

Clinical Forensic Medicine

Third Edition



Edited by

W. D. S. McLay

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Preface

This third edition of *Clinical Forensic Medicine* has been regrettably slow in gestation. Each year, it seemed, impending major legislation affecting the work of the forensic clinician made delay necessary or justifiable, until delay became a habit.

More important than legislation has been the long-awaited establishment of the Faculty of Forensic and Legal Medicine at the Royal College of Physicians of London, under the presidency of Guy Norfolk, one of our authors. Another author, Ian Wall, is the first to occupy the chair set up in memory of the late David Jenkins, a stalwart of the Association of Police Surgeons. Other friends and colleagues are no longer with us, most poignantly the writer of [Chapter 4](#), Michael Knight, who, with characteristic self-discipline, delivered a polished manuscript on time, and still found it possible to discuss other contributions before he died.

Thanks are, of course, due to all the authors. Several of these, and other colleagues who were not contributors, have given me advice on contentious matters (Vicky Evans, George Fernie, Judy Hinchliffe, Alistair Irvine, Archie McConnell, Jason Payne-James, Mac Ransom). I have not always taken that advice, so the responsibility for error lies with me.

During discussions with Cambridge University Press editors Nick Dunton and Laura Wood about format, the suggestion of a dedicated website emerged. Some material, mainly large figures and colour illustrations, will be posted there; this will

help to keep down the cost of production and allow for periodic updating.

Lastly, putting authors' contributions in order has been the work of months, requiring great spousal tolerance.

Legal systems: a world view

W.T.M. Ransom

The English legal system is based on the *common law*. Consistency and predictability are assured by prior decisions of the courts on similar matters establishing judicial *precedent*. The continuing role of the courts is to apply and develop the common law. Statute law is created by Parliament and takes precedence over common law, Parliament being the supreme legal authority of the United Kingdom. This supremacy has been affected by the UK's membership of the European Union (EU), with European Law taking precedence over British Acts of Parliament (although it is still thought possible by many that Parliament could reassert its supremacy if it should so choose).

The alternative legal tradition in most of Europe is derived originally from the legal system of Ancient Rome, also known as *Civil Law* (the latter not to be confused with English 'civil law' which refers to non-criminal legal matters – see below). Over the centuries the code developed as a body of international law, the *ius commune* and was later codified in many countries as their own national expression of law. In contrast to common law precedent, consistency is achieved by judicial application and interpretation of the code, rather than of prior case law decisions.

The United Kingdom exported the English legal system to its colonies, including the United States, and the countries of the Commonwealth. Most retained it after independence. By similar colonial

expansion many countries of Europe established Roman law as the predominant legal system. Other nations, including Turkey and Japan, adopted Roman law as the basis of their legal systems. A few countries have systems exhibiting a mixture of common and Roman law elements.

A third international legal system is based on religious law, mainly the Sharia Law, derived from the Islamic faith, which exhibits many differences from Western systems, such as a prohibition on exacting interest. It is the basis of law in countries such as Saudi Arabia and Iran.

Wales shares the same common law tradition as England. Scotland had developed its own more Roman law-based tradition and continues with this system today (see [Chapter 2](#)). The modern law in Northern Ireland is also based on the common law, a consequence of the Plantation in the seventeenth century, followed by the Union of Great Britain and Ireland in 1801. After Partition in 1922, Northern Ireland retained the common law system.

Civil and criminal law

Most legal systems are divided into civil and criminal jurisdictions. Civil law regulates the conduct of persons (which can include 'corporate' persons such as companies) toward one another. Criminal law regulates conduct sufficiently unacceptable to

society in general as to warrant the enforcement of penalties by the state. The law, procedural rules and courts which hear cases differ between civil and criminal jurisdictions in the United Kingdom.

Sources of law

The main sources of law in England and Wales are Parliament, the EU, and case law adjudicated by the courts.

