

## Learning objectives

After studying this chapter you should understand the following main points:

- the nature of law;
- the ways in which the law may be classified, including the differences between public and private law, civil and criminal law and common law and equity;
- the development of English law including the emergence of the common law and equity;
- the basic principles of legal liability, such as the distinction between civil and criminal liability.

The law affects every aspect of our lives; it governs our conduct from the cradle to the grave and its influence even extends from before our birth to after our death. We live in a society which has developed a complex body of rules to control the activities of its members. There are laws which govern working conditions (e.g. by laying down minimum standards of health and safety), laws which regulate leisure pursuits (e.g. by banning alcohol on coaches and trains travelling to football matches), and laws which control personal relationships (e.g. by prohibiting marriage between close relatives).

So, what is 'law' and how is it different from other kinds of rules? The law is a set of rules, enforceable by the courts, which regulate the government of the state and govern the relationship between the state and its citizens and between one citizen and another. As individuals we encounter many 'rules'. The rules of a particular sport, such as the off-side rule in football, or the rules of a club, are designed to bring order to a particular activity. Other kinds of rule may really be social conventions, such as not speaking ill of the dead. In this case, the 'rule' is merely a reflection of what a community regards to be appropriate behaviour. In neither situation would we expect the rule to have the force of law and to be enforced by the courts.

In this book we are concerned with one specific area of law: the rules which affect the business world. We

shall consider such matters as the requirements that must be observed to start a business venture, the rights and duties which arise from business transactions and the consequences of business failure. In order to understand the legal implications of business activities, it is first necessary to examine some basic features of our English legal system. It is important to remember that English law refers to the law as it applies to England and Wales. Scotland and Northern Ireland have their own distinct legal systems.

## Classification of law

There are various ways in which the law may be classified; the most important are as follows:

**1 Public and private law.** The distinction between public and private law is illustrated in Figure 1.1.

(a) *Public law.* Public law is concerned with the relationship between the state and its citizens. This comprises several specialist areas such as:

(i) *Constitutional law.* Constitutional law is concerned with the workings of the British constitution. It covers such matters as the position of the Crown, the composition

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## Part 1 Introduction to law

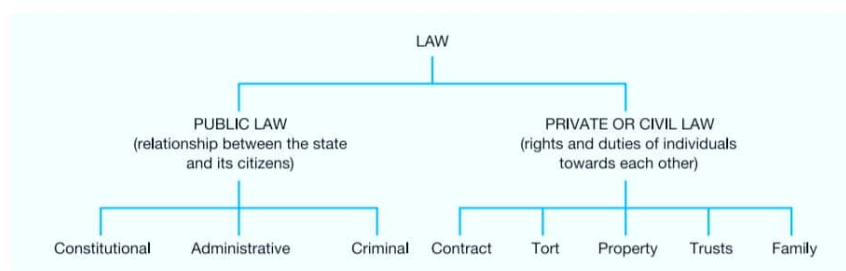


Figure 1.1 The distinction between public and private law

and procedures of Parliament, the functioning of central and local government, citizenship and the civil liberties of individual citizens.

(ii) *Administrative law.* There has been a dramatic increase in the activities of government during the last hundred years. Schemes have been introduced to help ensure a minimum standard of living for everybody. Government agencies are involved, for example, in the provision of a state retirement pension, income support and child benefit. A large number of disputes arise from the administration of these schemes and a body of law, administrative law, has developed to deal with the complaints of individuals against the decisions of the administering agency.

(iii) *Criminal law.* Certain kinds of wrongdoing pose such a serious threat to the good order of society that

(a) *Criminal law.* The criminal law is concerned with forbidding certain forms of wrongful conduct and punishing those who engage in the prohibited acts. Criminal proceedings are normally brought in the name of the Crown and are called prosecutions. In 1985 responsibility for the process of prosecution passed from the police to a newly created independent Crown Prosecution Service under the direction of the Director of Public Prosecutions (Prosecution of Offences Act 1985). It should be noted that prosecutions may also be undertaken by bodies, such as the trading standards department of the local authority, and by private individuals, e.g. a store detective prosecuting a shoplifter. In **criminal cases** you have a **prosecutor** who **prosecutes** a **defendant** in the **criminal courts**. The consequences of being found guilty are so serious that the standard of proof is higher than in civil cases. The standard of proof in criminal cases is 'beyond reasonable doubt'.

and child benefit. A large number of disputes arise from the administration of these schemes and a body of law, administrative law, has developed to deal with the complaints of individuals against the decisions of the administering agency.

