OXFORD

LEARNING LEGAL RULES

11TH EDITION

JAMES HOLLAND | JULIAN WEBB

Contents

EXERCISE 4 *continued*

8. (d) is the correct answer. The misdirection point is less obviously a ground of appeal, but it is raised by the defence and discussed by the House of Lords. The held that though there had been a technical misdirection, it had caused no carriage of justice, and so could be disregarded under their Lordships' statutory powers—see Lord Bridge, at approximately 341d–h.
9. The correct answer is (a). The decision of the House was unanimous in this respect though Lords Hailsham and MacKay state that they would have been content to distinguish *Anderton* v *Ryan* (see 337b and 345h), they do not actually dissent from the judgment given by Lord Bridge.

CHAPTER REFERENCES

DREWRY, G. (1973), 'Leapfrogging—and a Lord Justice's Eye View of the Final Appeal', *Quarterly Review*, 260.

HOUSE OF LORDS (2019), Select Committee on the Constitution, 'The Legislative Process: Passage of Bills Through Parliament. 24th Report of Session 2017–19' (HL Paper 393). Available at publications.parliament.uk/pa/ld201719/ldselect/ldconst/393/39302.htm.

EDWARD, D. (2004), 'Luxembourg in Retrospect: A New Europe in Prospect', 16 *European Business Journal*, 120.

JOHNSON, S. (2014), 'The Changing Discourse of the Supreme Court', 12 *University of New Hampshire Law Review*, 29.

MAUGHAN, C. and MAUGHAN, M. (2019), 'Legal Writing', in J. Webb et al., *Lawyers' Skills* (3rd edn, Oxford: Oxford University Press).

MAY, C. (2014), 'A Learning Secret: Don't Take Notes with a Laptop', *Scientific American* blog. Available at www.scientificamerican.com/article/a-learning-secret-don-t-take-notes-with-a-laptop.

PATERSON, A. (2015), '*Final Judgment* Revisited', 21 *European Journal of Current Legal Issues*. Available at webjcli.org/article/view/418/531.

REGAN, D. (2014), 'Ward of Court', *New Law Journal*, 19 September 2014. Available at www.newlawjournal.co.uk/nlj/content/ward-court.

ROBINSON, W. (2008), 'Drafting of EU Acts: A View from the European Commission' in C. Stefanou and H. Xanthaki (eds), *Legislative Drafting: A Modern Approach* (Aldershot: Ashgate).

STALFORD, H. and HOLLINGSWORTH, K. (2020), '"This Case Is about You and Your Future": Jowell Judgments for Children', 83 *Modern Law Review*, 1030.

TOSHKOV, D. (n.d.), '55 years of EU Legislation', online presentation. Available at www.dimiter-toshkov.eu/Eurlex.html.

VRANKEN, M. (1996), 'Role of the Advocate General in the Law-Making Process of the European Community', 25 *Anglo-American Law Review*, 39.

WATSON, G. (1996), 'From an Adversarial to a Managed System of Litigation: A Comparative Critique of Lord Woolf's Interim Report', in R. Smith (ed.), *Achieving Civil Justice* (London: Legal Action Group), 63.

WHALEN, R. (2015), 'Judicial Gobbledygook: The Readability of Supreme Court Writing', 115 *Law Journal Forum*, 200.

*WILLIAMS, K. (1989), *Study Skills* (Basingstoke: Macmillan).

4

From Reading to Writing

The processes of reading and note-taking will often be the precursor to a specific writing task—an essay or examination script. In this chapter we will consider briefly the techniques involved in basic academic legal writing, an aspect of one of the key skills required by employers, namely, written communication. There are many good, specialist, books on the market which cover general academic skills such as oral communication, mooting, team work, etc. (we have listed some at the end of the chapter), but here we want to introduce you to some of the basic requirements for producing what is still the most common form of assessment: written pieces of work.

4.1 Writing legal essays

Writing legal essays is essentially about three things:

- conveying information;
- constructing an *argument* based on the information you have acquired;
- applying the information and the arguments to the essay title or the problem posed.

4.1.1 Conveying information

Any essay you are asked to write will require you to tell the reader what you know about the subject under discussion. This requires more than the mere description of cases or statutes, or a summary of a textbook. *Description* is not the same as *explanation*. Lecturers, examiners, or judges want to see your analysis and an explanation of your argument. As with poor TV sports' commentators, simply telling the viewer/reader what they can already see is not much use.

In conveying that information there are three cardinal rules, set out as follows.

Cardinal rule 1: be accurate

Try to be as precise as possible in the information you put down. Vagueness is a sure sign of a lack of understanding or insufficient thought. If it is not possible to give an accurate statement of the principles involved (perhaps because the law is in a muddle), then say that there is no single answer and *clearly distinguish any alternatives that seem to exist*.

Precision involves accuracy and clarity of meaning. 'Accuracy' speaks for itself: make sure your source material is up to date and that you present the material or any summary of it correctly. Clarity depends upon the *style* of presentation that you use. By this we mean your choice of words, construction of sentences, and use of grammar, which is important because a good style enhances the exposition of your arguments, which can be only as good as your ability to express them. Do not ignore the fact that language has its own rhythm, and this can often guide you to sentences or phrases which do or don't work. Some people find that reading work aloud helps in this, because if a phrase sounds wrong it probably is wrong. Some people test out their work on friends who know nothing about the subject to see if the essay is clear enough.

An example of a very good writing style (even when the decisions are questionable) can be found in most of Lord Denning's judgments. He tended to favour a mixture of short and long sentences (with the balance in favour of short sentences). This creates a pattern that most people find attractive to read. Here is one of Lord Denning's more famous openings (from the case of *Hinz* v *Berry* [1970] 2 QB 40):

> It happened on 19 April 1964. It was bluebell time in Kent. Mr and Mrs Hinz, the plaintiff, had been married some ten years, and they had four children, all aged nine and under. The youngest was one. The plaintiff was a remarkable woman. In addition to her own four, she was foster mother to four other children. To add to it, she was two months pregnant with her fifth child.

