

Legal systems: a world view

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The English legal system is based on the *common law*. Consistency and predictability are assured by prior decisions of the courts on similar matters establishing judicial *precedent*. The continuing role of the courts is to apply and develop the common law. Statute law is created by Parliament and takes precedence over common law, Parliament being the supreme legal authority of the United Kingdom. This supremacy has been affected by the UK's membership of the European Union (EU), with European Law taking precedence over British Acts of Parliament (although it is still thought possible by many that Parliament could reassert its supremacy if it should so choose).

The alternative legal tradition in most of Europe is derived originally from the legal system of Ancient Rome, also known as *Civil Law* (the latter not to be confused with English 'civil law' which refers to non-criminal legal matters – see below). Over the centuries the code developed as a body of international law, the *ius commune* and was later codified in many countries as their own national expression of law. In contrast to common law precedent, consistency is achieved by judicial application and interpretation of the code, rather than of prior case law decisions.

The United Kingdom exported the English legal system to its colonies, including the United States, and the countries of the Commonwealth. Most retained it after independence. By similar colonial

expansion many countries of Europe established Roman law as the predominant legal system. Other nations, including Turkey and Japan, adopted Roman law as the basis of their legal systems. A few countries have systems exhibiting a mixture of common and Roman law elements.

A third international legal system is based on religious law, mainly the Sharia Law, derived from the Islamic faith, which exhibits many differences from Western systems, such as a prohibition on exacting interest. It is the basis of law in countries such as Saudi Arabia and Iran.

Wales shares the same common law tradition as England. Scotland had developed its own more Roman law-based tradition and continues with this system today (see Chapter 2). The modern law in Northern Ireland is also based on the common law, a consequence of the Plantation in the seventeenth century, followed by the Union of Great Britain and Ireland in 1801. After Partition in 1922, Northern Ireland retained the common law system.

Civil and criminal law

Most legal systems are divided into civil and criminal jurisdictions. Civil law regulates the conduct of persons (which can include 'corporate' persons such as companies) toward one another. Criminal law regulates conduct sufficiently unacceptable to

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society in general as to warrant the enforcement of penalties by the state. The law, procedural rules and courts which hear cases differ between civil and criminal jurisdictions in the United Kingdom.

Sources of law

The main sources of law in England and Wales are Parliament, the EU, and case law adjudicated by the courts.

Parliament

Statute law is enacted by Parliament. All Acts of Parliament must be passed by both Houses and receive Royal Assent. Statute law takes precedence over all other law. In addition to statute law (or *primary* legislation), Parliament passes a huge volume of *secondary* legislation, including Statutory Instruments and Bye-laws. The authority for these laws is derived from statute law. Such a mechanism enables the passage of many measures impracticable to enact fully as statutes.

Approved *Codes of Practice* issued by government departments comprise a special category. Such guidance has a quasi-legal status. Although not law, it can be admitted in court as evidence of recognized good practice; to disregard it could very rarely be justified. The most important examples for forensic physicians (FPs) are the Codes of Practice governing certain key areas of police procedure issued by the Home Office under the Police and Criminal Evidence Act 1984 (PACE), of which the most important is Code C governing the detention, treatment and questioning of suspects in police custody.

Legislation is also passed by representative bodies in the other UK nations. Since devolution in 1998 Scotland has its own Parliament whose responsibilities include criminal justice. Wales has a National Assembly capable of passing secondary legislation. Northern Ireland has recently seen devolved government restored, with an Executive and Legislative Assembly.

European Union (EU)

The United Kingdom acceded to the EU in 1973. Since then EU legislation has had growing effects on domestic law. The EU is governed by a Council of Ministers, has an elected Parliament, and is administered by a Commission from which all European legislation originates. *Regulations* automatically become the law in member states. *Directives* require member states to legislate to achieve the directive's intent.

