

Chapter

1

English law and other legal systems

Indicative Syllabus Content

D - Comparison of English Law with Alternative Legal Systems – 10%

- The sources of English law.
- The system of judicial precedent.
- The essential elements of the tort of negligence, including duty, breach and damage/loss/injury and the liability of professionals in respect of negligent advice.
- Alternative legal systems, including codified (civil law) systems, Sharia Law and international legal regulations

1.1 Criminal law

A crime is an offence against society's accepted behaviours and is prohibited by law. These persons (accused) are prosecuted by the state (who acts on behalf of us being society).

Examples of crimes are theft, murder or reckless behaviour. The main aim of criminal law is to punish offenders, but also it is used to deter others from doing the same.

Punishment is normally imprisonment or fines payable to the government. Serious crimes are dealt with in the Crown Court and by a jury.

A criminal action is brought to court by the Crown Prosecution Service and must be proved **beyond reasonable doubt by the prosecution**. The burden of proof rests with the prosecution.

1.2 Civil law

This area of the law defines the rights and obligations of persons. It resolves any disputes arising between persons over such matters in a peaceful way. The person who brings a civil action against someone is the claimant or plaintiff and the person who has the action brought against them is known as the defendant.

Examples of civil actions are defamation of character, breach of contract, negligence or trespassing. The main aim of civil law is compensation, restoring the claimant's position to that what it was before the civil infringement. This is normally achieved to the award of damages to the claimant, being paid by the defendant. There is no jury in a civil case (except defamation), the judge decides and awards an appropriate compensation.

If there is no loss suffered by a person then there cannot be a civil proceeding, unlike under criminal law there does not have to be a person who has suffered, for example a parking fine or speeding offence.

In civil proceedings the claimant needs to prove the case on the **balance of probability**, meaning he needs to prove to the court that it is more than probable that the accusation is true.

Most cases are heard in the County Court or High Court and a tracking system is now employed to decide this.

Small claims track - a simple and informal way of resolving disputes. You should be able to do this without a solicitor. The amount in dispute should not be more than £5,000.

Fast track - the amount in dispute would be more than £5,000 but less than £15,000. The judge will bear in mind that cases allocated to the fast track will generally require a period of no more than around 30 weeks to prepare for the trial, written expert evidence only, if required, and a trial lasting no more than one day (five hours).

Multi-track - the amount in dispute would be more than £15,000.

1.3 Sources of law

There are 3 main sources:

- a) Case law
- b) Legislation
- c) European law

a) Case law

There are 2 main areas here:

- **Common law** – This is an amalgamation of past cases which are used to make decisions on cases brought to court today. They have developed over time as a result of local customs and cases being decided, and have formed the backbone of judicial precedent (previous decisions made by judges on cases). Common law is updated as a result of new cases being decided. Judicial precedents made by higher courts are binding on lower courts.
- **Equity law** - This supplements common law by filling in the gaps where there was a lack of fair dealing in some cases. One of the main problems with common law was that its remedy for persons that had won the case was only damages. Delay in bringing a matter to court in reasonable time will not be good in equity law.

Remedies available under equity law are:

- **Specific performance** (forced to carry out task)
- **Injunction** (stopped from doing an action)
- **Rectification** (change a contract to show the true intentions)
- **Rescission** (restoring the position before the agreement)

If there is conflict between common law and equity law then equity law will always be superior.

b) Legislation

Legislation is the formalisation of rules and procedures by the UK Parliament. It does this by passing acts of parliament or statutes. They must be passed through the House of Commons and the House of Lords and then given the Royal Assent.

Parliament can legislate on any matter and once legislation has been passed and enacted it must be obeyed. Any legislation that has been enacted by parliament can be repealed by the next Parliament should they not agree with it. The courts do not question the acts that Parliament pass but they can ask the government for guidance as to how to interpret and enforce the act.

Delegated legislation

Parliament sometimes gives the ability to legislate to other bodies such as government departments, regional parliaments and local authorities and emergency laws (Orders in Council) approved by the Privy Council.