Parliament

Statute law is enacted by Parliament. All Acts of Parliament must be passed by both Houses and receive Royal Assent. Statute law takes precedence over all other law. In addition to statute law (or *primary* legislation), Parliament passes a huge volume of *secondary* legislation, including Statutory Instruments and Bye-laws. The authority for these laws is derived from statute law. Such a mechanism enables the passage of many measures impracticable to enact fully as statutes.

Approved *Codes of Practice* issued by government departments comprise a special category. Such guidance has a quasi-legal status. Although not law, it can be admitted in court as evidence of recognized good practice; to disregard it could very rarely be justified. The most important examples for forensic physicians (FPs) are the Codes of Practice governing certain key areas of police procedure issued by the Home Office under the Police and Criminal Evidence Act 1984 (PACE), of which the most important is Code C governing the detention, treatment and questioning of suspects in police custody.

Legislation is also passed by representative bodies in the other UK nations. Since devolution in 1998 Scotland has its own Parliament whose responsibilities include criminal justice. Wales has a National Assembly capable of passing secondary legislation. Northern Ireland has recently seen devolved government restored, with an Executive and Legislative Assembly.

European Union (EU)

The United Kingdom acceded to the EU in 1973. Since then EU legislation has had growing effects on domestic law. The EU is governed by a Council of Ministers, has an elected Parliament, and is administered by a Commission from which all European legislation originates. *Regulations* automatically become the law in member states. *Directives* require member states to legislate to achieve the directive's intent.

The EU has traditionally not had much influence on the UK criminal justice system but this may change in future. A recent change has been the introduction of the European Arrest Warrant (Extradition Act 2003). An arrest warrant can be issued by a court in one member state, leading to the arrest of a suspect in another, and speedy extradition.

The European Court of Justice (ECJ) sits in Luxembourg. It should not be confused with the European Court of Human Rights (ECHR) in Strasbourg, which adjudicates on the European Convention on Human Rights. The ECJ is the final authority on European Law throughout member states, and its decisions take precedence over national law. Where UK law is found to be in conflict with European Law, the former must be changed. The UK courts may refuse to enforce a conflicting national law (*R v. Secretary of State for Transport ex parte Factortame* [1990] 2 AC 85).

Case law and the courts

The role of the courts is to determine the facts of a matter, and then apply the law in judgment. This involves application of both legislation and prior case law. Good legislative drafting should reduce the need for arguments about interpretation. Court judgments much more commonly involve case law.

Consistency results from judicial *precedent*, applying the legal principle of *stare decisis* ('let the decision stand'). This means that courts are bound to act in accordance with prior rulings in other courts when faced with similar facts. Judgments are published in the Law Reports. All will contain

