Examiners’ report 2012

LA1031 Common law reasoning and institutions – Zone A

Introduction

Good marks were awarded to those candidates that attempted to engage with the question and produce a coherent argument that supports its conclusions. Those candidates that deployed model answers, simply wrote out their notes or listed detail were not awarded such good marks. Indeed, most of those who deployed these methods failed or received a bare pass mark. Candidates are reminded to work on essay writing skills or risk receiving low marks.

The main problem with CLRI examination answers is the repetition of model answers; or, an approach to answering examination questions that involves writing out notes verbatim in the hope that some of it is relevant.

The spread of marks saw a large banding around thirds and fails. This is not good, and reflects the ongoing reliance on model answers, and a general failure to understand what Section A requires. There were not enough good 2.2s and 2.1s, and no firsts.

Answers to the first part of Part A tend to be universally poor. See below for some tips as to how to approach this part of the examination. In terms of Part B, again as mentioned above, people tend to rely on model answers and have poor essay writing technique. The April 2007 newsletter hosted on the VLE outlines good essay writing technique. Please take a look at this document: https://laws.elearning.london.ac.uk/mod/page/view.php?id=1477. You must answer the question to get good marks. On the whole Question 8 was well done. It is necessary to point out (and to stress) that this question does not require an analysis of the literal rule/mischief rule/golden rule. It can best be understood as a comprehension exercise. See further notes below for guidance on how to approach it.

Specific comments on questions

Part A

Question 1

Candidates must answer this COMPULSORY question.

1. (a) Answer all questions

i. How would you find out which database contains a specific journal?

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.

ii. Give two examples of databases you might use to find journal articles on a topic.

The main examples are: JustCite, Justis, Lexis Library and Westlaw.

iii. How would you go about finding the following case in a database: Al-Khawaja and Tahery v the United Kingdom [2011] ECHR 2127?

Use the Cardiff Index to Legal Abbreviations to find the full title of the law report series. Then, you can check either the finding case reports online table or the Journal Finder, to find out which database (Justis, LexisLibrary or Westlaw) contains the full text of that particular law report.

iv. On which freely available database will you find the revised text of all statutes since 1267?

Legislation.gov.uk

v. What does the abbreviation ER stand for?

English report.

(b) Answer all questions

i. On which of the six topics was the essay which you submitted via the VLE? What were your initial impressions of the issues posed and to what extent did your understanding of the issues change as you carried out your research?

A good answer would outline the candidate’s first response to the topic (the research question) and then go on to show how their thinking developed. Good marks were awarded to detailed discussion of how the research changed first impressions.

We will examine the responses to this question from a candidate who was reflecting on the following research question:

‘Attaining a representative judiciary is difficult but necessary to ensure confidence in the rule of law and to avoid decisions partial to any group in society’ Assess the validity of this statement in relation to a jurisdiction other than England and Wales.

Student extract

‘My initial impression was that given the prominence of the judicial issues ongoing in Libya there would be sufficient material in addition to that already identified for UK judicial issues. The impression changed over the course of composition where it became apparent that the turbulence in Libya meant that there was comparatively little academic or journal writing on the proposed makeup of the not just the judiciary, but all areas of government. Relatively few commentators were able to write due to the ongoing nature of the Libyan revolution.’
Comment on extract
Note how this candidate has engaged with the specific problems of research in the Libyan judiciary. They provide a clear description of how their initial understanding of availability of resources changed, given the problems inherent in the area of study. This theme is picked up in their answer to 1(b)(ii), where the candidate offers further reflections on the difficulties of researching a ‘live’ topic. However, they use their initiative and discover a study of the Libyan judiciary published by Chatham House. They then present further reflections on the fact that they had to rely on journalistic material; and the relationship of newspaper reports to academic writing. To return to this first and main point: this is not a general reflection on the weaknesses inherent in ‘Google searches’ (a point most candidates make). It is a real engagement with problems that come out of researching a particular topic. Thus, their main point in response to 1(b)(iv) is that the ‘essay was written around six months too early.’ The candidate concludes with comments on the efforts of the Libyan NTC to ‘attain a representative judiciary’ that stress the difficulties of thinking and writing about ongoing policy changes in a revolutionary situation.

ii Explain how you found 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. For instance, the discussion of any theme in a textbook is necessarily general; and should thus be linked to the way in which journal articles allow a more focused consideration of key issues. To get good marks on this part of the question, a candidate needs to discuss the articles they used and precisely how they were illuminating or not. Good answers will also contain some reference to sources of law and the problems experienced in understanding them.

iii Outline your conclusions and explain the extent to which they are justified by arguments from the sources you have identified.

