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Judicial decision making

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Civil justice and tort law

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Contents

Introduction

Judges play a key role in a common law legal system such as that of England and Wales. But to outside observers, the way they arrive at their decisions may be something of a mystery. This course seeks to shed light on this process. The course starts by explaining how judges make factual findings from evidence, how they choose how a case should be decided, and how they explain their thinking. Key to all of these processes is the law, which influences judges at every stage.

To explain the role of the law, the course starts by focussing on the easier cases where the law is certain. As the course progresses, it introduces the harder cases where the law is uncertain and looks at how judges and lawyers navigate this uncertainty. As the challenges of uncertainty are introduced, the course also looks at fundamental debates concerning judicial decision making, in particular the issues of representativeness of the judiciary, bias, and whether judges make law.

This OpenLearn course is an adapted extract from the Open University course W112 *Civil justice and tort law*.

Learning outcomes

After studying this course, you should be able to:

- explain and distinguish fact-finding, decision-making and reason-giving
- discuss the issue of bias in the common law
- explain *stare decisis* and differentiate between *ratio decidendi* and *obiter dicta*
- recognise that some legal rules are uncertain
- discuss whether judges make law.

1 Legal reasoning

The start of this course (Sections 1-6) introduces you to what happens when a legal dispute goes through the courts, considering how the courts take the facts relating to legal disputes, analyse them, assessing what is relevant or not, and then uses them to make legal decisions. It also considers what happens when decisions are made and the process through which judges record their decisions so that future courts can follow them, if it is appropriate to do so.

Watch the video below for an introduction to what you will learn about in the start of this course.

Video content is not available in this format.
Video 1

2 Fact-finding

The first step in resolving a legal dispute is finding the facts. Correct fact-finding is vital to a just outcome. For example, if a court wrongly found that parents had mistreated their child when they had not, that child could be taken away, with terrible consequences. The process of working out from the evidence where the truth lies is generally known as fact-finding.

There are some instances when the opposing parties are agreed on the facts, but these are quite rare. Generally, one side makes claims that the other side disagrees with, so the court has first to decide where it thinks the truth lies. A legal dispute often comes to court some time after the dispute arises, and the fact-finder (also known as a 'tribunal of fact') has no previous information about the dispute, so they have to try to work out what happened from the evidence that is presented. In civil cases, the tribunal of fact is normally a judge or a panel of judges, but sometimes it can be a jury. In more serious criminal cases the tribunal of fact is generally a jury, and in less serious cases it is lay (unqualified volunteers) or professional magistrates.

Figure 1 demonstrates some of the forms that evidence might take.

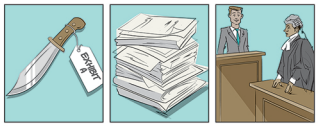

Figure 1 Examples of types of evidence

The majority of fact-finding also takes place during the 'first-instance' stage, that is, when the case first comes to court and before any appeal. If a case is appealed, the appeal court rarely hears evidence, so the appeal court will tend to rely on the facts that were found by the first-instance fact-finder at the very start of the dispute.

As you shall also see further along in this course, fact-finding may be a point at which bias can creep into the legal process.

2.1 Everyday fact-finding

Fact-finding is something that people do day-in, day-out with such ease that they rarely think about it. Fact-finding is a type of inference. Inference is where we draw conclusions by combining evidence that we hear or see with existing knowledge. For example, when a person's mobile phone alarm goes off (evidence) and even before they open their eyes, they infer that it is 7 a.m., (fact) on the basis that that is the time the alarm always goes off. And if there is a knock at the door (evidence) they infer before opening the door that it is a delivery (fact) because they are expecting a parcel and not a visitor.

Figure 2 In everyday life, people infer facts from evidence such as: (a) a mobile alarm or (b) the sound of a knock at the door

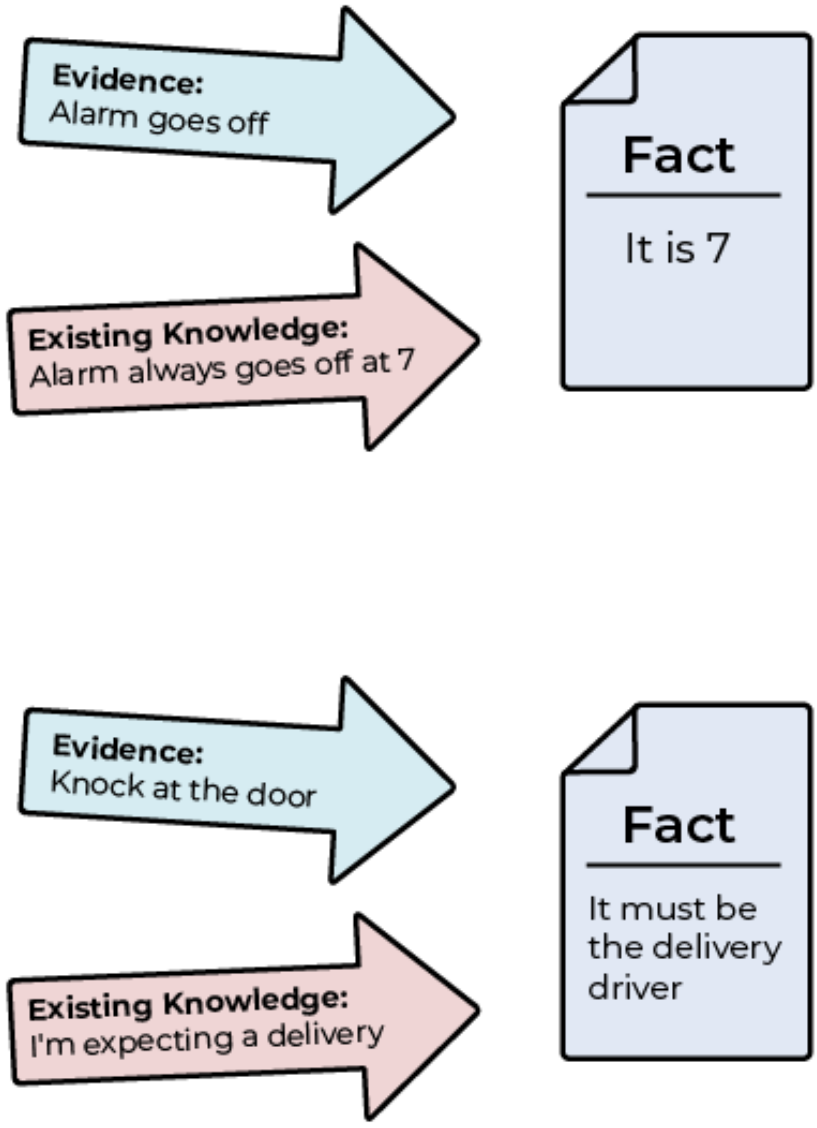

Figure 3 Using evidence and existing knowledge to infer facts

Notice that the factual inferences are never certain. If you imagine a scale from 0 to 100% where 0% is impossible, 50% is evenly balanced, and 100% is absolute certainty, all factual inferences will fall somewhere along that scale (see Figure 4). When the alarm goes off, the person might think it 99% certain that it is 7a.m., but they could be wrong. Their dastardly housemate might have changed the time, they might have forgotten that the clocks went back, or they may have pressed the ‘snooze’ button earlier. They might infer that it is 80% likely that the knock on the door is the delivery driver, but perhaps it is instead a neighbour who has locked himself out of his flat, or a group of police officers coming to arrest him for that jewellery heist in the 1970s he thought he had got away with.