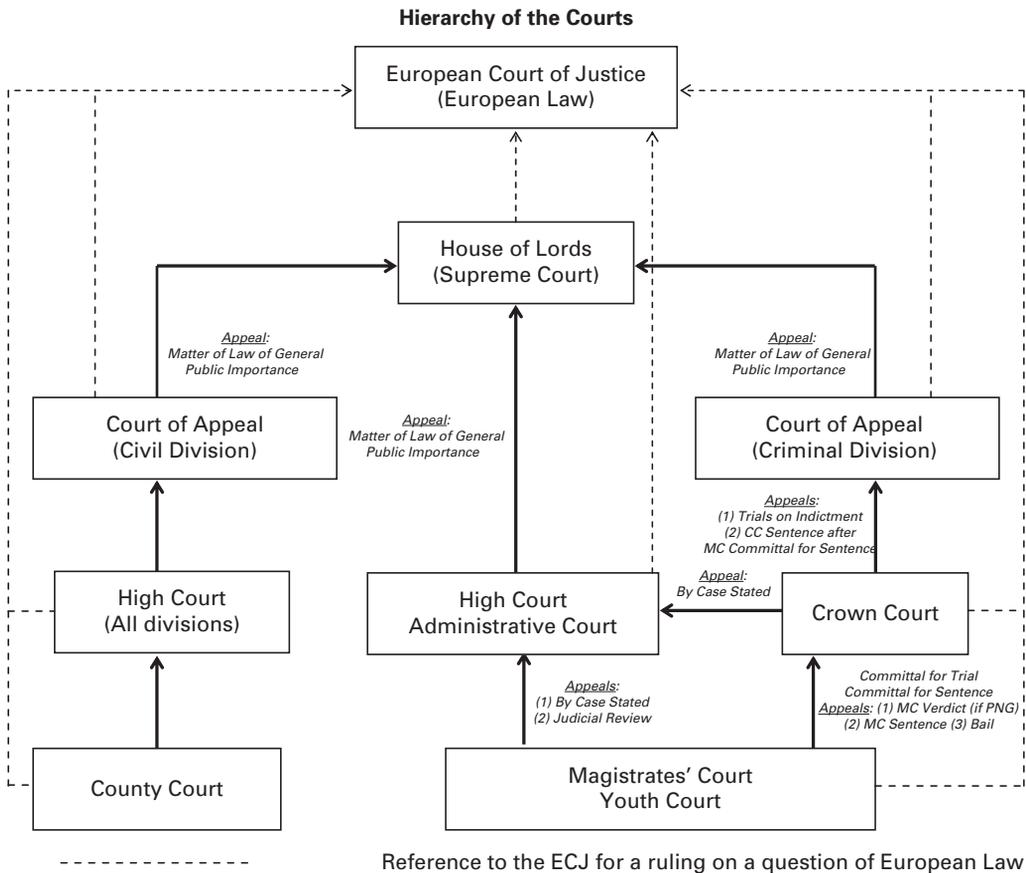


Fig. 1.1 Hierarchy of the courts. MC, magistrates' court; CC, Crown Court; PNG, Pleaded Not Guilty.

a kernel of legal reasoning known as the *ratio decidendi* (the 'reason for deciding'), which explains the legal principles applied. This is the part of the judgment creating the *binding* precedent. The remainder of the judgment is termed *obiter dicta* ('things said by the way'). This may influence other courts, so being persuasive, but is not binding. Identifying the *ratio* of a case is an important legal skill. For precedent to work in practice, a hierarchy of the courts allows more difficult matters to be appealed at a higher level. The court system differs for civil and criminal cases.

Traditionally the Judicial Committee of the House of Lords (HOL), comprising the most senior judges (the 'Law Lords'), formed the highest court in the United Kingdom (see Fig. 1.1). This arrangement has been criticized as diminishing the constitutional separation of the judiciary and the legislature. As a result of reforms enacted in the Constitutional Reform Act 2005, the HOL will soon be renamed the Supreme Court of the UK, and will become completely separate from Parliament. For similar reasons, the judicial role of the Lord Chancellor has now been abolished and replaced

with that of a Minister for Constitutional Affairs, more recently subsumed into the new Ministry of Justice.

The HOL binds all the courts beneath it. No other court binds it (other than the ECJ on matters of European Law) and it can depart from its own previous decisions. The next highest court, the Court of Appeal, is bound by the HOL, but also by its own prior decisions, and again binds all courts beneath it (with the exception of criminal appeals, where the Court of Appeal has the power to disregard precedent when it is deemed to be in the overall interests of justice).

Below the Court of Appeal, the Divisional Courts and High Court are bound by the courts above them, create precedent for those below and are in general also bound by their own prior decisions. The magistrates' and county courts are bound by precedents set in higher courts, but do not create precedent, and are not bound by other decisions of similar 'lower' courts. The Crown Court binds magistrates' courts and is bound by the higher courts, but not by itself.

In 1997, following concern about miscarriages of justice, the Government established an independent body, the Criminal Cases Review Commission, to investigate such possible cases in England, Wales and Northern Ireland. A similar body exists in Scotland. Anyone can apply for a case to be considered, although stringent criteria apply to avoid frivolous applications. The Commission assesses allegations of injustice and whether convictions or sentences should be referred to the Court of Appeal. The Court of Appeal may also direct the Commission to investigate appeal cases.

Matters of European Law can be referred to the ECJ, and ECJ rulings bind all courts including the HOL. Such referrals are not appeals, but requests for guidance on application of European Law. The ECJ also adjudicates on disputes involving member states, and the Institutions of the EU.

