All ER Annual Review 1999

Statute Law

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Introductory note

For the convenience of users this section of the Review conforms to the Code set out in the third edition (1997) of the author's textbook *Statutory Interpretation* as updated by the 1999 Supplement. A reference to the relevant section of the Code is given after each heading in the notes below, where the book is referred to as 'Code'.

The jurist or text writer (Code s 6)

Lord Wilberforce's warning (Code p 20) of the supposed dangers of relying on textbooks was distinguished by Robert Walker LJ in ***Bettison v Langton*** [1999] 2 All ER 367 at 375, where he relied on a textbook 'not for an analysis of apparently conflicting decisions, but to make good a want of any clear decision'.

Ignorantia juris neminem excusat (Code s 9)

There is a growing tendency for the courts to relieve from the harshest effects of this maxim. In *Osei-Bonsu v Wandsworth London Borough Council* [1999] 1 All ER 265 the Court of Appeal said (obiter) that the maxim applied only to criminal law, and even here a mistake as to civil law could disprove mens rea. In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 1 AC 153 (followed in *Nurdin & Peacock plc v D B Ramsden & Co Ltd* [1999] 1 All ER 941) the House of Lords purported to make a major change in the doctrine of mistake of law by ruling that a party could recover money paid under such a mistake. (As to whether this ruling can be regarded as good law see Bennion, 'A Naked Usurpation?' 149 NLJ (1999) 421.)

Mandatory and directory requirements (Code s 10)

In *R v Immigration Appeal Tribunal, ex p Jeyeanthan* [1999] 3 All ER 231 at 238 Lord Woolf MR said the question whether a requirement is directory or mandatory is 'only at most a first step'. If acted on, this dictum would restrict the utility of a helpful and well-established interpretative device.

Statutory procedures (p 34)

Where a statutory procedure is laid down for a particular purpose, the court will be reluctant to allow that purpose to be achieved in another way not primarily intended for it. It was held in *Re K (a minor) (adoption: nationality)* [1994] 3 WLR 572 at 583 that the making of an

adoption order on a nearly adult child immigrant infringed the public policy of not allowing an application for an adoption order to be a substitute for the criteria and procedures under the code governing immigration into the United Kingdom. This decision was distinguished in ***Re B (a minor) (adoption order: nationality)*** [1999] 2 All ER 576, where the period of childhood still had two years to run.

Statutory rights (pp 35-36)

In ***Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd*** [1999] 2 All ER 791 at 807 Laws LJ said of the ***Padfield*** approach (see Code p 65): 'I do not see why a like principle should not apply also to statutory ***rights*** in the private law field, not least if the right is in its nature penal or confiscatory'.

Civil sanction for disobedience (the tort of breach of statutory duty) (Code s 14)

Subsection (5) (p 52)

On the question whether an employee of a public authority owes a direct duty of care see ***Phelps v Hillingdon London Borough Council*** [1999] 1 All ER 421 (educational psychologist employed by local education authority did not owe a duty to the child in relation to a failure to identify its dyslexia).

Administrative or executive agencies (Code s 15)

As to the implied power to reverse the exercise of an administrative power see ***R v Bristol City Council, ex p Everett*** [1999] 2 All ER 193 at 203 (implied power to withdraw abatement notice issued under the Environmental Protection Act 1990 s 80(10)); ***R v Hillingdon London Borough Council, ex p London Regional Transport*** (1999) ***The Times*** 20 January (revocation of consent to erect bus shelters in highway).

Investigating agencies (Code s 17)

The distinction between crimes and civil matters is indicated by the cases on the Supreme Court Act 1981 s 18(1)(a), which states that in general no appeal shall lie to the Court of Appeal 'from any judgment of the High Court in any criminal cause or matter': see ***United States Government v Montgomery*** [1999] 1 All ER 84 and cases therein cited.

Courts and other adjudicating authorities (Code s 19)

Jurisdiction (pp 72-74)

The decision in ***Edge v Pensions Ombudsman*** [1998] 2 All ER 547 (see Supplement) was affirmed on appeal: see ***Edge v Pensions Ombudsman*** [1999] 4 All ER 546.

Ouster of jurisdiction (pp 74-76)

The ouster clause in the Supreme Court Act 1981 s 29(3), withdrawing jurisdiction from the High Court 'in matters relating to trial on indictment', does not apply where the Crown Court lacked jurisdiction to make the order in question: ***R v Crown Court at Maidstone, ex p Harrow London Borough Council*** [1999] 3 All ER 542.

McKenzie friend (p 77)

In footnote 8, for the reference to ***R v Bow County Court, ex p Pelling*** (1999) ***The Times*** 18 August (added by Supplement) substitute a reference to ***R v Bow County Court, ex p Pelling*** [1999] 4 All ER 751. The report contains much useful information on the McKenzie friend.

