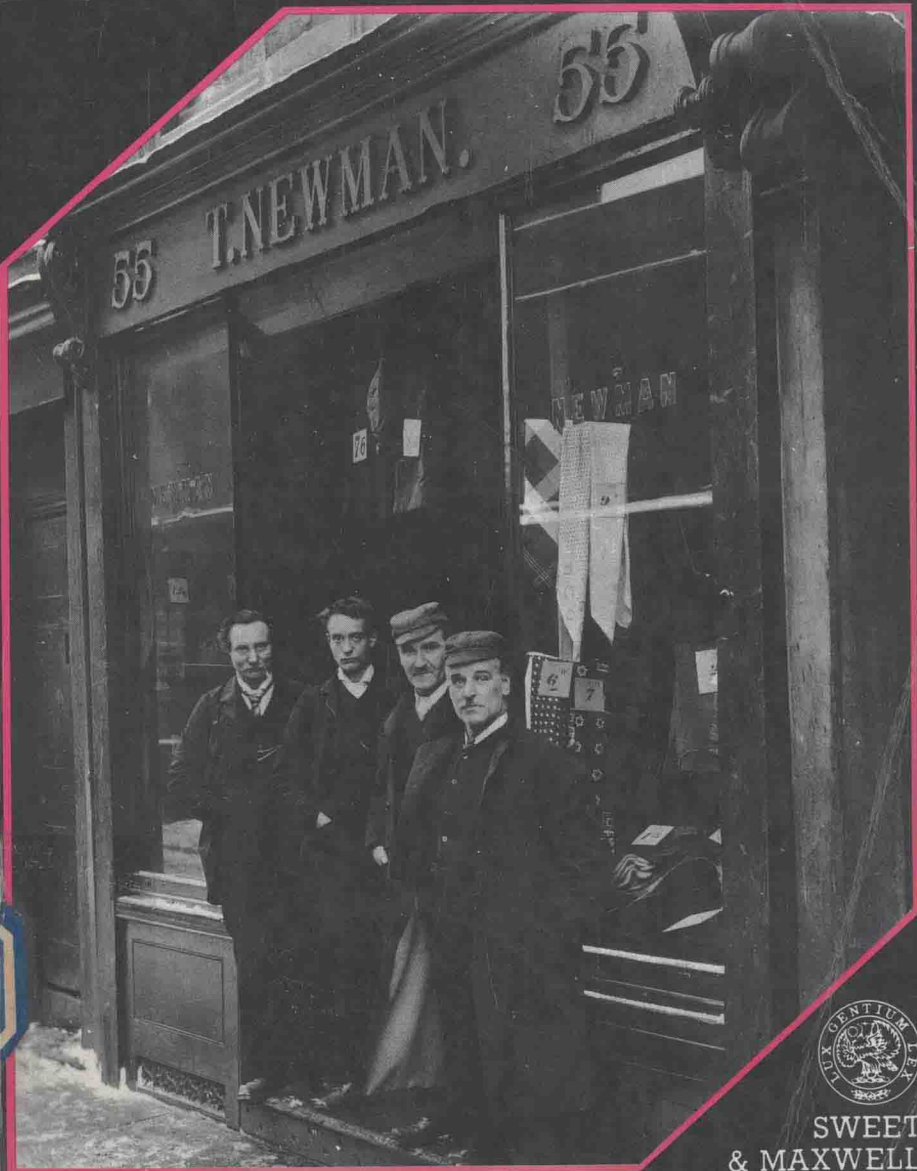


CONCISE
COLLEGE
TEXTS

LAW FOR RETAILERS

SECOND EDITION

JENNIFER BRAVE



SWEET
& MAXWELL

LAW FOR RETAILERS

Second Edition

By

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The index was prepared by Hélène Plant

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Preface

I am so delighted to have been asked to write this second edition, and I very much hope that each reader will enjoy finding something of particular interest within the following pages.

One of the nicest things in writing a book is being able to say thank you, publicly, to everyone who helped me behind-the-scenes. At the top of the list, my special thanks go to Michael Layzell, the Assistant Company Secretary of B&Q plc; and to everyone at Wigan Trading Standards, particularly to David O'Connor, the Assistant Borough Environmental Health and Consumer Protection Officer and to Adrian Hill, Senior Trading Standards Officer there.