This was a case about negligence in a car accident and claims for nervous shock. You might not know this from the opening paragraph. So, forget about the content: look at the patterns created and how they draw you into the narrative. It is a homely style, but one which engages you. We are not suggesting you copy the homeliness of the style, merely that you see the pattern of sentences and how they easily convey meaning. Here is another example (from a case called *Thornton* v *Shoe Lane Parking* [1971] 2 QB 163). The passage centres on the point at which a contract is formed when driving up to an automated ticket machine. Lord Denning starts by referring to existing authorities that dealt in general terms with terms appearing on tickets. Again, look at the use of short and long sentences:

> These cases were based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat. None of those cases has any application to a ticket which is issued by an automatic machine. The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it, but it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way. The offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot.

A similar style can be found in the judgments of Laddie J. (e.g. here in a case called *Series 5 Software Ltd* v *Clarke* [1996] 1 All ER 853). Note how the learned judge mixes short and longer sentences, as needed, to explain the points:

> The basic outline of the dispute between the parties is as follows. The plaintiff is a company which is engaged in the development, production and sale of computer software for use in the printing and publishing industry. It commenced trading in June 1992. Its main product is a software system called 'QC 2000' which enables print shops to quote, manage and schedule their production. It claims that it employed Mr Jenkinson, the fifth defendant, in February 1995 as a technician, Mr Clarke, the first defendant, in June 1995 as a sales manager and Mr Wheeler, the fourth defendant, as a computer programmer. The employment did not last long. By letters of August 25 1995 all the defendants resigned. The three defendants say that this was because they had all been treated very shabbily. Their salaries were paid with cheques which were not honoured or they simply were not paid at all. There is little dispute as to this . . .

An example of how to refer to case law in a simple manner can be found in Dillon LJ's judgment in *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1989] QB 433 at 438:

> Counsel for the plaintiffs submits that *Thornton* v *Shoe Lane Parking Ltd* [1971] 2 Q.B. 613 was a case of an exemption clause and that what their Lordships said must be read as limited to exemption clauses and in particular exemption clauses which would deprive the party on whom they are imposed of statutory rights. But what their Lordships said was said by way of interpretation and application of the general statement of the law by Mellish LJ in *Parker* v *South Eastern Railway Co.*, 2 C.P.D. 416, 423–424 and the logic of it is applicable to any particularly onerous clause in a printed set of conditions of the one contracting party which would not be generally known to the other party. Condition 2 of these plaintiffs' conditions is in my judgment a very onerous clause.

This has two long sentences and one short sentence, but clearly lays out a pattern, a structure that is easy to follow. His Lordship sets up the proposition (put by counsel), disagrees with this by reference to his interpretation of the authorities, and then sets about applying that analysis to the facts. Note also that in **Exercise 9** in **Chapter 6** we give some examples of how cases can be cited in essays.

It is equally important to avoid jargon or words you do not understand. Do not be like the famous Mrs Malaprop in Sheridan's play 'The Rivals', with her 'nice derangement [arrangement] of epitaphs' and her 'very pineapple [pinnacle] of politeness'. If in doubt, use a dictionary or a thesaurus to bring in alternative vocabulary.

Cardinal rule 2: be relevant

Do not introduce something you know or suspect to be irrelevant into an answer. There is a great temptation to throw every possible bit of information you have at the question, and hope that some of it is right (what many lecturers call a 'shotgun' approach). This does not look impressive, as it again suggests a lack of forethought. Keeping to what is relevant is not magic; it is simply a question of familiarity with and understanding of your material. If you have taken the time to analyse the question, and thought out what is expected of you, there should be no need to adopt such an approach.

Cardinal rule 3: be concise

Blaise Pascal (and others including Mark Twain) are credited with the adage 'I would have written something much shorter but I didn't have the time'. In essay words: editing is good but it takes time and effort. It also helps overcome things such as the the brain's tendency to ignore the second 'the' in this sentence (check it if you're not it). In our experience, lecturers do not award marks on the basis of the number of words filled. It is obviously impossible for us to state what the 'average' acceptable length of an essay is, as criteria vary from course to course and year to year. You should also be guided by your tutors as to what is required. If you are given an indication of the appropriate length or there is a word limit, then any significant shortfall normally indicates that something is missing and any excess may incur penalties.

Brevity is not, ultimately, just about the number of words you use; it is about how you use them. Again, it is a matter of clarity. As seen under 'Cardinal rule 1: be accurate'; you can use short sentences but you can also add interest and explain relationships between ideas by using some longer sentences. Remember, though, that a sentence should always make sense, and that each separate issue you discuss deserves its own paragraph. For example, a common misuse of sentences seems to be the 'hanging sentence' such as this:

- *'Whereas the claimant has a good case. Therefore he should be advised to bring a claim.'* The first 'sentence' does not make sense: it goes nowhere and is technically not a sentence at all.

Here is another example:

- *'As counsel failed in her professional capacity to secure the company's costs. The court she should pay the costs herself as she was engaged as a competent and qualified'.* You might just be able to run these together (with some amendments) to make one sentence, but, as they stand, neither 'sentence' does its job.

A sentence is a complete idea, capable of standing on its own. Forgive us for also stating the basic point that a sentence begins with a capital letter and ends with a full stop. In addition, it must contain a main clause that usually has a subject, verb and object, though it may contain much more. In our first example the student probably meant to write something like: *'The claimant appears to have a good case and should be advised to bring a claim'*.

Sentences full of long words do not impress unless they convey a meaning more clearly than otherwise possible. Lawyers, perhaps more than any other profession, have a reputation for pomposity. It is a reputation that is not wholly undeserved.

