Examiners' report 2011

265 0031 Common law reasoning and institutions – Zone A

Specific comments on questions

PART A

Question 1

Candidates must answer all parts of this COMPULSORY question.

1. (a) Answer all questions.

In order to discover the database hosting the Weekly Law Reports (W.L.R.) which tool from the Online Library website would you use?

Use the finding case reports online table. This reveals that WLR are either in Lexis Library or Westlaw. If you do not know what WLR means, you would need to use the Cardiff Index to legal abbreviations.

See www.external.shl.lon.ac.uk/info_skills/law/faqs/which_database_cases.php

i. What does the abbreviation Q.B. stand for in the citation [2006] Q.B. 588?

Queen’s Bench.

ii. What is the name of the government department with responsibility for affairs relating to criminal law, prisons and sentencing?

The Ministry of Justice.

iii. Explain, in outline, the process involved in finding an article in the M.L.R. using the Online Library.

The Online Library’s Journal Finder allows you to search a catalogue of the journal titles where you can get the full text of articles. You will see a search box for the Journal Finder on the right side of every page in the Online Library. Simply enter the journal title and click on go. If your search finds any journal titles, for each title in the results list there will be a link to the database where you will find the journal. You would then enter the relevant database which would show a list of holdings of the MLR.

See www.external.shl.lon.ac.uk/info_skills/law/faqs/which_database_articles.php

To find articles on a particular topic, probably the best place to start is the Legal Journals Index (LJI). To access the LJI proceed as follows:

Login to the Westlaw database with your Portal Password following the instructions is the Westlaw Login Guide.

After logging into Westlaw, choose ‘Journals’ from the menu across the top of the Westlaw homepage.

Click on ‘Advanced Search’ to view the full range of search options. You will notice that you can search for articles in a variety of ways. For instance, you can search by ‘free text’ or by ‘subject / keyword’.
Try searching by ‘free text’ first; if this returns too many results, search by ‘subject, keyword’ which should return fewer hits.

If the full text of the article is available in Westlaw there will be a red link to Full Text Article before the Legal Journals Index Abstract link. Simply click on Full Text Article to link through to the full text.

See www.external.shl.lon.ac.uk/info_skills/law/find_articles.php#topic

iv. On which freely available online database can you find the transcripts of judgments as handed down by the court hearing the case?

Baili.

(b) Answer all questions.

The key point to remember with this section of Part A is that the Examiners are concerned with how you approached your research. We could usefully call this the question of method; i.e. how you found things out, rather than what you found out. The latter (‘what you found out’) is the substance of your research; the content of the essay that you wrote and submitted as part of the examination process. So, in 1(b) you need to focus on the process of how you researched the topic on which you chose to write.

The main problem (alongside not realising that this part of the exam is about method and process) is that of providing formulaic answers. To avoid this, you need to think specifically about the process of research in which you engaged, and the issues that you encountered in reading the materials.

i. On which of the six topics was the essay which you submitted via the VLE? How did you first understand the topic and to what extent did your understanding of the question change as you read material?

The key part of this question is contained in the second sentence. To summarise: the question is asking you how you first approached the material that related to the question you answered and how your understanding changed or developed as you conducted your research. The point of this question is to ask you to think about your first response to the topic (the research question). This would (of course) have to be based on a preliminary understanding, or the basic sense you have gained from whatever lectures you have attended or readings you have done. Be precise about the questions that you had; how they emerged from the material that you were using, and how you sought to answer them. To what extent were you happy with the answers that you found? Did they resolve areas of difficulty or did they open up new questions?

ii. Explain how you located source material. Which sources were of most use in constructing your essay? Rank these sources in terms of their authority and ease of understanding.

The marks in this question are for analysing the sources; once again, then, we are concerned with method and the focus is the extent to which the sources helped you; in other words, how authoritative did you find them? How did they help your thinking about the topic? There is some room in this question to reflect on where you found the sources; this is a matter of detail and does not present particular problems. The real problems tend to come with the analysis of ‘authority’ and ‘understanding’.