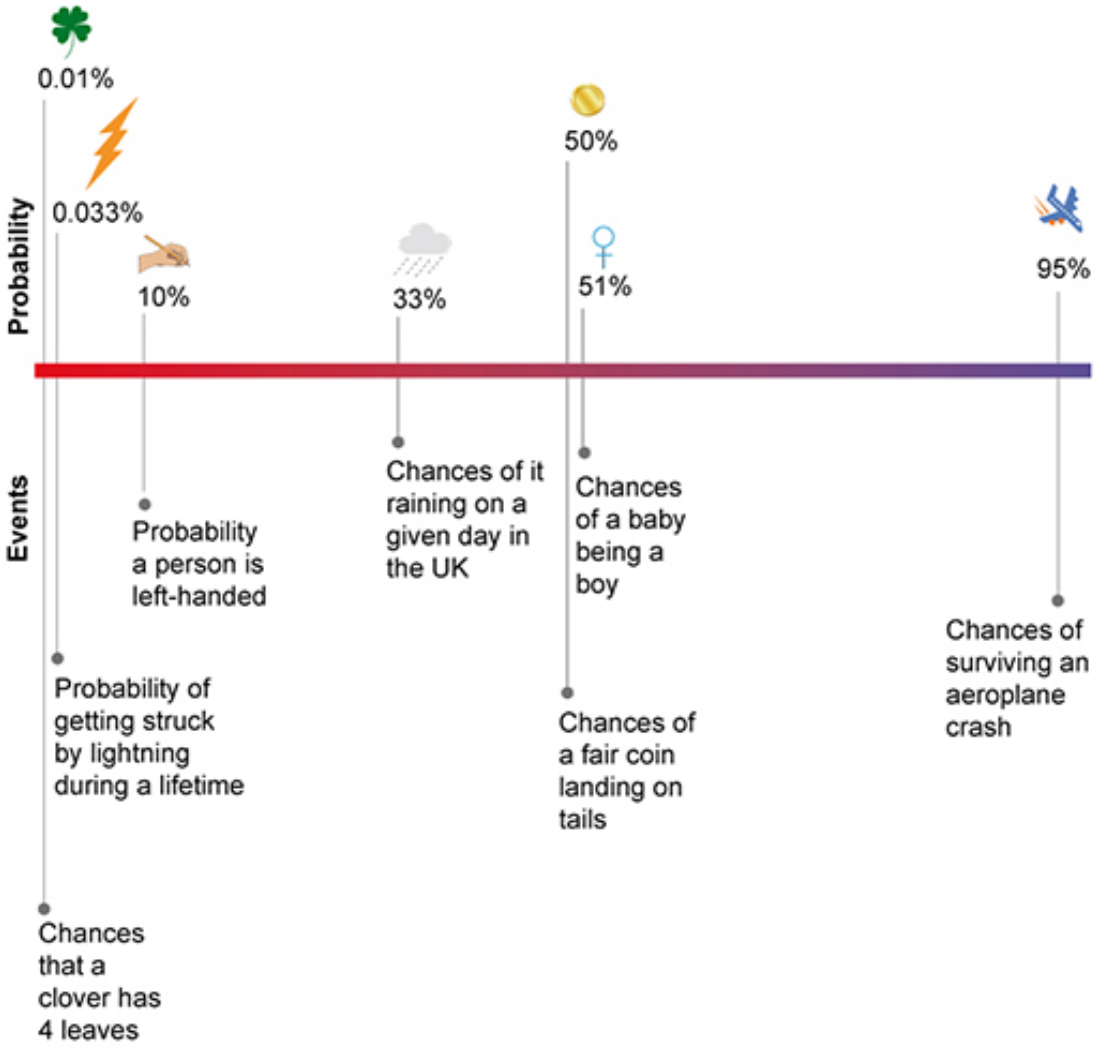

Figure 4 Scale of probabilities

In the next section, you will see how legal fact-finding is similar to everyday fact-finding.

2.2 Legal fact-finding

Fact-finding in a legal case is just like common-sense fact-finding in everyday life. The fact-finder has to use the evidence that is available at the trial to infer what they think happened in the past. For example, the court might use skid marks on the road to infer how fast a vehicle was travelling before it was involved in an accident, or medical evidence to infer how likely it was that the claimant's disease was caused by exposure to toxic particles in the workplace, or chemical analysis to infer how likely it was that a particular company polluted a river.

Figure 5 (a) skid marks; (b) medical evidence; (c) chemical analysis

However, when making findings of fact, the fact-finder also has to follow legal rules contained in common-law cases and parliamentary statutes. For example, in the previous

section on everyday fact-finding, we noted how fact-finding is never certain, only probable, and a fact may be found with varying degrees of probability ranging from 0% (impossible) to 100% (dead certain). In everyday life, it is up to us what degree of likelihood we want to rely upon in making decisions, but in law there are legal rules that impose very strict requirements on what degree of probability is acceptable.

The standard of proof

The law generally treats fact-finding as a simple yes or no question, so we have to translate the grey scale of probabilities into a straight black-and-white answer. This is called the 'standard of proof' and in civil law context this standard is 'on the balance of probabilities'. The balance of probabilities means more likely than not. Therefore anything with a probability of 50% or less is taken not to have happened, and anything with a probability of 51% or more is taken to have happened. In criminal cases the standard is much higher, 'satisfied so that you feel sure' or the famous 'beyond reasonable doubt'. However, there is disagreement about what exact percentage this equates to.

The burden of proof

The standard of proof still does not tell us which way round to apply it (does the claimant need to show that something is 51% likely, or does the defendant need to show it is 51% likely?), so we also need the 'burden of proof'. In civil law, the law is that the burden of proof is on the side alleging that a particular fact is true. So a claimant who says that a defendant polluted a river will need to show that it was at least 51% likely that the defendant did so. And if the defendant says that the pollution was instead caused by a factory further up the river, the defendant will need to show this with 51% probability. In criminal cases the burden is generally on the prosecution.

There are other legal rules that must be followed when fact-finding. Sometimes these rules have a drastic effect on the fact-finding process. For example, 'public interest immunity' is a process recognised by common law rules where the government can apply to a court to exclude evidence that would otherwise be used because the government believes it would harm the public interest. The evidence might put an informer's life at risk if disclosed, or it might harm national security. Just before World War II, an experimental submarine sank while being tested, killing 99 sailors. When a claim was brought against the shipbuilders, the House of Lords upheld a certificate from the government that it would damage national security if the designs for the submarine were disclosed. This meant that the plans could not be used as evidence (*Duncan v Cammell Laird and Co Ltd* [1]). Public interest immunity is controversial because it can affect the fairness of the trial. Nonetheless, the tribunal of fact is obliged to follow these laws because if it does not, its decision will be overturned on appeal.

2.3 Material facts

Not all facts are important for legal reasoning. The facts that are important are called 'material facts' (material just means relevant) and are facts that make a difference to the decision or outcome. For example, in a negligence claim arising out of a road traffic accident, it would be a material fact whether or not one of the drivers was using their mobile telephone immediately prior to the accident. If he was using his telephone then the judge may decide that he was negligent, whereas if he was not using his telephone then the judge may not decide he was negligent.