Civil cases are generally heard first at the county court. However, if complex, or involving large sums of money, they may be heard first at the High Court, to which county court cases may also be appealed.

In civil cases in general appeals are made to the next level of judge up in the court hierarchy. A county court appeal lies from a district judge to a circuit judge (who may also sit in the county court) and thence to a High Court judge. Appeals from a High Court judge are heard by the Civil Division of the Court of Appeal, and thence in turn by the HOL.

Roughly 95% of criminal cases are heard in the magistrates' courts. Many are minor matters such as speeding or parking, and can be dealt with by the accused pleading guilty by post (s12 Magistrates Court Act 1980). Summary trial usually takes place before a panel of three lay persons appointed as magistrates, assisted by a legally qualified court clerk. In some larger courts, a salaried district judge replaces the panel.

After a first appearance in a magistrates' court, more serious 'indictable' offences will be sent for Crown Court trial. Transfers to Crown Court are now made by a simple 'allocation' procedure. (Sch. 3 Criminal Justice Act 2003 (CJA 2003)). Both the verdict and sentence of a magistrates' court may also be appealed to Crown Court. The prosecution also have limited rights of appeal. Appeals from Crown Court are heard by the Administrative Court, part of the Queen's Bench Division of the High Court. The sole ground for appeal is now that the conviction is 'unsafe' (s2 Criminal Appeal Act 1995). From the High Court cases may be appealed to the Criminal Division of the Court of Appeal, and from there in turn again to the HOL.

The youth court is effectively a specialized form of magistrates' court, in which procedure has been amended to make the court less intimidating for juveniles (who are classed as those under 18). It is one result of a widespread change in managing youth offenders since passage of the 1998 Crime and Disorder Act. New police powers were created to issue warnings and reprimands, and new sentences, including reparation and parenting orders were introduced. Juveniles have no power to elect Crown Court trial, and all matters except homicide can be tried before the youth court. Public access to youth court trials is not permitted and reporting strictly controlled.

The ECHR adjudicates on disputes involving issues of human rights as in the European Convention. Forty-five member states are signatories to the Convention, and half have incorporated the Convention into their national law, as Britain did with the 1998 Human Rights Act (HRA). This Act has enabled UK nationals to seek redress in the UK national courts for infringement of Convention rights. An appeal to the ECHR is only possible if domestic redress is exhausted. Detailed discussion of the Convention and HRA 1998 are outside the scope of this chapter but they have had far-reaching effects on UK law.

Criminal law and procedure

Investigation of crime

The criminal justice process begins with the suspicion that an offence has been committed. Upon receiving a report of an alleged offence the police, whose role is to uphold the law, will consider an investigation, dependent on the nature of the report, the gravity of the matter, and the resources available. The police are not the only body with power to investigate suspected crime, and other agencies may also do so, for example HM Revenue and Customs (HMRC) and Trading Standards.

Arrest

The Police and Criminal Evidence Act 1984, and the provisions of the PACE Codes of Practice, apply to all criminal investigations, ensuring a balance between the rights of suspects and the conduct of enquiries. Once individuals become 'suspects' they should be cautioned, before further questioning. The Police and Criminal Evidence Act 1984 powers of arrest have been substantially amended by s110 Serious Organised Crime and Police Act 2005 (SOCAPA) making all offences arrestable. Lawful arrest (without warrant) now requires the arresting officer to have formed an (objective) reasonable suspicion of guilt, a genuine (subjective) belief of

probable guilt, and to believe that arrest is necessary. The necessity criteria are set out in PACE Code G para 2.4 to 2.9 and include such things as the need to prevent the person causing injury to himself or others, or damage to property, and the protection of children.

The Police and Criminal Evidence Act 1984 as revised also contains a new section 24A dealing with powers of arrest by persons other than a constable (so-called 'citizen's arrest'). These are of especial importance to the growing number of Police Community Support Officers (PCSOs) as well as workers in the security industry. Section 24A arrest powers apply only to indictable offences and it must also be impracticable for a constable to make the arrest, which must also be necessary, for example to prevent the suspect making off before a constable can assume responsibility for him/her.