For example, let’s say that we are referring to a text book that we have used. The discussion of any theme in a text book is necessarily general, and so, if you want to find out more, you need to go to more specific sources (such as a journal article).
Our discussion of the uses and limits of the text book have to move beyond general reflections in order to get good marks. You need to think about the following points; what were the uses/limits of the text book that you were using? Were the authors merely describing a topic, or were they trying to present an argument or thesis about it? Did you agree with their thesis? Did you find it a useful way of introducing the topic? In order to develop your understanding, it is likely that you used a journal article. A journal article is likely to be more focused than a text book. However, you need to ask similar focused questions: what was the author’s thesis? Did you agree with it? The more articles you consult, the more you will become aware of debates and questions that relate to an area of study.

To get good marks on this part of the question, you have to discuss the nature of debates that animate academic commentaries or journal articles and the extent to which you found them illuminating in your research. You could, of course, also discuss cases and case extracts (or even any statutes that you have read). These sources will clearly tell you what the law is, and (as far as cases are concerned) provide some commentary; you need to assess the usefulness of this material to your research. Did you, for instance, find Justice X in case Y particularly lucid in his/her argument? Is so why? How did it influence your thinking?

iii. **Outline your conclusions and justify them by tracing arguments from the sources you have identified.**

This part of the question is about relating conclusions to sources. You will get good marks if you are precise. You need to set out the conclusions that you came to and link these to the information that you found out. You need to go into some detail to show how your conclusion is informed by the information that you have discovered in the article; and this is precisely where the good marks lie. To repeat the central point; discuss the actual sources you used, and go into detail about how they informed your conclusions.

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

Most people approach this part of the question in a very mechanical way; repeating something about starting their research process in a more timely fashion or reading more material. To get good marks you need to be absolutely precise about the questions that remain open after you have finished your research, and how these questions might suggest a different way of thinking about your area of research. The main general point is this; any research findings are provisional and have to be amended in the light of new thinking. This part of the question is asking you to think about the limited nature of the conclusions that you have arrived at. A good researcher knows that their findings can always be challenged – and this part of the exam is trying (albeit in a limited way) to force you to think about how the end of one research project is the beginning of another.
PART B

Question 2

‘Provided that only suitable cases are dealt with informally, Alternative Dispute Resolution has an important role to play in the civil justice system.’

Discuss.

General Remarks
This question requires an assessment of ADR within the context of the Woolf reforms, and requires a consideration of the relative merits of ADR and more formal court-based dispute resolution. A good answer would broadly agree with the statement. Those disputes that can be dealt with effectively by ADR are probably best diverted from the courts. This allows more efficient use of resources in civil justice. However, it is worth stressing that certain disputes can only be effectively and fairly resolved by formal proceedings in court. There is also an Article 6 point. Insisting on ADR for unsuitable cases might amount to a breach of Article 6. This is not to detract from the assertion that ADR can contribute successfully to civil justice by dealing with those cases that are most suited to informal resolution.

Question 3

EITHER

(a) ‘Critics of the jury do not seek to abolish it; rather, they realise its limitations and seek to improve the way the criminal justice system operates.’

Discuss.

OR

(b) ‘The measures taken to prevent miscarriages of justice have been a success.’

Discuss.

General Remarks
(a) A good essay would assert its broad agreement with this statement. It is perhaps hard to agree that the abolition of the jury is presently on the agenda; rather recent reforms, and attempts at reform, present themselves as ways of improving the operation of criminal justice. The relevant material is contained largely in 8.7. A good answer would cover the Criminal Justice (Mode of Trial) Bill 1999, and focus on the Criminal Justice Act 2003 as it relates to the use of the jury in complex fraud trials. A good answer would also make reference to Lord Judge’s reasoning in R v Twomey, Blake, Hibberd and Cameron [2011] EWCA Crim 8; J, S, M v R [2010] EWCA Crim 1755 and KS v R [2010] EWCA Crim 1756. Lord Bingham’s speech in R v Comerford [1998] 1 Cr App R 235 is also useful as it shows judicial argument about the dynamics of the jury trial. A compelling answer would show that these measures keep the jury in place, and seek to refine its operation. Poor answers would approach this issue from too historical a perspective, and would not focus specifically on the contemporary problems that are raised by jury reform.

