INTRODUCTION TO

CRIMINAL AND CIVIL LITIGATION

Brian Raymond

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PREFACE

As a place of education, the average solicitor's office leaves a lot to be desired: nowadays the pressure upon practitioners to satisfy the demands of clients and simultaneously produce a reasonable profit means that staff training is relegated to that mythical 'spare moment' which never comes. As a result, many essential members of a solicitor's staff—secretaries, legal executives and outdoor clerks, for example—work below their full potential simply because nobody has the time to explain the wider significance of their work. This book is designed to perform the function of the experienced solicitor blessed with an endless capacity for answering basic questions and providing straightforward answers. For the complete novice I have tried to provide an intelligible introduction, which assumes no prior knowledge whatsoever, but which will enable the reader to obtain a basic idea of the terrain so that knowledge and experience acquired later can be seen in a proper context. At the other end of the scale, even the most experienced secretary or managing clerk may derive more satisfaction from their work if they are fully aware of the ends to which their efforts are directed.

It is fair to point out, however, that, as its title clearly states, this book is only an introduction to the complex and diverse fields of criminal and civil litigation and not a comprehensive practitioner's handbook. Explaining matters from first principles inevitably takes a considerable amount of page space, and thus to avoid an unwieldy and over-expensive work I have been forced to omit some topics which ideally I would like to have included. The two most obvious absences are the subjects of matrimonial litigation and the practice and procedure of industrial tribunals, but as these are largely self-contained areas of litigation, deriving their existence from specific aspects of the law, it is hoped that this will not detract from the overall value of the work.

In the final analysis, however, the proof of the effectiveness of this book will lie in the value which it has for its readers. The writer of an instructional manual has to guess at the needs of his readers and if they are not satisfied then it is the book which is at fault and not they. If the disgruntled reader will take the trouble to write to the publishers, efforts will be made to avoid the difficulties in future editions.

Finally my thanks are due to the staff at Oyez Publishing for their patience and encouragement and to my partners and colleagues for allowing me to pick their brains unstintingly. I am particularly grateful to David Charlton whose careful reading of the civil part of the manuscript has enabled me to avoid falling into error in a number of instances.

Brian Raymond
October 1980

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1 WHAT IS LITIGATION?

1 Doing battle without violence

As members of a civilised society we tend to take it for granted that there are ways of preventing other people from perpetrating wrongful acts against us. We may not have a very clear idea as to what these ways are or how we should put them into operation, but it is comforting to know that they exist in the background, ready to be used in time of need, like an old cudgel that might be kept in a cupboard to repel burgulars. The overall name for these methods of securing our rights against our fellow citizens, or even against the government, is *litigation*. This is a word generally used by lawyers but it covers all those situations where people say 'I'll sue you' or 'I'll take you to court'. Thus if your neighbour starts to build an extension which threatens to block the light to your windows, or a workman drops a brick on your head as you walk past a building site, or a store-detective catches you with a copy of this book stuffed inside your coat, the legal way of dealing with these situations is litigation. Note that the remedy or the outcome that is sought in each of these cases is very different: you would want to find a way of *restraining* your neighbour from blocking your light, but would be seeking some form of *compensation* from the workman or his employers for the injuries caused to your head, and by way of further contrast, the store-detective would be wanting to have you *punished* for the terrible crime of stealing this book.

Although the types of action which can properly be described as litigation vary considerably, they all share basic features which distinguish them from other forms of legal activity. What are these features? The first thing to notice is that there is always some dispute, or a wrong committed. Where there has been no wrong done or there is no dispute there can be no litigation as litigation is basically concerned with the settling of disputes or the righting of wrongs done, by compensation or punishment. The second thing to notice is that there will be at least two sides to the proceedings.

In the examples given above it would be you and your neighbour who are the parties to the action, or you and the workman or his employer or you and the shop in the last case.

The two sides or litigants invariably have conflicting interests; your neighbour, for example, wants to build his extension and you want to stop him. The point of court action or litigation is not to draw a veil over conflict but rather to have the important issues brought to light and resolved impartially and in a civilised manner. The fact that litigation is a battle between two or more adversaries is reflected in the way that legal cases are referred to, or described in documents. Thus if you are called Smith and your neighbour is called Bloggs, the title of your case will be *Smith* v *Bloggs*. By one of the strange conventions with which our legal system is riddled, however, when you are speaking about a case or reading out a case-name it is customary to say 'Smith *and* Bloggs' rather than 'Smith *versus* Bloggs'.