(iii) **Criminal law.** Certain kinds of wrongdoing pose such a serious threat to the good order of society that they are considered crimes against the whole community. The criminal law makes such anti-social behaviour an offence against the state and offenders are liable to punishment. The state accepts responsibility for the detection, prosecution and punishment of offenders.

(b) **Private law.** Private law is primarily concerned with the rights and duties of individuals towards each other. The state's involvement in this area of law is confined to providing a civilised method of resolving the dispute that has arisen. Thus, the legal process is begun by the aggrieved citizen and not by the state. Private law is also called civil law and is often contrasted with criminal law.

**2 Criminal and civil law.** Legal rules are generally divided into two categories: criminal and civil. It is important to understand the nature of the division because there are fundamental differences in the purpose, procedures and terminology of each branch of law.

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(b) **Civil law.** The civil law deals with the private rights and obligations which arise between individuals. The

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## Chapter 1 The nature of law

	<i>Criminal law</i>	<i>Civil law</i>
Concerns	Offences against the state	Disputes between private individuals
Purpose of the action	To preserve order in the community by punishing offenders and deterring others	To remedy the wrong which has been suffered
The parties	A prosecutor prosecutes a defendant Prosecutions are brought in the name of the Crown, signified by R for Rex (King) or Regina (Queen) Case title: <i>R v Smith</i>	A claimant sues a defendant Case title: <i>Jones v Patel</i>
Where the action is heard	The criminal courts, i.e. magistrates' court or Crown Court	The civil courts, i.e. county court or High Court
Standard and burden of proof	The prosecutor must prove his case beyond a reasonable doubt	The claimant must establish his case on the balance of probabilities
Decision	A defendant may be convicted if he is guilty and acquitted if he is innocent	A defendant may be found liable or not liable
Sanctions	Imprisonment, fine, community order	Damages, injunction, specific performance, rescission
Examples	Murder, theft, driving with excess alcohol, engaging in an unfair commercial practice	Contract, tort, trusts, property law

Figure 1.2 The differences between criminal and civil law

purpose of the action is to remedy the wrong that has been suffered. Enforcement of the civil law is the responsibility of the individual who has been wronged; the state's role is to provide the procedure and the courts necessary to resolve the dispute. In **civil proceedings** a **claimant** sues a **defendant** in the **civil courts**. The claimant will be successful if he can prove his case on the **balance of probabilities**, i.e. the evidence weighs more in favour of the claimant than the defendant. If the claimant wins his action, the defendant is said to be **liable** and the court will order an appropriate remedy, such as damages (financial compensation) or an injunction (an order to do or not do something). If the claimant is not successful, the defendant is found **not liable**. Many of the laws affecting the businessperson are part of the civil law, especially contract, tort and property law. The main differences between civil and criminal law are illustrated in Figure 1.2.

The distinction between the criminal and civil law does not depend on the nature of the wrongful act, because the same act may give rise to both civil and criminal proceedings. Consider the consequences of a typical motor accident. Julie is crossing the road at a zebra crossing when she is struck by a car driven by Gordon. An ambulance takes Julie to a local hospital where it is discovered that she has sustained a broken leg. Meanwhile, the police have arrived at the scene of the accident and they breathalyse Gordon. The result is positive and Gordon is charged with a criminal offence based on driving with excess alcohol. He appears before the local magistrates' court and is convicted. He is disqualified from driving for 18 months and fined £400. The fine is paid to the court: it does not go to compensate the victim of the criminal act. However, a criminal court now has a limited power to order an offender to pay compensation for any 'personal injury, loss or damage' caused to the

victim of his offence (under s 130 of the Powers of Criminal Courts (Sentencing) Act 2000). Julie must pursue a separate civil action against Gordon to remedy the personal wrong she has suffered. She sues Gordon in the tort of negligence, seeking damages for the injuries she has sustained. The case is heard in the county court where Gordon is found liable. He is ordered to pay £6,000 in damages. Normally, the loser in a civil action pays the winner's costs. So Gordon is ordered to pay Julie's costs in bringing the action.

**3 Common law and equity.** Legal rules may also be classified according to whether they form part of the common law or equity. The distinction between these two systems of law is rooted in history and can only be understood properly by examining the origins of English law. English legal development can be traced back to 1066 when William of Normandy gained the crown of England by defeating King Harold at the Battle of Hastings. Before the arrival of the Normans in 1066 there really was no such thing as English law. The Anglo-Saxon legal system was based on the local community. Each area had its own courts in which local customs were applied. The Norman Conquest did not have an immediate effect on English law; indeed, William promised the English that they could keep their customary laws. The Normans were great administrators and they soon embarked on a process of centralisation, which created the right climate for the evolution of a uniform system of law for the whole country.