4.1.2 Language

Formal legal writing is still perceived to be very different from everyday English. Indeed there are those who suspect that its connexions with the English language are little more than coincidental. This is because, at its worst, it not only uses technical terms unknown in the general language but also uses forms of language and phrasing that are archaic and often redundant—documents full of jargon interspersed with the occasional 'whatsoever', 'howsoever', 'wheresoever', 'heretofore', and 'hereafter'. In a brilliant parody, James D. Gordon

III (1991: 1689) offers a classic example of such 'legalese'; a lawyer's translation of the phrase, 'I give you this orange':

> Know all men by these presents that I hereby give, grant, bargain, sell, release, convey, transfer, and quitclaim all my right, title, interest, benefit and use whatever in, of, and concerning this chattel, otherwise known as an orange, or citrus orantium, together with all the appurtenances thereto of skin, pulp, pip, rind, seeds and juice, to have and to hold the said orange together with its skin, pulp, pip, rind, seeds and juice for his own use and behoof, to himself and his heirs in fee simple forever, free from all liens, encumbrances, easements, limitations, restraints or conditions whatsoever, and all prior deeds, transfers or other documents whatsoever, now or anywhere made to the contrary notwithstanding, with full power to bite, cut, suck or otherwise eat the said orange or to give away the same, with or without its skin, pulp, pip, rind, seeds or juice.

Fortunately, this kind of 'supernatural incantation' (to borrow Gordon's phrase) is becoming far less common in legal practice, where there is a growing tendency to simplify documents and to move towards a system of 'plain English' drafting (see Watson-Brown, 2009). Although mastery of technical legal language is a requisite for both the study and practice of law, jargon used for its own sake has no place in the law school. Do not let your choice of words turn your work into a parody of legal language.

However, there is no escaping the fact that legal language is littered with Latin and Norman-French words: *ratio decidendi*, *stare decisis*, *autrefois acquit*, *puisne* judges, to name but a few. Many of these have, quite rightly, been abandoned—at least when talking to clients. However, that is a recent development and the law reports are full of such terms, so when you read a report from, say, 1950 you will encounter these and it is best to have a working knowledge of what they mean. Oddly enough, the one Latin term most lawyers come across very early in their studies (*mens rea*) does not mean what most textbooks say it means ('guilty mind') but just means 'mind thing' and the Romans never used this as a legal term anyway.

Legal jargon can also arise in unexpected quarters. A question once asked of one of the authors by an employment tribunal judge in Truro in an unfair dismissal case ('Are you asking me to read that *eiusdem generis* with the rest of the section so as to incorporate a notion of *mens rea*?') would not have been well received with a response of: 'I have no idea what you are talking about'. The case later went to the Court of Appeal on this very point: the question of whether one should use the criminal law concept of *mens rea* in employment misconduct cases.

All this need not be as terrifying as it first appears: we use Norman-French and Latin words every day. In a legal setting the following are all of Norman-French derivation yet they are used widely: accused, defendant, perjury, judgment, jury, arson, and dungeon. In a non-legal setting, we have words such as bacon, pork, and beef (which, when out in the fields and not on the table, retain their Saxon names of pig and cow). Latin phrases such as *caveat emptor*, *ad nauseam*, *per se*, and *et cetera* are used frequently in ordinary conversation. English developed from a whole range of languages—chiefly, Latin, Ancient Greek, Norman-French, the Germanic and Scandinavian languages, and later Hindi and Urdu—adopting and adapting them when necessary. This is one of its great strengths.

4.1.3 Constructing an argument

Essay writing is about constructing an *argument* based on the information you have acquired. Essay questions inevitably ask you to structure your material in one way or another. The clue usually lies in the first or last words of the question: 'Consider critically'; 'Discuss'; 'Evaluate', and so on. The greatest failing of all is to miss the significance of those words and simply 'write all you know' about a topic without bringing any critical faculty into play. 'Discuss' is the most general of these: anything else tends to narrow the field of enquiry.

The key thing to remember about argument in academic writing is that there are certain conventional rules about what constitutes a 'good argument'. If you have had little or no previous experience of this type of writing, it is something you will certainly need to think about and practise. There are many useful publications on study skills and we have listed some of them at the end of this chapter. We can briefly summarise the techniques here.

Authority

When lawyers use the word 'authority' we are referring to *legal* authority, i.e. cases and legislation together with academic sources, such as textbooks and journals. A good legal argument requires authority: it is insufficient to rely on your own value judgments or 'common sense'. **Any arguments you advance must be supported by authority from primary sources (cases, legislation) or at least secondary sources (legal academic literature). Primary sources take precedence over secondary sources.**

Your own value judgments do not constitute evidence of how things work. To be blunt: your opinion does not matter unless it is backed by legal authority. Value judgments also personalise the debate, so that your arguments will lack a sense of objectivity. You may bring an element of value judgment into play in a conclusion, for example, where you have to choose between two established alternative arguments, but even then, you should indicate why one argument is to be preferred. Your preference should be supportable on rational grounds, not just on the basis that 'I think this is the better answer' or 'this is fairer'. Common sense is of no more worth than any person's value judgment. New bulletins are replete with interviews following court cases where one hears: 'A great example of British justice' from the winners and 'A mockery of British justice' from the losers. These are obviously (often heartfelt) subjective views.

An argument is not necessarily true because the proponent believes most other people would support it. For instance, it is 'common knowledge' that before Christopher Columbus discovered America everyone thought the world was flat. First, he did not discover America (even from a European perspective) and secondly, at the time of his journey in 1492 very few people thought the world was flat—and had not thought so since the time of the Ancient Greeks. He was trying to sail around the world to find a quicker route to Japan/India; that is how he raised the money for the voyage, so a flat world would have been a problem. Nevertheless, possibly under the influence of the lyric 'They all laughed at Christopher Columbus when he said the world was round' (in the song 'They all laughed' by Ira and George Gershwin), there is the commonly held belief that our ancestors were a little on the stupid side. So much for generally held beliefs.

Having a plan

A good argument is built up carefully. In developing that argument, it is important to have a plan of where you are going and, to persuade most people, arguments need to be developed gradually. A good essay comprises three elements:

- introduction;
- discussion; and
- conclusion.

