LEGAL ENGLISH
& CASE ANALYSIS

法律英语与案例鉴析

张涛　编著

黄河出版传媒集团
宁夏人民出版社

Contents

Chapter One: An Introduction to Law

Law is pervasive. It interacts with and influences the political, economic, and social systems of every civilized society. It permits, forbids, or regulates practically every known human activity and affects all persons either directly or indirectly. Law is, in part, prohibitory: certain acts must not be committed. Law is also partly mandatory: certain acts must be done or be done in a prescribed way. Finally, law is permissive: individuals may choose to perform or not to perform certain acts.

1. DEFINITION OF LAW

A fundamental but difficult question regarding law is this: what is it? Numerous philosophers and jurists (legal scholars) have attempted to define it. American jurists and Supreme Court Justices Oliver Wendell Holmes and Benjamin Cardozo defined law as predictions of the way that a court will decide specific legal questions. William Blackstone, an English jurist, on the other hand, defined law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong".

2. FUNCTIONS OF LAW

At a general level the primary function of law is to maintain stability in the social, political, and economic system while simultaneously permitting change. The law accomplishes this basic function by performing a number of specific functions, among them dispute resolution, protection of property, and preservation of the state.

Therefore, a second crucial function of law is to protect the owner's use of property and to facilitate voluntary agreements (called contracts) regarding exchanges of property and services. Accordingly, a significant portion of law, as well as this text, involves property and its disposition, including the law of property, contracts, sales, commercial paper, and business associations. A third essential function of the law is preservation of the state. In our system, law ensures that changes in leadership and the political structure are brought about by political actions such as elections, legislation, and referenda, rather than by revolution, sedition, and rebellion.

3. CLASSIFICATION OF LAW

Because the subject is vast, classifying the law into categories is helpful. Though a number of classifications are possible, the most useful categories are (1) common law and civil law, (2) substantive and procedural, (3) public and private, and (4) civil and criminal Basic to understanding these classifications are the terms right and duty. A right is the capacity of a person, with the aid of the law, to require an-

other person or persons to perform, or to refrain from performing, a certain act. Duty and right are correlatives: no right can rest upon one person without a corresponding duty resting upon some other person or, in some cases, upon all other persons.

(1) common law and civil law

In this particular juxtaposition, these terms are used to distinguish two distinct legal systems and approaches to law. The use of the term 'common law' in this context refers to all those legal systems which have adopted the historic English legal system. Foremost amongst these is, of course, the US, but many other Commonwealth, and former Commonwealth, countries retain a common law system. The term 'civil law' refers to those other jurisdictions which have adopted the European continental system of law, which is derived essentially from ancient Roman law but owes much to the Germanic tradition.

The usual distinction to be made between the two systems is that the former, the common law system, tends to be case centred and, hence, judge centred, allowing scope for a discretionary, ad hoc, pragmatic approach to the particular problems that appear before the courts; whereas the latter, the civil law system, tends to be a codified body of general abstract principles which control the exercise of judicial discretion. In reality, both of these views are extremes, with the former overemphasising the extent to which the common law judge can impose his discretion and the latter underestimating the extent to which continental judges have the power to exercise judicial discre-

tion. It is perhaps worth mentioning at this point that the European Court of Justice(ECJ), which was established, in theory, on civil law principles, is in practice increasingly recognising the benefits of establishing a body of case law.

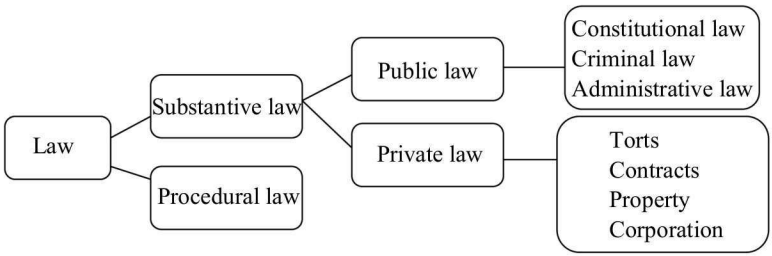
(2) substantive and procedural law

Substantive law creates, defines, and regulates legal rights and duties. Thus, the rules of contract law that determine when a binding contract is formed are rules of substantive law. This book is principally concerned with substantive law. On the other hand, procedural law establishes the rules for enforcing those rights that exist by reason of substantive law. Thus, procedural law defines the method by which one may obtain a remedy in court.