Having seen that litigation always involves a contest between opposing parties it is obvious why lawyers call this kind of work *contentious* and the rest of their work *non-contentious*. Examples of non-contentious work are conveyancing (buying and selling land and houses), probate (dealing with people's wills and property after they die) and commercial work (drafting contracts and agreements relating to business affairs). Lawyers become involved in these situations not because people are in dispute, but for the opposite reason: they are in agreement and they want to make the position perfectly clear so as to prevent disputes in the future.

Take the example of the ordinary purchase of a house. There are two parties here, a seller and a purchaser. The parties are unaware of any conflict since they are in agreement over the basic transaction, namely that one should sell and the other should buy. Solicitors are brought into the picture to make sure that both parties are of exactly the same mind over the detailed points that they may have given no thought to. For instance, you may want to buy a house that has an adjoining orchard and all through the negotiations you assume that this orchard is included in the purchase price, whereas the seller does not intend to sell it at all. You can imagine the row that would take place if the transaction went through without this issue being resolved properly. It is the basic job of the solicitors on both sides to ensure that every conceivable eventuality is taken care of and future disputes avoided.

It can be seen that there is a link between the contentious work of litigation, dealing with disputes once they have arisen, and the non-contentious work which seeks to prevent them ever arising. The conveyancing solicitor, for instance, will know how past disputes have been resolved by the courts and will be able to steer his client clear of the more

obvious pitfalls that gave rise to them. But if something does go wrong despite his best endeavours the matter will probably have to be litigated and sorted out by the courts. Just as the ordinary citizen knows that there are courts to back him up in the last resort in a dispute over his rights (although he may be wary of resorting to them), so in the same way the solicitor doing non-contentious work operates in the knowledge (and perhaps fear) that his work may become the subject of litigation and be scrutinised by the courts.

2 The two separate systems—criminal and civil

Of the examples already given of situations which might give rise to litigation (the house extension, the brick and the book) only the last would be likely to involve a party with no direct connection with the dispute—the police. This, as you will have realised already, is because the act of stealing a book is *criminal* whereas the acts of the expanding neighbour and of the careless workman are not. As we all know, it is the job of the police to detect crime and prosecute criminals; they are employed by all of us to protect society from certain wrongs. They are not concerned with all wrongs, however, and you will have a hard time trying to interest them in your neighbour, although if you become so exasperated that you punch your neighbour on the nose, they will soon become very interested in you! The reason is not bloody-mindedness on their part, of course, but because inconsiderate building is not a crime whereas assaulting someone is. Crimes, then, are particular wrongs committed against individuals or society at large, which are thought to be sufficiently serious to warrant special legal machinery to deal with them which does not depend on the initiative being taken by the person or persons suffering the wrong.

This matter of the motive force behind a legal action is one of the most important differences between the operation of criminal and civil litigation. When you reach the end of your tether over the extension next door you will probably have to seek legal advice as to how to take your neighbour to court over it. This could come from a solicitor or from a law centre or advice centre; if you are not eligible for legal aid, the solicitor will charge you for his services. Your neighbour may defend a court action vigorously and it may take several court appearances before the case is finished. We shall be discussing the mechanics of a civil action in much greater detail in later chapters but you will have no difficulty in appreciating that to put forward a civil claim through the courts requires on the part of the person suing a great deal of time and energy and possibly money, even if he is represented by a solicitor or law centre and, of course, the situation is much worse for the person who represents himself. By contrast the victim of a crime whose case is taken up by the police has the whole thing done for

him in that the police will apprehend the offender, prepare the legal case against him, start the court proceedings and follow them through to the end with the only effort required of the victims being a possible court appearance as a witness.

A second important difference between the civil and criminal systems relates to the result of an action. The main purpose of a civil action is to restrain some wrongs from being committed or to obtain compensation for past wrongs suffered by the individual or body bringing the action. Thus in your litigation against your neighbour for blocking your light you would seek an order of the court to restrain him from continuing to build or damages for wrongfully doing so in the past (in practice you would probably get both). On the other hand, by calling in the police over his bruised nose, your neighbour would be setting into motion a process designed not to compensate him but to punish you. This is because crimes are restrained and punished for the benefit of society as a whole rather than to provide redress for particular victims. In recent years the deficiencies of the criminal process in this regard have been recognised and there are now statutory provisions for the compensation of victims in certain circumstances at the end of criminal cases, but these are really adjuncts to the main purpose of the criminal process.