[1] *Duncan v Cammell Laird and Co Ltd* [1942] AC 624.

Then there are other facts that are just background and would make no difference to the outcome. For example, the colour of the driver's shirt would be unlikely to be a material fact.

Factual issues v legal issues

When a case comes to court, the parties may agree on some facts, but disagree on others. The disputed facts are called issues of fact whereas the undisputed facts are called agreed facts. The court has to determine the issues of fact. This course focuses mainly on issues of fact.

This course will start by assuming that the law is certain and agreed on by the parties. However, there are times when the parties disagree what the law is. A disagreement about the law is called an issue of law. You will look at issues of law in more detail later in the course.

Activity 1 Legal fact-finding

Allow about 20 minutes

Now it's your turn. The following questions are designed to put you in the shoes of a tribunal of fact in the civil context. At this stage, do not worry about other rules of evidence, other than the legal rules that:

- the burden of proof lies on the side arguing that a particular fact is true
- the standard of proof is 'on the balance of probabilities', which is 51% or higher.

Once you have made your findings of fact and indicated your confidence, you will be able to see what other people's views are.

1. Employment discrimination

You are sitting as a judge in the Cardiff Employment Tribunal. The claim is one for race discrimination, which is a statutory tort. The summary of the evidence that you have heard is that the claimant, Allegra Conti, says that her manager, Fiona Boyle, used racist language when raising a disciplinary issue. Fiona Boyle admits using a raised voice, but denies using discriminatory language. There is one other witness, Erika Edwards, another employee who was present at the time, who says that Fiona Boyle did use racial language. However, the words that Erika Edwards says Fiona Boyle used are different to the words the Allegra Conti says were used.

Interactive content is not available in this format.

2. False imprisonment

You are sitting as a member of a civil jury in a complaint for the tort of false imprisonment. The claimant, Tammy Smith, says she was falsely imprisoned for an

hour by British Transport Police when she arrived at Newcastle railway station to attend a job interview. Tammy Smith says that she lost her ticket, and two police officers told her very clearly that she could not leave the station master's office until they had investigated. One of the officers stood in front of the only door, preventing Tammy Smith from leaving. The experience was humiliating and led to Tammy Smith missing her interview. Both officers deny in evidence that Tammy Smith was detained because they say that Tammy Smith could have left the office at any point.

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3. Sale of goods

You are sitting as a judge in the County Court considering a case on the small claims track.

The claimant, Dev Patel, bought an expensive racing bicycle at a car-boot sale from Cameron Brown and is now bringing a claim for breach of contract. Dev Patel says in evidence that Cameron Brown assured him that the bicycle was 'in perfect working order', but after he took it home it transpired many of the components were in such a bad condition that replacing them all made the bicycle effectively worthless. Dev Patel says that when he returned to Cameron Brown to ask for a refund, Cameron Brown refused, saying 'What do you think this is, John Lewis?'. In evidence Cameron Brown says that when Dev Patel asked about the condition, he had in fact said that the bike was 'sold as seen'.

In relation to the assertion by Dev Patel that Cameron Brown said that the bicycle was in perfect working order, what is your finding of fact?

Interactive content is not available in this format.

In this section you learnt about the first stage of adjudication, fact-finding. In the next section, you will find out about the second stage, decision-making.

3 Decision making

Decision making

Watch the video below for an introduction to the role of decision making in law.

Video content is not available in this format.
Video 2 Decision making

Now that you have been introduced to legal decision making, the next activity gives you an opportunity to try putting your understanding into practice.

Activity 2 Legal decision-making

Allow about 25 minutes

The following questions are designed to put you in the shoes of a legal decision maker. Again, you do not need to do any research, just try to make the decision you think is right on the basis of the facts that are given and the explanation of the law provided. The law may have been simplified for these exercises. This time, you do not have to make any factual findings, so assume that the facts have already been found or have been agreed by the parties.

Once you have made your decision, you will be able to see what other people's views are.

1. Trespass to land

You are sitting as a judge in the Exeter County Court. Massbuild Housing Development Plc ('Massbuild') is suing Elaine Woodford for the tort of trespass to land. Massbuild bought a large area of land from the Ministry of Defence to build houses. For a number of years, the area was unfenced and Elaine Woodford accepts that for a couple of years she used to walk across the land as it was the shortest route for her to get to the shops and local facilities even though there were signs saying private. Nonetheless, she says that she did not cause any harm. The common law rule is that a claimant can win a claim for trespass to land even if the defendant caused no loss to the claimant.

Interactive content is not available in this format.

2. Treasure

You are sitting as a coroner in the Truro Coroner's Court. Emmanuel James is a farmer whose family have rented land from the Duchy of Cornwall for generations. The James family have suffered a series of unexpected misfortunes and have very little money. While ploughing, Emmanuel James strikes a hard object, which turns out to be a valuable hoard of hundreds of silver Roman coins. The statute (the Treasure Act 1996[2]) says that treasure includes coins which are at least 300 years old that are at least 10% precious metal and that treasure found within land that is part of the Duchy of Cornwall belongs to the Duke of Cornwall (who is currently Prince William).

Interactive content is not available in this format.

3. Artificial insemination

This question introduces an issue of law for the first time. Up until this point, the law you have applied has been certain. However, here the facts are certain, but the law that applies is uncertain. You therefore need to make a finding of law by deciding what the law is before you can apply it.

You are sitting as a civil judge in the Court of Session in Edinburgh. Andrew Wallace would like a divorce from his wife, Sandra Wallace. Mr and Mrs Wallace have been separated for 14 months and Mrs Wallace is pregnant. Assume that the law says that a person is only entitled to a divorce if they have committed adultery. Sandra Wallace admits that Andrew Wallace is not the father, but says that she became pregnant as a result of artificial insemination, not through intercourse. You need to decide the issue of law of whether artificial insemination amounts to adultery.

[2] Treasure Act 1996 c.24.

Interactive content is not available in this format.

Now you have studied both fact-finding and decision-making. In the next section, you will study the third important stage of adjudication, giving reasons.

4 Reasons

Box 4 Reasons

Watch the following video for a discussion of the role of reasoning in the law.

