Examiner’s report 2010

265 0031 Common law reasoning and institutions Zone A

Introduction

The majority of candidates that undertake CLRI pass the examination and there are a number of very good spirits. However around 30% fail. The syllabus for CLRI was revised for the 2007 intake and all students now sit the same paper. The paper has a compulsory question in Part A which itself is divided into two parts: the first part being a set of short questions based on the online research exercises while the second part is a set of questions asking you to reflect on the process of writing a research essay. That research essay must have been submitted via the VLE by May 1 and its submission is the prerequisite for the examiners marking part B of question one. The second part of the paper consists of seven questions: one of which is a problem question of statutory interpretation while the other six are essay questions. This has been the format of the paper since the revision in 2007 and is unlikely to change in the immediate future.

General remarks

CLRI provides an introduction to the core institutions and modes of legal reasoning constituting the legal system of England and Wales. The title, common law reasoning and institutions is designed to reflect the diverse nature of the student body for the London LLB, namely that they are predominantly spread around common law jurisdictions with a minority residing in civil law jurisdictions. The study of the legal system of England and Wales is thus the study of the original common law system. Many students are located in jurisdictions whose legal system derives a great deal of its characteristics from England and Wales; some of the questions, and indeed the research essay topics, are designed so that information on the jurisdiction in which the candidate resides with the act to include in the answer.

The subject material could get lost in a wealth of detail. While considerable information is assumed to be learnt in the course, the questions are designed more to reflect general principles and a grasp of underlying contentious issues. It is not sufficient therefore merely to recite a list of factors or information in a particular area,
for example criminal justice or civil justice, the task is to show that you can relate the information that you have learned to the precise key points of the question.

There are a number of familiar issues that occur across subjects and which reoccur each year. It should be borne in mind that the examinations are the formal mode of assessment judging the achievement of the learning outcomes for each subject. However, while the information that you are expected to have mastered and the grasp of the underlying issues that you are expected to demonstrate may be subject specific, there are certain rules of being successful in the examination that apply equally across all subjects. Among these are:

- address the actual words of the question;
- allocate your time; and
- be in command of the answer.

What do we mean by these? A good answer speaks to the question and to the examiner: in a sense what we are looking for is focus. The good answer manages to convince the examiner that the candidate has focused on the key words of the question - as it is set - and then develops a structured answer that shows reading AND a grasp of the underlying issues. By contrast many answers do not do justice to the work that candidates have done by a lack of focus. Often we find answers that contain some material that makes sense and other material that does not, with the effect on the examiner that s/he can not reward the answer with a good mark as the candidate has not showed command of the material. Others do not address the actual question set. We get a lot of material that are general answers – that for example tell us about the reforms in Civil Justice - rather that focusing on the actual question on the paper. Another common mistake in scripts is to give much longer answers to the first two questions and then a hurried third and tiny fourth answer indicating that the candidate has misjudged their time and have left little time for the 4th question. Remember all questions are worth 25 marks in total!

To illustrate these general remarks some actual examples of real answers will be presented when the actual questions are looked at below.

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### Specific comments on questions

#### PART A

These short questions referred to the online legal research exercises:

(a) (i) Explain the process involved in finding the following case report using the online library.

Examples of an answer: ‘the citation actually has both the neutral citation and reference to the report is in WLR which I know from having used the Cardiff index of legal abbreviations means the Weekly Law Reports. To find the weekly Law report reference check which data base contains the Weekly Law Reports and then search in the case name box; but a better approach is to enter the neutral citation [2004] UKHL 56 in the citation field which would give this case only (making sure to include [2004] as part of the entry). This would be the preferable citation to search for initially rather than the weekly Law reports citation is the neutral citation provide a return regardless of the database used.’

(ii) **What is a neutral citation?**

A neutral citation does not specify an actual Law Report series. Traditional Law Reports used a citation system that was linked to the actual law reports series but since the internet because widely used many countries have developed citations that contain a reference to the court the case was heard in and the year. Used since 2001, in the UK Judgments with neutral citations are freely available on the British and Irish Legal Information Institute website (www.bailii.org). Neutral citations identify judgments independently of any series of reports, and cite only parties, year of judgment, court and case number.

(iii) **What do the following abbreviations stand for?**

LLB and MLR.

For LLB we accepted either the Bachelor of Laws degree or the equivalent in Latin, namely *Legum Baccalaureus*

MLR referred to Modern law Review

(iii) **On which freely available website do you find British and Irish case law & legislation, European Union case law, Law Commission reports, and other law-related British and Irish material?**

Answer: the British and Irish Legal Information Institute website (www.bailii.org).