3 Which types of case are criminal and which civil?

The question of whether a particular act is against the law at all, and, if it is, whether the remedy is criminal or civil is largely a matter of historical accident. Our law and legal system is rather like a building that has been erected at the rate of one room a year for five hundred years without any overall plan; the result is an edifice without recognisable shape, with some rooms performing vital functions in a form that has hardly changed for several centuries, others serving no purpose at all but still occupying large parts of the original structure, and the whole continually being added to, refurbished and renovated on a piecemeal basis. Other countries, with the aid of a revolution or two, have torn down their old structures entirely and have rebuilt at a stroke with an overall design and concept and with a few later additions which conform to that concept. These countries have written constitutions and codified laws organised in a more or less rational way while our law has simply grown over the centuries, gradually adapting itself to modern conditions but often retaining accretions from an irrelevant past. Just to make our life harder, the categories of crimes and civil wrongs overlap to a considerable extent and there are acts (assault, for example) which can give rise to both criminal and civil cases. Although there is no short answer to the general question of which types of case are criminal and which civil there are three valuable

guidelines which will help you to recognise whether a particular matter you may have to deal with is civil or criminal. These are set out below.

(a) Types of court

All criminal cases, from murder to parking on a yellow line, start their legal lives in a *magistrates' court* and the overwhelming majority of cases never progress beyond that court. The few cases that do go further include serious matters like murder and rape and are heard in the *Crown Court,* perhaps the most famous example being the Old Bailey in central London.

The most basic court dealing with civil cases is the *county court.* Most medium-sized towns in England and Wales have one. They deal with claims for up to £2,000 in a broad variety of actions including debts and landlord and tenant disputes. The *High Court* is the highest civil court of 'first instance' (one that can be approached directly rather than on appeal) and has three main divisions, the *Queen's Bench Division,* the *Chancery Division* and the *Family Division.*

Matrimonial work is normally thought of as civil, but cases of this type can be heard in magistrates' courts, county courts and even the High Court itself (in the Family Division).

(b) Distinctive words and phrases

The person who starts a criminal case is called a *prosecutor* and, indeed, another word for a criminal case is a *prosecution.* The person who is accused of a criminal offence is called a *defendant* and those representing him are called the *defence.* A criminal case can be started by a *summons* for a minor offence or by the defendant being *charged* in more serious cases. When a criminal case is sent up from the magistrates' to the Crown Court, that process is called a *committal.* Magistrates' court proceedings are usually identified by the names of the prosecutor (usually a policeman) and the defendant: *Dixon* v *Moriarty* or *Police* v *Moriarty* or, if it is a smuggling case, *Customs and Excise* v *Moriarty.* In official law reports, the actual name of the person prosecuting will be used. Cases in the Crown Court are described with the prosecutor given the name of the Crown as in *R* (or *Regina*) v *Moriarty* or sometimes *The Crown* v *Moriarty.* When there is an appeal, say from the magistrates' court to the Crown Court, the names will be reversed as in *Moriarty* (appellant) v *Dixon* (respondent). This designation is not peculiar to criminal cases and is used for all appeals including civil ones.

The majority of civil cases are started by the party known as the *plaintiff,* who is doing the suing; the person being sued is called the *defendant* (see the example on page 65). In certain types of action the person starting it is called the *applicant;* his or her opposite number is always

referred to as the *respondent*. Divorce cases are begun by the *petitioner* and the spouse on the receiving end is the *respondent* once again. Actions in the county court are generally started by *summons* and in the High Court by a *writ:* some actions are started by *originating summons*.

(c) Documentation

In criminal cases it is only the prosecution who have to reveal their case before it is heard in court and then only when the case is to be heard in the Crown Court; in a magistrates' court neither side is entitled to know what the other is going to say before it is actually said. Accordingly very few documents in a file relating to a magistrates' court case will have been copied and made known to the other side. A case that goes to the Crown Court, however, will involve disclosure by the prosecution to the defence of the statements forming the basis of their case. These are called the *committal statements* or the 'depositions' or sometimes just 'the deps'. The document containing the charges that the defendant is facing is called the *charge sheet* if he has been charged, or the *summons* if the prosecution has been started that way. When a case is heard in the Crown Court the charges are recorded on a new document called the *indictment* (pronounced 'in-dite-ment' as in 'excitement') which has all the charges set out formally in separate *counts* one for each offence alleged against the defendant.