(b) One could either agree or disagree with this statement. A good essay would provide a brief overview of the reasons that gave rise to the miscarriages of justice – at least as far the ‘IRA cases’ are concerned. The key sections in the subject
guide are found at 8.5. (Indeed, the sample examination question at 8.4 is similar to this question). The focus of the essay should perhaps be on this material. One should perhaps stress that the recommendations relating to the acquittal of the innocent were not given priority over those relating to the conviction of the guilty. However, the pattern is not simplistic; and it is perhaps an open question as to whether the criminal justice system privileges crime control or due process values. An outstanding essay would also offer an overview and assessment of the Criminal Cases Review Commission. Another point that would distinguish an answer is to make reference to the *Stephen Lawrence* case. This shows a miscarriage of justice, but, for reasons different to those that underlay the IRA cases. Indeed, Stephen Lawrence’s case shows a failure to prosecute rather than an undermining of defendant’s rights. The critical question would then be: to what extent have changes after Stephen Lawrence’s murder been a success? The link between the IRA cases and *Stephen Lawrence* perhaps point at institutional racism, which is still a problem in policing. From this perspective, it would be hard to assert that ‘measures taken’ are a success.

**Question 4**

‘Lawyers have had it too good for too long. We can no longer afford the luxury of the state providing legal aid. Market provision is the only other solution.’

**Discuss.**

**General Remarks**

The best way to answer this question is to take issue with its rhetoric. The wrong way to approach it is to write out the material contained in Chapter 12 of the subject guide. The pervasive theme in Chapter 12 is the idea of privatisation that has driven the reforms of Conservative, New Labour and Coalition governments. The posting on legal aid and the welfare state in April 2009 provides some useful general information, and the posting in January 2010 would also give some sense of the direction of reform after the Carter Review. In other words, rather than describing legal aid reforms in detail, the question asks you to identify and discuss some important pervasive reforms. Whether or not you agree with the move to limit public spending and privatise legal aid, one should begin by discussing the rhetorical claim made in the question. It seems to suggest that lawyers simply exploit the legal aid system, and that it is somehow an expensive ‘luxury’ that can be limited to fund other presumably essential services. There is little evidence that legal aid lawyers exploit the system; rather, providing a sophisticated and functioning legal aid system is both expensive and necessary. To return to the kind of ideas discussed in the posting of April 2009, legal aid is an important element in a welfare state characterised by social solidarity and some basic form of social equality. Whether or not market provision is compatible with this vision of welfare is an open question; but a good candidate should at least engage with this issue. One could argue that privatisation has itself failed to provide a viable way of funding public services. The fundamental point is that a good answer must engage with the broader political issues about the funding of legal aid that the question raises. It is not sufficient to merely describe legal aid reforms.
Question 5

‘Judges are not politicians. To say that they must be representative of society, misunderstands their essential role.’

Discuss.

General Remarks
This is a fairly straightforward question. It draws on a basic understanding of the judicial role. This is outlined in Chapter 9, section 9.2 of the subject guide. The title also draws on pervasive themes in 9.5. Judges are clearly not politicians; they are not part of the legislature. However, there is clearly a politics of the judiciary. The Law Lords play an important political role in ensuring government according to law. In so doing, the Law Lords are not representatives of society as such. They are, perhaps, ‘representatives’, or at least the upholders of, important constitutional and legal principles. However, there is a sense in which it is desirable to have a judiciary that reflects the composition of society as a whole. This is important for the social legitimacy of the judiciary, but also for the range of interpretations of constitutional and legal principles. The problem is that, even after the recent reforms of judicial appointments, the judiciary remain remarkably homogenous in their social and class composition. This suggests that, unless this is remedied, there might be problems in legitimising the role that judges play. In other words, a good answer would assert that it is not a complete misunderstanding to say that judges should be representative of society. They are not representatives of the people in the sense that politicians are; however, upholding the rule of law requires at least some recognition that the composition of the judiciary should represent the plurality of British society.

Question 6

‘Precedent requires a hierarchy of courts and respect by lower courts for the decisions of higher courts. These principles have stood the test of time and should not be interfered with in any way.’

Discuss.