This part of the question is about relating conclusions to sources. Good marks for precision and detailed analysis. There has to be a clear sense of how conclusions and sources are linked.

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, a candidate needs to be absolutely precise about the questions that remain open after they have finished their research, and how these questions might suggest a different way of thinking about the relevant area of research.

(20 marks)

General remarks
The main problem (alongside not realising that this part of the examination is about research method) is that of providing formulaic answers.

For general advice on Part A, see the May 2011 newsletter on the VLE: https://laws.elearning.london.ac.uk/mod/page/view.php?id=1477
Part B

Question 2

“The contemporary practice of precedent is largely unproblematic; indeed, since the Practice Statement of 1966 the parameters of the doctrine of precedent have been largely settled.”

Discuss.

General remarks

A good answer would probably agree with the statement in the question. The real issue is perhaps Lord Denning’s campaign to enhance the powers of the Court of Appeal. So, a good answer would engage with Schorsch Meier, Miliangos v George Frank, Young v Bristol Aeroplane and Davis v Johnson. The next major focus for an intelligent answer would be Davis v Johnson, and in-depth consideration of Lord Denning’s reasoning, and his arguments in relation to Bristol Aeroplane and the claim that ‘every court of justice possesses an inherent power to correct an error into which it had fallen’. Some consideration of the House of Lords in Davis and the final refutation of Lord Denning’s campaign to enlarge the powers of the Court of Appeal would also be relevant. An outstanding answer might also cover the perturbations in the doctrine of precedent caused by the Human Rights Act and examine Leeds City Council v Price/Kay v London Borough of Lambeth. Lord Bingham’s judgment stressed the importance of the 1966 Practice Statement and that the ‘ordinary rules of precedent’ still applied in a human rights context.

This answer draws on material in Chapter 3 of The politics of the common law. It also makes reference to the online lecture at https://laws.elearning.london.ac.uk/course/view.php?id=23 and material in Chapter 3 of the subject guide, The decision making of the courts and the doctrine of precedent (in particular Section 3.4.4.).

Student extract

‘Since the House of Lords issues their Practice Statement in 1966, they have largely followed and enforced their own position. Despite repeated attempts by Lord Denning to widen the scope of deviation from existing precedent, they have maintained the position that the powers of the Court of Appeal and the House of Lords are different. The Court of Appeal can depart from its own decisions as elaborated in Young, but only on very limited grounds.’

Comment on extract

This paragraph has the merits of pithy and focused analysis. It comes from the beginning of the essay, and we can see how the candidate is dealing directly with one of the major issues raised by the essay question. If one reads on in the essay, these points are then developed in more detail. The reader thus gets the sense of a carefully organised answer that responds directly to the question asked.

Question 3

‘Are we setting out to make sure those who are appointed as judges are best fitted to carry out the duties of the judge, or are we trying to do other things at the same time to make sure judges reflect society or that the appointment system is a democratic system? It will not necessarily lead to the same result.” (Lord Phillips on reforms of the judicial appointments system).

Discuss.
General remarks
This question concerns the tensions between a representative judiciary, appointment on merit and the extent to which the system of appointments is open to democratic scrutiny. A good answer will engage with Lord Phillips’ statement; is it accurate to assert that reform in these three areas will not produce the same result? The result is presumably a modern, representative judiciary that is transparent and accountable.

There are two possible approaches to this question; two basic ‘variations’ on a set of core themes. We will examine the two options below, but, it must be remembered that this is a rather formulaic approach to the question, that nevertheless allows us to appreciate how best to approach it. First of all, it would be possible to disagree with the statement. The fundamental problem is that, despite the operation of the Judicial Appointments Commission (JAC), the pattern of appointments does not seem to have changed, and, as far as the public is concerned, the process appears difficult to scrutinise. While it would be hard to look behind the assertion that the system, as configured, successfully appoints on merit (i.e. little or no evidence of an incompetent or corrupt judiciary) one could still assert that carefully planned reforms could target all three areas and produce coherent institutional change.

If one was so minded, one could agree with the statement. If one follows Lord Phillips’s arguments before the House of Lords Constitution Committee in May 2011, one can create a case for asserting that the system of appointments to the Supreme Court as presently configured works well. It allows those who are most familiar with a candidate’s track record to make the necessary assessment of their abilities and suitability for high judicial office. It might be that opening up judicial appointments also requires reforms that make the whole process more transparent to public scrutiny; however, this is arguably a different objective from changing criteria for appointment on merit. The idea of a democratically accountable judiciary is also a different concern from a representative judiciary, or appointment on merit. If one is recommending reform of the judiciary, one has to be careful to specify one’s objectives and how they are to be achieved.