Parliament does exercise control over delegated legislation by supervising these bodies and also has the right to take away these powers should they be abused. In addition the courts can assist and hold any bye laws or regulations passed by these bodies as outside the scope of powers given (*ultra vires*) should they be abused.

Advantages

- ✓ Allows Parliament time to concentrate on other legislation.
- ✓ It is faster if legislation is delegated as getting a piece of legislation through Parliament is a very slow process.
- ✓ Delegated legislation allows fast amendments to the law to be made to keep pace with changing circumstances.
- ✓ Allows consultation with experts on technical topics and keeps the detail of the law very simple and therefore can be easily understood by the layman.

Disadvantages

- ✗ The delegated body which is responsible for the legislation is not representative of the people and was not elected by the people to power.
- ✗ Gives a lot of power to few civil servants.

Parliamentary procedure for passing legislation

A statute can only be part of law when it has passed the following procedures and before such time it is known as a Bill:

Government Green Paper

This is when the proposal for the legislation is aired to the public for comments and reaction.

White Paper

This sets out the aim of the legislation and takes into account comments that have been received on the Green Paper. A draft Bill is then formed and introduced in either the House of Commons or the House of Lords.

First Reading

This is simply a formal introduction of the Bill with no debate and will then be timetabled for debate.

Second Reading

This is a general discussion on the principles of the Bill but no changes are made. A vote is taken to see whether it should proceed to the next level.

Committee Stage

The Bill is now discussed and amended in detail by a committee made up of representatives in the same proportions of the House. This can be a very long procedure.

Report Stage

The committee reports to the House with their findings and conclusions and the House votes on each of the changes proposed.

Third Reading

A final debate is held regarding the Bill and a vote is taken, if approved the Bill passes to the other House for the same procedure.

The Royal Assent

This is given when the Bill has passed through both Houses successfully and is normally simply formality. It then becomes part of law and comes into operation once a commencement date has been given.

Private members' Bill – this is where some MP's are given the chance (by ballot) to introduce a Bill on something that is of interest to them. A lot of the time they don't get passed as they run out of time due to lack of help from the government.

c) European law

Designed to create a single market for European member states to trade freely with each but has since moved on to a closer tie in of a single economic and political union since the Maastricht Treaty.

The UK being a member state has accepted European law as part of UK law and Parliament is no longer the supreme law-maker. It cannot override EU law and all UK courts must abide by it.

There are 3 main sources of EU law:

1. Primary legislation – this is the Treaties of Paris and Rome which initially created the Community, and these treaties have been revised under the Treaty of Maastricht. It imposes rights and obligations on all member states.

2. Subordinate legislation

- **Regulations** – directly applicable and self-executing, no need for member state to make own legislation (e.g. CAP or transport).
- **Directives** – not directly applicable and must be incorporated in national law in a certain time period. (e.g. company law directives).
- **Decisions** – directly applicable and self-executing, addressed to state, person or institution. It is a requirement that must be followed by the recipient, unlike regulations which all have to follow.

3. European Court of Justice rulings

The House of Lords was the final court of appeal until the UK joined the EC and now the European Court of Justice is the highest court. It observes that EU law is being interpreted properly and resolves any issues of dispute. The European Court of Justice can override any piece of legislation that has been issued under EU law. EU legislation tends to be principled based and not detailed as UK law, which tries to ensure that ambiguity is eliminated as far as possible.

Although there may be conflict between UK law and EU law, the EU is fully represented by UK members and vote on all proposed law. If the UK did not want to be directed by EU law ultimately Parliament could repeal the law which states UK's membership of the EU.

1.4 The doctrine of judicial precedent

This states that higher court decisions are binding on lower courts and as a result it means that there is a level of superiority in courts, for example the House of Lords is a higher court than the Crown Court and any decisions made by the House of Lords will be binding on the Crown Court. This ensures consistency in decisions made by judges.

Stare decisis – a maxim which means stand by a decision and is when precedent is followed.