### The common law

The Norman kings ruled with the help of the most important and powerful men in the land who formed a body known as the Curia Regis (King's Council). This assembly carried out a number of functions: it acted as a primitive legislature, performed administrative tasks and exercised certain judicial powers. The meetings of the Curia Regis came to be of two types: occasional assemblies attended by the barons and more frequent but smaller meetings of royal officials. These officials began to specialise in certain types of work and departments were formed. This trend eventually led to the development of courts to hear cases of a particular kind. The courts which had emerged by the end of the 13th century became known as the Courts of Common Law

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and they sat at Westminster. The first to appear was the Court of Exchequer. It dealt with taxation disputes but later extended its jurisdiction to other civil cases. The Court of Common Pleas was the next court to be established. It heard disputes of a civil nature between one citizen and another. The Court of King's Bench, the last court to appear, became the most important of the three courts because of its close association with the king. Its jurisdiction included civil and criminal cases and it developed a supervisory function over the activities of inferior courts.

The Normans exercised central control by sending representatives of the king from Westminster to all parts of the country to check up on the local administration. At first these royal commissioners performed a number of tasks: they made records of land and wealth, collected taxes and adjudicated in disputes brought before them. Their judicial powers gradually became more important than their other functions. To begin with, these commissioners (or justices) applied local customary law at the hearings, but in time local customs were replaced by a body of rules applying to the whole country.

When they had completed their travels round the country, the justices returned to Westminster where they discussed the customs they had encountered. By a gradual process of sifting these customs, rejecting those which were unreasonable and accepting those which were not, they formed a uniform pattern of law throughout England. Thus, by selecting certain customs and applying them in all future similar cases, the **common law** of England was created.

A civil action at common law was begun with the issue of a writ which was purchased from the offices of the Chancery, a department of the Curia Regis under the control of the Chancellor. Different kinds of action were covered by different writs. The procedural rules and type of trial varied with the nature of the writ. It was essential that the correct writ was chosen, otherwise the claimant would not be allowed to proceed with his action.

### Equity

Over a period of time the common law became a very rigid system of law and in many cases it was impossible to obtain justice from the courts. The main defects of the common law were as follows:

- The common law failed to keep pace with the needs of an increasingly complex society. The writ system was slow to respond to new types of action. If a suitable writ was not available, an injured party could not obtain a remedy, no matter how just his claim.
- The writ system was very complicated, but trivial mistakes could defeat a claim.
- The only remedy available in the common law courts was an award of damages. This was not always a suitable or adequate remedy.
- Men of wealth and power could overawe a court, and there were complaints of bribery and intimidation of jurors.

It became the practice of aggrieved citizens to petition the king for assistance. As the volume of petitions increased, the king passed them to the Curia Regis and a committee was set up to hear the petitions. The hearings were presided over by the Chancellor and in time petitions were addressed to him alone. By the 15th century the Chancellor had started to hear petitions on his own and the Court of Chancery was established. The body of rules applied by the court was called **equity**.

The early Chancellors were drawn from the ranks of the clergy and their decisions reflected their ecclesiastical background. They examined the consciences of the parties and then ordered what was fair and just. At first, each Chancellor acted as he thought best. Decisions varied from Chancellor to Chancellor and this resulted in a great deal of uncertainty for petitioners. Eventually

trust for a beneficiary (B). The common law treated T as if he were the owner of the property and B's claims were ignored. The Court of Chancery, however, would require T to act according to his conscience and administer the trust on B's behalf. Thus, equity recognised and enforced the rights of a beneficiary under a trust. The Court of Chancery also came to the aid of borrowers who had mortgaged their property as security for a loan. If the loan was not repaid by the agreed date, the common law position was that the lender (mortgagee) became the owner of the property and the borrower (mortgagor) was still required to pay the outstanding balance. Equity gave the mortgagor the right to pay off the loan and recover his property even though the repayment date had passed. This equitable principle is known as the equity of redemption. It will be considered in more detail in Chapter 4.