Question 3 draws on material in Chapter 9 (see, in particular 9.5) of the subject guide, Chapter 5 of The politics of the common law and the March 2012 newsletter (https://laws.elearning.london.ac.uk/mod/page/view.php?id=1477).

Student extract
Commenting on the pace of reform, one candidate argues:

‘...unless we are clear about our aims, intentions and timescale there is little likelihood that the result we would get would be the best outcome. That does not mean sticking rigidly to the existing methods of judicial appointments, but, rather, embracing pragmatic evolution. There has been slow progress so far. Solutions to the problems of judicial appointment will ultimately depend on sufficient women lawyers or lawyers from minority backgrounds entering the profession and making progress in their careers. We will ultimately perhaps see significant changes in the composition of the judiciary if such groups and encouraged and supported. It is unlikely that simply ‘appointing’ to high office lawyers from such backgrounds would be anything more than a quick fix; changes in the English legal system come slowly, and thus the judiciary will not change overnight; it will, however, change over time.’

Comment on extract
This paragraph comes near the end of the candidate’s essay. Note how they are providing a focused argument that deals with the issues raised by the essay question and brings together concerns from the two basic positions outlined above.
The analysis is interesting as it relates the issue of change in the judiciary to the wider question of how legal institutions change.

Question 4

“The aims and objectives of the civil justice system are not best served by solely emphasising efficient and well managed court processes or by solely emphasising easily available alternative dispute resolution (ADR); instead a balance of both is required. The trick is getting the balance right.”

Discuss.

General remarks
This question calls for an engagement with Lord Woolf's reforms of civil justice. An intelligent answer will start with the discussion of principles in the overview of the final report, focusing on the idea of access to justice. These general principles can then be read into and used to assess more specific areas of reform. The question clearly requires a focus on case management and ADR. More specifically, the question requires a consideration of the way in which principles of reform can balance streamlining civil justice, with alternative ways of resolving disputes with the traditional adversarial culture of civil litigation. Some disputes are not suitable for ADR, and need to be resolved within a court. Does this lead to conclusions that are, in Lord Woolf's words, both just, fair and responsive to the needs of those who make use of the civil courts? In assessing whether or not a balance has been achieved, a good answer will make use of independent assessment of the reforms. Even if a candidate does not do so, credit should be given to any answer that at least raises the issue of how the 'balance' of the reforms can be assessed.

This answer refers to material in Chapter 9 of the subject guide; in particular, see Section 11.2 and the relevant sections of The politics of the common law on ADR.

Question 5

“The creation of a Supreme Court has fundamentally changed the role of the Law Lords. There is now a more confrontational position between the judges and Parliament. This is healthy in a democracy.”

Discuss.

General remarks
It would perhaps be difficult to argue that the Supreme Court has 'fundamentally changed the role of the Law Lords' – this would perhaps only be the case if the Supreme Court had the power to strike down Acts of Parliament. Clearly, this fundamental re-alignment of the constitution was not at stake in the creation of the Supreme Court. Although concerns about the separation of powers were to the fore, it would perhaps be best to see the Supreme Court as a modest re-working, rather than a fundamental change in the relationship between the Law Lords and Parliament. A good answer would perhaps extend this argument into considerations of human rights; and perhaps consider cases like Jackson. It is arguable that there is a kind of 'dialogue' between the Law Lords and Parliament, and to some extent judicial deference to Parliament is perhaps not as marked as it once was. A good answer would also engage with the extent to which it is 'healthy' in a democracy that judges confront Parliament. There are clearly arguments on either side here, but a good answer should make a clear statement for or against an 'empowered' judiciary; a really good answer would also link this issue back to the creation of a Supreme Court and meditate on the relationship between institutional and broader political changes in law.
This question draws on material found in the April 2012 newsletter (https://laws.elearning.london.ac.uk/mod/page/view.php?id=1477), *The politics of the common law* Chapter 5, subject guide Chapter 9 (in particular Section 9.3), and *Recent developments* 2010.

**Question 6**

“Kenneth Clarke’s legal aid reforms are nothing new; the reforms of the New Labour government also attempted to balance reduced funding against the protection of fundamental rights of access to justice. But a satisfactory balance is impossible to achieve.”