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Video 3 Reasons

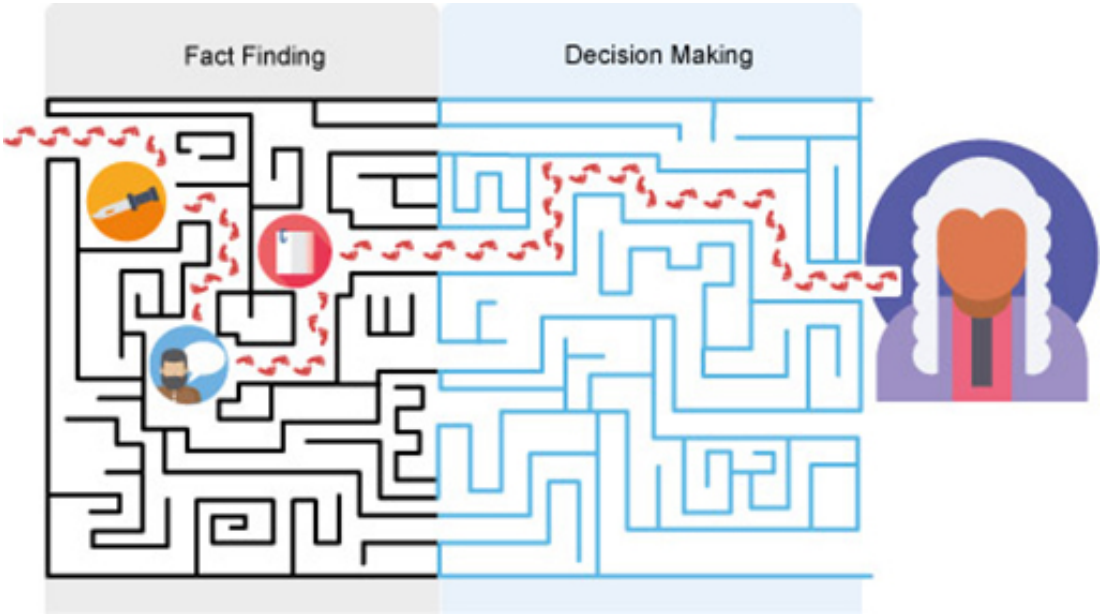

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Figure 6 The route through evidence and facts to decisions

In the following activity you will have an opportunity to try and give reasons for your finding of fact, your finding of law, and your decision-making. In the case you have to decide, both the facts and the law are uncertain. Do not worry if you find this challenging, it can be very difficult. Even experienced, professional judges sometimes struggle to explain the reasons for their thinking. It can happen that two judges reach the same conclusions, but for very different reasons.

Activity 3 Giving reasons

Allow about 15 minutes

1. Read the following scenario and complete the question that follows.

Sara Hopmeier has a number of disabilities and uses a motorised wheelchair. Where she lives is relatively isolated, and the shortest route to town is via a recognised public footpath. The landowner Tobia Broad previously installed a stepped stile that was impossible to navigate with a wheelchair. Sara Hopmeier complained and Tobia Broad replaced the stile with a gate. Nonetheless, Sara Hopmeier is still dissatisfied and is bringing a claim for disability discrimination under the Equality Act 2010[3] before you in the Norwich County Court.

The law states that if a physical feature puts a disabled person under a 'substantial disadvantage', a landowner only has to make reasonable adjustments to it if they are a 'service provider'.

There is one issue of fact and one issue of law. Everything else is agreed.

The factual issue is whether the gate amounts to a 'substantial disadvantage' to Sara Hopmeier. Sara Hopmeier says that she still finds the gate extremely difficult to operate without assistance, and it leaves her so exhausted that she has to call for help. Tobia Broad denies this and says that he has watched Sara Hopmeier navigate the gate without help on many occasions.

The legal issue is whether Tobia Broad is under a legal duty to make 'reasonable adjustments' to the gate. Even if a physical feature puts a disabled person under a substantial disadvantage, a landowner only has to make reasonable adjustments to it if they are a 'service provider'. The legal issue is therefore whether the owner of land where a footpath runs is a service provider. Sara Hopmeier argues that Tobia Broad is a service provider, but Tobia Broad denies this.

Interactive content is not available in this format.

[3] Equality Act 2010 c.15.

2. In the textbox below, write a post which explains the reasons for your findings and decisions.

Provide your answer...

Discussion

As previously noted, there was no obvious right answer for the factual and legal issue. The focus was more on providing reasons that explain why you decided the issues the way that you did. You may also have struggled to articulate the reasons for your decisions. This is normal, particularly in an unfamiliar area. Judges sometimes struggle with this too! But through having a go at this process, you should have developed your understanding of the obligation to give reasons for decisions.

In the next section, you will look a bit more closely at the reasons that a judge will give for their decision.

5 Bias in judicial decision-making

Up until this point, this course has been primarily practical, focusing on the nitty-gritty of doctrinal law, how judges make decisions, and how understanding these provides tools to answer practical problem questions that are commonly asked of law students to help them develop their legal skills and knowledge. But now you have a working understanding, we are now in a position to look at a deeper socio-legal issues of bias in legal reasoning.

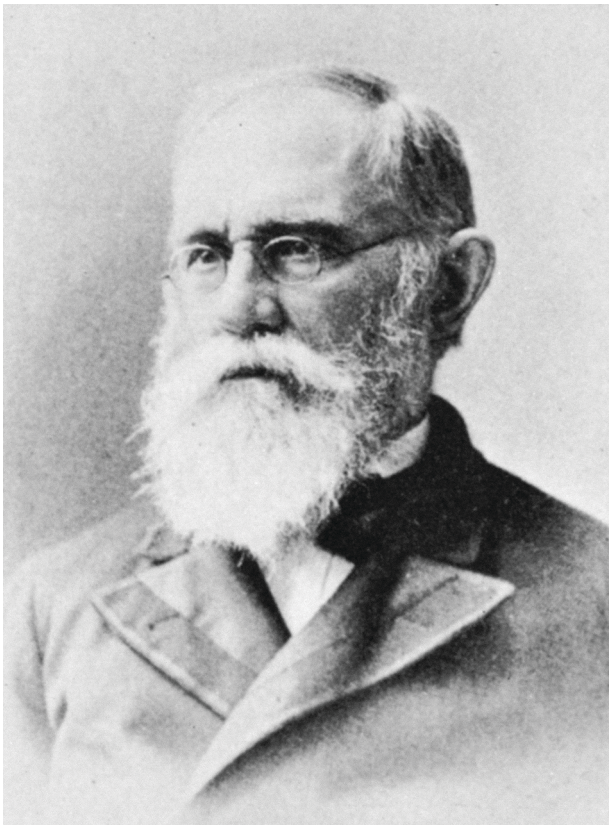

Figure 7 Christopher Columbus Langdell

At one extreme, some doctrinal lawyers (lawyers who study the rules and principles) believe that the cases and statutes that form part of the black-letter law always provide the answer, and that judges have very little discretion as to how they decide a case. This view is sometimes called ‘formalism’ and is associated with academic lawyers such as Christopher Columbus Langdell, dean of the Harvard Law School in the late 19th century. If the law does not leave a judge any discretion, then it seems there is no scope for bias to creep in. The law is the law and it does not matter who the judges are (Holland and Webb, 2019, p. 129). Formalism is sometimes called ‘the official theory of judicial behaviour’ because it gives the impression that adjudication is not political (Posner, 2008, p. 41). This can be attractive to a judge who wants to avoid controversy.

But in the 20th century, a group of American lawyers, many of whom were also practising lawyers began to question the neutrality of law. At the other extreme, Felix Cohen called doctrinal law ‘transcendental nonsense’ because he thought it was ‘entirely useless’ for predicting how a judge would behave (Cohen, 1935). They were called legal realists, because they sought a more realistic picture of law. If judges do have freedom to decide cases, it may be important who the judges are.

5.1 Empirical evidence

Arguments have raged between formalists and realists about how much freedom judges have, but empirical evidence suggests that the realists were at least partially right. Psychologists have recognised a phenomenon called ‘motivated reasoning’ which is where decision makers are influenced to choose the outcome they prefer (Kunda, 1990). For example, Balcetis and Dunning (2006) asked participants to decide whether an ambiguous character (I3) was a number 13 or a letter B. Depending on which they chose, their task was to drink some orange juice, or a ‘vile’ health drink. Perhaps unsurprisingly, participants preferred whichever interpretation let them avoid the vile drink. The table below shows the outcome of this study.