The EU has traditionally not had much influence on the UK criminal justice system but this may change in future. A recent change has been the introduction of the European Arrest Warrant (Extradition Act 2003). An arrest warrant can be issued by a court in one member state, leading to the arrest of a suspect in another, and speedy extradition.

The European Court of Justice (ECJ) sits in Luxembourg. It should not be confused with the European Court of Human Rights (ECHR) in Strasbourg, which adjudicates on the European Convention on Human Rights. The ECJ is the final authority on European Law throughout member states, and its decisions take precedence over national law. Where UK law is found to be in conflict with European Law, the former must be changed. The UK courts may refuse to enforce a conflicting national law (*R v. Secretary of State for Transport ex parte Factortame* [1990] 2 AC 85).

Case law and the courts

The role of the courts is to determine the facts of a matter, and then apply the law in judgment. This involves application of both legislation and prior case law. Good legislative drafting should reduce the need for arguments about interpretation. Court judgments much more commonly involve case law.

Consistency results from judicial *precedent*, applying the legal principle of *stare decisis* ('let the decision stand'). This means that courts are bound to act in accordance with prior rulings in other courts when faced with similar facts. Judgments are published in the Law Reports. All will contain

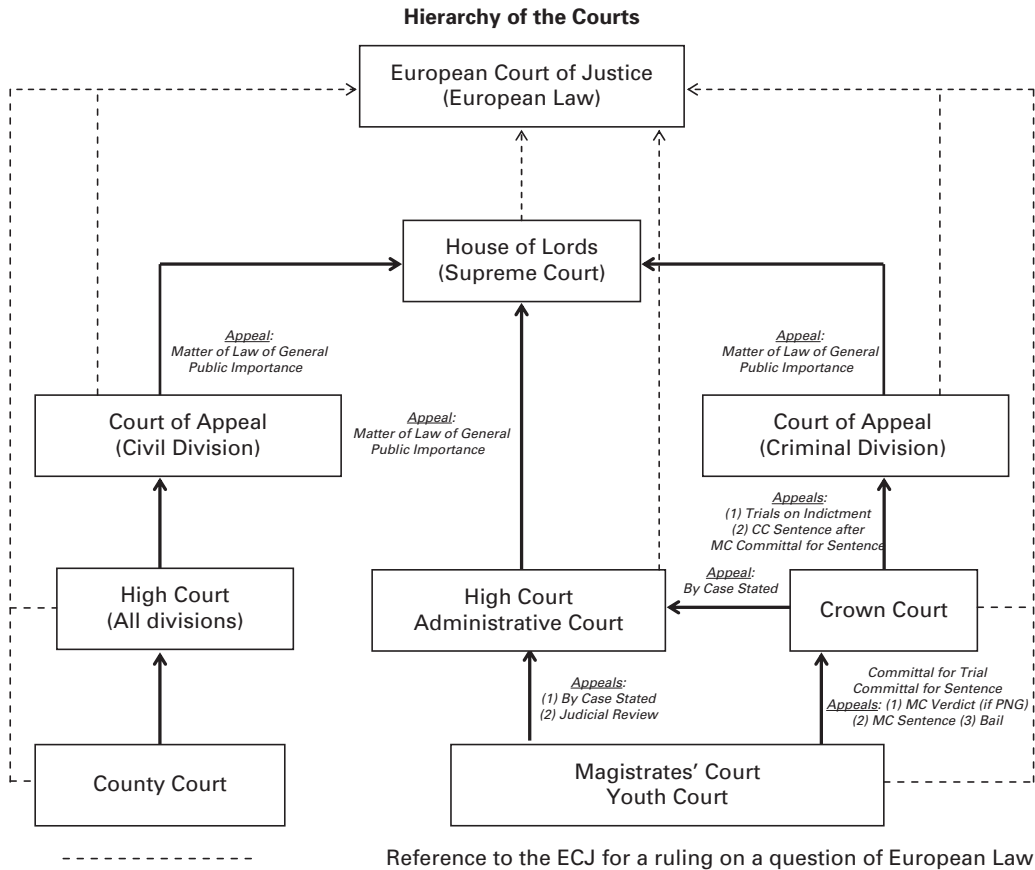


Fig. 1.1 Hierarchy of the courts. MC, magistrates' court; CC, Crown Court; PNG, Plead Not Guilty.