Advantages

- ✓ Makes it more clear in terms of chances of winning a case should you bring it to court.
- ✓ Flexible as the law can be amended in higher courts by rulings.
- ✓ Plenty of illustrations that can be used when comparing it to your particular case.

Disadvantages

- ✗ Overtime there has been a large number of cases, making it very difficult to manoeuvre through.
- ✗ Judges are constrained by higher court rulings.
- ✗ The law is reactive and not proactive, it is not forward thinking.

A judge's decision is made up of two segments:

1. *Obiter dicta*

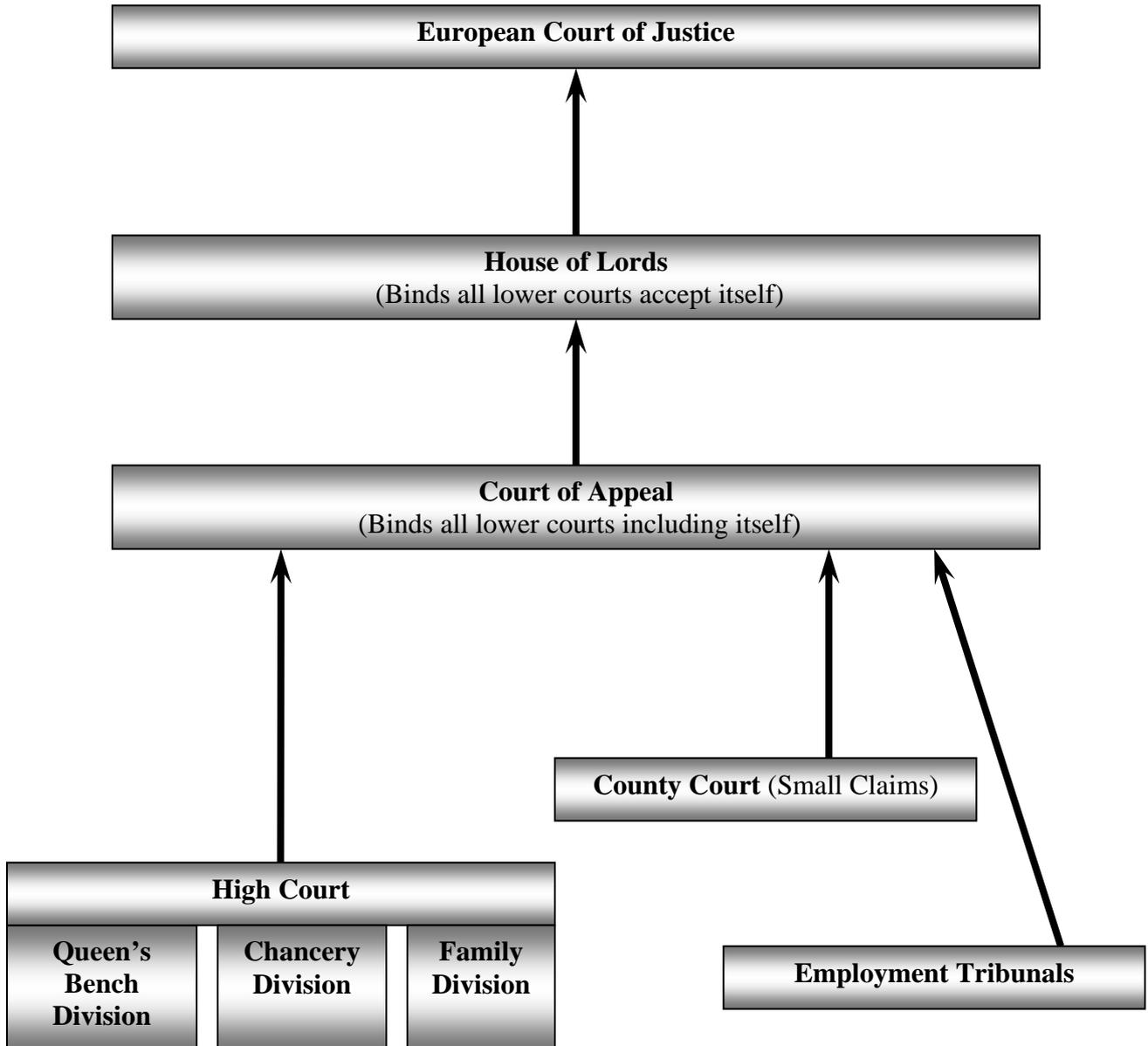
Things said by the way on other matters. They are persuasive and not binding on future cases. The comments focus on general principles and hypothetical points which influenced the judgement and may influence other judges.