General Remarks
This essay question requires a focused engagement with a very specific problem in the doctrine of precedent. After briefly reviewing the fundamental terms of the doctrine of precedent and its relationship to the hierarchy of courts, a good essay would engage with the key issue: Lord Denning’s attempts to give the Court of Appeal equal powers with the House of Lords to over-rule itself. The starting point of the analysis would be the 1966 Statement and the relationship between the House of Lords and the Court of Appeal as illustrated by cases like Miliangos and Schorsch Meier. The key case is perhaps Davis v Johnson; and it would be worth looking in a little detail at the reasoning in the Court of Appeal and the House of Lords. A good essay must take a position on whether or not Lord Denning’s ‘campaign’ in the Court of Appeal was an innovation, or, as Lord Denning himself claimed in Davis v Johnson, it restored powers that the Court of Appeal always had. Perhaps Lord Denning has a point: a Court of Appeal with enhanced powers to over-rule itself might be entirely coherent with the doctrine of the hierarchy of courts (again, it is worth reading the Court of Appeal case in Davis v Johnson for an explanation of this position). However, the House of Lords in Davis did not find this line of reasoning compelling, and affirmed the traditional view of the hierarchy of courts. Thus, whatever position the writer takes, the conventional statement of the doctrine of the hierarchy of the courts would more or less assert the need for all
courts to keep to their place in the hierarchy; a position also affirmed by authorities on the position under the Human Rights Act of the Court of Appeal and the House of Lord’s relationship to Strasbourg authorities.

Question 7

‘Bringing the common law test for bias into line with European Human Rights law, shows that the common law takes fair trial rights seriously.’

Discuss.

General Remarks

Question 7 is not too difficult for the well-prepared student who has read the question carefully. Its focus is on Chapter 10, and in particular section 10.4.1. Activity 10.4 is also directly relevant to this answer. The best approach to the question is to agree with the statement that it is making. Discussion should then concern *Porter v Magill* and the revision of the Gough test. Given that Lord Hope in *Porter* attempted to redefine the common law test for bias, the case provides a good reason to agree with the statement contained in the question. However, it would also be important to take into account the case law post Porter which further refined the common law test in the light of Strasbourg jurisprudence.

Question 8

The (fictitious) Police Powers, Covert Operations and Surveillance Act 2010 reads as follows:

1. No police officer should counsel, incite or procure the commission of a crime.

2. (1) Where a police officer acting covertly gives the police information about the intention of others to commit a crime in which he intends that he shall play a part, his participation should be allowed to continue only where:

   (a) he does not actively engage in planning and committing the crime;

   (b) he intends to play only a minor role;

   (c) his participation is essential to enable the police to frustrate the objectives of the principal criminals and to arrest them (albeit for lesser offences) before injury is done to any person or serious damage to property; and

   (d) he is instructed that he must on no account suggest to others that they should commit offences or encourage them to do so.

3. If a police officer acting covertly breaches sections 1 to 2 he may be liable to prosecution on the same terms as others who participated in the crime.

4. If a police officer breaches sections 1 to 2 and as a consequence crimes are committed by another the Crown Prosecution Service may refrain from or discontinue prosecution. In deciding whether to prosecute or discontinue prosecution the public interest will be the overriding factor. In determining the public interest, the Crown Prosecution Service will take into account (i) the seriousness of the
crime; (ii) the difficulties involved in the covert operation; (iii) whether it is likely that no crime would have occurred without the police officer’s involvement; and (iv) the effect on any future prosecutions if prosecution was not engaged in.’

You act for the Crown Prosecution Service. Write a memorandum outlining arguments for and against prosecution in the following situations for both the police officer involved and the persons arrested.

(a) Police officer A has infiltrated an anarchist group who are planning to kidnap a member of the royal family. A copies extensive documentation providing details of the group’s plans including records of their discussions. He claims to have contacts with dealers of high quality weapons and leads B and C, members of the anarchist group, to a pre-arranged location where he tells them they will meet a man who will supply the weapons. When they arrive, B and C are arrested. A had not made any arrangements for B and C to buy weapons.

(b) Police officer D has been working under cover for two years and has assumed the identity of a violent criminal in order to infiltrate a criminal gang. He has been helping gang members to plan a sophisticated robbery whilst providing information to the police. While the planned robbery is taking place, a security guard is shot and killed. D drives the get away car. The police arrest gang members.

(c) Police officer F has assumed the identity of a student protestor, in order to infiltrate the Student Movement protesting against the privatisation of Universities. The Movement intends to organise a series of street protests, and they inform the police of this matter. Officer F seduces G, an executive council member of the Student Movement. With the intention of getting G to speak more freely, F supplies G with cannabis (a prohibited drug) and encourages her to smoke it (G has not previously smoked cannabis). When the demonstration takes place, the police stop and search G and find she is carrying cannabis. G is arrested for possession of a prohibited drug.