a kernel of legal reasoning known as the *ratio decidendi* (the 'reason for deciding'), which explains the legal principles applied. This is the part of the judgment creating the *binding* precedent. The remainder of the judgment is termed *obiter dicta* ('things said by the way'). This may influence other courts, so being persuasive, but is not binding. Identifying the *ratio* of a case is an important legal skill. For precedent to work in practice, a hierarchy of the courts allows more difficult matters to be appealed at a higher level. The court system differs for civil and criminal cases.

Traditionally the Judicial Committee of the House of Lords (HOL), comprising the most senior judges (the 'Law Lords'), formed the highest court in the United Kingdom (see Fig. 1.1). This arrangement has been criticized as diminishing the constitutional separation of the judiciary and the legislature. As a result of reforms enacted in the Constitutional Reform Act 2005, the HOL will soon be renamed the Supreme Court of the UK, and will become completely separate from Parliament. For similar reasons, the judicial role of the Lord Chancellor has now been abolished and replaced

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with that of a Minister for Constitutional Affairs, more recently subsumed into the new Ministry of Justice.

The HOL binds all the courts beneath it. No other court binds it (other than the ECJ on matters of European Law) and it can depart from its own previous decisions. The next highest court, the Court of Appeal, is bound by the HOL, but also by its own prior decisions, and again binds all courts beneath it (with the exception of criminal appeals, where the Court of Appeal has the power to disregard precedent when it is deemed to be in the overall interests of justice).

Below the Court of Appeal, the Divisional Courts and High Court are bound by the courts above them, create precedent for those below and are in general also bound by their own prior decisions. The magistrates' and county courts are bound by precedents set in higher courts, but do not create precedent, and are not bound by other decisions of similar 'lower' courts. The Crown Court binds magistrates' courts and is bound by the higher courts, but not by itself.

In 1997, following concern about miscarriages of justice, the Government established an independent body, the Criminal Cases Review Commission, to investigate such possible cases in England, Wales and Northern Ireland. A similar body exists in Scotland. Anyone can apply for a case to be considered, although stringent criteria apply to avoid frivolous applications. The Commission assesses allegations of injustice and whether convictions or sentences should be referred to the Court of Appeal. The Court of Appeal may also direct the Commission to investigate appeal cases.

Matters of European Law can be referred to the ECJ, and ECJ rulings bind all courts including the HOL. Such referrals are not appeals, but requests for guidance on application of European Law. The ECJ also adjudicates on disputes involving member states, and the Institutions of the EU.

Civil cases are generally heard first at the county court. However, if complex, or involving large sums of money, they may be heard first at the High Court, to which county court cases may also be appealed.

In civil cases in general appeals are made to the next level of judge up in the court hierarchy. A county court appeal lies from a district judge to a circuit judge (who may also sit in the county court) and thence to a High Court judge. Appeals from a High Court judge are heard by the Civil Division of the Court of Appeal, and thence in turn by the HOL.

Roughly 95% of criminal cases are heard in the magistrates' courts. Many are minor matters such as speeding or parking, and can be dealt with by the accused pleading guilty by post (s12 Magistrates Court Act 1980). Summary trial usually takes place before a panel of three lay persons appointed as magistrates, assisted by a legally qualified court clerk. In some larger courts, a salaried district judge replaces the panel.