2. *Ratio decidendi*

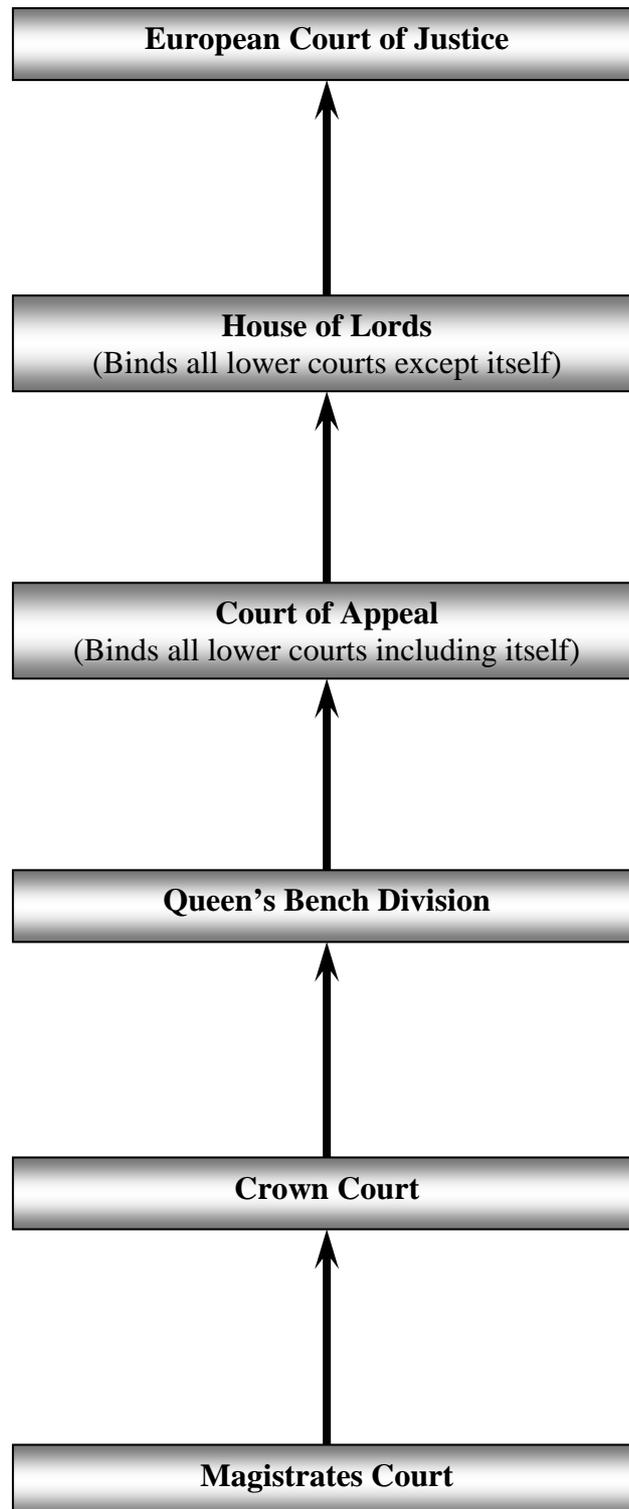
This is the decision itself and is based on the relevant legal reasoning taking into account the facts and application of law. The *ratio decidendi* is binding on future cases.

1.5 A brief illustration of the court structure

Civil courts



Criminal courts



1.6 The tort of negligence

A type of civil wrong where a contract does not exist between the two parties and it is not a crime where punishment is the main objective to the offender. It is generally when the one party has suffered a loss or injury from another party and damages should be paid. For example trespass on private property or nuisance behaviour, these have no contract between the claimant and defendant and are dealt with under tort.