Balcetis and Dunning results

Condition	Number reporting they saw a B	Number reporting they saw a 13	No answer
B = orange juice 13 = vile health drink	18	0	7
B = vile health drink 13 = orange juice	9	23	6

Experiments in a legal context have found that lawyers are also influenced by their outlook. For example, Redding and Reppucci (1999) found that US judges and law students’ decisions on whether to admit empirical research about the death penalty as evidence in a trial were influenced by whether or not they supported or objected to the death penalty. At the appellate level, there is also considerable evidence that appellate judges’ decisions are influenced by their attitudes.

While we know that motivated reasoning happens in a legal context, researchers do not have a clear picture of when it occurs. One aspect that seems to make a difference is whether the bias can be hidden (Kunda, 1990). Note that in the exercises earlier in this unit, some of the fact-finding and decision making were ‘easy’ where almost all judges would have come to the same conclusion. If a judge had come to a different conclusion, it might have looked a bit suspicious. Other cases were ‘hard’ where reasonable judges might have decided either way. These are the cases where the effect of bias is more difficult to spot. Overall, the potential for bias provides an argument in favour of a judiciary that reflects the community.

5.2 Feminist Legal Judgments Project

In England and Wales, in common with most other jurisdictions, the overwhelming majority of judges have historically been, and continue to be male (Ministry of Justice, 2020). To highlight the effect this has had on the law, scholars have rewritten many key common law judgments from a feminist perspective (e.g. Hunter, McGlynn and Rackley (2010)). These scholars seek to demonstrate that judges that believe in equality between women and men would have decided the cases differently, and would have given different reasons for their decisions.

In the following activity, you will have an opportunity to reflect on what you think about these issues.

Activity 4 Judicial bias

Allow about 30 minutes

1. Watch the following video of an interview with Professor Rosemary Hunter.

Video content is not available in this format.
Video 4 Interview with Professor Rosemary Hunter of the Feminist Legal Judgments Project

2. Read the following questions and summarise your response in the text box below. Explain your thinking as clearly as you can, and, if possible, draw on examples and experiences from your own knowledge.

- To what extent do you think bias is a problem in legal reasoning?
- What, if anything, do you think could be done about it?

Provide your answer...

6 Precedent and interpretation

From this point of the course, you are going to further explore what happens when the law is uncertain. Where the law is uncertain, it often will need to be researched, and correspondingly, people are more likely to need the help of a lawyer.

Introduction

Watch the following video, which is an introduction to the next part of this course.

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Video 5 Introduction

7 *Sliding Doors* and *stare decisis*

This section uses a famous movie to introduce the challenge posed to the law if different judges made different decisions about similar cases.

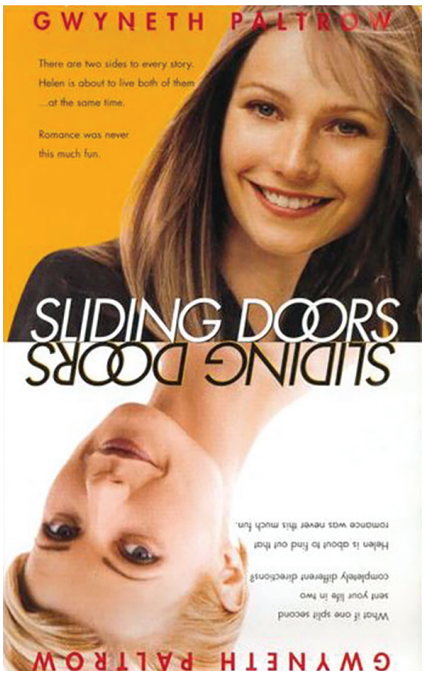

Figure 8 *Sliding Doors*

Sliding Doors

Watch this short trailer for the film *Sliding Doors* (open the video in a new tab or window by holding down Ctrl [or Cmd on a Mac] when you click on the link).

The film *Sliding Doors* follows two histories of a character played by Gwyneth Paltrow. One follows what happens to her if she catches her train, and the other if she misses it. As you can imagine, this small twist of fate leads to two totally different outcomes. Earlier in the course, particularly in Sections 3 and 4, you saw that some cases are 'difficult' or 'hard' so that one judge might decide one way and other judge might decide the other way. Imagine if Gwyneth Paltrow was a judge and her missing the train meant the case was assigned to another judge who would have made a different decision to her. If cases were decided differently depending on which judge happened to be assigned to a case, this could seem unfair. The losing party might well ask why they could not have a judge that would have decided the case in their favour.

You have also seen that in hard cases it is difficult to know what the right decision is. The first judge to decide a legal problem might suggest a rule that afterwards turns out to cause more problems than it solves. A second judge faced with a similar case might be tempted to apply a different rule. But this would cause uncertainty because nobody would know whether a judge is going to follow a previous judge or decide a different way.

The common law legal system therefore needs a method of balancing flexibility and certainty, and this method is known by its Latin name of *stare decisis*. *Stare decisis* just

means ‘letting the decision stand’. The earlier case becomes called a ‘precedent’ because later courts are expected to follow it. In general, decisions in cases are allowed to stand, even if they might not be perfect. This provides certainty for the public and the parties. At the same time, higher courts can overturn decisions by lower courts, which provides some flexibility.

7.1 The Incorporated Council of Law Reporting

Stare decisis became particularly important after 1865 when the Incorporated Council of Law Reporting (ICLR) was established. Law reporting is the publishing of judicial decisions so that the public can know the law and how cases have been decided. Before 1865, law reporting was a bit haphazard. Without a reliable law report, it was more difficult to be sure what previous courts had decided. A court that did not want to follow a particular precedent could cast doubt on whether the law report was accurate. For example, Lord Lyndhurst was reported to have said of the unfortunate law reporter Mr Barnardiston who wrote reports published between 1726 and 1735: ‘I fear that is a book of no great authority; I recollect, in my younger days, it was said of Barnardiston, that he was accustomed to slumber over his note-book, and the wags in the rear took the opportunity of scribbling nonsense in it’ (William, 1882, p. 424).

The establishment of the ICLR effectively put an end to judges querying law reports. After that time, the draft ICLR reports would be returned to the judges to check that the report was accurate. It would also include the arguments of the parties so that the context of the dispute was clear.

8 Precedent for prediction and persuasion

Practising lawyers use the rules in cases for persuading a court in addition to predicting how a court would decide. If the lawyer can find a previous case where the judge applied a rule similar to the case before the court and where the litigant in their position previously won, the requirement to follow *stare decisis* can force the judge to find in their favour, even if the judge would not want them to win otherwise. This makes finding supportive cases an important skill for a lawyer.

How influential a rule in a case is as a precedent depends on a number of factors. These include:

- whether the judge's rule is central to the determination of the case, or more of a speculative comment
- whether the court is a senior or junior court
- how similar a precedent case is to later cases where the parties seek to apply it.

Some of these factors will be considered in the following sections.

8.1 *Ratio decidendi* and *obiter dicta*

The first factor that influences how persuasive a rule is whether the rule was key to the outcome, or whether it was just a speculative comment by the judge. If the rule was key, then it can be binding on later courts, whereas speculative comments are only persuasive and do not need to be followed. It is therefore necessary to distinguish between them. The two types of rules also tend to be called by their Latin names.