After a first appearance in a magistrates' court, more serious 'indictable' offences will be sent for Crown Court trial. Transfers to Crown Court are now made by a simple 'allocation' procedure. (Sch. 3 Criminal Justice Act 2003 (CJA 2003)). Both the verdict and sentence of a magistrates' court may also be appealed to Crown Court. The prosecution also have limited rights of appeal. Appeals from Crown Court are heard by the Administrative Court, part of the Queen's Bench Division of the High Court. The sole ground for appeal is now that the conviction is 'unsafe' (s2 Criminal Appeal Act 1995). From the High Court cases may be appealed to the Criminal Division of the Court of Appeal, and from there in turn again to the HOL.

The youth court is effectively a specialized form of magistrates' court, in which procedure has been amended to make the court less intimidating for juveniles (who are classed as those under 18). It is one result of a widespread change in managing youth offenders since passage of the 1998 Crime and Disorder Act. New police powers were created to issue warnings and reprimands, and new sentences, including reparation and parenting orders were introduced. Juveniles have no power to elect Crown Court trial, and all matters except homicide can be tried before the youth court. Public access to youth court trials is not permitted and reporting strictly controlled.

The ECHR adjudicates on disputes involving issues of human rights as in the European Convention. Forty-five member states are signatories to the Convention, and half have incorporated the Convention into their national law, as Britain did with the 1998 Human Rights Act (HRA). This Act has enabled UK nationals to seek redress in the UK national courts for infringement of Convention rights. An appeal to the ECHR is only possible if domestic redress is exhausted. Detailed discussion of the Convention and HRA 1998 are outside the scope of this chapter but they have had far-reaching effects on UK law.

Criminal law and procedure

Investigation of crime

The criminal justice process begins with the suspicion that an offence has been committed. Upon receiving a report of an alleged offence the police, whose role is to uphold the law, will consider an investigation, dependent on the nature of the report, the gravity of the matter, and the resources available. The police are not the only body with power to investigate suspected crime, and other agencies may also do so, for example HM Revenue and Customs (HMRC) and Trading Standards.

Arrest

The Police and Criminal Evidence Act 1984, and the provisions of the PACE Codes of Practice, apply to all criminal investigations, ensuring a balance between the rights of suspects and the conduct of enquiries. Once individuals become 'suspects' they should be cautioned, before further questioning. The Police and Criminal Evidence Act 1984 powers of arrest have been substantially amended by s110 Serious Organised Crime and Police Act 2005 (SOCAPA) making all offences arrestable. Lawful arrest (without warrant) now requires the arresting officer to have formed an (objective) reasonable suspicion of guilt, a genuine (subjective) belief of

probable guilt, and to believe that arrest is necessary. The necessity criteria are set out in PACE Code G para 2.4 to 2.9 and include such things as the need to prevent the person causing injury to himself or others, or damage to property, and the protection of children.

The Police and Criminal Evidence Act 1984 as revised also contains a new section 24A dealing with powers of arrest by persons other than a constable (so-called 'citizen's arrest'). These are of especial importance to the growing number of Police Community Support Officers (PCSOs) as well as workers in the security industry. Section 24A arrest powers apply only to indictable offences and it must also be impracticable for a constable to make the arrest, which must also be necessary, for example to prevent the suspect making off before a constable can assume responsibility for him/her.

Magistrates may also issue arrest warrants, usually when suspects fail to attend court, commonly called 'bench warrants'. If the magistrates are prepared to allow bail after arrest, they endorse the back of the warrant with the necessary conditions, and the warrant is then 'backed for bail'. Crown Court judges have similar powers.

A person must be told the reason for arrest as soon as practicable, after which they must be either bailed or taken to a police station suitable for detention purposes. Procedures at the police station, and the FP's role therein, are dealt with elsewhere in this book.

Decision to prosecute

The Crown Prosecution Service (CPS) is the body responsible for prosecuting criminal cases investigated by the police. When a decision is made whether to charge a person with an offence the CPS is responsible for this decision (s28 CJA 2003) in all but minor offences, and is now routinely consulted by the police before proceeding. The CPS decision is guided by the Code for Crown Prosecutors, which provides a test for decisions on prosecuting. There must be sufficient evidence to

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provide a realistic prospect of conviction (on the balance of probabilities), and the public interest must lie in favour of prosecution.