**(Answer all questions – total five marks)**

(b) **Answer all the following questions.**

(i) **On which of the six topics was the essay which you submitted via the VLE? How did you first approach the topic and to what extent did your understanding of the question change as you read material?**
(ii) What sources were of most value to you? How did you find these? Rank them in terms of their authority and ease of understanding.

(iii) Outline the conclusions in your essay and justify them in terms of the sources you have identified.

(iv) If you were to undertake the same research exercise tomorrow, what, if anything, would you do differently?

(Answer all sections – total 20 marks)

The important feature here is authenticity. We are looking for a sincere narrative account of the research process and the process involved in writing the essay. The examiner is provided with a copy of the essays submitted and can refer to these to check what the candidate writes.

The topics for the 2009-10 academic year were:

1. ‘A crime control centred criminal justice system has the distinct advantage of reducing crime/offending but lessens the protections of the accused.’

   Discuss.

2. ‘The HRA 1998 is being used for purposes not originally intended by its proponents.’

   Discuss.

3. Analyse the advantages and disadvantages of conditional fee arrangements for legal aid.

4. ‘The jury is an outmoded institution and ought to be discarded. The fact that many countries that once had the jury have abandoned it only reinforces this point.’

   Discuss with reference to the use of the jury in England and Wales and the position in at least one other jurisdiction.

5. ‘This is the Court of Chancery...which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honorable man among its practitioners who would not give—who does not often give—the warning, “Suffer any wrong that can be done you, rather than come here”.’ (Charles Dickens, Bleak House, 1853, Penguin Classics 1971: 51)

   To what extent, if any, does this warning hold true today in the civil justice process?

6. ‘There is no way of proving that legal systems are racist. Any claim that a particular legal system is racist is mere rhetoric.’

   Discuss.


It is important to note that most of these questions are NOT confined to England and Wales. Students could have, and are to be encouraged to, researched using local examples and local material.

PART B

Question 2

‘Alternative Dispute Resolution has not been a resounding success in English civil justice because it goes against the very culture of the common law.’

Discuss.

This question is complex and was not popular. It assumes that the candidate has read around the attempts to reform the civil justice system AND has paid quite some attention to the arguments for and against ADR. The key words are that ADR has ‘not been a resounding success’ as ‘it goes against the very culture of the common law’. This can be contested. Of specific important are pages 295-300 in the provided text The Politics of the Common Law and the Recent Developments for 2009 and for 2010 drew candidates’ specific attention to the arguments made by Professor Dame Hazel Genn in her Hamlyn lectures (a chapter from her published lectures was put on the VLE as additional reading).

An answer could be orientated around judging ‘success’. To do so reference could be made to the material setting out the aims and objectives of the civil justice process as outlined in the subject guide. Would it be a resounding success if the vast majority of civil cases ended up ‘resolved’ through ADR? What is gained and what is lost? Most good answers identified ADR as an alternative to adversarial processes and noted that the take up has not been as Lord Woolf apparently hoped. Several quoted Zander’s 2007 comment (reproduced in The Politics of the Common Law) ‘While the “mood music” of the courts is certainly therefore in favour of ADR it is making slow headway on the ground as a means of resolving civil disputes.’

This brings up a point that candidates often ask: ‘is it good to use quotes in the answers?’ In general quotes from leading authors, properly referenced, demonstrate that the candidate has indeed read around. Some paraphrased Dame Hazel Genn’s arguments that ‘the true aim of the push to mediation should have been to make mediation attractive for its own virtues, not a skip into which civil disputes are dumped because the civil justice system is too expensive’.

Question 3

‘The common law always contained due process principles. Article 6 ECHR merely provides a new way of thinking about them as human rights.’

Discuss.

This question was not popular although it mapped on to Chapter 10 of the subject guide ‘Human rights in criminal and civil procedure – Article 6 and due process’ and Chapter 11 of the provided text ‘The Jurisprudence of Article 6: Due process and the
common law. Candidates who did it showed evidence of reading and there were a few were structured answers. Consider the following introduction.

‘Introduction
if we take as our starting point Blackstone's comment from the 18th century that it is better but 10 guilty men go free than one innocent man to be convicted we can see this as a declaration of the principles of due process and is evidence that the argument that has always been an important part of common law. Against this of course is historical evidence of the all too important part played by the judge in influencing the outcome of cases and perhaps it was the advent of lawyers and the right of appeal that really guaranteed principles of due process in the actual operation of criminal trials. My argument will be that the incorporation of article 6 not only provides a new way of thinking of them but entrenches them…’

This is a provocative beginning: also note it is from one of the few scripts that provided section headings. It can be an aid to the examiner and certainly help in giving answers structure if you do use section headings.