In tort there must be two elements:

- The breach of legal duty (*injuria*).
- Loss suffered by defendant (*damnum*).

For a case to succeed the claimant must show the following:

- 1 There was a duty of care.
- 2 There was breach of that duty.
- 3 Negligence was the main cause.

1. Duty of care

There is a duty of care by one person to another where it can be reasonably foreseen that one's action may injure the other (negligent). This is known as the neighbour rule.

In the case of *Donoghue v Stevenson (1932)* Donoghue had drunk a bottle of ginger beer which had been bought by a friend, which had the remains of a snail. The bottle was not transparent and was sealed at the manufacturers. Donoghue was very ill and suffered shock.

Held: Although there was no contract between Donoghue and place of purchase, because she did not purchase it, there was a duty of care in tort as the manufacturers ought to have reasonably contemplated Donoghue being affected.

Other areas include victim's parents, children and partners (close relationship test) and also those who were 'nearby in time and space' (proximity test) are all owed a duty of care. However the neighbour rule maybe restricted on grounds that it might become ridiculous for economic or social reasons.

McLoughlin v O'Brien (1983) it was held that the claimant was owed a duty of care after her family was injured by the defendant in a car accident. The claimant was not in the accident herself or anywhere near it but saw her family in hospital an hour later. Her close relationship with the victims meant that she has fulfilled the close relationship test and the defendant would be liable in tort.

However duty of care was restricted in *Alcock v Chief Constable of South Yorkshire (1992)* which was the Hillsborough football disaster and it was held that there was not a duty of care to relatives who saw their loved ones suffering on the television or at the grounds, but that there was a duty of care to the police and rescuers who were not adequately trained for these kinds of horrific scenes.

2. Breach of duty

This is based on what a “reasonable man” would conclude whether there has been any negligence. The basis stems from what is best practice and knowledge at the time and that as long this has been followed, then reasonable care has been taken. For example an accountant who has followed all Companies Act requirements, reporting standards and best professional practices when preparing a set of accounts would have taken adequate steps against negligence.

There is also a higher level of duty owed to those who are already injured or children. In *Paris v Stepney Council (1951)* a man who was blind in one eye already worked on fixing vehicles for the local council. During this work a piece of metal went into his good eye and completely blinded him. The work did not normally require protective goggles.

Held: Council was negligent and owed him a higher duty of care because of the fact that he was currently blind in one eye and that the other being damaged now has left him with completely no sight.

In *Glasgow Corporation v Taylor (1992)* the local council put up a sign in the park saying warning do not eat the poisonous berries. Some children later ate the berries and it was held that the local authority was negligent.

Res ipsa loquitur – “the thing speaks for itself” meaning that the cause of the matter is negligence, and therefore if the court uses this maxim then the burden of proof is reversed and placed on the defendant to show that he was not negligent.

To use this maxim the claimant must prove that the injury was caused under the **direction and control** of the defendant, and he did not use **proper care** which resulted in the injury.

In *Richley v Fould (1965)* car skidded across to the wrong side of the road and caused an accident. The defendant had not taken proper due care of vehicle which was under his control. The defendant was held to be negligent.

In *Mahon v Osbourne (1939)* a patient had an operation however swabs have been left inside the body. This case satisfied the maxim “***res ipsa loquitur***” and the burden of proof was reversed from the claimant to the defendant. The defendant was required to prove that this was not negligent.

3. Negligence was the main cause

A claim for damages can only succeed if there has been loss or damage to the claimant.

Examples:

- Personal injury
- Damage to property
- Financial loss directly linked to any of the above
- Pure financial loss is highly unlikely to be recovered, but there are exceptions e.g. *Hedley Byrne & Company Ltd v Heller and Partners Ltd (1963)*.

Negligence must be shown to be caused by the defendant and not too remote.

Causation – if the accident were going to happen anyway then causation is not proved, i.e. a third party has not broken the “chain of causation”.