Adversarial trial process

In English law the trial process is an adversarial one, which tests the competing claims of the parties, rather than 'searching for the truth'. Each party presents their case, with the evidence to support it, and may seek to discredit the other party's case. The role of the judge is to ensure proper conduct between the parties. By contrast, the trial process in many civil (Roman) law systems is an inquisitorial one, characterized by a search for facts. In both systems, the court is normally the vehicle for determining the conclusion or verdict, and also the appropriate remedy or sentence.

Offence categories and mode of trial

Criminal cases follow a path through the courts determined by which of three categories they fall into. *Summary* offences are heard in the magistrates' court, including relatively minor matters such as obstructing police, and in the absence of a guilty plea will be listed for summary trial. Offences *triable only on indictment* (TOI) are immediately sent to the Crown Court for trial before a jury, and include the most serious offences, such as murder and rape. Several preparatory hearings frequently occur before the actual trial date.

In the third category of offences, *triable either way*, a further hearing will be held in the magistrates' court to determine where the trial will take place (Mode of Trial Determination – MOTD), depending on the seriousness of the offence, and the magistrates' sentencing powers in the event of a conviction. National guidelines from the Sentencing Guidelines Council help magistrates reach consistent decisions.

At the MOTD hearing the accused is offered the opportunity to enter a plea. If the plea is Guilty, the magistrates' court moves straight either to sentence (or to committal to Crown Court for sentence if the

magistrates consider their powers inadequate). If the plea entered is Not Guilty, the MOTD hearing proceeds. If the court decides that summary trial is appropriate, the accused can accept this, or elect for Crown Court trial instead. The effect of this procedure is that both court and accused must agree for summary trial to take place.

From the perspective of the accused, the main considerations will be that conviction rates in the magistrates' court are much higher (some studies suggest 70% or more) than in the Crown Court before a jury (somewhat less than 50%). However, if convicted, the sentencing options available at the Crown Court are much more stringent, including longer terms of imprisonment and heavy fines. A careful exercise in balancing the possible outcomes and sentences is necessary, with legal advice essential to making the best choice.

Criminal procedure reforms

Significant recent changes have taken place in the management of all criminal cases with the introduction of the Criminal Procedure Rules 2005 to govern all aspects of handling cases. An accompanying Consolidated Criminal Practice Direction consolidates all previous such directions. The system has introduced a stated overriding objective that criminal cases be dealt with justly, with active case management by judges and magistrates to speed up the court process. Plea and Case Management (PACM) hearings have been introduced to enable more efficient case management.

Juries

The main difference between trials in the Crown and magistrates' court is in the role of the jury. Magistrates and judges both serve as *tribunal of law* in their courts, applying the law to the facts laid before them in evidence. Magistrates also serve as the *tribunal of fact*, reaching conclusions on the facts and thus the verdict. However, the tribunal of fact in the Crown Court is the jury, which alone determines the verdict, and may acquit even when

it appears the facts must lead to a conviction. This is a central part of the system of protection afforded to the accused. Some civil cases may also be heard by a jury (see below).

Recent reforms mean that, with very few exceptions such as the mentally ill, almost all adults on the electoral roll are eligible for jury service. Selection is at random and made by computer. In certain sensitive cases, those selected may be vetted by guidelines issued by the Attorney General. The jury must not discuss the case with other people and their deliberations must remain secret (Contempt of Court Act 1981). A unanimous verdict is always sought first, but if this cannot be reached after a reasonable interval, a majority verdict of not less than ten to two is permitted. This may be reduced to nine to one if jurors have been discharged in the course of the trial. Up to three jurors may be discharged during a trial (requiring a unanimous verdict of the remaining nine) before the jury must be dismissed and a retrial ordered (s16 Juries Act 1974).