Your introduction should explain what you are setting out to do. Your discussion should display the relevant information, derived from the appropriate sources, and show clearly on what side of the argument each piece falls. The conclusion should sum up the main points you have made and make clear your conclusions regarding the question asked. Keep these separate functions clearly in mind. Do not fall into the trap of presenting a lengthy ramble through the detail of the law, followed by a final paragraph containing a number of disparate critical remarks. That does not constitute an argument. If you have time, write both the introduction and conclusion after you have written the main body of the text: it all appears to make so much more sense then.

We return to this theme in **Exercise 9** in **Chapter 6**. There we have set out how an essay may be written using the structure described earlier and how you would cite relevant authorities. As the 'essay' concerns points discussed in **Chapters 5 and 6** we have left this fuller account until you have read those chapters.

Use of visual aids

You may find it helpful when planning an answer to reduce your plan to a diagrammatic form. Space precludes us from exploring the options in any depth, but you should be aware that there are a number of techniques you can use, including flow charts and 'decision trees', which help you to construct a logical framework for ideas or processes, and 'mind maps' (see Buzan, 2002), which provide, it is said, a less formally structured way into a problem, and therefore a less restrictive and more powerful way of identifying the issues and making connexions between ideas. For examples of how each of these can be used to support legal problem solving, see Maughan and Webb (2005: ch. 10). **Figure 4.1** is a simple flow chart which could be used to examine the question of offer and acceptance in the law of contract.

A final word of warning: good planning and good writing technique can never wholly disguise a lack of content. It can, however, enable you to use your knowledge to its best effect. Failure to abide by the basic rules can be met with the kind of indignity once meted out to an attorney by the United States Supreme Court. The Court returned a brief with the instruction that a whole new set of papers be filed in a form that was 'logically arranged … concise and free from burdensome, irrelevant and immaterial matter …' (*Gilchrist* v *Interborough Rapid Transit Co.* (1929) 279 US 159). Back in the UK, in 2008, one judge referred to a prosecutor who kept saying 'grievious bodily harm' instead of 'grievous bodily harm' as 'an illiterate idiot'. We hope that none of your work receives a similar response.

4.1.4 Applying the information

We will explore this more fully in section **4.2** as regards the key topic of 'problem questions' but the idea of 'application' also relates to writing what may be termed 'pure essays' (the ones that have a quote or statement followed by 'Discuss' or something similar). The basic

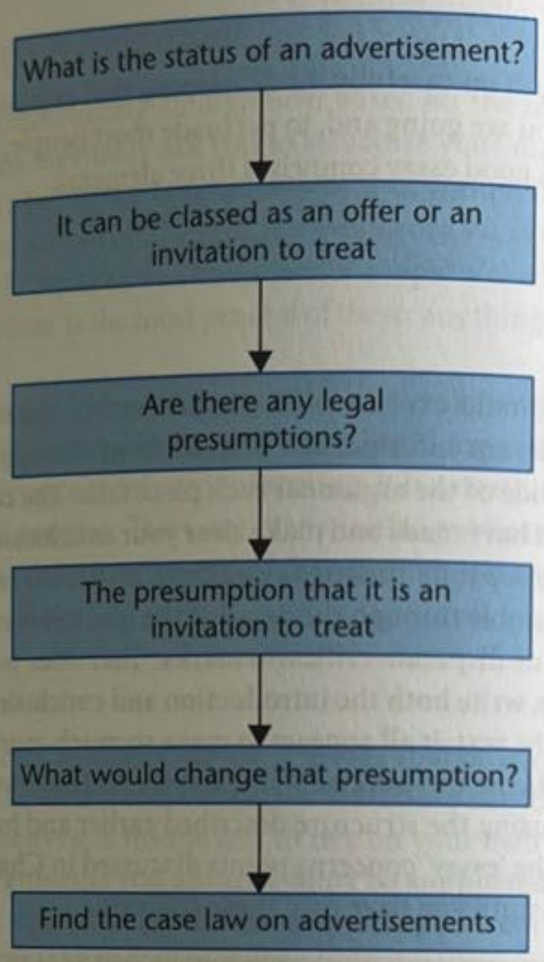

Figure 4.1 Law of contract: offer and acceptance

rule with these essays is to try to relate your answer throughout the text to the statement posed (i.e. do not write everything you know about a topic and then have a conclusion which starts, 'So, as can be seen, the statement is true . . .'). Here are some preliminary matters you need to note which concern all legal problems and essay questions set at academic stage:

- There is always a potential problem of proving the facts (a question of evidence). With such questions, however, unless you are actually studying the law of evidence, this is not something you need to worry about. All these questions are posed on the basis that the facts can be proven, so if you start examining all the problems of proof you will not be answering the question. Don't worry for the moment as to how we know that 'Patrick wanted to kill the neighbour's cat'. If the question says he did, then he did.
- Pure essay questions tend to present you with an extract from a book or judgment and ask you to comment on this. More marks are gained by relating your answer to the quotation than to your general description of the area of law in question. If the question is about the writings of author X and you have not read her words and do not relate your essay to those writings you have missed the point.
- The question might ask you to discuss X's possible guilt. It could ask something different, for example, 'What possible defences may she have to a charge of murder?' or 'For what crimes might X be charged?' Although covering similar ground, these questions raise slightly different points and it is that question that should be answered specifically.

- In problems based on contract, negligence, and other civil matters it is quite common for the examiner to ask you to advise one client on his or her potential liability. If this is so, structure your answer to do this and do not just describe the legal position generally. Try to imagine, for instance, that you are giving advice to a real client sitting in front of you. He or she wants their problem answered, not a general lecture on the law of trespass, though the advice may well have to include the weak spots in your client's case (real clients appreciate this no end and often accuse you of being negative or 'not on their side'). Questions on criminal law tend to be more straightforward: is X guilty or not?

Here is an example of how to relate your essay to a title which reads: '*Most employers now believe that the law of unfair dismissal has gone too far in providing all employees with statutory rights which restrict the managerial prerogative of employers. Discuss*'. The statement asks for comment on a specific issue, not for a rambling exposition of the law on unfair dismissal. The comment is deliberately provocative and reflects how many employers mistakenly perceive the law on unfair dismissal to be biased in the employees' favour (the irony being that most employees think it is balanced in the employers' favour). So, one comment (early on) could be:

> Before we discuss the merits of the claims made in the essay title we should note that the statement contains a common fallacy: it is based on the premise that *all* employees have the right to claim unfair dismissal. This is not true: in most cases only those employed for two years or more gain this right.