Figure 9 *Ratio decidendi* and *obiter dicta*

The binding type of rule is one that actually decides the case. This is known in Latin as the '*ratio decidendi*', or reason for the decision. Sometimes it is shortened just to '*ratio*'. All cases must have a *ratio* because it is the rule that the judge applies to decide the case and also the judge must explain this in their reasons. For example, in the circumstances of the case of *MacLennan v MacLennan*,[4] if the judge had decided that the partner who became pregnant by artificial insemination had not committed adultery, then the *ratio* might be something like: 'a married woman who becomes pregnant through self-

[4] *MacLennan v MacLennan* [1958] SC 105.

impregnation does not commit adultery'. The *ratio* is obviously the most important part of a case.

There is no easy way to identify what part of a case is the *ratio* (Holland and Webb, 2019). Court reporters such as those who work for the ICLR will try and identify the *ratio* in the summary of the case, but the reporters do not always get the *ratio* right. Judges themselves rarely try to highlight the *ratio* in their own decisions, but they may use the phrase when discussing what part of a previous case might be the *ratio*. As a result, spotting the *ratio* is a skill that comes with practice and familiarity with case reports.

The second type of rule is the one that is not binding. Judges sometimes like to offer comments about hypothetical and related circumstances that they do not have to decide. They do this to explain their thinking and check that the rules that they are applying make sense. This is also known by its Latin name of '*obiter dictum*' meaning an incidental comment. Sometimes this is also shortened to just '*obiter*'. Rules that are *obiter* are not binding on later judges, but they may be persuasive. For example, in the case of *MacLennan v MacLennan*, when giving reasons, the judge might have said something like: 'Of course, and hypothetically speaking, it might be the case that a married man might offer his sperm to somebody other than his wife for reproductive purposes and without having intercourse. While these are not the facts before the court today, my view is that those circumstances would not amount to adultery either'. If there was a later case that happened to fit those facts, then the earlier judge's comments would not be binding, but they would be influential. Exactly how influential depends on how senior the court is. *Obiter* from a judge in the Supreme Court carries a lot more weight than *obiter* from an adjudicator in the Traffic Penalty Tribunal.

Activity 5 *Ratio* or *obiter*?

Allow about 30 minutes

Consider the following legal issue:

> The issue in the case of *Gillick v West Norfolk and Wisbech AHA* [5] was set out by Lord Fraser as follows: 'My Lords, the main question in this appeal is whether a doctor can lawfully prescribe contraception for a girl under 16 years of age, without the consent of her parents' (p.162).

Below are some extracts from the speeches (speeches are what the judgments used to be called in the House of Lords) of the House of Lords. For each extract, try to distinguish between what is *ratio decidendi* and what is *obiter dictum*. To do this, you need to decide whether they are directly deciding the legal issue (in which case it is *ratio*), or whether they are speculating on a slightly different issue (in which case it is *obiter*). This is a difficult task, so do not worry if you do not get it right first time.

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[5] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112.

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The second factor that determines how influential a rule in a case is, is how senior the court is. Or to put it in comedy terms of the '*Class sketch*' (see Figure 10 overpage), if a court looks down on other courts, it is more influential than a court that looks up to other courts.

8.2 The judicial hierarchy

Figure 10 The '*Class sketch*' featuring Ronnie Corbett as working class, Ronnie Barker as middle class, and John Cleese as upper class. In the sketch, Ronnie Barker looks up to John Cleese but looks down on Ronnie Corbett. If Ronnie Barker was the Court of Appeal, he would look up to the Supreme Court, but down to the High Court. (Image reversed for pedagogical reasons.)

The second factor that influences whether *ratio decidendi* is binding on the court depends on where the earlier court is in the judicial hierarchy compared to the later court.

In general:

- Appeal courts are more senior than first-instance courts.
- Second level appeal courts (like the Supreme Court) are more senior than first level appeal courts (like the Court of Appeal).
- Higher level first-instance courts (like the High Court) are more senior than lower level first-instance courts (like the County Court).

This is illustrated in the civil context in Figure 11.

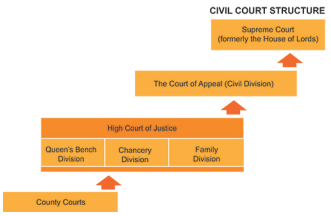

Figure 11 The court hierarchy showing which courts are more senior than other courts for deciding how influential a precedent is

Therefore, if the precedent is from a more senior court than the court hearing the new case, then the precedent tends to be binding. But if the precedent is from a more junior court than the court hearing the later case, then the earlier precedent tends not to be binding (but it may be persuasive). This allows the more senior court to make changes to the law.

Figure 12 The Supreme Court

Back in the day, the House of Lords (the predecessor to the Supreme Court) treated itself as bound by its previous decisions (see: *London Tramways Co Ltd v London County Council*[6]). This caused a problem because if the House of Lords made a mistake, the only way of overturning its mistake was to wait for Parliament to bring in a statute to overrule it. The House of Lords realised that there was a problem, and in 1966 issued a practice statement giving notice that in the future it would not bound by its previous decisions (see: *Practice Statement (Judicial Precedent)* [1966][7]). After 1966, the House of Lords began to overturn some of their previous decisions. For example, recall the case of *Duncan v Cammel Llaird*,[8] discussed earlier in the course, where the House of Lords had ruled that a public interest immunity ('PII') certificate from the government that disclosing evidence would risk national security was the end of the matter. This principle was not followed in *Conway v Rimmer* [9] where the House of Lords ruled that it **could** scrutinise whether such a PII certificate was in fact justified. The Supreme Court now follows the same approach and can overrule its previous decisions.

6 *London Tramways Co Ltd v London County Council* [1898] AC 375.

7 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

8 *Duncan v Cammel Llaird* [1942] AC 624.

9 *Conway v Rimmer* [1968] AC 910.

Activity 6 Which precedent is binding?

Allow about 15 minutes

For this activity, assume that there are always two earlier precedents that apply to the issue before the court in the present case but that these conflict with each other. Each time you click the button, the activity will randomly choose different courts. Your task is to decide which of the two earlier precedents is binding on the present court.

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The third factor that determines whether a precedent is binding is whether the material facts are sufficiently similar (or analogous).

8.3 Analogy in law

Whether rules in cases are binding also depends on whether the facts of the cases are similar enough, or analogous, to each other. There are three different possibilities:

- On the one hand, if the material facts in the two cases are identical, then the earlier case is binding and the later court must follow it.
- On the other hand, if the material facts are completely different, then the earlier case is not binding. Here, the later court can ignore it and either follow another precedent, or establish a new principle.
- Between these two extremes there are many different gradations. Given the rich tapestry of life that comes before the law courts, many cases fall somewhere in the middle. This obliges the lawyers and the judges to grapple with the question of whether the cases are sufficiently similar. If a court decides that the facts in an earlier case are similar, but not similar enough, then this is called distinguishing.