Magistrates' court trial

In the magistrates' court the charges are put to the accused and the plea is taken. The prosecution may then make an opening speech giving an overview of the case. Usually this is confined to a brief account of the alleged facts of the offence(s), or foregone altogether. The prosecution then calls its witnesses, who take the oath (or affirm), and are then questioned by the prosecution; this is *examination in chief*, and the witness gives his *evidence in chief*.

After each witness is heard the defence can then question or *cross-examine* them. Finally the prosecution can make a brief further *re-examination*. Written statements agreed by both parties are read into the record.

At the end of the prosecution case the defence may make a submission of 'no case to answer', if insufficient evidence has been advanced to prove one of the essential facts for conviction or the evidence given has been discredited. If a no case submission is not made, or fails, the defence will then

present their case, by calling witnesses as did the prosecution. The accused must be called first if giving evidence. The defence must ensure that they 'put their case' to the court, that is adduce evidence to support all aspects of that case. Any facts advanced by the prosecution that the defence does not dispute are deemed accepted. The defence usually does not make an opening speech, saving their submissions for a closing speech, and thus having the last word.

The magistrates then retire to reach a verdict. If a guilty verdict is announced, unless then committed to the Crown Court for sentence, the case is usually adjourned. Typically this is for three or four weeks to obtain pre-sentence reports, before sentence is passed.

Crown Court trial

In the Crown Court the charge is put and plea taken (the *arraignment*) at a PACM hearing. At the start of the trial a jury is empanelled by selection of 12 jurors from a larger pool who enter court. Those selected, unless challenged, are then sworn. The indictment is then read to the jury and they are advised of the not guilty plea.

It may be asserted that the accused is unfit to plead, which has a specific meaning in law, namely that the accused is incapable of understanding the proceedings, and thus cannot advance a defence, follow the evidence, or instruct counsel (*R v. Podola* [1960] 1 QB 325). Under the Criminal Procedure (Insanity) Act 1964 (as later amended), the judge must hear evidence and determine the issue. If then found unfit to plead, the court proceeds to trial and the jury has to establish whether the accused committed the criminal act (*actus reus*) of the offence. If so, an order for detention in a secure hospital will normally be made.

Unlike the magistrates' court, the prosecution always make an opening speech giving the jury an overview of the case. Prosecution witnesses are then examined and cross-examined as in the magistrates' court. At the conclusion of the prosecution case, the defence may make a 'no case' or

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'half-time' submission on similar grounds to the magistrates' court.

The defence may object to part of the prosecution evidence. Where possible such questions are resolved in preliminary hearings, but if they occur during a trial a hearing may be held to determine the matter in the absence of the jury, commonly called a *voir dire* (a trial within a trial). The position differs in the magistrates' court, where the bench are also the tribunal of fact, and the guiding principle is to ensure the fairness of the proceedings. Once a decision on admissibility is made, witnesses may require warning and written statements may require editing to exclude matters not admissible.

In complex cases the defence may start their evidence with a speech outlining their case, but if no witnesses to fact other than the accused (and any character witnesses) are to be called, the right to a defence opening speech is lost. The defence witnesses are then examined and cross-examined. As in the magistrates' court, the accused must be called first if giving evidence. Where multiple defendants are being tried, their defence cases are heard in the order in which their names appear on the indictment. A closing speech is sometimes made by the prosecution and always by the defence. The judge then sums up the case by instructing the jury on their role, on the applicable law and by summarizing the evidence. The jury then retire to consider their verdict.

Sentencing

Following conviction, sentence is passed. Magistrates and judges work within clear guidelines issued by the Sentencing Guidelines Council on their sentencing powers, such as the relevant aggravating and mitigating factors which should be considered and the credit to be given for an early guilty plea. Any significant departure from these is likely to form grounds for an appeal. The sentences available include fines, custody, community sentences and costs orders. Compensation orders may be awarded to victims.