Another example might be:

> When the statement in issue refers to 'managerial prerogative' it begs the question: what is 'managerial prerogative'? If it means that employers should have the right to dismiss without reason or justification, then it is certainly the case that the law restricts their freedom.

4.2 Answering legal problems

In studying law many of you will encounter what law teachers call 'problem questions' for the first time. Most students find these the best part of studying law because, to a limited extent, you are trying to apply the law to the facts as if in real life. Indeed, as we noted in section **4.1.4**, a good way to approach these questions is to imagine a real client asking you for advice (and then to imagine how, if you were the client, that advice addresses your concerns). The basic techniques of introduction and discussion which we have already considered apply to problems as much as essays, but you must be aware of the fact that you are dealing with a different kind of question.

The essence of any problem question is that it requires you to analyse some fictitious situation and consider questions of legal liability that it creates. As with arguments in court, your best friend is a sound structure. Take the reader/judge on a clearly defined path, perhaps laying out the pattern you wish to follow from the start, as in 'There are three aspects to the case here: A, B, and C. All must be proven before liability can be imposed. Should the claimant fail on any one ground it is submitted that that will be enough for the case to be dismissed. I will deal with these in turn'. (In court you have to insert a lot of 'May it please your Honour' and other displays of good manners—or

obsequious comments depending on your viewpoint.) Essays should gen... framed in the 'third person' as in 'It is submitted that . . .'.

The precise scope of your answer will depend on what you are asked to d... will normally be followed by some such request as 'Discuss', 'Advise Ann a... Ken of his liability to Lee'. Do not ignore this: questions of standpoint a... are as important to the student as the practitioner; so, in dealing with proble... remember who you are advising and what you are trying to do. For example... that the problem concerning Ken and Lee also involves a third party, Mary. ... have not been asked about Mary's rights or liabilities, it would be a serious ... cuss them. If 'Discuss' is used, then you have a freer rein.

Problem questions are usually constructed on a number of levels. Chiefly ... teachers to differentiate more clearly between the various qualities of answer ... therefore have one or two major issues, plus a number of less obvious legal ... 'twists' to the facts which, for example, could distinguish the events from a ... which you might cite as a precedent. Particularly in examinations, it can be ... sort out the factual material and assess its legal implications in the time avail... is no instant solution to this. The answer lies in having a good working knowle... relevant law (this helps you to identify those facts which will have legal signific... in adopting a systematic approach to the question.

By 'systematic' we mean that you must learn to use the question to help cons... answer. Let us explain. Most problems involve a sequence of events, so that ... followed by *y*, then *z*. Often *x*, *y*, and *z* have separate legal consequences, so by ... ing the facts as laid down you can explore the consequences of each event, as ... pens'. This should help ensure that you do not miss elements of the question ... However, you may also need to rearrange the discussion.

For instance, imagine you are studying the law of wills (often called th... sion) and the question states that, 'Ms Lee was an elderly lady who rewrote h... deathbed to leave everything to her solicitor. Her previous will left all her estate to ... her children (Ann and Bob) in equal measure but omitted any reference to her third ... Christopher. Ann and Bob wish to challenge the latest will and Christopher wishes ... lenge both wills. Discuss'. Probably the best way to deal with this is to consider ... final will first and test its validity (it may not be valid because the solicitor exerted ... influence or even fraud, or perhaps it was not witnessed properly). Why start there? ... if that will stands, then, as it is the final expression of Ms Lee's wishes, no further discussion ... would be necessary in reality. However, the examiner would expect you to cover all ... alities and to analyse the position where that 'final' will is invalid, because the question ... that Christopher wishes to challenge both wills. (If the question simply told you he has ... excluded, this would be an example of an 'unspoken' question in the problem and would ... require your attention.) You would introduce this with a sentence which begins 'Assuming ... however, that the final will is invalid . . .' and then go on to discuss the possibilities. So ... final will is invalid we need to examine whether the law allows the first will to be revived ... these circumstances and, if it can be revived, whether it can validly exclude Christopher. ... You would need to examine how he might challenge the will. You then need to look ... the consequences of that first will being either valid or invalid. Here, you have ... chronologically, but in reverse.

Above all else, developing a good problem-solving technique takes practice. ... miss out because of a lack of it. On most law courses that practice is offered in seminars, ... tutorials, or workshops which 'test out' different answers to legal problems.

One key weakness identified by lecturers all over the world seems to be that of 'applying' the law to the facts, so here is an exercise in that as regards the use of case law (you will find similar exercises on answering legal questions on precedent at **Exercise 9** in **Chapter 6** and concerning the interpretation of statutes at Exercise 15 in **Chapter 8**). **As we have not fully discussed the operation and importance of statutes or case law, we will take some shortcuts here, but you may find it useful to return to this exercise when you have read Chapters 5 and 6.** Our example here concerns the law on age discrimination.

EXERCISE 5 An age of discrimination

Outline of the law: Employers can no longer dismiss an employee 'for retirement' at age sixty-five or any other age unless they can demonstrate why this is not 'unfair' (as statutorily defined) and why this would not be age discrimination.

Q QUESTION

Keith is fifty-seven and is employed by a company which specialises in removing asbestos from old buildings. He is told by his employer that he will be forced to retire in six months' time when he reaches fifty-eight as this is the company's 'normal retirement age'. He does not wish to retire and so challenges this as amounting to discrimination and unfair dismissal. He points out that his colleague, Xena, who works in the finance department is the same age as Keith and she is not being 'retired'. The company claims that because of the strenuous nature of the work it has a general policy of retiring workers in Keith's job at fifty-eight for health reasons. Discuss Keith's claims for discrimination and unfair dismissal.