Quite how people, or judges and lawyers, assess whether two things are similar or different is frankly something of a mystery. In general, we might assume that one type of apple is more similar to another type of apple than an orange. But as soon as we look at a specific case, this assumption becomes unreliable. For example, if somebody ordered sweet juicy Cox's apples from an online supermarket, and the supermarket replaced the Cox apples with some very sour Bramley cooking apples, the customer might have preferred that they had been given oranges. The same happens in law. The aspects of cases that influence whether lawyers treat cases as the same are not well understood (Holland and Webb, 2019, pp.146–47). As a result, deciding whether a case is similar enough to be treated as a precedent is something that comes with practice and experience, and even then, trained lawyers may disagree.

Figure 13 You might think an apple is more similar to another apple than an orange. But would you rather eat a sour apple or an orange?

9 Certainty and uncertainty

The importance of certainty and uncertainty for lawyers

Watch the following video, which introduces some aspects of certainty and uncertainty, both important concepts for a lawyer.

Video content is not available in this format.
Video 6 Certainty and uncertainty

After watching the video introducing the idea of uncertainty and how courts grapple with it, you will have a chance to grapple with a challenging case yourself in the next activity.

Activity 7 Is it a crisp?

Allow about 30 minutes

In this activity, you get to decide a similarly uncertain rule as in the Jaffa Cake case discussed in the previous video. This is whether Pringles should be treated like crisps or not. Generally VAT does not have to be paid on food, but crisps are an exception. When the issue first arose, schedule 8 of the the VAT Act 1994[10] said that the following would incur VAT:

> Any of the following when packaged for human consumption without further preparation, namely, potato crisps, potato sticks, potato puffs and similar products made from the potato, or from potato flour, or from potato starch, and

[10] VAT Act 1994 c.24.

savoury products obtained by the swelling of cereals or cereal products; and salted or roasted nuts other than nuts in shell.

The decision made a difference of around £20m in taxes per year!

Figure 14 A tube of Pringles, a savoury snack. But is it a crisp or not?

You may be relatively familiar with the snack known as Pringles, but if you are not, the facts as found by the VAT tribunal were that Pringles:

- Were made from potato flour, corn flour, wheat starch and rice flour together with fat and emulsifier, salt and seasoning.
- Were manufactured by mixing the dry ingredients into dough with water and emulsifier, cutting shapes out of a dough sheet, frying it for a few seconds, adding oil and salt, cooling and then adding flavours.
- The manufacturing process caused oil to go into the spaces throughout the texture of the product replacing the water content removed during the frying. This gave the ‘mouth-melt’ feel when eaten. For potato crisps most of the fat stays on the surface.
- Had a regular shape in the form of a saddle, which aids stacking them enabling high production speeds. They were a uniform pale-yellow colour, which is paler than a potato crisp. They had a crisp texture.

- Had an amount of potato flour of around 40%.

In the text box below, write a passage imagining you are a judge applying the provision of the VAT Act 1994 above to these facts. When you have done this, vote in the poll below. Once you make your choice you will be able to see what others thought.

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Provide your answer...

Comment

This was the issue for the Court of Appeal in the case of *Proctor & Gamble v HM Revenue & Customs*.[11] The judges in the various courts struggled with the question! The VAT Tribunal judge (see *Proctor & Gamble UK*[12]) first ruled that they **were** crisps, but at the first appeal to the High Court, the judge thought that they were **not** crisps (see *Proctor & Gamble UK* [13]). Eventually the case was appealed further to the Court of Appeal which then decided that Pringles **were** crisps.

[11] *Proctor & Gamble v HM Revenue & Customs* [2009] EWCA Civ 407, [2009] BVC 461.

[12] *Proctor & Gamble UK* [2004] BVC 4,038.

[13] *Proctor & Gamble UK* [2007] BVC 4,107.

10 Do judges make law?

Now that you are familiar with the mechanics and practical side of doctrinal law, we can turn to look at an old philosophical question about this law. We have seen in this course that some cases are ‘hard’, meaning that there is not always a clear rule for a judge to follow. When this happens, judges seem to have a choice about which rule to make, and they often could choose between making a number of different new rules. We have also seen that historically, much of the common law was created by judges. Whether judges make law is important because it raises fundamental questions about fairness.

An important common law and human rights standard is that of the so-called ‘rule of law’. The rule of law requires (amongst other things) that the rules that apply to people’s behaviour are clear in advance. If judges make up legal rules only after you have already done something, this seems unfair because you could not have complied with a rule before it existed. A losing party in a court case might justifiably be upset at losing if the rule they should have followed is set out only after the dispute arose.

There is also another concern about judges making law: judges, unlike elected politicians, are not democratically accountable. If they are not accountable to the community, it seems wrong for them to be making the law. This is aggravated if you also recall that the individuals who become judges in England and Wales are not yet representative of the wider community.

In the past, the answer to such worries was said to be the ‘declaratory theory of law’. It was argued that judges did not actually make the law, they only declared what everybody knew the law was. For example, Sir William Blackstone wrote in 1766:

> it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgement, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.
>
> (Blackstone, 1766, p. 69)

For a long time, the declaratory theory of law was widely accepted, but it was famously attacked by one of the most famous British legal philosophers, Jeremy Bentham. For example, in a colourful short pamphlet, he attacked the entire common law as ‘b*start law’ that was made ‘just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it’ (Bentham, 1823, pp.11–12).

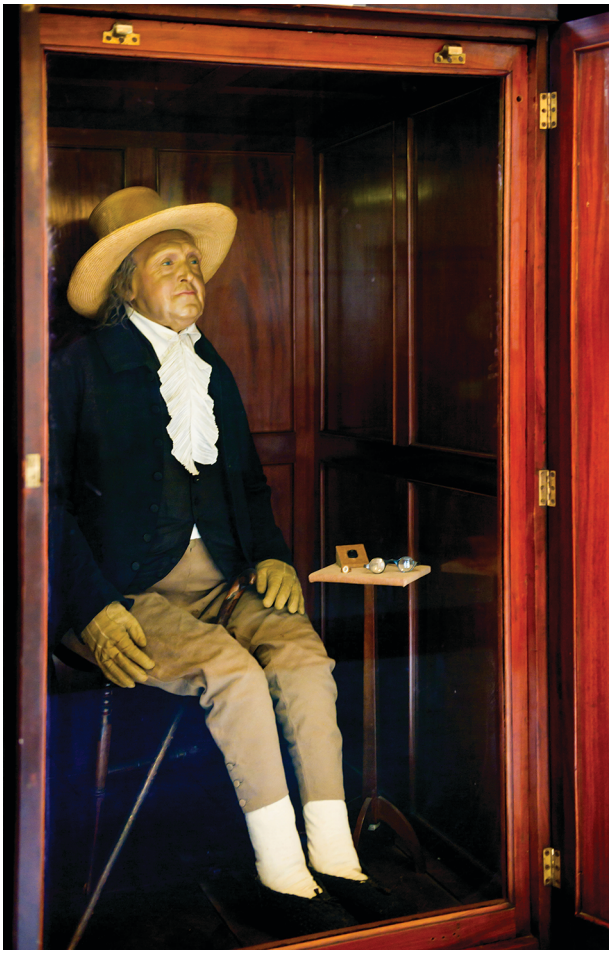

Figure 15 A photo of Jeremy Bentham's autoicon in its cabinet at UCL. When Jeremy Bentham died, he asked that his body be preserved. This was done, and the body was subsequently presented to University College London. The body is now displayed and can be visited; the head has been replaced with a wax copy because the actual head is too disturbing for general viewing.