Question 4
‘There is no alternative. Provision of legal aid has to be opened to the market.’
Discuss.

The keywords of this question are there is ‘no alternative’ and ‘has to be opened up to the market’. Good answers provided a short history of legal aid provision, analyzed its functions and put the question in terms of whether it is a welfare right or whether access to justice in many situations can be covered by insurance and private market solutions (conditional fee arrangements were a popular example). As one candidate put it: ‘the politics of legal aid are such that at one time it could be seen as a positive marker for a government to care for its citizens by the provision of publically funded legal services, instead and without many howls of protest governments now shout their ability to save citizens tax dollars by aggressively depicting “fatcat lawyers” and highlighting any examples of cases that received legal aid when on a common sense level they clearly did not merit it.’ Most candidates who answered this question made reference to the Carter report and good answers certainly differentiated between criminal legal aid and civil legal aid. The underlying themes of access to justice and the idea the courts should be open to all and should not be the preserve of the rich and powerful were common.
Question 5

‘Recent reforms in English criminal justice have pushed the system too far towards the crime control model.’

Discuss.

This question called for a discussion of developments in criminal justice in light of the different models of criminal justice and implicitly of the aims and purposes of the criminal justice system. Implicit in question is the idea of balance. One candidate addressed the question by first setting out a number of ‘fundamental questions, namely: what is the criminal justice system for? Whose interests does it serve? What agencies are involved? And what influences criminal justice policy? While the most common contrast was between the Due Process and Crime Control model other models for understanding criminal justice mentioned included Human Rights Approach (as put forward by Andrew Ashworth in The Criminal Process); The Decency Model (as put forward by Andrew Rutherford Criminal Justice and the Pursuit of Decency); Restorative Justice; Managerialism and Actuarialism.

Question 6

EITHER

(a) ‘The role and functions of a court of appeal and a supreme court are different. The United Kingdom has created a Supreme Court in name but not in function; it would be better if no change had been made.’

Discuss.

OR

(b) ‘The judiciary is a core institution in a liberal democracy governed by the rule of law. A representative judiciary reflects the idea that all should be able to participate in the small and large decisions that shape the society in which we live. It can not be acceptable to exclude, or appear to exclude, well qualified candidates.’

Discuss, and assess the extent to which the current selection process in England and Wales achieves a representative judiciary.

This question gave the candidates a choice between either the extremely topical advent of the Supreme Court or the continuing issue of the role of the judiciary and the aptness of the selection process for the judiciary.

The advent of the new Supreme Court was highlighted in the Newsletters and in the 2010 Recent Developments. A number of newspaper articles were referred to including articles by Connor Gearty. The question reflected the arguments as highlighted in those short articles and candidates who had read them and followed the newspaper accounts of the new Supreme Court fared well.

Question 7
‘The predominant value of the doctrine of precedent remains the maintenance of judicial authority, rather than that of responding to the needs of justice in individual cases.’

Discuss.

There is always a question either directly using the phrase ‘the doctrine of precedent’ or more generally concerned with how judges articulate legal principles and rules in creating their judgments and how they deal in their reasoning with previously decided cases. Along with statutory interpretation these are core elements in learning legal skills. The subject guide deals at length with the idea of precedent and what exactly is it in previous cases that is binding (discussing the concepts of ratio decendi and obiter dicta etc). However, whatever question is asked our experience has been that most answers are disappointing. The questions in this area are most likely to provoke the kind of general answer or selections from notes rather than candidates providing us with real material from actual cases. There are, of course, exceptions and there are a few really top class answers to these questions, but it does seem an issue that independent teaching institutions should take up: have your students read real cases not summaries of them!

This specific question was set in terms of the maintenance of judicial authority contrasted to responding to the needs of justice in individual cases. Although this question did evoke some to references to the attempts by Lord Denning to have the Court of Appeal break free of vertical precedent, that is that courts lower in the hierarchy must follow the decisions of courts higher in the hierarchy, the question could have much boarder discussion than that focus.