**2 Introduction of new remedies.** The new equitable rights were enforced by means of new equitable remedies. In the field of contract law, the Court of Chancery developed such remedies as the injunction, specific performance, rescission and rectification which will be examined in Chapters 7 and 9. These remedies were not available as of right like common law remedies: they were discretionary. The Court of Chancery could refuse to grant an equitable remedy if, for example, the claimant had himself acted unfairly.

By the 19th century the administration of justice

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varied from Chancellor to Chancellor and this resulted in a great deal of uncertainty for petitioners. Eventually, Chancellors began to follow previous decisions and a large body of fixed rules grew up. The decisions of the Court of Chancery were often at odds with those made in the common law courts. This proved a source of conflict until the start of the 17th century when James I ruled that, in cases of conflict, equity was to prevail. For several centuries the English legal system continued to develop with two distinct sets of rules administered in separate courts.

Equity is not a complete system of law. Equitable principles were formulated to remedy specific defects in the common law. They were designed to complement the common law rules and not to replace them. Equity has made an important contribution to the development of English law, particularly in the following areas:

**1 Recognition of new rights.** The common law did not recognise the concept of the trust. A trust arises where a settlor (S) conveys property to a trustee (T) to hold on

By the 19th century the administration of justice had reached an unhappy state of affairs and was heavily criticised. The existence of separate courts for the administration of common law and equity meant that someone who wanted help from both the common law and equity had to bring two separate cases in two separate courts. If a person started an action in the wrong court, he could not get a remedy until he brought his case to the right court. The proceedings in the Court of Chancery had become notorious for their length and expense. (Charles Dickens satirised the delays of Chancery in his novel *Bleak House*.) Comprehensive reform of the many deficiencies of the English legal system was effected by several statutes in the 19th century culminating in the Judicature Acts 1873–75. The separate common law courts and Court of Chancery were replaced by a Supreme Court of Judicature which comprised the Court of Appeal and High Court. Every judge was empowered thenceforth to administer both common law and equity in his court. Thus, a claimant seeking a common law and an equitable remedy need

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Common law	Equity
Developed by circuit judges from English customary law applying the principle of <i>stare decisis</i>	Developed by Chancellors, in dealing with petitions addressed to the King from citizens complaining about the rigidity of the common law
Complete system of law	Complements the common law, but could not replace it
Does not recognise the existence of equity	Acknowledges the common law and tries to provide an alternative solution
Upholds rights irrespective of the motives or intentions of the parties	Originally, a court of conscience which ordered the parties to do what was just and fair. These principles are contained in equitable maxims, e.g. 'He who seeks equity must do equity' and 'Delay defeats equity'
Remedies available as of right	Discretionary remedies

Figure 1.3 Differences between the common law and equity

only pursue one action in one court. The Acts also confirmed that, where common law and equity conflict, equity should prevail. These reforms did not have the effect of removing the distinction between the two sets of rules: common law and equity are still two separate but complementary systems of law. A judge may draw upon both sets of rules to decide a case. See, for example, the decision of Denning J in the *High Trees Case* in Chapter 7.

The differences between the common law and equity are summarised in Figure 1.3.

#### Some basic principles of legal liability

Before we consider the specific areas of law governing the activities of business organisations, we must first of all consider the branches of law which are most likely to affect those in business and certain basic principles of liability.

It is a basic function of the law to set out the circumstances in which a person may be required to answer for his actions. Legal liability describes a situation where a person is legally responsible for a breach of an obligation imposed by the law. Such obligations may arise from the operation of either the civil or criminal law. The activities of business organisations are subject to a wide

range of potential liability. So, before we consider the law governing the formation, operation and dissolution of business organisations, we must first examine in outline the nature and scope of legal liability for wrongful acts.

#### Civil liability

As we have already seen, the civil law is concerned with the rights and duties which arise between private individuals. The aim of taking legal action is to put right a wrong which has occurred, often by means of an award of compensation. The areas of civil liability which have the greatest impact on businesses are liability in contract and tort.

#### Contractual liability

Contractual liability arises when two or more persons enter into a legally enforceable agreement with each other. The law of contract is concerned with determining which agreements are binding, the nature and extent of the obligations freely undertaken by the parties and the legal consequences of breaking contractual promises.

Every type of business transaction, from buying and selling goods and services to employing staff, is governed by the law of contract. Contractual arrangements are so important to the conduct of business they are examined in more detail in later chapters. (See, in

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particular, Chapter 7, Forming business contracts ●; Chapter 8, The terms of business contracts ●; Chapter 9, Ending business contracts ●; Chapter 10, Law of agency ●; Chapter 11, Contracts for the supply of goods and services ●; Chapter 16, Employing labour ●.)