General Remarks
(a) A might face prosecution under s.1 for counselling, inciting or procuring the commission of a crime. Under s.3 he would be charged with the same offences as the Anarchists. Given the facts of the question, it is possible that they would be charged with offences relating to kidnapping and attempting to obtain firearms. However, it would appear that A is acting covertly, with the knowledge of the police. We may have to assume that he has been given permission to continue under s.2(1) as he is supplying the Police with evidence on the Anarchists’ activities. To the extent that he intends to play a part in the attempt to obtain firearms, we may have to assume that he has been allowed to continue participating on one or other of the following grounds: that he does not actively engage in planning and committing the crime; that he intends to play only a minor role, or that his participation is necessary to ‘enable the police to frustrate the objectives of the principal criminals and to arrest them’. It must also be born in mind that, on the facts of the question, the arrest takes place ‘before injury is done to any person or serious damage to property’. Whether or not s.2(1)(d) is made out is open to question. A is prohibited from suggesting ‘to others that they should commit offences or encourage them to do so’.

The fundamental question, then, is whether or not the CPS would, under s.4 decide to refrain or discontinue prosecution. The CPS have to take into account whether a prosecution would be in the public interest. In so doing, they need to assess: (i) the
seriousness of the crime; (ii) the difficulties involved in the covert operation; (iii) whether it is likely that no crime would have occurred without the police officer's involvement; and (iv) the effect on any future prosecutions if prosecution was not engaged in.

To turn our attention to (i) it would certainly seem that a serious offence was committed. This would suggest that refraining from prosecution might be in the public interest. It is hard to assess (ii). It may or not be the case that this was a risky and hazardous operation; although, the more risk and hazard involved, the more likely it would perhaps be not to prosecute A. On the evidence we have it is also hard to assess (iii). The critical issue to be established would be whether or not arrests would have taken place without A’s involvement. Prosecution would be unlikely if A had perhaps (and with reference to s.2) played a minor role, and not expressly encouraged B and C. As far as (iv) is concerned, it is perhaps possible to argue strongly that if A was prosecuted it would be harder to infiltrate violent gangs in the future. This might suggest that it was not in the public interest to prosecute A.

(b) As with (a), D might face prosecution under s.1 for counselling, inciting or procuring the commission of a crime. Under s.3 he would be charged with the same offences as those who participated in robbery and murder. We may have to presume that D has been given permission to continue under s.2(1) as he is supplying the Police with evidence that relates to the robbery. The problem is that he appears to be actively engaged in planning and committing the crime and is playing more than a minor role. It is an open question whether or not his participation is necessary to 'enable the police to frustrate the objectives of the principal criminals and to arrest them'. A distinguishing factor with (a) is that a murder has been committed before arrests were made. We also do not know whether or not s.2(1)(d) is made out. D may even have suggested that the offence should be committed.

Arguments for and against prosecution must thus address similar factors as (a) above. In relation to (i) it would certainly seem that a serious offence has been committed and that refraining from prosecution might not be in the public interest. It is hard to assess (ii). It may or not be the case that this was a risky and hazardous operation; although, the more risk and hazard involved, the more likely it would perhaps be not to prosecute D. It is also difficult to assess (iii). The critical issue to be established would be whether or not arrests would have taken place without D’s involvement. If D’s involvement was central to the arrests, then perhaps prosecution is not in the public interest. We can make a similar argument in relation to (iv) as we did in (a). If D was prosecuted it would be harder to infiltrate violent gangs in the future. On balance, and given than D drove the get away car and does not appear to have actually committed the murder, it might be that prosecution is not in the public interest.

(c) This seems different from (a) and (b) to the extent that F has supplied G with cannabis. It may be that F would be prosecuted for supplying the drugs to G.

Arguments for and against prosecution must address a number of factors under s.4. In relation to (i) it is perhaps unclear whether a serious offence has been committed. Indeed, the student group has informed the police of their plans. As far as (ii) is concerned, it does not appear that this is a particularly risky or hazardous operation. As far as (iii) is concerned, it is unclear why people have been arrested. G appears to have been stopped and searched, but it is hard to link this with G’s covert operation. Finally, (iv) does not appear to be a compelling ground. Indeed, it is hard to see why this particular group was infiltrated in the first place. It may be that prosecution of F is in the public interest.