Thank you also to each of the following people – Helena O'Neill at the Office of the Data Protection Registrar; Andy Scott formerly of Haringey Trading Standards but now Head of Consumer Services at Greenwich; Jane Moss, Standards Programme Manager at the British Standards Institution; Ivor Levy at Frenkel Topping & Co; Peter Carter, Senior Solicitor at British Gas Southern for checking my credit advertisements; and Ken Ellis, County Trading Standards Officer, Devon (Appellant in *Wings Ltd. v. Ellis.*)

I particularly wish to thank Jackie Brooks, who so kindly typed and set out the manuscript in such a professional way; and the editorial team at Sweet & Maxwell Ltd. too for helping steer the way for this second edition.

On the principle, once more, of saving the best until the last, my very special thanks go to my parents for their love and on-going help and support, and to Margaret Sinclair, a true Scots Saint and my own special patron, without whom neither this book nor the first would ever have been written and published.

Jennifer Brave
May 1993

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Chapter One

Setting the Legal Scene

1. INTRODUCTION

This book is designed to be a practical guide for the retailer, covering those areas of consumer law that affect the day-to-day activities of the business – from the initial advertising to the point of sale.

It is not designed to be a book on employment law, which is hardly mentioned here, except for a brief discussion on the law relating to discrimination. The field of consumer hire remains untrodden, but some emphasis has been given to the subject of consumer credit, both in relation to credit advertising and the giving of quotations.

All other areas of consumer law have been included and presented from the retailer's point of view, with a clear statement as to his rights – and, of course his duties, where these apply.

The first topic for consideration is the sources of "Law for Retailers."

2. STATUTE LAW

The main source of law affecting the retailer is that found in various Acts of Parliament or statutes, which are the supreme authority and provide the bare bones of the law of the land. The courts of law may not disregard an Act of Parliament, but they may add some flesh to it in the form of various legal decisions.

The fundamental provisions of the legislation are usually expressed within the statute itself, but it may, in addition, provide that future rules in the form of "Regulations" and "Orders" will come into effect under its authority. Modern legislation in this form has been significant, and the working of the Fair Trading Act 1973 and the Consumer Credit Act 1974 are worthy examples of this practice.

Statute law has both a civil and criminal nature, in that certain Acts of Parliament regulate the dealings between private individuals, while others regulate the position between individual and society.

3. COMMON LAW

Common law is a second source of law which has developed over the centuries from various practices and ancient customs, and which has been extended and applied through the courts, by the judges.

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The role of the judge is an important one, and where a previous judgment has been made it will affect each new decision by being applied in a similar set of facts. This is known as the doctrine of Judicial Precedent.

Not everything said by a judge is to be applied in later, similar cases. The part of his judgment that contains the reason or ground for his decision is the part which becomes binding as a future precedent – this reason or ground bears the Latin name of “*ratio decidendi*,” which means “the reason for the decision.” A statement which is made by the judge by way of an aside – as a mere observation – is known as an “*obiter dictum*.” Such a statement does not form a binding precedent, but is a persuasive authority, and is an important source of guidance.

Nor is every court bound by a particular legal decision. A court is bound only by the decisions of a court superior to itself in the hierarchical structure, and some courts are bound by their own decisions as well.

4. CIVIL LAW DEFINED

Civil law is concerned with the rights and obligations between individuals. It sets down those legal rules that apply, and provides the appropriate remedies, when things go wrong, through a system of civil courts.

This means that a person who has suffered loss or damage at the hands of another is able to bring an action against him through the courts – and to be given the appropriate remedy, usually an award of damages by way of compensation.

The injured party making the claim is known as the plaintiff, and the party against whom the claim is made is known as the defendant, in proceedings in England and Wales. The terminology for proceedings in Scotland is slightly different, the parties being called the pursuer and the defender respectively.

Many of the laws affecting the retailer are rooted in civil law – the law of contract and the law of negligence being particularly important, as is the Sale of Goods Act 1979, which is an example of civil statutory legislation.

5. CRIMINAL LAW DEFINED

Criminal law is concerned with matters between the individual and the State; it too, sets down the legal rules that apply, and provides appropriate remedies when things go wrong, but the whole nature of criminal law is essentially different.

It is rare in criminal law for the injured party to bring his own proceedings, but it can be done by way of private prosecution. Proceedings are more usually brought by the police in England and Wales, and by the procurators fiscal in Scotland. Proceedings may also be brought by the local trading standards departments and by environmental health officers, where there has been a breach of a particular consumer law.