(3) public and private law

Public law is the branch of substantive law that deals with the government's rights and powers in its political or sovereign capacity and in its relation to individuals or groups. Public law consists of constitutional, administrative, and criminal law. Private law is that part of

FIGURE 1: Classification of Law



substantive law governing individuals and legal entities (such as corporations) in their relations with one another. Business law is primarily private law.

(4) civil and criminal law

The civil law defines duties the violation of which constitutes a wrong against the party injured by the violation. In contrast, the criminal law establishes duties the violation of which is a wrong against the whole community. Civil law is a part of private law, whereas criminal law is a part of public law (The term civil law should be distinguished from the concept of a civil law system).

In a civil action, the injured party sues to recover compensation for the damage and injury he has sustained as a result of the defendant's wrongful conduct. The party bringing a civil action (the plaintiff) has the burden of proof, which he must sustain by a preponderance(greater weight) of the evidence. Whereas the purpose of criminal law is to punish the wrongdoer, the purpose of civil law is to compensate the injured party. The principal forms of relief the civil law provides are a judgment for money damages and a decree ordering the defendant to perform a specified act or to desist from specified conduct.

A crime is any act or omission that public law prohibits in the interest of protecting the public and that the government makes punishable in a judicial proceeding brought (prosecuted) by it. The government must prove criminal guilt beyond a reasonable doubt, which is a significantly higher burden of proof than that required in a civil action. The government prohibits and punishes crimes upon the ground of

public policy, which may include the safeguarding of the government itself, human life, or private property. Additional purposes of criminal law include deterrence and rehabilitation.

FIGURE 2: Comparison of Civil and Criminal Law

	Civil Law	Criminal Law
Commencement of Action	Aggrieved individual (plaintiff) sues	State or federal government prosecutes
Purpose	Compensation Deterrence	Punishment Deterrence Rehabilitation Preservation of peace
Burden of Proof	Preponderance of the evidence	Beyond a reasonable doubt
Principal Sanctions	Monetary damages Equitable remedies	Capital punishment Imprisonment Fines

Case Study

Kuehn v. Pub Zone

(SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2003)

Facts: Maria Kerkoulas owned the Pub Zone bar. She knew that several motorcycle gangs frequently visited the tavern. From her own experience, she knew that some of the gangs, including the Pagans,

were dangerous and liked to attack customers for no reason. Kerkoulas posted a sign prohibiting any motorcycle gangs from entering the bar while wearing "colors"; that is, insignia of their gangs. She believed that gangs without their colors were less likely to violence, and experience proved her right.

Rhino, Backdraft, and several other Pagans, all wearing colors, pushed their way past the tavern's bouncer and approached the bar. Although Kerkoulas saw their colors, she allowed them to stay for one drink. They later moved towards the back of the pub, and Kerkoulas believed they were leaving. In fact, they followed a customer named Karl Kuehn to the men's room, where, without any provocation, they savagely beat him. Kuehn was knocked unconscious and suffered numerous fractures of facial bones. He was forced to undergo various surgeries.

Kuehn sued the Pub Zone. The jury awarded him $300,000 in damages. However, the trial court judge overruled the jury's verdict. He granted a judgment for the Pub Zone, meaning that the tavern owed nothing. The judge ruled that the pub's owner could not have foreseen the attack on Kuehn and had no duty to protect him from an outlaw motorcycle gang. Kuehn appealed, and the appeals court's decision follows:

Issue: Did the Pub Zone have a duty to protect Kuehn from the Pagans' attack?

Decision: Yes, the Pub Zone had a duty to protect Kuehn. The decision is reversed, and the jury's verdict is reinstated.

Reasoning: Whether a duty exists depends on the foreseeability of the harm, its potential severity, and the defendant's ability to prevent the injury. A court should also evaluate society's interest in the dispute.