Civil procedure

Civil law comprises actions brought by claimants against defendants in the county court or the High Court, which may lead to the award of remedies, such as damages and/or costs. Since 1999 the structure of civil justice has been radically reformed with the introduction of the Civil Procedure Rules, and an overriding objective to ensure that the courts deal with cases *justly*, ensure efficiency and save costs. These changes were the forerunner of the Criminal Procedure Rules, which have similar objectives. The rules provide a uniform framework for both county and High Court actions, which used to be subject to different rules and procedures.

The most common civil actions are for recovery of debt, recovery of land and personal injury. However, those most likely to involve FPs are actions against the police for assault, unlawful arrest, false imprisonment and malicious prosecution (the latter two classes of action are normally tried before a jury). In addition there is the risk of a medical negligence action directly involving the FP.

Such actions may be commenced several years (sometimes decades) after the events giving rise to them. Thus it is essential that the FP keep detailed notes on all the cases he sees and retains these for many years (effectively for life). Of particular importance are the notes kept on the injury or lack of injury resulting from the application of handcuffs, strikes by asp and batons, and the use of control and restraint agents such as CS spray and the Taser (Thomas A. Swift's electronic rifle). Where such methods have been employed it is unwise to rely on saying the absence of notes indicates normality, which can be made to sound a very weak assertion in court.

Claimant solicitors make an initial assessment of the possible claim, including potential costs. If the claimant proceeds, the solicitor arranges detailed investigation of the claim and assembly of relevant evidence, including witness statements. In certain types of case, including medical negligence, this process has been streamlined through the introduction of *pre-action protocols* enabling

efficiency in the exchange of information and the use of experts.

The action commences with issue of a Claim Form (formerly a *writ*) served on the defendant, followed by details (the *particulars*) of the claim. The defendant must then acknowledge receipt of this and/or file a defence, or risk judgment being awarded against him/her in default. If either the original case or the defence is weak, either party may seek, or the court itself may enter, a summary judgment to bring proceedings to a close and minimize costs. Alternative Dispute Resolution by arbitration, mediation, or conciliation may also be suggested.

If the action proceeds it is then allocated to one of three tracks according to its value and complexity: the small claims track in the county court deals with sums less than £5000; fast track cases are usually allocated to the county court and deal with sums of between £5000 and £15000; multi-track cases of more than £15000 value may be allocated to the High Court.

Evidence is then disclosed by the parties, and the court may give directions for further such disclosure, including that of expert evidence. A trial date is eventually fixed. At the hearing the judge, who will have read the papers, will sometimes forego an opening address, otherwise the claimant's advocate makes an opening speech. Witness statements are in a standard form containing a signed statement of truth. These will usually simply be tendered as evidence in chief, and the witnesses then called are submitted to immediate cross-examination. After closing speeches judgment is given either immediately or after an adjournment. The judge may then award damages, make other remedial orders and award costs.

Case preparation and the law

For a criminal conviction, three things must normally be established, namely a criminal act (*actus reus*), an accompanying mindset (the *mens rea* – guilty mind) and the absence of an accepted defence. A prosecution lawyer confronted with

criminal case papers will first determine what offences have been charged, and then examine the law to determine what are the above *elements* making up the offence(s). All the elements must be proved for a conviction to be established, and each has its own legal background. Alongside this there must be no recognized defence, of which there are a number of established legal categories, each with its own legal framework.

Once the offence(s) and the law are clarified, the next step will be to review the evidence to establish what are asserted to be the facts of the matter, and in particular those which are disputed. Applying the law to the facts will enable a prosecution lawyer to determine what facts must be proved to enable a conviction, and then to assess the strength of the evidence available to prove those facts. Those that must be proved and are disputed are the *facts in issue* of the case. A defence lawyer will perform the same exercise but with a view to disproving some of the facts in issue such that at least one element of the offence is not established, or a defence is proved.