In a common law system precedent is, if you like, the glue that holds the system together. And the system is a hierarchical one; the whole structure of the court system is as one where there are many courts of first instance and then smaller and smaller numbers of higher courts until you can to the apex of either a final Court of Appeal or Supreme Court. The authority of the higher courts is maintained by the doctrine of precedent. But while ensuring consistence precedent must be flexible; thus there is always interpretation, looking at previous cases is an act of construction. It would be advisable for students to learn in depth and handful of cases. By this we mean not just a paragraph or two from the leading judgment but what arguments were there in the dissenting judgment (if that were such and important cases the usually is), and what were the arguments that the majority of the court felt superior. The subject guide takes a whole chapter to go through in great detail the case of Donoghue v Stevenson; therein in is presented and contrasted most of the judgments of Ld Buckmaster and Ld Atkin. Strangely, only a handful of candidates appeared familiar with this material. Ld Atkin’s judgment is regarded as a leading judgment and common law not just for the principal shall establish that for the method he users in his reasoning and the clarity with which he articulates his position. Ld Atkin begins by stating - contrary the Lord Buckmaster who seemed to end his judgment with the policy decision that the sole question in the case was legal, further he poses it as a question for the system: does the legal system provide an answer to Mrs Donoghue? In setting out to give his answer he remarks that it is remarkably difficult to find statements of general applicability in the cases that were argued before the court and he explains that by contrast he is going to articulate a general principle. While many would think that Lord Atkin thereby creates
the ‘good neighbour principle’ he is at pains to say that while he is consciously articulating a principle of general applicability, that principle was inherent in the cases that had previously given a plaintiff a right of action. In other words while he sets out to give a legal answer to the plea for justice he also consciously preserves judicial authority.

Question 8

Read the following material concerning the (fictitious) Endangered Species Act 2007 (ESA 2007) and then advise the parties as asked in situations (a) – (d).

When the Minister for Overseas Aid introduced the ES Bill into Parliament he stated, ‘This legislation will help protect many of the world’s native species facing possible extinction in their natural habitat by controlling the importation of wildlife and wildlife products into the United Kingdom and by imposing harsh penalties on those who seek to make a profit from trade in endangered species.’ When asked if the legislation would cover the importation of rare breeding fish from a specialised Japanese farm to a carp breeding farm in Scotland, the Minister replied, ‘The legislation will not cover importation from a specialised breeding farm to another; it is wildlife in its natural state that we are protecting.’

Section 1 of the Act specifies that HM Revenue and Customs (HMRC) may issue a licence for (a) the importation of or (b) the possession of any wildlife or wildlife product but that ‘any licence obtained by a false or misleading statement shall be void’. Section 2 makes it an offence for ‘any person’ to ‘import or seek to import into the United Kingdom any wildlife or wildlife product unless he has an import licence’. Section 3 makes it an offence for ‘any person to knowingly be in possession in the United Kingdom of any wildlife or wildlife product that has been imported into the United Kingdom unless he has a possession licence’.

The interpretation clause specifies that for the purposes of the Act:

“import” means to bring into or cause to be brought into the United Kingdom from another state;

“import licence” and “possession licence” mean licences issued pursuant to section 1 of this Act;

“wildlife” means any animal, bird or fish living in its natural habitat;

“wildlife product” means any body part or any skin, fur, hair or other body covering of any wildlife.

(a) Tony purchases a belt made from the skin of a very rare snake for his own use by mail order from Taiwan. The seller in Taiwan farms snakes specifically for the purpose of using their skins in the manufacture of clothing accessories that are sold to the general public. The breeding programme at the farm has been so successful that the number of snakes has increased dramatically and the farm now exports live snakes – including the type that the belt is made from – to zoos and conservation schemes in ten countries. Customs intercept the delivery and Tony is charged under s.2. Tony has no licence.

Advise Tony.

(b) Tundi, a renowned figure in Uganda for her work in promoting the cause of protecting endangered species, arranges to make a tour of England to rally support for her campaign. The symbol of her campaign is an elephant’s tusk that was carved over 200 years ago. Tundi arrives in England with the tusk and leaves
it in storage at London airport. When she returns to pick it up, she is arrested and charged under s.2. Tundi has no licence.

Advise Tundi.

(c) Stephanie owns a shop in which she sells natural medicines. Her premises are raided by Customs officials and a quantity of traditional Chinese remedies are seized that are shown on analysis to contain small amounts of powders made from dried tiger penis and elephant tusks. Stephanie is charged under s.3. Stephanie has no licence. Stephanie claims she does not know that the products contained these powders, but the Customs officials note that accompanying papers written only in Chinese refer to the ingredients. Stephanie does not read or speak Chinese.

Advise Stephanie.

These problem questions do not require an introductory essay explaining the principles of statutory interpretation. It is a good example of a lack of time management that several answers gave us around two pages of such explanation leaving the candidates with very little time to actually read this relatively long question and simply apply basic techniques.

In general one should always begin with the actual words of the statute and then simply giving the words that ordinary everyday meaning applied the factual scenarios. In other words begin with the literal approach. If the liberal approach then gives ambiguity or that seems to give a result which is at arms with the clear purpose of the statute then an argument that complicates the literal interpretation; but it is best to begin with the simple literal approach.