Discuss.

**General remarks**

This question focuses on the Legal Aid, Sentencing and Punishment of Offenders Bill. *Recent developments* 2012 quotes Kenneth Clarke: the fundamental objective of the Bill is to ‘[reconcile] the reduced but generous funding that fiscal reality requires, with the protection of fundamental rights of access to justice for critical issues that no civilised society can do without.’

A good answer should perhaps go into some of the changes the Bill attempts to achieve: amending the Access to Justice Act 1999 to limit the availability of legal aid for civil cases. The Bill also ‘abolishes the Legal Services Commission’ and builds on the findings of the Jackson review. Is there a balance between reduced funding and access to justice? Certainly, the Bill is predicated on the argument that costs have risen out of line with the issues that the court is resolving (the Jackson review is relevant here). However, do these reforms jeopardise access to justice? Assessments of this point could make use of information published in *Recent developments* 2012. For instance, the Trafigura toxic waste ‘litigation’; the limitation of the ‘no win, no fee’ system will affect a large number of people and limit their ability to achieve legal remedies. A good answer will have a clear thesis on the extent to which a ‘balance’ has been achieved and also mediate on the final, provocative claim that the question makes.

This question draws on material in *Recent developments* 2012, Chapter 12 of the subject guide (particularly Section 12.9) and Chapter 16 of *The politics of the common law*.

**Question 7**

**EITHER**

(a) “A profound change has occurred in England and Wales where it is now possible for counsel and a judge to decide the fate of defendants without the involvement of 12 ordinary citizens. Efficiency and common sense have won over symbolism.”

Discuss.

**OR**

(b) “Due Process is that which comports with the deepest notions of what is fair and right and just.”

Discuss with reference to Article 6 of the European Convention on Human Rights.

**General remarks**

(a) The focus for this answer is ss.44 to 50 of the Criminal Justice Act (CJA) 2003, *R v Twomey, Blake, Hibberd and Cameron* [2011] EWCA Crim; *J, S, M v R* [2010]
EWCA Crim 1755; KS v R [2010] EWCA Crim 1756. A good answer will consider the development of the case law in relation to ss.44 to 50, and come to a considered conclusion on whether or not there are sufficient safeguards for a trial to take place without a jury.

For information relevant to this question, see Recent developments 2011, and Chapter 8 of the subject guide (particularly Section 8.8).

(b) This is a very straightforward question. A good answer will engage with the idea of fairness and link it to the notion of an independent and impartial tribunal. The relevant cases are Incal v Turkey, Le Compte, Findlay v UK and the subsequent cases on military justice. It would also be necessary to consider the modification of the Gough test in Porter v Magill, and offer a sensible assessment on the degree to which the Strasburg jurisprudence has impacted on the common law.

This question draws on information from Chapter 10 of the subject guide, and Chapter 11 of The politics of the common law.

**Question 8**

Read the following sections of The Search Warrants Act 2010 (a fictitious Act) and advise on the situations that follow.

1 In order to obtain a search warrant, a constable has to show to a Justice of the Peace that there are reasonable grounds for believing that an offence has been committed.

2 A constable must also show that there is material on premises to be searched which is likely to be of substantial value to the investigation of the offence, and that:

   (a) it is not practicable to communicate with any person entitled to grant entry to the premises; and

   (b) entry to the premises will not be granted unless a warrant is produced; and

   (c) the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

3 Search under a warrant must be at a reasonable hour unless it appears to the constable executing it that the purpose of a search may be frustrated on an entry at a reasonable hour.

4 When any person is present at the premises to be searched, the constable shall identify himself to that person unless there are reasonable grounds to suspect that notification of the fact of the search would lead to the destruction or concealment of the evidence named in the warrant.

5 Search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued.

6 Items subject to legal privilege cannot be the subject of a search warrant.

7(1) Items subject to legal privilege are defined as communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client.

7(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.
8 A constable legally on premises can seize any property provided that there are reasonable grounds for believing that the evidence relates to an offence, and it is necessary to seize it to prevent it being lost or destroyed.

Advise on these situations:

(a) Constable Arnold wants to obtain authorisation to search and seize property in Brian’s premises. There are strong suspicions that Brian has been involved in handling stolen goods. Brian has access to a warehouse and a private home address. The Police have evidence that the property is being stored at the warehouse. Advise Arnold of the argument he needs to make to the Justice of the Peace.