A ANSWER

First you need to marshal your information (as noted earlier). This will mean acquiring information on: (a) the relevant legislation (if there is any); and (b) case law on 'retirement'. You find that the legislation is mainly contained in the Equality Act 2010 and follows the outline described above but that there is quite a lot of UK and EU case law on the meaning of 'retirement'. You must now read that case law in depth. One thing you notice from the case law is that an employer can force someone to retire at a particular age—called an 'employer-justified retirement age' (EJRA)—but it must not be discriminatory, and the justification must clearly apply to the particular employee affected. The next paragraph shows how you might apply that information (we have not used real case names or section numbers). The Equality Act 2010 prevents employers dismissing employees on the grounds of 'retirement' (see section x) but allows for a company to have an EJRA (see section y). However, the case of *A* v *B* set out the conditions for establishing an EJRA. One key aspect of that case was that the EJRA must not be discriminatory itself—there must be a legitimate aim, as set out in section z—and that it had to be clear that the EJRA applied directly to the affected employee (here, Keith). The case of *C* v *D* also emphasised that this must be clear from the contract: that something did not constitute an EJRA just because that was what normally happened—there must be a contractual requirement to retire at that age.

continued

EXERCISE 5 *continued*

(Comment: this is good at establishing the basic ground on which to build the application. It is not the application itself because we have not related our findings to the question yet; we have not solved Keith's problem—now we need to do that.)

Here is how you could apply your research:

In our problem, Keith is fifty-eight at the point of 'retirement'. Any dismissal for retirement reasons will be unfair unless there is an effective 'employer justified retirement age' (EJRA) at the company which could apply to him (see Case A x.x.x). The company's general policy might be an EJRA if it can clearly be shown to apply to Keith, but the case of *C* v *D* requires an additional step: there must be a clear contractual term to this effect, and the case of *E* v *F*, a German case in the Court of Justice of the European Union (CJEU), tells us that there must also be some 'social policy' grounds for the retirement age (an aspect of 'legitimate aim'). This CJEU decision is still relevant to our analysis even after Brexit for reasons we will explain in Chapter 10. The evidence we have from Keith (which may be disputed) is that the contract does not allow for this. If Keith is correct (*note here that if the question does not tell you about a key point, the examiner expects you take account of both possibilities*), there can be no EJRA and the dismissal is unfair. (*This applies your finding on the facts to the law you have discovered so that you can reach a conclusion as to consequence.*) Only if the 'company policy' can be interpreted as a contractual term which applies directly to Keith; (b) the 'company policy' is a proportionate means of achieving a legitimate aim; and (c) there was no way of achieving this in a less discriminatory manner will the company have an effective EJRA to enforce against him. We know that *C* v *D* established that 'company policies' will generally not be regarded as binding contractual terms, so (*here we see an application of that case to the facts*) it seems unlikely that a policy will bind Keith. Further, even if they have a policy which is deemed a term of the contract but they do not enforce it against, say, female secretaries, then this will mean the EJRA is discriminatory and not effective. The company may, however, overcome the claim of discrimination if they can show justification (here, related to the so-called health reasons—which should fall within the reasoning of the Court of Justice in *E* v *F*). (*These last points show a lawyer's caution in accepting that we may possibly lose the argument on whether a policy is a contractual term, but we have a reserve argument on discrimination. The evidence in Keith's favour is given in the question—the question to Xena. On the whole, examiners do not put in facts without a reason so you should always be a clue for you. This is an example of a 'hidden fact' or 'twist' question as the question does not ask you about discrimination explicitly but hints at it through the reference to Xena. This is not unfair: very often you have to extract this sort of thing from real clients in practice as they do not know the significance of the facts themselves.*)

Note that what we have not done here is to make general statements about how older people should be treated, nor have we tried to say whether we think such treatment is 'fair' or 'unfair' except in the statutory sense. We have taken the key points in the question and *applied* those to the statute and case law. *In other words, we have tested the facts as given against the law we researched in the same way as if responding to a real client.* It is vital, when dealing with problem questions, to actually address the problem raised. However banal or obvious this seems, the major reason that law students do badly when answering problem questions (other than lack of knowledge) is their failure to attempt to solve the client's problem.

4.3 How to present your answer

There are a number of models and strategies available. Though some law teachers take the view that these can be too formulaic, we think they are a useful tool in developing competence and confidence in answering problem questions. One of the most widely used is '**IRAC**'. This requires you to break your answer down into four elements:

- Introduce the **Issues:** show that you have correctly identified that the problem raises the issues (say) of the *mens rea* in homicide and defences to murder, or of what steps can constitute consideration in contract.
- Discuss the **Rules**: this enables you to show that you know the law. Don't use it as an opportunity just to write everything you know about murder, or negligence. Keep it focused to the issues, but don't stray into the detailed analysis of fact at this stage. Imagine, for instance, that the problem posed is this: '*Tired of being kept awake at night by the howling of the local fox population, Alex takes his shotgun, goes into the garden, and fires at some foxes. He kills two but with the third shot he misses a fox as it passes by a house, the shot goes through an open window into the house, and kills Bob. Alex is charged with murder. Discuss*'.

The question clearly relates to the problem area of the lines to be drawn between murder (with intent or recklessness) and manslaughter. For these purposes we will concentrate on intent and recklessness. Your research reveals that *Blackstone's Criminal Practice 2021* [at A2.6] says that recklessness is 'essentially concerned with unjustified risk-taking' and that 'the precise meaning of the term "recklessness" has been the subject of great controversy . . .'. The text then shows that there are many ways intention and recklessness can overlap. Now, if all you do is to copy and paste section A2.6 there is little to reward. You need to explore the cases and the classifications given by *Blackstone's*, but keeping in mind Alex's case, not just a general description:

- **Apply** the rules to the facts in this scenario. Make sure here that you state the legal implications of all the material facts and identify any issues of doubt. Cross-refer to authorities (statute, precedent, or maybe even academic authority) wherever possible—most of these you will have already discussed in the 'Rules' part of your answer. What does your research tell you about Alex's case? When he fired at the fox (as it passed a house) what category of intent or recklessness (if any) did he fit into according to any legal authorities you have explored?
- **Conclude** by summarising your analysis. This is an opportunity to make clear that you have appreciated your instructions. If the question says, 'Advise Diana', then phrase your conclusion as legal advice to Diana—make it clear (so far as the information given to you allows) whether, on these facts, you think Diana is liable. If you cannot come to a definite conclusion, clearly state why and identify what information you would need to complete your advice.