In *McWilliams v Sir William Arrol (1962)* employees were not given safety harnesses when working on buildings, one employee died but it was shown that the accident would have occurred anyway as the employees were not likely to wear one even if one were provided.

Remoteness – when there is a chain of events too complex to foresee then the negligence is too remote.

In the *Wagon Mound case (1961)* oil had spilled into the sea and drifted across to a harbour where some men were working on a wharf, sparks fell on to the oil drift and caused extensive damage. It was held that the pollution was foreseeable but not the fire, this was too remote and therefore there was no negligence.

Contributory negligence – if the claimant has made some contribution to the negligence then the court will apportion blame and damages appropriately.

In *Sayers v Harlow Council (1958)* a woman tried to climb out of public toilet because she was locked inside and could not get out due to faulty lock. She balanced herself on the toilet roll in her attempt to climb out but fell and suffered injuries. It was held that there was contributory negligence and awarded damages in the proportion 25% less to the claimant as she had been partially responsible for her plight.

Liability of the employer and employee

An employer maybe liable as a result of a negligent action carried out by the employee. This is known as “**vicarious liability**”.

In *Limpus v London General Omnibus Co (1862)* the employer was vicariously liable when a bus driver disobey instructions not to race for passengers against other bus drivers. Although the bus driver was specifically told not to do this it is still in the scope of normal duty to pick up passengers even though an unauthorised procedure.

This is different to *Beard v London General Omnibus Co (1900)* where the employer was not vicariously liable when a bus conductor drove a bus negligently. This was not an authorised act in the course of normal duty.

An employer is vicariously liable if:

- Employer authorised.
- Unauthorised procedure used when carrying out an authorised act.
- It is necessarily incidental to which the employee is supposed to do.

An employer is not vicariously liable if:

- Employee is doing something of a personal nature in working hours.
- He or she is an independent contractor or non-employees.

Volenti

Consent given by a claimant to the defendant be it implicitly, by action or explicitly to be negligent will not succeed in court. This is “*volenti non fit injuria*”.

In *Morris v Murray (1990)* two drunk friends flew a private plane and crashed. Volenti applied here as the defendant consented with free will by action.

1.6 Negligence by professionals

People giving professional advice can be sued if they breach their contractual obligations but also can be sued if they are negligent where a contract may not exist.

In *Hedley Byrne & Co v Heller & Partners Ltd (1963)* information was obtained about the credit status of a company from a bank. The information that was given by the bank had a disclaimer stating that they were not liable should the information be inaccurate. The information turned out to be inaccurate, but it was held that the bank was not liable as they had given this explicit disclaimer.

Had it not been for the disclaimer, the afore mentioned case would have satisfied the proximity test:

- The information was communicated.
- The information was used for a particular purpose.
- The information was relied upon.

In the *Caparo case (1990)* a company had increased its stake in another company substantially on the basis of the audited accounts being showing a £1.3m profit. The accounts actually should have shown a loss of £400,000.

Held: The auditors owed a duty of care to the shareholders as a whole and not to individual shareholders or the public at large and as a result were not held negligent.

In *ADT Ltd v BDO Binder Hamlyn (1995)* showed a situation where the auditors (BDO Binder Hamlyn) had satisfied the proximity test by giving specific assurance to a third party. The auditors of BSG were called in for a final hurdle meeting with ADT Ltd before ADT Ltd was going to buy BSG. The auditors were asked whether they stood by their audit of BSG and they confirmed this. ADT Ltd bought BSG only to find later on that BSG was not worth as much as what was in the accounts.

Held: The auditors had specifically given assurance to ADT Ltd and were fully aware of the purpose of this confirmation, being to bid for BSG. Therefore owing a duty of care to ADT Ltd. The proximity test had been fulfilled and the auditors were negligent.

In *NRG v Bacon and Woodrow and Ernst & Young (1996)* NRG had taken professional advice as to the value of another company. The valuation was complicated and sophisticated. NRG had overpaid for the target company because poor advise.