(b) Constable Clive has obtained a warrant to search the premises of Edith for stolen computers. The warrant specifies that the search must be made in the morning, but Clive suspects that this will alert the occupier of the premises and so he enters the premises late at night. When Edith challenges Clive, he states ‘get out of my way’ and pushes past her. He then proceeds to tear up Edith’s floorboards as he believes that he will also find drugs that have been concealed. Advise Edith as to the legality of the search.

(c) Constable Frank has a search warrant for the property controlled by Graham. Frank serves the warrant at the correct time, and identifies himself to Graham. Frank is searching for a stolen vehicle. He goes through desk drawers in the premises and confiscates a folder of correspondence that includes letters from Graham’s solicitor, as well as letters to Graham’s co-accused, Helen. When searching another desk drawer, Frank finds a bag of white powder, which he confiscates believing it to be drugs. Advise Graham of the legality of Frank’s search.

General remarks

(a) Under s.1 A needs to show to the Justice of the Peace that he has reasonable grounds for believing that an offence has been committed. As the question states that ‘there are strong suspicions that Brian has been involved in handling stolen goods’ we can presume that this ground has been satisfied. The next issue is that the search warrant must be for the warehouse rather than the private address. Under s.2, A must also show that there is material on premises to be searched which is likely to be of substantial value to the investigation of the offence, and that it has not been practicable to communicate with B and that entry to B’s premises will not be granted unless a warrant is produced. Finally, A must also show that ‘the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.’ It is worth reminding A that the search must be at a reasonable hour (s.3); and that he should bear in mind s.4. Furthermore, items subject to legal privilege cannot be subject to a search. Any further discussion extends into the next two parts of the question, and is thus probably not worthwhile.

(b) The focus of this part of the question is on s.3. C can enter the premises later than the time specified on the warrant to the extent that ‘the purpose of a search may be frustrated on an entry at a reasonable hour.’ A good answer would stress that the language of the relevant section is rather vague: C does not have to have a reasonable belief/suspicion: it merely has to ‘appear’ to C that the search would be frustrated by the time specified on the warrant. This part of the question also raises a s.4 issue. C does not identify himself, and it does not appear that there are ‘reasonable grounds to suspect that notification of the fact of the search would lead to the destruction or concealment of the evidence named in the warrant.’ A good answer will contain some analysis of this point. There also appears to be a breach of s.5. This specifies that ‘search under a warrant may only be a search to the
extent required for the purpose for which the warrant was issued.' C appears to believe that he will find drugs. However, C may be acting under s.8: so far as he is legally on the premises, he ‘can seize any property provided that there are reasonable grounds for believing that the evidence relates to an offence, and it is necessary to seize it to prevent it being lost or destroyed.’ A good answer would have to show that this section applies to the facts of the case.

(c) This part of the question is focused on issues relating to items subject to legal privilege. There are clearly no issues about the service of the warrant, or F’s identification of himself to G. There is a possible breach of s.5, but it depends whether or not F is searching for documents relating to the vehicle. As far as the white powder is concerned, it may raise a s.8 point, and a good answer would ask questions about whether or not F was legally on the premises. As far as the seizure of the correspondence is concerned, the starting point of analysis is s.6. To the extent that the correspondence is subject to legal privilege it clearly cannot be subject to a search warrant. The real issue relates to the definition of items subject to legal privilege at s.7(1); a good answer will speculate as to whether or not the correspondence might fall under s.7(2).

**Student extract**

Consider the following response from a candidate to this question:

‘While F can probably make a case for searching the for documentary evidence relating to the theft of a car under s. 8 of the Act, he appears to go beyond his authority in confiscating privileged items if they are in connection to legal representations and the provision of legal advice. This element of the matter will thus be determined by the contents of these letters, and as a point of caution, if they contain material held with the intention of furthering a criminal purpose, they will not be afforded legal privilege and have been seized legitimately. This rationale extends to letters to the co-accused Helen, in as much as their content and status being subject to seizure under the terms of the Act.’

**Comment on extract**

This paragraph from 8(c) deals well with one of the central points raised by this part of the question. The candidate identifies the issue and deals with it succinctly. As they argue, whether or not the correspondence can be seized depends very much on their content. It might have been worth going into some more detail on the s.8 point. How would F make a case for the search of the desk drawers? The point is that they may contain documents that relate to the car or its whereabouts.

For guidance on answering this kind of question, see the January and February 2011 newsletters: https://laws.elearning.london.ac.uk/mod/page/view.php?id=1477. Feedback on similar questions from the 2011 CLRI examination can be found on the May 2012 newsletter.