Problem questions are structured in such a way that there are little hints in the narrative that serve to remind you of other cases or relevant principles. When we look at the first paragraph of narratives in this quest the statements by the Minister for overseas aid when the introduced the bill in Parliament is meant for you to have reference to the case of Pepper v Hart and the relaxation of the rule that one could not have any reference to material beyond the act.

(a) in the first scenario, that of Tony, at first sight we have a clear difference between a literal approach and our understanding of the purpose of the act. Most candidates when reading the Act assumed that read literally Tony was caught. However even on a literal approach it is more complex.

To quote from one answer (which was given a 1st):

‘When Tony purchases a belt made from the skin of a very rare snake for his own use from Taiwan he is importing the belt. Is this snakeskin considered to be a wildlife products when we look at the definition section it seems absolutely clear, to import means to bring in or cause to be brought into the United Kingdom, and the wildlife product means any body part or any skin etc covering of any wildlife. Yet there may be some ambiguity in the definition of wildlife for this refers to ‘any animal bird or fish living in its natural habitat’. So even on a literal approach we might be able to argue that the breeding are does not come within the notion of natural habitat. It may not be necessary to help Tony to do more than show possible ambiguity for our visitors a
penal statute there is a rule of statutory interpretation that this after applying literal approach you find ambiguity then you should construe it in such a way that you favour the citizen. In this case having found ambiguity we would then argue that section should be construed such a way that the importation of the skin from a snake held in a breeding farm is not a wildlife product for the purposes of this act.

A further argument can be derived from the ability to look at Hansard after the case of Pepper v Hart. Here the Minister had been specifically asked ‘if the legislation would cover the importation of rare breeding fish from a specialised Japanese farm to a carp breeding farm in Scotland’ and the Minister replied, ‘The legislation will not cover importation from a specialised breeding farm to another; it is wildlife in its natural state that we are protecting.’ So applying this it would seem that this precise situation is outside of the scope of the act. There are therefore two arguments to ensure that Tony is not caught by these provisions and has committed no offence.

(b) Concerning Tundi, there appears a straight contrast between literal interpretation and purposeful one. On a literal interpretation it would seem that Tundi even though working for the cause of protecting endangered species as important the same task which is a wildlife product to England. First question: was the tusk a wildlife product? It would seem so as the task was from an animal which died 200 years ago at a time when there were no zoos and we must accept was almost certainly an elephant in its natural habitat. No time limit is given in the legislation so would seem on the face of it that Tundi should have obtained an import licence. A technical argument might be made that so far the task is only at London airport but this surely cannot help for it was only left there for storage and she has now come to collect it.

Can Tundi’s case this helps by the minister’s statements? When Pepper v Hart was decided the leading judgment tried to lay down certain requirements to limit reference to Hansard, as then envisaged we would only be able to consider a statement that specifically applied to the scenario in question (such as in Tony’s case) but subsequent cases have relaxed the situations in which Hansard can be referred to. In this case we can not e that the Minister stated: ‘This legislation will help protect many of the world’s native species facing possible extinction in their natural habitat by controlling the importation of wildlife and wildlife products into the United Kingdom and by imposing harsh penalties on those who seek to make a profit from trade in endangered species.’ As a statement of the purpose of the Act this helps Tundi. The elephant has been dead for over 200 years, Tundi is not seeking to make a profit, on the contrary is campaigning to save endangered species. Therefore on a purposive interpretation Tundi should escape liability.

(c) In Stephanie’s case the crucial question focuses around the word knowingly, as another answer puts it:

‘Stephanie sells natural medicines and it was found that some Chinese remedies contain small amounts of power made from dried Tiger penis and elephant tusks. These are clearly wildlife and wildlife products. She is charged under section 3 which makes it an offence for ‘any person to knowingly be in
possession ...’ Stephanie claims that she was not aware that the products contained these powders and therefore she was not a person ‘knowingly’ in possession. In support she argues that she does not read or speak Chinese and that the list of ingredients of the said medicines containing the wildlife products were all written in Chinese.

While that answer sets out the issue the candidate thought that that was enough to get Stephanie off! Other candidates disposed of this argument in short time: generally saying that even though she did not know of the specific products in the Chinese remedies she was knowingly in possession of the Chinese remedies. Moreover that it is her business to sell these and it can be implied that she ought to know what the remedies contain. Further that it is clearly the purpose of the Act to prevent the very practice that Stephanie is engaged in. It would seem therefore that Stephanie only has a very weak defence.