A business owner generally has no duty to protect a customer from acts of a third party unless experience suggests that there is danger. However, if the owner could in fact foresee injury, she is obligated to take reasonable safety precautions.

Kerkoulas knew that the Pagans engaged in random violence. She realized that when gang members entered the pub, they endangered her customers. That is why she prohibited bikers from wearing their colors-a reasonable rule. Regrettably, the pub failed to enforce the rule. Pagans were allowed to enter wearing their colors, and the pub did not call the police. The pub's behavior was unreasonable and it is liable to Kuehn.

Exercise one: choose the right answers.

The case is called Kuehn v. Pub Zone. Karl Kuehn is the (defendant/plaintiff), the person who is suing. The Pub Zone is being sued, and is called the (defendant/plaintiff). In this example, the plaintiff's name happens to appear first, but that is not always true. When a defendant (loses/wins) a trial and files an appeal, some courts reverse the names of the parties for the appeal case.

The Facts section provides a background to the lawsuit. Lawsuits always begin in (a trial court/a court of appeal). The (losing/winning) party often appeals to (a court of appeals/trial court). The trial judge

ruled in favor of Pub Zone, but in the appellate decision, Kuehn won.

Issue section is very important. It tells you what the court had to decide-and why you are reading the case.

The Decision section describes the court's answer to the issue. A court's decision is often referred to as its holding. The court rules that the Pub Zone did have a duty to Kuehn. The court (reverses/reinstates) the trial court's decision, meaning it declares the lower court's ruling wrong and void. The judges (reinstate/reverse) the jury's verdict. In other cases, an appellate court may (remand/reverse) the case; that is, send it back down to the lower court for a new trial or some other action. If this court had agreed with the trial court's decision, the judges would have (affirmed/reversed) the lower court's ruling, meaning to uphold it.

Exercise two: MATCHING QUESTIONS

Match the following terms with their definitions.

___ A. Statute

___ B. Administrative agencies

___ C. Common law

___ D. Stare decisis

___ E. United States Constitution

1. Law created by judges.

2. Let the decision stand.

3. A law passed by Congress or a state legislature.

4. The supreme law of the land.

5. The IRS; the FCC; the FTC.

Exercise three: TRUE/FALSE QUESTIONS

1. T F The idea that current cases must be decided based on earlier cases is called legal positivism.

2. T F Civil lawsuits are brought to court by the injured party, but criminal cases must be prosecuted by the government.

3. T F Congress established the federal government by passing a series of statutes.

4. T F The federal government has three branches: executive, legislative, and administrative.

5. T F Law is diff erent from morality, but the two are closely linked.

Chapter Two: Common Law

1. Early English Courts

After the Normans conquered England in 1066, William the Conqueror and his successors began the process of unifying the country under their rule. One of the means they used to do this was the establishment of the king's courts. Before the Norman Conquest, disputes had been settled according to the local legal customs and traditions in various regions of the country. The king's courts sought to establish a uniform set of rules for the country as a whole. What evolved in these courts was the beginning of the common law—a body of general rules that applied throughout the entire English realm. Eventually, the common law tradition became part of the heritage of all nations that were once British colonies, including the United States.

Courts developed the common law rules from the principles underlying judges' decisions in actual legal controversies. Judges attempted to be consistent, and whenever possible, they based their decisions on the principles suggested by earlier cases. They sought to decide similar cases in a similar way and considered new cases with care, because they knew that their decisions would make new law. Each interpretation became part of the law on the subject and served as

a legal precedent—that is, a court decision that furnished an example or authority for deciding subsequent cases involving identical or similar legal principles or facts.

In the early years of the common law, there was no single place or publication where court opinions, or written decisions, could be found. Beginning in the late thirteenth and early fourteenth centuries, however, portions of significant decisions from each year were gathered together and recorded in Year Books. The Year Books were useful references for lawyers and judges. In the sixteenth century, the Year Books were discontinued, and other reports of cases became available.