Magistrates may also issue arrest warrants, usually when suspects fail to attend court, commonly called 'bench warrants'. If the magistrates are prepared to allow bail after arrest, they endorse the back of the warrant with the necessary conditions, and the warrant is then 'backed for bail'. Crown Court judges have similar powers.

A person must be told the reason for arrest as soon as practicable, after which they must be either bailed or taken to a police station suitable for detention purposes. Procedures at the police station, and the FP's role therein, are dealt with elsewhere in this book.

Decision to prosecute

The Crown Prosecution Service (CPS) is the body responsible for prosecuting criminal cases investigated by the police. When a decision is made whether to charge a person with an offence the CPS is responsible for this decision (s28 CJA 2003) in all but minor offences, and is now routinely consulted by the police before proceeding. The CPS decision is guided by the Code for Crown Prosecutors, which provides a test for decisions on prosecuting. There must be sufficient evidence to

provide a realistic prospect of conviction (on the balance of probabilities), and the public interest must lie in favour of prosecution.

Adversarial trial process

In English law the trial process is an adversarial one, which tests the competing claims of the parties, rather than 'searching for the truth'. Each party presents their case, with the evidence to support it, and may seek to discredit the other party's case. The role of the judge is to ensure proper conduct between the parties. By contrast, the trial process in many civil (Roman) law systems is an inquisitorial one, characterized by a search for facts. In both systems, the court is normally the vehicle for determining the conclusion or verdict, and also the appropriate remedy or sentence.

Offence categories and mode of trial

Criminal cases follow a path through the courts determined by which of three categories they fall into. *Summary* offences are heard in the magistrates' court, including relatively minor matters such as obstructing police, and in the absence of a guilty plea will be listed for summary trial. Offences *triable only on indictment* (TOI) are immediately sent to the Crown Court for trial before a jury, and include the most serious offences, such as murder and rape. Several preparatory hearings frequently occur before the actual trial date.

In the third category of offences, *triable either way*, a further hearing will be held in the magistrates' court to determine where the trial will take place (Mode of Trial Determination – MOTD), depending on the seriousness of the offence, and the magistrates' sentencing powers in the event of a conviction. National guidelines from the Sentencing Guidelines Council help magistrates reach consistent decisions.

At the MOTD hearing the accused is offered the opportunity to enter a plea. If the plea is Guilty, the magistrates' court moves straight either to sentence (or to committal to Crown Court for sentence if the

magistrates consider their powers inadequate). If the plea entered is Not Guilty, the MOTD hearing proceeds. If the court decides that summary trial is appropriate, the accused can accept this, or elect for Crown Court trial instead. The effect of this procedure is that both court and accused must agree for summary trial to take place.

From the perspective of the accused, the main considerations will be that conviction rates in the magistrates' court are much higher (some studies suggest 70% or more) than in the Crown Court before a jury (somewhat less than 50%). However, if convicted, the sentencing options available at the Crown Court are much more stringent, including longer terms of imprisonment and heavy fines. A careful exercise in balancing the possible outcomes and sentences is necessary, with legal advice essential to making the best choice.

Criminal procedure reforms

Significant recent changes have taken place in the management of all criminal cases with the introduction of the Criminal Procedure Rules 2005 to govern all aspects of handling cases. An accompanying Consolidated Criminal Practice Direction consolidates all previous such directions. The system has introduced a stated overriding objective that criminal cases be dealt with justly, with active case management by judges and magistrates to speed up the court process. Plea and Case Management (PACM) hearings have been introduced to enable more efficient case management.

Juries

The main difference between trials in the Crown and magistrates' court is in the role of the jury. Magistrates and judges both serve as *tribunal of law* in their courts, applying the law to the facts laid before them in evidence. Magistrates also serve as the *tribunal of fact*, reaching conclusions on the facts and thus the verdict. However, the tribunal of fact in the Crown Court is the jury, which alone determines the verdict, and may acquit even when