A similar process underlies civil actions. For example, in a negligence action, success with a claim requires proof of four components; the existence of a duty of care, a breach of that duty, damage or harm and a causal link between breach and the damage.

The law of evidence

In an apocryphal legal tale, an English judge is said to have become impatient when witness after witness produced conflicting accounts before him. 'Am I never to hear the truth?' he finally asked a barrister. 'No my Lord, merely the evidence', replied counsel.

Evidence is information by which facts tend to be proved or disproved, by persuading a court of the probability of the facts asserted. Evidence can be of several forms, such as witness evidence, documentary evidence and real evidence (objects like clothing or specimens). Circumstantial evidence

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suggests the truth of a fact by inference rather than by direct observation.

Evidence must be both relevant and admissible. Evidence is relevant if it logically helps to prove or disprove some fact at issue in the case (*R v. Sang* [1980] AC 402). It is admissible if it is related either directly or circumstantially to the facts at issue, and (in general) has been properly obtained. The *weight* of evidence is how much probative effect it has.

For many years the English approach to evidence has tended to be exclusionary in nature, to provide safeguards against unfairness, particularly in criminal prosecutions. For example there were stringent restrictions on admissibility of evidence of the defendant's previous convictions. Such restrictions were aimed at preventing both undue prejudice against the accused, and reducing the risk of concocted or improperly obtained evidence.

In recent years the trend has been less protective, especially in the civil courts where most cases are heard before a judge rather than a jury. This change in approach has now also extended to large areas of criminal evidence. The Criminal Justice and Public Order Act 1994 (CJPOA) made the accused's right to silence subject to possible adverse inferences. The CJA 2003 has now allowed much wider admissibility of both hearsay and bad character criminal evidence, subject to certain restrictions.

Witness evidence

Witnesses are *competent* if they can be allowed to give evidence. They are *compellable* if they can be made to do so by law. In general everyone is considered both competent and compellable. Criminal defendants are competent but not compellable in their own defence, or that of co-defendants.

In civil actions spouses are competent and compellable. In criminal cases the defendant's spouse is competent and compellable as a defence witness. For the prosecution, he/she is competent but becomes compellable only in certain categories of offence that involve domestic violence or sexual abuse. He/she cannot be compelled in any case where he/she is a co-defendant.

Children (those under 18 – s105 Children Act 1989) (ChA) in civil cases are competent to give evidence on oath if they understand the nature of the oath and the duty it embodies (*R v. Hayes* [1977] 2 All ER 288). If not, they can give evidence unsworn if they understand their duty to be truthful, and have sufficient understanding to be heard (s98 ChA 1989). In criminal cases persons of all ages are competent unless they do not understand questions put to them and cannot give answers that can be understood (s53 Youth Justice and Criminal Evidence Act 1999) (YJCEA). Children under 14 give criminal evidence unsworn. Over the age of 14, they are presumed able to give evidence sworn (if disputed this is determined by a test similar to the Hayes test for civil cases – s55 YJCEA 1999).

The competence tests for mentally subnormal persons as criminal witnesses are similar to those for children. In civil cases, however, if a person does not satisfy the Hayes test there is no provision for them to give evidence unsworn, and they are deemed incompetent to testify.

Testimony in court

The aim of examination in chief is to elicit a witness's contribution to the story of the case. The technique permitted is *direct* questioning – using questions which do not suggest the response sought. An alternative form of impermissible questioning is the *leading* question – one suggesting a particular response. To speed the process a few simple leading questions will often be asked at the start of examination in chief, provided the other party agrees, where these relate to what may be uncontested matters such as simple names and dates.

The aim of cross-examination is to amend or undermine the prosecution's case and the technique permitted now includes leading questions. A final and usually very brief re-examination may follow to further clarify any matters raised in cross-examination, and leading questions are again not allowed. The same rules apply in reverse when the