In civil cases there are invariably *pleadings* which are not, as they sound, desperate cries for help, but documents setting out the case of each party; usually a *statement of claim* or *particulars of claim* for the person bringing the action and a *defence* for his opposite number, often with more elaborate versions of the original documents called *further and better particulars* (of *claim* or *defence,* as the case may be). There will often be *affidavits* (pronounced 'affy-day-vits') which are statements under oath made by the parties to an action or their witnesses to provide evidence in written form which has the same force as evidence given under oath in court and is subject to the same penalty (prosecution for perjury) if it is proved to be lies. You might also come across *orders,* which are official documents stamped by the court to record its decision, whether it be the final outcome of the case as decided by the judge or an interim decision by a *master* or *registrar* (junior judges) on a point relating to the conduct of a case before the actual trial itself.

4 The importance of choosing the appropriate kind of litigation

Let us return to your hypothetical assault on your neighbour. By punching him on the nose you are clearly committing a crime (provocation, no matter how severe, is not a defence to assault) and he could call in the

police to charge you with the criminal offence. This, as we have seen, would have the effect of punishing you for your crime, but would offer no direct means of securing compensation for his damaged nose. Furthermore it would not deal adequately with the problem of restraining you in the future. Fortunately for your neighbour your act of hitting him gives rise to civil as well as criminal liability on your part: you can be prosecuted for the criminal offence of assault but you can also be sued in the civil courts for trespass to the person. Which kind of litigation he should pursue depends largely upon what he wants to achieve. If he is motivated by revenge, the criminal process is probably his best choice; if he wants compensation for himself, however, and an order restraining you from punching him again on pain of going to prison if you do, he should take civil proceedings.

We have already seen that there are different kinds of courts which perform different functions. Each court will only deal with issues directly before it. Thus if you were prosecuted in the local magistrates' court for your assault it would do you little good to try to bring up the whole history of the extension and ask the magistrates to do something about it as the magistrates' proper concern would be whether or not you committed the assault and, if you did, what punishment you should get. Your reason for doing it is only relevant to the sentence. Great harm can be done and is actually done by misguided attempts to solve a problem by the wrong methods. It is not uncommon for tearful ladies, bearing the visible evidence of assaults by their husbands, to act on the advice of well-meaning policemen and appear before the magistrates to apply for a private assault summons against their husband. Instead of starting criminal proceedings which can only result in punishment for their husbands with no protection for the wives while the case is pending, they would be better off, with the help of a solicitor (as opposed to a policeman who, however well-intentioned, is only trained in the details of criminal law) to take civil proceedings in a county court for an injunction to restrain the husband from using violence and, in an extreme case, to have him ejected from the matrimonial home. An injunction, by the way, is an order of the court either restraining an action (a prohibitory injunction), or compelling someone to do something (a mandatory injunction).

5 Tribunals

The system which has been described earlier in this chapter has existed in its present form for the greater part of this century and an experienced lawyer of, say, the 1920s would find himself in a completely familiar world if he were transported to the present on a time-machine. Certain areas of

the law itself have been altered considerably, and procedure is more complex and sophisticated, but the basic system of the courts and the words used in them remain the same. There is one aspect of today's legal system, however, which would be new and baffling to our friend from the past—the vast network of tribunals which has grown up since the last war.

Perhaps the best known type of tribunal is the Industrial Tribunal which decides issues of unfair dismissal, redundancy and discrimination by race and sex in employment, but there are many other tribunals which decide issues relating to such diverse subjects as rents and compensation for miners suffering from lung disease. What do these tribunals have in common and how do they differ from 'ordinary' courts?

A tribunal is an impartial body set up to decide issues of fact for the purpose of assessing the rights of individuals in relation to Acts of Parliament. Thus the Industrial Tribunal decides whether or not a company has dismissed someone unfairly by referring to the provisions of the Employment Protection Act, and a Rent Tribunal fixes fair rents for certain types of premises and tenancies according to criteria to be found in the Rent Act. Whereas a court can deal with a whole range of things arising from many different branches of the law, the functions of a tribunal are very strictly defined and are always confined to the application of a single or closely related set of statutes in a specific area.