Held: The professional advisors had a duty of care to NRG and owed a higher standard of care, however it was decided that NRG would have received the same advise from other competent advisors at that time, and therefore there was no negligence. The advisors had take adequate steps to provide a competent level of advice.

In *Barings plc v Coopers & Lybrand (1997)* the Singapore subsidiary of Barings was audited by a branch of Coopers & Lybrand, and summary consolidation schedules were given to Barings along with a copy of the audit report. The Singapore subsidiary was actually loss making and was the main reason for the collapse of Barings.

Held: A duty of care was owed to Barings as these schedules are known to back up the audit for Barings overall.

Today we have Limited Liability Practices (LLPs) to try and protect the interests of partners in a firm of accountants from negligence. KPMG and Ernst & Young are examples of firms which have made their audit practices LLPs.

1.7 Codified (civil law) systems

This is a rules based approach to law making and is designed to provide a comprehensive code of laws for the area in question. Most countries around the world use a codified system as it provides certainty and clarity of law.

Unlike common law codified systems such as civil law does not view case precedents as legally binding on future cases but only the rules within the code itself, however this does not mean that previous cases are not considered and followed.

As a result of the codified system judges cannot set precedents in cases they preside over and must follow and apply the rules of the code exactly. This is very different from common law judges who can effectively make law by setting precedents in cases that they hear.

Many of the European countries unlike the UK have codified legal systems where there is more reliance on the creation of rules or legislation rather than using case law to create future laws. France and Germany are very good examples of this.

1.8 Sharia law

Sharia law is a form of religious law. It is based on Islamic law and the rules are taken from the Quran, the holy book of Muslims. The Quran is a divine revelation from Allah (god) revealed to the Prophet Muhammed (peace be upon him), the last messenger of Allah.

Sharia law is not just a legal system but a complete set of instructions as to how to conduct oneself in life.

The primary sources of Sharia law are the Quran and the Sunnah.

The Quran was revealed in stages to the Prophet Muhammed (peace be upon him) throughout his life and compiled together after his death. It is seen as the direct word of Allah given to man and therefore cannot be altered. It is up to the judges to interpret the Sharia law as how it should be. Judges in Sharia law are religious persons known as Imams rather than non-religious individuals.

The Sunnah are the sayings and interpretations of the Prophet Muhammed (peace be upon him) and help to fill in the detail where the Quran has only given broad descriptions or where it is silent. The Sunnah is also known as the Hadith.

The judges who are practicing Muslims have had great influence in the interpretation of the law over time and therefore similar to other faith based legal systems. Sharia law has five distinct areas within it:

- Family law
- Financial and commercial transactions, such as the prohibition of earning interest (Riba)
- Peace and warfare, such as the basis of a holy war (Jihad).
- Penal punishments
- Obligations related to food and drink, such as the consumption of blessed foods (halal foods) only.

Key terms in Sharia law

Taqlid – this is the school of thought that the law does not need any further interpretation and adaptation to modern society. The traditions and original interpretations should remain unchanged.

Fiqh – this is the school of thought that the law does need further intellectual exertions made on re-interpreting in light of the changing world and influences from other civilisations.

Ijtihad – this is the process used to assist Fiqh. It can only be carried out by a qualified person and cannot be used for certain matters such as the existence of Allah.

Sharia law has been adopted by countries like Pakistan and Iran and Iraq whilst Saddam Hussien was in power.

1.9 International legal relations

International law covers the issues that may arise between countries unlike domestic legislation which looks at issues that may arise within a country. They have begun as customs and traditions which occurred over time and have become accepted by some countries and eventually have been codified as law known as conventions and treaties, between participating countries, for example the Vienna Convention or the Maastricht Treaty. Conventions and treaties are legally binding on countries who have accepted them and can be enforced by the United Nations if they are not met.

There are two main types of international law this being public international law and private international law.

Public law is law which has been agreed collectively by participating countries on broad issues such as invasions, sanctions, weapons and human rights. Private law is law governing what rules should be followed when two countries trade which have differing national laws.