2. Stare Decisis

The practice of deciding new cases with reference to former decisions, or precedents, eventually became a cornerstone of the English and U.S. judicial systems. The practice forms a doctrine called stare decisis6 ("to stand on decided cases").

(1) the importance of precedents in judicial decision making

Under the doctrine of stare decisis, once a court has set forth a principle of law as being applicable to a certain set of facts, that court and courts of lower rank must adhere to that principle and apply it in future cases involving similar fact patterns. Stare decisis has two aspects: first, decisions made by a higher court are binding on lower courts; and second, a court should not overturn its own precedents unless there is a strong reason to do so.

Controlling precedents in a jurisdiction (an area in which a court or courts have the power to apply the law—see Chapter 3) are referred to as binding authorities. A binding authority is any source of law that a court must follow when deciding a case. Binding authorities include constitutions, statutes, and regulations that govern the issue being decided, as well as court decisions that are controlling precedents within the jurisdiction. United States Supreme Court case decisions, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation.

(2) stare decisis and legal stability

The doctrine of stare decisis helps the courts to be more efficient because if other courts have carefully reasoned through a similar case, their legal reasoning and opinions can serve as guides. Stare decisis also makes the law more stable and predictable. If the law on a given subject is well settled, someone bringing a case to court can usually rely on the court to make a decision based on what the law has been.

(3) departures from precedent

Although courts are obligated to follow precedents, sometimes a court will depart from the rule of precedent if it decides that a given precedent should no longer be followed. If a court decides that a precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent. Cases that overturn precedent often receive a great deal of publicity.

(4) when there is no precedent

At times, cases arise for which there are no precedents within the jurisdiction. When hearing such cases, called "cases of first impression," courts often look at precedents established in other jurisdictions for guidance. Precedents from other jurisdictions, because they are not binding on the court, are referred to as persuasive authorities. A court may also consider various other factors, including legal principles and policies underlying previous court decisions or existing statutes, fairness, social values and customs, public policy, and data and concepts drawn from the social sciences.

Case Study 1:

HAUMSCHILD v. CONTINENTAL

CAS. CO.

Supreme Court of Wisconsin, 1959. 7

Wis. 2d 130, 95. W. 2d 814

CURRIE, J. This appeal presents a conflict of laws problem with respect to interspousal liability for tort growing out of an automobile accident. Which law controls, that of the state of the forum, the state of the place of wrong, or the state of domicile? Wisconsin is both the state of the forum and of the domicile while California is the state where the alleged wrong was committed. Under Wisconsin law a wife may sue her husband in tort. Under California law she cannot. (cit.) (The trial court, applying California law, granted summary judgment for defendant driver and his insurer and dismissed the suit by the passenger, the driver's ex wife.)

This court was first faced with this question in Buckeye v. Buckeye, 234 N. M. 342 (Wis.1931). In that case, Wisconsin was the state of the forum and domicile, while Illinois was the state of the place of wrong. It was there held that the law governing the creation and extent of tort liability is that of the place where the tort was committed, citing Goodrich, Conflict of Laws (1st ed.), p. 188. From this premise it was further held that interspousal immunity from tort liability necessarily is governed by the law of the place injury.

The principle enunciated in the Buckeye case and followed in subsequent Wisconsin cases, that the law of the place of wrong controls as to whether one spouse is immune from suit in tort by the other, is the prevailing view in the majority of jurisdictions in this country… However, criticism of the rule of the Buckeye case, by legal writers, some of them recognized authorities in the field of conflict of laws, and recent decisions by the courts of California, New Jersey, and Pennsylvania, have caused us to re-examine the question afresh…

The first case to break the ice and flatly hold that the law of domicile should be applied in determining whether there existed an immunity from suit for tort based upon family relationship is Emery. Emery, 289 P. 2d 218 (Cal. 1995). In that case, two unemancipated minor sisters used their unemancipated minor brother and their father to recover for injuries sustained in an automobile accident that occurred in the state of Idaho, the complaint alleging willful misconduct in order to come within the provisions of the Idaho "guest" statue. All parties were domiciled in California. The opinion by Mr. Justice Traynor rec-