### Tortious liability

A tort consists of the breach of a duty imposed by the law. The law of tort seeks to compensate the victims of certain forms of harmful conduct by an award of damages or to prevent harm occurring by granting an injunction. Examples of torts include negligence, nuisance, trespass, defamation (libel and slander) and conversion. These torts, along with others which are relevant to business, will be studied in more detail in Chapter 12 ●.

### Criminal liability

A crime is an offence against the state. The consequences of a criminal conviction are not confined to the punishment inflicted by the court. For example, if a person is convicted of theft, his name will probably appear in the local papers causing shame and embarrassment and he may even lose his job. The sanctions are so severe that the criminal law normally requires an element of moral fault on the part of the offender. Thus, the prosecution must establish two essential requirements: *actus reus* (prohibited act) and *mens rea* (guilty mind). For most criminal offences, both elements must be present to create criminal liability. If you pick someone's umbrella up thinking that it is your own, you cannot be guilty of theft, because of the absence of a guilty mind. There are, however, some statutory offences where Parliament has dispensed with the requirement of *mens rea*. Performance of the wrongful act alone makes the offender liable. These are known as crimes of strict liability. Selling food for human consumption which fails to comply with food safety requirements contrary to the Food Safety Act 1990 is an example of an offence of strict liability. The prosecutor is not required to show that the seller knew that the food did not comply with food safety

requirements. He will secure a conviction by establishing that the food was unsafe and that it was sold. The seller may be able to defend himself by showing that he has taken all reasonable precautions and exercised due diligence to avoid commission of the offence.

### Law of property

The law of property is concerned with the rights which may arise in relation to anything that can be owned. Thus, property covers land, goods and intangible rights such as debts, patents or the goodwill of a business. The legal implications of acquiring, using and disposing of business property will be studied in more depth in Chapter 15 ●. In order fully to understand other principles of business law which you will encounter before then, it is necessary to consider the relationships which may arise between persons and property, namely, the rights of ownership and possession.

**1 Ownership.** Ownership describes the greatest rights that a person can have in relation to property. An owner enjoys the fullest powers of use and disposal over the property allowed by law. The owner of this book, for example, has the right to read it, lend it to a friend, hire it out, pledge it as security for a loan, or even tear it into shreds. An owner does not enjoy absolute rights; restrictions may be imposed to protect the rights of other members of the community. The ownership of a house does not entitle the occupants to hold frequent wild parties to the annoyance of neighbours.

**2 Possession.** Possession consists of two elements: physical control and the intention to exclude others. For example, you have possession of the watch you are wearing, the clothes in your wardrobe at home and your car which is parked while you are at work. Ownership and possession often go hand in hand, but may be divorced. The viewer of a hired TV enjoys possession of the set, but ownership remains with the TV rental firm. If your house is burgled, you remain the owner of the stolen property, but the burglar obtains (unlawful) possession.

## Part 1 Introduction to law

### Self-test questions/activities

- 1 What is law and why is it necessary?
- 2 Explain the difference between the following pairs:
  - (a) public law and private law;
  - (b) civil law and criminal law;
  - (c) contract and tort;
  - (d) common law and equity;
  - (e) ownership and possession.
- 3 Consider the following legal actions and indicate whether civil or criminal proceedings would result:
  - (a) Ann decides to divorce her husband, Barry, after 10 years of marriage;
  - (b) Colin is given a parking ticket by a traffic warden for parking on double yellow lines;
  - (c) Diane returns a faulty steam iron to the shop where she bought it, but the shop manager refuses to give her a refund;
  - (d) Eamonn drives at 50 mph on a stretch of road where there is a 30 mph limit. He fails to see Fiona, who is crossing the road. She is knocked down and sustains severe injuries;
  - (e) Graham takes a copy of *Business Law* from the reference section of the library, with the intention of returning it when he has finished his first assignment. He finds the book so valuable that he decides to keep it;
  - (f) Hazel returns to England after working abroad for three years. While abroad, she rented her flat to Ian. She now gives him notice to quit, but he refuses to move out.

### Specimen examination questions

- 1 Explain why equity developed and how it differs from the common law. What is the present relationship between the two systems?
- 2 David, a farmer, supplies organic free range eggs on a regular basis to the Peak Park Hotel and Country
- 3 Identify the different types of legal proceedings which might arise from these facts.
- 4 For each type of legal action you have identified in (a), discuss the nature of the legal liability and the purpose or objective of taking legal action.