These bodies are often used to settle disputes between the state and an individual. Traders who are disgruntled with their VAT assessments can appeal to the VAT Tribunal and in matters relating to entitlement to supplementary benefit or national insurance benefit you can appeal to the separate tribunals which exist to deal with those issues.

The idea behind the creation of tribunals was to establish a means of settling disputes in specific areas quickly and cheaply, without any of the pomp and formality of conventional court proceedings, so that lay people would feel at home in them and would be able to present their own cases without the need to resort to lawyers. Their success in fulfilling this aim has been very limited. The trouble is that the law surrounding most of the issues with which tribunals have to deal is highly complex and known only to a small section of the legal profession, most of whom are employed by the very government bodies the citizen is trying to grapple with. Representation by a lawyer is a decided advantage, but as this is beyond the financial resources of many people, there being no legal aid to cover representation at any tribunal, tribunals are a less effective way of securing rights than they should be.

2 OUTLINE OF CRIMINAL LITIGATION

1 The basic features of the system

Before we get down to the details of the way in which the system of criminal litigation operates it may be helpful to examine some of the basic differences from the civil system. One of the most important things to appreciate is the *pace* at which a criminal action evolves and the way that it progresses from stage to stage: failure to observe a time-limit or to be prepared for the next stage in an action is perhaps the commonest source of mistakes and crises in solicitors' offices.

(a) Who sets the pace?

We have seen how criminal cases arise from acts which the state itself is trying to restrain and punish. There may be an individual victim, as in a case of assault, or not, as in a drugs case, but the motive force behind the case is the prosecutor, who in most cases will be the police and the solicitors acting on their behalf. Thus without the prosecutor going through the steps necessary to start the prosecution, the case will not begin at all as there is no way that any case can be started by the court itself—in our adversarial system there must always be two parties and one of them has to set the case in motion. Once a criminal case has started, however, who then decides how fast it should progress and who is responsible for seeing that it goes from one stage to the next? Here we come to one of the most important differences between civil and criminal litigation.

In a civil case the court will take no action at all unless prompted to do so by one of the parties, but in a criminal case the court will take an active part in bringing a case, once started, to fruition. If you issue a writ against your neighbour for some civil wrong he has done you and then the argument is settled between you and both of you forget about the court case, nothing will happen—your writ will simply moulder away in a file in the Royal

Courts of Justice, never to be looked at again. But if a criminal prosecution has been started and has got to the stage where it has been sent up from the magistrates to the Crown Court, and reconciliation takes place at that point, positive steps must be taken to *prevent* it from going any further: in the absence of such steps the case will be 'listed' by the Crown Court will then expect both parties to turn up on a particular day. Enquiries will certainly be made as to why nobody has turned up and in the end the prosecutor will be obliged to attend court and formally offer no evidence against the defendant and only then will the case be closed. Thus the speed at which a criminal case progresses is largely dictated by the courts themselves, although it can be modified to some extent by the parties; in a civil case the pace is forced entirely by one side or the other, each step requiring a positive act to make it happen.

(b) What happens before an action is actually tried?

Almost all criminal cases end in a trial at court when the issues and the people involved are dealt with by the court; but the overwhelming majority of civil cases, particularly those in the High Court, are completed when the parties agree to settle their differences, without the case ever being decided by a court at all. Why is this? For the answer we must come back to the fundamental purpose of each branch of litigation: civil cases are in the main quarrels between private individuals and thus it is up to them how far they take their disagreements, but criminal cases are fought between the wrongdoer and society as a whole, and the end result, the punishment of the guilty, cannot be left to private agreement. Financial questions are also relevant here. In a civil case where the parties are personally responsible for the costs of the court action, it is very easy to reach a point where the game is hardly worth the candle in that the potential costs exceed the amount being claimed in the first place, and this is when the pressures to settle become acute. This problem rarely arises in criminal cases as the police who bring most prosecutions are publicly funded and are not personally responsible for the prosecutions they bring. The solicitor with a civil case knows perfectly well that his or her case will probably end in settlement, but he or she cannot afford to assume this and must go through all the pre-trial work as though it were going to end in a trial. With a criminal case there is none of this 'shadow boxing' and the lawyer knows from the outset that it will end in court and that he or she must prepare accordingly.

How are these preparations made? In a civil case there is an elaborate system for the exchange of information between both sides so that the areas of factual dispute are very clearly identified before the trial, and we shall be examining this in detail in the chapters dealing with civil litigation.