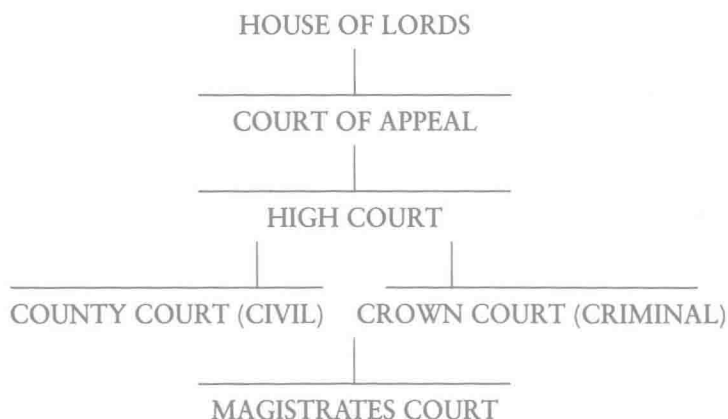
Proceedings brought in the criminal courts are known as a prosecution, and if an offence is proved to have been committed the guilty party is duly "convicted." The punishment meted out is usually a fine or a term of imprisonment, but it can be both in serious cases.

Many of the laws affecting the retailer have their root in criminal law, notably the Trade Descriptions Act 1968 and the Health and Safety at Work, etc., Act 1974. Some, like the Consumer Protection Act 1987, contain a mixture of both criminal and civil law – the 1987 Act creates criminal offences in relation to Consumer Safety and to Misleading Price Indications, and civil liability in relation to its Product Liability provisions.

6. THE COURTS IN ENGLAND AND WALES

It is through the system of courts, both civil and criminal, that appropriate legal remedies are administered.

It is important to know that a structural hierarchy of courts exists, led by the House of Lords, with the other courts in *descending* order as follows:



Civil actions, such as breach of contract and the recovery of debt, are usually heard in the county court. Breaches of the criminal law may

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either be tried “summarily” – in the magistrates’ court, or “on indictment” – before a judge and jury in the Crown Court.

7. THE COURTS IN SCOTLAND

The courts in Scotland carry out a similar role in the administration of legal remedies, but through a different hierarchy of courts. Although bearing different names, the work of each court is somewhat similar. The hierarchy is set out below, the sheriff courts being at the lower level:



The sheriff courts in Scotland hear the majority of actions for the recovery of debt and breach of contract. Breaches of the criminal law may also be tried by the sheriff court, which has both “solemn” and “summary” jurisdiction – “summary” trial being by the sheriff alone, “solemn” trial being before the sheriff and a jury.

8. TRIBUNALS

Tribunals are a twentieth century development for resolving disputes, and they exist in addition to the hierarchy of courts already referred to. To quote Lord Denning on the subject:

“They are a separate set of courts dealing with a separate set of rights and duties . . . just as there was the Chancellor dealing with the enforcement and administration of trusts, so in our day there are new tribunals dealing with the rights and duties between man and the State.”

Some tribunals deal with disputes between individuals. The Tribunals and Inquiries Act 1971 consolidated earlier legislation on the subject, and it continues to be the main source of general control even today. Hand-in-hand with this is the Council on Tribunals, which is a purely advisory body existing for the purpose of keeping the workings of the tribunal system under review, and which is

permitted to attend tribunals as they are taking place, and which may also present reports and recommendations for change. The Council has a Scottish Committee.

Tribunals can be divided into three basic categories:

1. *Administrative Tribunals* – such as Social Security Tribunals; Rent Tribunals; Special Commissioners of Income Tax and Industrial Tribunals. Not all members of a tribunal have to be legally qualified. Certain specified tribunals, such as an Industrial Tribunal, must be chaired by a legally qualified person appointed by the Lord Chancellor (for England and Wales), or by the Lord President of the Court of Session (for Scotland). Two fellow lay members sit on the tribunal with the chairperson. These two are themselves experts in their own particular field, being drawn from employers' representatives and the unions respectively. Where the claimant is a woman, it is usual for one tribunal member to be a woman too. An appeal to the Employment Appeal Tribunal may be made on a point of law from a decision of an industrial tribunal.
2. *Domestic tribunals* – such as the Law Society's and Bar Council's own, each of which resolves disputes and hears disciplinary matters relating to its own members. (Law Society/Solicitors and the Bar Council/Barristers.)
3. *Tribunals of inquiry* – which are included here only for the sake of completeness. These do not usually affect the retailer, being generally instigated by the Government to look into matters of national interest, or disaster – such as the recent Herald of Free Enterprise and Hillsborough Football disasters.