10.1 Judges as legislators

If you think back to some of the exercises and cases considered over this course and the previous one, some of the situations seemed quite tricky. It was not always obvious what the legal rule should have been. Some other recent cases also challenge the idea that judges are merely declaring what the law should be. For example, in *R (Smeaton) v SS Health*,[14] Munby J had to decide whether prescribing the 'morning after' pill amounted to the offence of supplying poison to procure a miscarriage, contrary to the Offences Against the Person Act 1861.[15] Obviously anxious to avoid being seen to be making law, he wrote [47]:

> The issue which I have to decide is not whether the sale and use of the morning-after pill is morally or religiously right or wrong, nor whether it is socially desirable or undesirable. What I have to determine is whether it may constitute an offence under the 1861 Act.

[14] *R (Smeaton) v SS Health* [2002] EWHC 610.

[15] Offences Against the Person Act 1861 c.100.

The commentator David Kelly (2020, p. 515) is scathing about these words, writing: 'With the greatest of respect to Munby J, what he seeks to avoid is exactly what he is forced to do in making his 'legal' decision.' (Munby J eventually ruled it was not a crime.)

In the present day, the pendulum has swung back the other way, such that many now accept that judges make law. For example, Lord Reid writes:

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.
>
> (Reid, 1972–73, p. 22)

If judges make law, then common law is at least partially retrospective, and therefore unfair. Bentham's solution was to do away with the common law and attempt to codify the law in its entirety. It is fair to say that parliament legislates more than it did when most people believed in the declaratory theory of law. At the same time, present day judges are less interventionist. Where there seems to be a problem with the law, they are not always happy to set out a solution. Instead they sometimes refuse to act, saying it is a matter for parliament. For example, in *R (Nicklinson) v Ministry of Justice* [16] the appellants suffered from debilitating conditions and wanted to commit suicide, but were unable to do so without help. While it is not a crime to commit suicide, it is a crime to assist. The appellants sought declarations of incompatibility under the Human Rights Act 1998. The majority of the court thought that they had the power to give a declaration of incompatibility, but refused to do so, saying that the issue was one for parliament, not the courts.

Activity 8 Do judges make law?

Allow about 30 minutes

1. Submit your response to the following question:

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2. In the box below, type your response to the following question, explaining why you think the way that you do.

Provide your answer...

[16] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

11 Consolidation quiz – Part 1

Now you've reached the end of this course, attempt the following questions in Part 1 of the quiz to help consolidate your knowledge. If you're unsure of any of the answers, revisit the relevant sections .

Activity 9 Quiz questions

Allow about 10 minutes

1. What process would a judge do first, fact-finding or decision-making?
- ☐ Fact-finding
- ☐ Decision-making

2. What is an inference?
- ☐ A process of drawing conclusions from combining information we receive with information we already know
- ☐ A type of evidence
- ☐ A type of fact

3. Who bears the burden of proof in civil proceedings?
- ☐ The party who asserts a fact as being true
- ☐ Always the defendant

4. What is the standard of proof in civil proceedings?
- ☐ On the balance of probabilities
- ☐ More likely than not
- ☐ 51% or more
- ☐ Beyond reasonable doubt

5. How does the law influence legal decision-making?
- ☐ Laws limit the decisions that a judge can make
- ☐ Law does not influence decision-making

6. Why are reasons important in legal judgments?
- ☐ They allow a party to understand why they won or lost.
- ☐ They provide guidance for how courts will decide similar cases in the future
- ☐ Reasons are not important in legal reasoning

7. What is an issue?
- ☐ A disputed question of fact
- ☐ A disputed question of law
- ☐ A type of evidence
- ☐ A type of fact

8. What is evidence?
- ☐ Information or clues that a court uses to infer the facts

- ☐ Statements from witnesses, documents, or objects
- ☐ A type of law

9. What type of lawyer might believe that judges have no discretion in legal reasoning?

- ☐ A formalist
- ☐ A realist
- ☐ A feminist

12 Consolidation quiz – Part 2

Attempt Part 2 of the quiz to help consolidate your knowledge. If you're unsure of any of the answers, revisit the relevant sections of the course.

Activity 10 Quiz questions

Allow about 10 minutes

1. What is *stare decisis*?
- ☐ The practice of following previous decisions even if they are not perfect
- ☐ The reason for the decision
- ☐ The most important part of the decision

2. Why was the creation of the Incorporated Council of Law Reporting Important?
- ☐ It enabled lawyers and the public to be confident that the law report was an accurate report of what the judge had decided.
- ☐ It stopped judges from questioning the quality of law reports
- ☐ It made a single body responsible for all law reports

3. Why is finding precedent an important skill for a lawyer?
- ☐ A precedent that supports your case can force the judge to decide in your favour
- ☐ Precedent can be used to help predict how a court will decide
- ☐ Finding precedent is not an important skill for a lawyer

4. Which is more influential on later courts, *ratio decidendi* or *obiter dicta*?
- ☐ *ratio decidendi*
- ☐ *obiter dicta*

5. What is *ratio decidendi*?
- ☐ The rule that determined the case
- ☐ A principle that is binding on later courts
- ☐ An offhand comment by the judge
- ☐ A factual finding

6. What is *obiter dicta*?
- ☐ Speculation by the judge about how legal principles might apply in other circumstances
- ☐ Persuasive comments that are not binding on later courts
- ☐ The key rationale for the decision

7. Where would you find Jeremy Bentham's body?
- ☐ University College London
- ☐ The Open University

8. What problems are there with the idea that judges make law?
- ☐ It is unfair to the losing party because it is retrospective

- ☐ Judges are not democratically accountable
- ☐ Judges are not representative of wider society
- ☐ There are no problems if judges make law

9. What is the ‘declaratory’ theory of law

- ☐ Judges do not make law
- ☐ Judges simply declare the law as it already exists
- ☐ Judges must give reasons for their decisions
- ☐ Judges must follow previous precedent

Conclusion

To an outsider, the process by which judges make decisions may seem mysterious. But by breaking down the process into smaller components, we can demystify the process.

You have seen how judges make sense of evidence to find the facts, by drawing inferences using tacit information that they already know. And then how judges decide cases once they have found the facts. At both stages, the law imposes restrictions on the types of inferences or decisions that judges can make. To help parties and members of the community understand and scrutinise judicial decision making, judges are generally required to give reasons for their decisions.

But there is also more to judicial decision making than this straightforward picture, particularly where the law is uncertain or contested. Here, we see how bias may creep into the law, where judges may use the latitude that legal uncertainty provides to make decisions that meet their own personal preferences. This suggests that it is important for judges to be representative of wider society, a situation that has not yet been achieved in England and Wales.

Law is also quite a technical subject and there are formal requirements to promote certainty and consistency in judicial decision making. Some of these requirements are known by their old Latin names: *stare decisis*, *ratio decidendi*, and *obiter dicta*. These are respectively the requirement to stick with previous decisions, the principle decided in the case, and non-binding but persuasive comments by a judge.

Finally, the course examined a longstanding and controversial question in judicial decision making which is whether judges make law. We saw how the convenient fiction that judges simply declare what the law has always been may not always be true, and that the reality is a little more complicated.

This OpenLearn course is an adapted extract from the Open University course W112 *Civil justice and tort law*.

Other OpenLearn resources:

Jury Hub

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Images

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