Examiner’s report 2010

265 0031 Common law reasoning and institutions Zone B

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 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 the research essay. The research essay must have been submitted via the VLE by May 1 and is the prerequisite 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 well 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 near future.

General remarks

There are a number of familiar issues that is 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
- 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 waste 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, nor addressed 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 addressing the actual question on the paper. Another common mistake in scripts is much longer answers to the first two questions 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! In what follows some actual examples of real answers will be presented.

Specific comments on questions

PART A

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


This citation actually has both the neutral citation and reference to the report is in WLR which 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
(iv) 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).

(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 changed 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?

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.

A sincere but honest answer is perfectly acceptable.

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PART B

Question 2

‘Lord Woolf sought to downplay the role of courts and increase alternative dispute resolution. But civil justice will always require that many disputes must be resolved by a court.’

Discuss.

This was a popular question but the fact that it began with reference to Lord Woolf had the unfortunate effect of inducing in several answers their ‘Woolf reforms answer’... Of specific importance 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 and a chapter from her published lectures was on the VLE. The best answers dealt at length with Genn’s criticisms but all good answers included some discussion on the aims and objectives of civil justice and the role of courts.

Consider the following:

‘When one thinks of the English legal system and more and justice the first institution that comes to mind is the courts, why? Many say this because the court is the most visible symbol of law; people want their day in court. It is the first thing that comes to mind when we hear that someone has committed a crime and the first thing we think about when we hear for example to relatives fighting over a piece of land or two people getting a divorce. But are we seduced by the image of the court? Do we just automatically send things to court that would be best dealt with outside of it?’

This is an engaging introduction to an answer.
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 was only undertaken by a few students 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 who provided well structured answers. Consider the following introduction.

Question 4

‘The days of publicly funded legal aid are over. Reforms are entirely driven by the argument that the only way of delivering an efficient service is to open legal aid providers to the “discipline of the market”. This will mean the withdrawal of the Government as a provider of funds.’
Discuss.

This question maps onto Chapter 12 of the subject guide, Chapter 16 of the provided text (The Politics of the Common Law, chapter 16 The Politics of Representation: legal aid, human rights and access to justice’) and materials in the study pack). The keywords of this question are the days of publically funded legal aid are over, that only by opening up to the discipline of the market can efficiency be ensured, withdrawal of government as provider of funds. This is a clear statement, the question calls for it to be analysed and placed in context. While some good answers provided a short history of legal aid provision, and put it into a context of functions (what are the purposes served under the slogan ‘access to justice’?) and political views (is it a welfare right or whether access to justice in many situations can be covered by insurance and private market solutions) most candidates who answered this question made reference to the Carter report and good answers certainly a differentiated between criminal legal aid and civil legal aid.

Question 5

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 the extremely topical advent of the Supreme Court and the continuing issue the role of the judiciary and 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.

The best answers to b, linked their discussion of the selection process for the senior judiciary to arguments about the nature of the rule of law. Such as the following introduction:

‘Central to the proposition of the rule of law is a commitment that the legal system establishes the rule of “law” rather than the rule of men. This puts judges as a highly important part of the process; it is the independence of the judiciary that ensures that it is the clarity of legal rules and principles which are reasons for the courts decisions. However it is to be kept in mind that codes, statutes and precedents do not make judges superfluous nor their function mechanical. They exercise discretion in applying law and handling precedents and interpreting words. The judges have built up established practices in interpreting statutes and reading previous cases. ...’

This particular answer then presented the core issue in terms of whether it is necessary to have a judiciary that was representative of the population it the people who were in the judiciary were acting professionally. The answer then went on to review the changes in the selection processes, in particular the advent of the Judicial Appointments Commission, in terms of whether it was effective in getting a wider spread of people with the right qualities. It listed for example the five ‘core qualities’ which were stated by the commission in October 2006.

It was common to find arguments like the following ‘the parties to the case must believe the outcome is just. They will better accept the outcome of the judge appears a representative of the general society in which decisions are being made’.

In general answers showed that candidates were familiar with the debates and followed the creation of the Judicial Appointments Commission and some good use was made of the statistics which have been obtained from the Commission’s website.

**Question 6**

‘Miscarriages of justice are usually due to errors or abuse of process by the police at the investigation stage. Thus real criminal justice reform should focus on policing and the investigation of crime.’

Discuss.

As one answer made clear, this question somewhat turns around the usual emphasis in miscarriages of justice.
In general most answers focused on the main examples of MoJ (Bridgewater Four etc) and the role of the CCRC – clearly several had been to the CCRC website and knew relevant statistics on referrals and success upon referral. A couple picked up on a criticism of the CCRC in that it does not have its own independent investigators that must rely on police officers to re-examine cases. But if, as the question suggested, we were to see the real problem in terms of police conduct, can the police really check on themselves? Alternatively, it can be said that only the police would have an understanding of police procedures and pressures on police so that they would be the ones to check most effectively. Analysis of the core examples shows that the most serious miscarriages of justice did not happen because of some wrong decision on a point of law, but because of fabricated or misleading prosecution evidence and forced ‘confessions’. Commonest factors appear to be wrongful identification of defendant; false confessions; perjury by co-defendant; police misconduct; and bad trial tactics by defence lawyers.

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 (ratio 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 v responding to the needs of justice in individual cases. Although this question did evoke some to reference 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 statue 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 statue 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.

What were features of a good answer?

It analyses the actual factual picture, for example it is clear that 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 product? 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, some candidates argued roughly along the following lines:

Namely that 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 line of argument sets out the issues it is not 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 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 Stephenie is engaged in. It would seem therefore that Stephenie only has a very weak defence.