4.4 Planning your answer

Whatever you are writing, take note of two fundamental principles. First, there is one vital ingredient in any writing—willpower. Unfortunately, essays do not write themselves, and most universities enforce strict deadlines. The hardest part of any piece of writing is

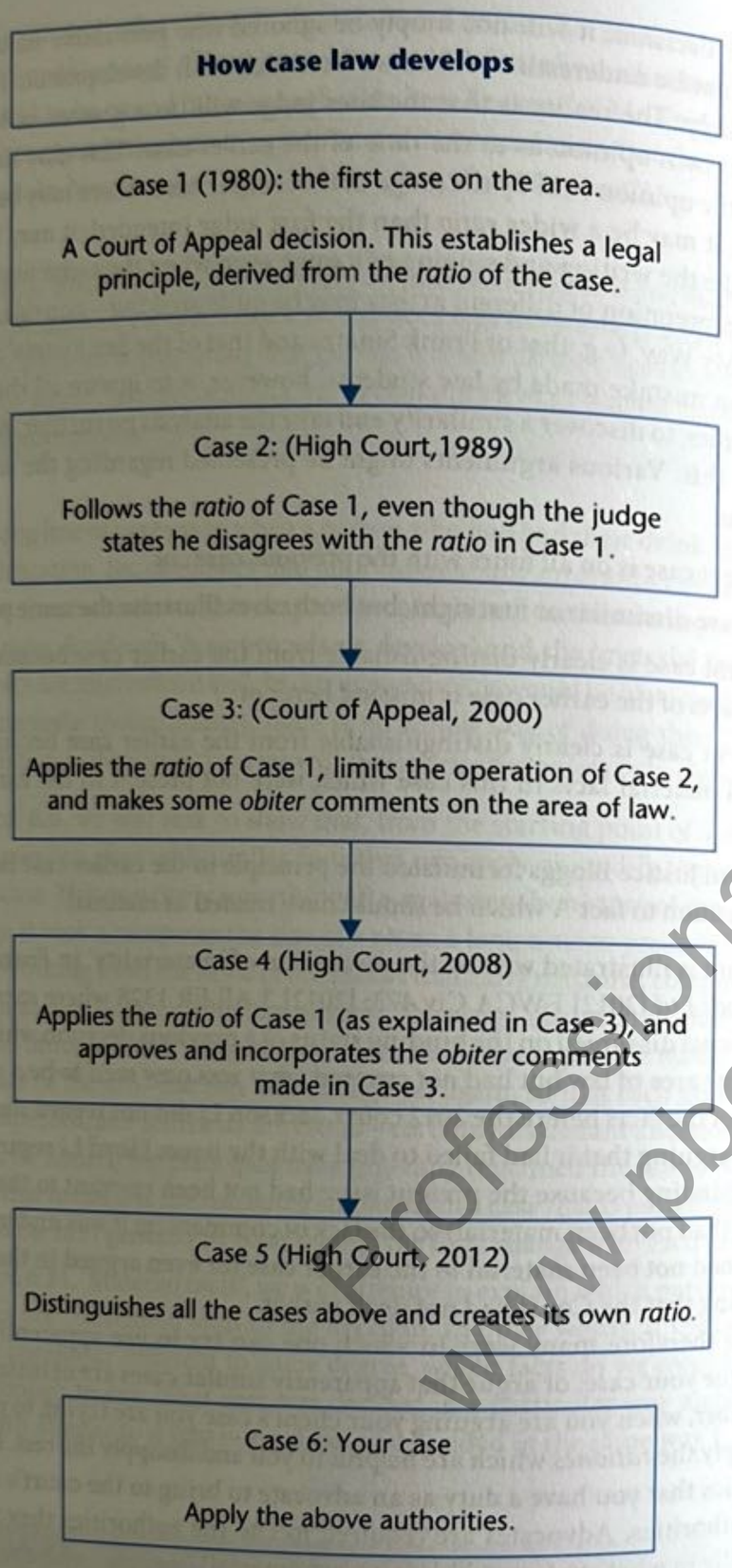

Figure 6.1 How case law develops

We can show this in action a little more specifically by returning to the example of the road accident first set out in **Chapter 5**. You may remember that the facts were: in *case (1)* a man driving a Ford Mondeo runs over an old lady who was lawfully using a zebra crossing. The man is held to be liable in negligence. In Brenda's case—*case (2)*—a woman driving a BMW runs over an old man who was crossing the road.

The question before the court is therefore: how does the decision in *case (1)* apply to the facts in *case (2)*? (We should state here that none of what follows is meant to be an accurate statement of the law—we have simplified many things to illustrate our general point.)

We shall start by assuming that *case (1)* took place in 2019 and the driver (we shall call him Alfred) argued that he was not liable because the old lady stepped onto the zebra crossing so late that he could not stop. The court did not accept that this was a legitimate excuse and Alfred was found liable in negligence to the old lady for the injury he caused her. Alfred's appeal to the Court of Appeal failed. By looking at the judgment of the trial judge and taking the comments of the Court of Appeal, we can put together the following **material facts**:

(i) The weather conditions were excellent.

(ii) The old lady was on a zebra crossing.

(iii) The fact that she stepped onto the crossing late did not, in law or on the facts, excuse Alfred from liability because:

(a) Alfred was speeding;

(b) Alfred's attention was distracted as he was using his mobile phone at the time.

We might say that the *ratio* of this case is: where a person is not paying adequate attention and is speeding, they will be liable for their negligence if they injure a pedestrian who is using a zebra crossing, even where the pedestrian steps onto the crossing late, provided a careful driver (taking account of the weather conditions) could have still avoided causing injury.