1.10 United Nations (UN)

The UN was set up to create international public law after the Second World War. It is represented by nearly all countries throughout the world now and is therefore an organisation accepted by most countries as an international rule maker and resolver of international disputes. The UN is made up of five organisations.

1. The General Assembly

The General Assembly is the main deliberative organ of the United Nations. It is composed of representatives of all member states, each of which has one vote. Decisions on important questions, such as those on peace and security, admission of new members and budgetary matters, require a two-thirds majority. Decisions on other questions are by simple majority.

The functions and powers of the United Nations General Assembly are:

- To consider and make recommendations on the general principles of cooperation for maintaining international peace and security, including disarmament;
- To discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, to make recommendations on it;
- To discuss, with the same exception, and make recommendations on any questions within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;
- To initiate studies and make recommendations to promote international political cooperation, the development and codification of international law, the realization of human rights and fundamental freedoms and international collaboration in the economic, social, humanitarian, cultural, educational and health fields;
- To make recommendations for the peaceful settlement of any situation that might impair friendly relations among nations;
- To receive and consider reports from the Security Council and other United Nations organs;
- To consider and approve the United Nations budget and establish the financial assessments of Member States;
- To elect the non-permanent members of the Security Council and the members of other United Nations councils and organs and, on the recommendation of the Security Council, to appoint the Secretary-General.

2. The Security Council

The Security Council has primary responsibility for the maintenance of international peace and security. It is so organized as to be able to function continuously, and a representative of each of its members must be present at all times at United Nations Headquarters.

The functions and powers of the Security Council are:

- To maintain international peace and security in accordance with the principles and purposes of the United Nations;
- To investigate any dispute or situation which might lead to international friction;
- To recommend methods of adjusting such disputes or the terms of settlement;
- To formulate plans for the establishment of a system to regulate armaments;
- To determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken;
- To call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression;
- To take military action against an aggressor;
- To recommend the admission of new Members;
- To exercise the trusteeship functions of the United Nations in "strategic areas";
- To recommend to the General Assembly the appointment of the Secretary-General and, together with the Assembly, to elect the Judges of the International Court of Justice.

Each Council member has one vote. Decisions on procedural matters are made by an affirmative vote of at least nine of the 15 members. Decisions on substantive matters require nine votes, including the concurring votes of all five permanent members. This is the rule of "great Power unanimity", often referred to as the "veto" power.

3. UN Economic and Social Council

The Economic and Social Council (ECOSOC) serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to Member States and the United Nations system. It is responsible for promoting higher standards of living, full employment, and economic and social progress; identifying solutions to international economic, social and health problems; facilitating international cultural and educational cooperation; and encouraging universal respect for human rights and fundamental freedoms.

It has the power to make or initiate studies and reports on these issues. It also has the power to assist the preparations and organization of major international conferences in the economic and social and related fields and to facilitate a coordinated follow-up to these conferences. With its broad mandate the Council's purview extends to over 70 per cent of the human and financial resources of the entire UN system.

The Council's 54 member Governments are elected by the General Assembly for overlapping three-year terms. Seats on the Council are allotted based on geographical representation with fourteen allocated to African States, eleven to Asian States, six to Eastern European States, ten to Latin American and Caribbean States, and thirteen to Western European and other States.

4. The International Law Commission

Established in 1948, the International Law Commission's mandate is the progressive development and codification of international law, in accordance with article 13(1)(a) of the Charter of the United Nations.

5. The International Court of Justice (ICJ)

Its main functions are to settle legal disputes submitted to it by states and to give advisory opinions on legal questions submitted to it by duly authorised international organs and agencies. The number of decisions made by the ICJ has been relatively small, but there has clearly been an increased willingness to use the Court since the 1980s, especially among developing countries, although the USA withdrew from compulsory jurisdiction in 1986, meaning it accepts the court's jurisdiction on only a case-to-case basis.

The ICJ is composed of 15 judges elected to nine year terms by the UN General Assembly and the UN Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration. Judges serve for nine year terms and may be re-elected. Elections take place every three years, with one-third of judges retiring each time, in order to ensure continuity within the court.