similar characteristics as a pit bull terrier could be covered by the legislation. You can see how this would be important to someone charged with an offence under the Act who owned a dog which was a similar type to a pit bull terrier but not actually of that breed. The court’s decision meant that such a person could be guilty of the offence.

Students new to the study of law often get confused by statutory interpretation. That is probably because teachers often deal with it separately to the system of precedent that we have already looked at. However, it is really just part and parcel of that system. It is still true that judges can only become involved in interpretation when a relevant case comes before them. It is also true that any decision made by the court will then form a precedent to bind lower courts in the usual way.

There are rules of interpretation that judges consider when trying to establish the meaning of words. The first rule is called the literal rule, and as you would expect, it means that judges look at the literal meaning of the words used in the statute. That means they give the words their ordinary or everyday meaning or, if you prefer, their dictionary definition. ***Fisher v Bell*** (1960) is the case most often used as an example here. It is an offence to offer a flick-knife for sale. However, in law, placing an item in a shop window is not technically “offering” it for sale, it simply invites others to make an offer to buy the

item. The court therefore found that the accused was not guilty of offering the knife for sale when he placed it in his shop window; the court interpreted the wording of the statue very literally.

So the starting point used by many judges is to try the ordinary meaning of the words used in the statute. However, this can give rise to some rather absurd results on occasion. The case of ***Alder v George*** (1964) is a good example. The Official Secrets Act 1920 made it an offence to obstruct HM Armed Forces in the vicinity of a prohibited place. The accused argued that he was in fact ***in*** the prohibited place (an air force base) rather than "in the vicinity" of it. On a literal interpretation of the words used, he would not be guilty of an offence. However, the court applied what is known as the golden rule of interpretation, which states that if the literal rule leads to an absurd result, then some other interpretation should be used instead. The court thought the outcome of this case was absurd, and so decided that "in the vicinity" of a place included "in the place itself" and found him guilty.

Other rules of statutory interpretation include the mischief rule and the purposive approach. Both of these rules allow the court to look not at the exact meaning of the words, but at the gap in the law that the particular statute is trying to fill, and also at what it feels Parliament was trying to achieve when it passed the law. In other words, the court uses the interpretation which satisfies the objective or intention behind why the law was created in the first place. An often quoted example is the case of ***Smith v Hughes*** (1960). This required an interpretation of a phrase in the Street Offences Act 1959. The phrase made it an offence to "loiter or solicit in the street for the purposes of prostitution". The accused claimed that they were not "in the street" because they were generally on balconies or knocking on windows from within buildings. The court used the mischief rule to deem that such behaviour occurred "in the street" because the intention behind the legislation was to prevent prostitutes harassing people in the street, and this is what they were doing.

We have seen in this chapter that the courts have a very important part to play in the development of English law. The decisions made in higher courts become binding precedents and subsequent cases in lower courts must follow those decisions when based on similar facts. Included in this role is the important job of interpreting the meaning of legislation as and when required. Decisions made as to how a word or phrase applies in a particular factual situation, or as to its scope or extent, also bind courts which are lower in the hierarchy.