The fact that Alfred is male, that the injured person is female or old, that the car was a Ford Mondeo, have not been held to be relevant as **material facts**. Indeed, the court seems not to have concentrated on the use of the mobile phone (being a criminal offence in the UK), but taken a more general line about 'careful driving'. Now we have to apply this reasoning to *case (2)*—the woman (Brenda) driving a BMW, who hits an old man crossing a road. It is 2020. First, **Table 6.2** shows a simple comparison of (material) facts. We shall assume that the court in *Brenda's case* decides that the absence of facts (i) and (iv) does not affect the general principle to be found in *Alfred's case*. This means that the judge in Brenda's case believed that the fact the old lady in *Alfred's case* was injured *while using a zebra crossing* was not material to the *ratio* of *Alfred's case* when looked at in the

Table 6.2 Application of facts to *Brenda's case*

Material facts in Alfred's case	*Facts in Brenda's case*
Fact (i): use of a zebra crossing	Not present—this was a straight piece of open road
Fact (ii): speeding	Brenda was also speeding
Fact (iii): attention distracted by use of mobile phone	Similar—attention distracted by noisy child in the back seat
Fact (iv): the old lady stepped onto the crossing late	Not present—the man is not at a zebra crossing
Fact (v): weather conditions good	Same

light of the present case so that the same principle applies even where the injured person is crossing another part of the road. This is interesting: perhaps the textbooks written after *Alfred's case* thought that the protection given to the old lady only applied because she was using a zebra crossing—if so, the texts will have to be rewritten. The judge will have fixed on the presence of facts (ii), (iii), and (v) in *Brenda's case* as the determining factors (even though they are not identical to *Alfred's case*).

The *ratio* of *Brenda's case* might then be: where a person is not paying adequate attention and is speeding, they will be liable for their negligence if they injure a pedestrian who is crossing the road, provided a careful driver (taking account of the weather conditions), could have still avoided causing injury.

Our perception of the legal principles relating to driving negligently has been widened, even if only slightly. Gone is the requirement for the presence of the zebra crossing and the related fact of the person stepping onto it late. Also gone now is the basis for any argument which tried to limit the *ratio* of *Alfred's case* to inattention caused by the use of mobile phones. If we were being very precise, we only know that using a mobile phone or having a noisy child in the back of the car do not amount to sufficient excuses to overcome the 'inattention' point. Perhaps other distractions might be excused. However, we are at least beginning to get a clearer picture of what is required for liability and what does not matter.

We can now introduce a final example. *Carol's case* involves a woman driving a VW Golf, who runs over a student crossing the road (this time on a bend). It is 2022. **Table 6.3** sets out the material facts for this scenario.

You can see that the facts have moved on a little from each of the first two cases. It is possible that this shift will mean that Carol is not liable. It is also possible that the judge may find that the differences are immaterial to the general principle so that she is liable. This is what judges do: they make decisions. In any decision there is a point where a judgment has to be made and this is not a purely mechanical exercise (one reason why

Table 6.3 Application of facts to *Carol's case*

Material facts in *Alfred's case*	Material facts in *Brenda's case*	Material facts in *Carol's case*
Fact (i): use of a zebra crossing	Not present—this was a straight piece of open road	Not present—accident on the bend in a road
Fact (ii): speeding	Brenda was also speeding	Carol was *not* speeding
Fact (iii): attention distracted by use of mobile phone	Similar—Brenda was distracted by a noisy child in the back seat	Similar—Carol was distracted by seeing a dog, which was not on a lead and which was wandering around the roadside
Fact (iv): the old lady stepped onto the crossing late	Not present	Not present
Fact (v): weather conditions good	Same	Different—it was raining

it is so difficult to invent a computer-based 'expert system' for deciding cases). As the great lateral thinker Edward de Bono once commented, 'In the end all decisions are emotional' and much of behavioural economics centres on this concept too. If it helps: we have described this moment of decision to our students as the 'Marmite moment'—a point where logic comes to an end and a judge either loves or hates your argument (to those readers who have not encountered the joys of Marmite, it is a yeast extract used as a spread on toast, etc.—even its own advertising campaign plays on the fact that people are divided on the taste).

We shall say that Carol is also found to be liable. This means that the judge has confirmed that the principles of liability as originally set out in *Alfred's case* are:

(i) not limited to cases involving zebra crossings (though this probably came out of *Brenda's case* anyway);

(ii) not limited to accidents occurring on straight roads (as had been the fact in *Brenda's case*);

(iii) not limited to cases where the driver is speeding (which was the position with both *Alfred* and *Brenda* but not Carol);

(iv) not limited to cases where the weather conditions were good (previously we would have been unsure, but in *Carol's case* it was raining and the same principles were still applied); and

(v) not limited by the fact that Carol's attention was distracted by a genuine and understandable concern that a loose dog might run into the road. On this, we can now speculate that any excuse regarding lack of attention will be very limited in its scope.

The *ratio* for *Carol's case* might be: where a person is not paying adequate attention, even where there is an understandable reason for that lack of attention, they will be liable for their negligence if they injure a pedestrian who is crossing on the bend of a road, provided a careful driver could have still avoided causing injury. The possible formulations of *ratio* in the three cases are compared in Table 6.4. How important are the minor differences?

Table 6.4 *Rationes* of the three cases

Alfred's case	*Brenda's case*	*Carol's case*
Where a person is not paying adequate attention and is speeding, they will be liable for their negligence if they injure a pedestrian who is using a zebra crossing, even where the pedestrian steps onto the crossing late, provided the driver (taking account of the weather conditions) could have still avoided causing injury.	Where a person is not paying adequate attention and is speeding, they will be liable for their negligence if they injure a pedestrian who is crossing the road, provided a careful driver (taking account of the weather conditions) could have still avoided causing injury.	Where a person is not paying adequate attention, even where there is an understandable reason for the lack of attention, they will be liable for their negligence if they injure a pedestrian who is crossing on the bend of a road, provided a careful driver could have still avoided causing injury.