9. ARBITRATION

A further way of resolving a dispute is for the parties concerned to refer it to "arbitration." An arbitrator may be any independent person that the parties feel is suitable for the purpose. That can mean the registrar of the county court (under the Small Claims procedure) or an outside arbitrator with a specialist knowledge which will be of particular assistance in determining the dispute in question.

Whoever is nominated, the dispute will be heard quickly, in private, and in an informal atmosphere. Any award or judgment given by the arbitrator is legally binding on the parties to the arbitration. The right of appeal from it is extremely limited, and will arise only if it can be shown that either the arbitrator did not

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conduct the proceedings properly or that his award or judgment contained an error.

A further limitation is imposed by the Arbitration Act 1979 which prohibits an appeal from arbitration to the High Court on a point of law unless the parties concerned agree and the court has given leave to appeal.

Under the small claims procedure in the county court, defended money claims that do not exceed £1,000 are *automatically referred* to arbitration. Here, the arbitrator will usually be the registrar, but even here the appointment of any other suitable person may be agreed between the parties.

Provided the parties agree, and at any time before giving his decision, the arbitrator may consult any expert or invite an expert to attend the hearing as an assessor.

Where the amount being disputed is more than £1,000, if the parties agree, the proceedings *may be referred* to arbitration. They will not automatically be referred to arbitration, however.

10. E.C. LAW

With the establishment of the European Economic Community by the E.E.C. Treaty in 1957, the United Kingdom was later to become a member of that European Community on January 1, 1973, under the European Communities Act 1972.

From this date, the United Kingdom is bound by the Articles of the E.E.C. Treaty and any regulations made under it. Should any conflict arise between it and the United Kingdom's own national law, the E.E.C. Treaty is supreme on the subject. This explains why, because of its incompatibility with its obligations under the E.E.C. Treaty, the United Kingdom was obliged to repeal its earlier legislation on "Origin-Marking."

Directives, and other Orders, may be adopted by the Council of Ministers (more about which later) from time to time. These must be incorporated into U.K. legislation within a specific time-scale, but exactly how this is to be done is left to the U.K. to freely decide. The Council Directive of July 25, 1985 (on Product Liability), for example, provided as follows:

"Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the commission thereof."

To comply with this requirement, "Product Liability" became law in the U.K. on March 1, 1988, under Part I of the Consumer Protection Act 1987.

The European Court of Justice also makes European law by giving rulings concerning the E.E.C. Treaty and by interpreting questions of Community law referred to it. Its decisions have the force of law within the United Kingdom.

Before moving on to another chapter, brief mention should be made of the four Institutions of the European Community and the role which they play within it:

(1) The European Commission

This is composed of 17 members each appointed by their own governments for a term of four years. Their prime task is to monitor the interests of the Community as a whole, and not their own particular national interests. The European Commission is concerned with putting forward proposals and ideas for new Community legislation, as well as ensuring that existing Community law is being effectively complied with. It is the European Commission that has, currently, commenced proceedings in the European Court of Justice against the United Kingdom on the basis that it believes that the E.C. Product Liability Directive has not been properly implemented with regard to the U.K.'s "development risks" defence.

(2) The Council of Ministers

The Council is composed of 12 members, one for each Member State, each of which is present to look after its own national interests. It is the Council of Ministers which has the power to decide whether or not the proposals and ideas for new Community legislation put to it by the European Commission, become European law. The Council also takes into account the provisions of the E.E.C. Treaty, the proposals of the European Commission, the opinion and advice of the European Parliament, and those of the Economic and Social Committee before any subject matter becomes law.

This consultation and consideration process is clearly reflected in the recital to each Directive. The 1985 Council Directive on Product Liability begins as follows:

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof, Having regard to the proposal from the Commission, Having regard to the opinion of the European Parliament, Having regard to the opinion of the Economic and Social Committee,
Whereas”

Each proposal requires 54 votes before it can become law, and each Member State has a number of votes in proportion to its population – the United Kingdom has the greatest number of votes allowed, namely ten. Each Member State also has the right of veto to protect its national interest.

(3) The European Parliament

The European Parliament came into being on July 1, 1987 when the Single (European) Act (S.E.A.) came into force. Up to that time, it had been an “Assembly” and not a Parliament as such, but it is likely that its powers will continue to grow. The European Parliament consists of 518 Euro-M.P.s, each elected for a term of five years. The European Parliament sits in Strasbourg, but is quite unlike the U.K. Parliament at Westminster. The main difference between them is that the European Parliament does not make law – as mentioned above, it gives opinions on which the Council of Ministers subsequently acts. It is the Council of Ministers which is the “law-maker” in this sense.

(4) The European Court of Justice

The European Court of Justice is composed of 13 judges and six officials known as “Advocates General” who present cases to the judges. It is the Court of Justice which decides and interprets questions of Community law. It deals with matters brought before it by private individuals as well as those matters put forward by Member States, the European Commission and the Council of Ministers.

Decisions of the European Court of Justice are legally binding and have the force of law. It is the European Court of Justice which is

currently determining the validity of the United Kingdom's "development risks" defence in relation to Product Liability. As mentioned earlier, proceedings were commenced in the Court by the European Commission, which believes that the U.K. defence does not strictly implement the provisions of the E.C. Directive on this point.

Setting the Legal Scene – Quiz Sheet

Decide which is the correct answer to each of the following questions and place “a,” “b” or “c” in the box provided for your answer.

1. *Civil Law* is concerned with the legal relationship between
 - a) one private individual and the State
 - b) one private individual and another
 - c) one State and another☐
2. *Criminal Law* is concerned with the legal relationship between
 - a) the individual and society
 - b) one individual and another☐
3. The doctrine of *Judicial Precedent* means that
 - a) those in court must stand up when the judge enters and leaves the courtroom
 - b) the judge leads the procession of court officials into and out of the courtroom
 - c) a judgment or decision of an earlier court is cited as an authority for deciding a similar set of facts☐
4. The *Ratio Decidendi* is
 - a) the reason or ground of a judicial decision, which makes that decision a binding precedent for the future
 - b) the process by which the members of the jury are chosen☐
5. An *Obiter Dictum* is
 - a) the decision made and pronounced by the judge at the end of the case
 - b) an observation made by the judge on a legal question suggested by the case☐
6. An *Industrial Tribunal* must be chaired by
 - a) an expert in the field of employment
 - b) a legally qualified person
 - c) a union representative drawn from an appropriate industry☐

7. Any award or judgment given by an *Arbitrator* is
 - a) legally binding on the parties to the arbitration ☐
 - b) left open to the parties to accept or reject
8. The *Small Claims procedure* is designed for those claims where the amount of money in dispute is up to
 - a) £500
 - b) £750 ☐
 - c) £1,000
9. In any conflict between the *E.E.C. Treaty* and *U.K. national law*
 - a) The E.E.C. Treaty is supreme on the subject
 - b) U.K. law is supreme on the subject ☐
10. The *Law-Making Institutions* of the European Community are
 - a) the European Parliament and the European Court of Justice
 - b) the Council of Ministers and the European Court of Justice
 - c) the European Commission and the European Parliament. ☐

Chapter Two

General Rights and Duties

1. CASH

Money plays an important part in every business, and we become so used to working with it that we sometimes tend to take it for granted. But here, as in every other part of modern life, certain legal rules apply – even to the ordinary, every-day situation where a customer wants to pay cash for goods which he/she wants to buy. There are basically three points for the retailer to remember here:

1. The retailer is legally entitled to demand the *exact* purchase price for the goods in cash. He is not obliged to give change, though in practice he does so as a matter of course. The customer cannot insist that he does.
2. The money paid must be legal tender, *i.e.* Bank of England notes and coins made by the Royal mint, and gold. Scottish bank notes are not legal tender in England, but banks usually accept them with other foreign money.
3. The customer cannot expect the retailer to accept unlimited amounts of loose change or coinage. The Coinage Act 1971 and the Currency Act 1983 provide that coins made by the Royal Mint are legal tender as follows:
 - (a) £1 coins – for payment of any amount;
 - (b) coins of cupro-nickel or silver of denominations of more than 10 pence – for payment of any amount not exceeding £10;
 - (c) coins of cupro-nickel or silver of denominations of not more than 10 pence – for payment of any amount not exceeding £5;
 - (d) coins of bronze – for payment of any amount not exceeding 20 pence.

A new £2 coin, made up of copper, zinc and nickel, was introduced as legal tender in 1986 to commemorate the Commonwealth Games, followed by the Bill of Rights £2 coin and the Scottish Claim of Rights £2 coin issued in 1989.

A new £5 coin, made up of cupro-nickel, was introduced in 1990 to commemorate the Queen Mother's 90th birthday, followed more