Defective court orders (pp 79-80)

See ***R v Central London County Court, ex p London*** [1999] 3 All ER 991 (county court order under County Courts Act 1984 s 38 alleged to be void).

Interpretation by adjudicating authorities (Code s 20)

Judgment and discretion compared (p 83)

Although where judgment is required there is notionally one right answer, in practice there is what in ***R v Criminal Cases Review Commission, ex p Pearson*** [1999] 3 All ER 498 at 523 Lord Bingham of Cornhill CJ called 'the area of judgment'. In that case the Commission might properly have found either that there was or there was not a 'real possibility' within the meaning of the Criminal Appeal Act 1995 s 13(1)(a) that the conviction would not be upheld. This 'area of judgment' may overlap two categories, eg two broad terms (for these see Code s 356). So in ***Bromley London Borough Council v Special Educational Needs Tribunal*** [1999] 3 All ER 587 the Court of Appeal held that there was such an overlap between the broad terms 'special educational provision' and 'non-educational provision' in the Education Act 1996 s 319. Sedley LJ referred at 591 to 'the limits of possible meaning' of the term 'special educational provision. These led, he said at 596, to a 'potentially large area of judgment' resulting in the fact that it would be acceptable to reach a judgment that given treatment fell within the range of special educational provision or fell within the range of non-educational provision.

Doctrine of judicial notice (Code s 21)

Judicial notice of fact (pp 88-89)

Facts of which judicial notice will be taken include the fact that the eviction of travellers from local authority land 'can be difficult for the local authority to undertake': ***Lippiatt v South Gloucestershire Council*** [1999] 4 All ER 149 ***per*** Evans LJ at 151.

Adjudicating authorities with original jurisdiction (Code s 22)

Tribunals (pp 92-93)

Where an order is made on an appeal from a tribunal's decision, the tribunal itself should not normally lodge a further appeal against that order: ***Edge v Pensions Ombudsman*** [1999] 4 All ER 546.

Adjudicating authorities with appellate jurisdiction (Code s 23)

Academic points (p 94)

An exception to the rule against deciding academic points arises in public law cases. In ***R v Secretary of State for the Home Department, ex p Salem*** [1999] 2 All ER 42 Lord Slynn said (at 47): '. . . in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se . . . The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example . . . when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated . . .'

In ***R v Kensington and Chelsea Royal London Borough Council, ex p Kujtim*** [1999] 4 All ER 161 the Court of Appeal entertained a housing appeal by an asylum seeker which was academic because he had left the country. It was entertained because (a) he might return, and (b) there were a number of pending cases raising the same point. The case illustrates the wisdom of not entertaining academic appeals because the court's decision was inconclusive.

Court of Appeal (pp 97-99)

'. . . justice requires that when a conviction is set aside on appeal, all penalties imposed at the time of conviction should also, so far as possible, be set aside': ***Attorney General v Jones*** [1999] 3 All ER 436, ***per*** Kennedy LJ at 442 (MP held to retain her seat after conviction for election offence quashed on appeal).

Types of Act (Code s 28)

Codifying Acts (p 125)

Indicating the desirability of codification, Brooke LJ, a former chairman of the Law Commission, said in ***R v St Helens Justices, ex p Jones*** [1999] 2 All ER 73 at 74: 'Unhappily, because we do not have an easily accessible criminal procedure code in this country, [certain provisions] are not very easy to find, and a large number of mistakes have been made in applying the procedures'.

Overriding effect of an Act (Code s 32)

Court's inherent jurisdiction (pp 136-137)

In ***Turner & Co (a firm) v O Paloma SA*** [1999] 4 All ER 353 it was held that the taxation provisions of the Solicitors Act 1974 do not by implication remove a client's common law right to put the solicitor to proof of the reasonableness of his charges.

Whether an Act binds the Crown: the doctrine of Crown immunity (Code s 34)

Taking of benefit by Crown (p 144)

In ***Tandridge District Council v Verrechia*** [1999] 3 All ER 247 at 257 Scott V-C said, where an undertaking was given by a person to a district council under a mistake of law, it would 'be quite wrong for the district council, a public authority, to hold him to [it]'.

Challenge to validity of an Act (Code s 47)

Defects in enactment procedure (p 164)

'It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and construe its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders . . . It would be impracticable and undesirable for the High Court of Justice to embark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament . . .': ***British Railways Board v Pickin*** [1974] AC 765, ***per*** Lord Morris of Borth-y-Gest at 790. On the wider application of this principle of comity see ***Hamilton v Al Fayed*** [1999] 3 All ER 317.

Nature of delegated legislation (Code s 50)

Reasons for delegation (p 173)

Modern legislation requires far more detail than Parliament itself has time or inclination for eg detailed forms may be needed. For interpretation of an Act by reference to forms prescribed under it see ***R v St Helens Justices, ex p Jones*** [1999] 2 All ER 73 at 83.

Must not conflict with law (pp 174-175)

In ***General Mediterranean Holdings SA v Patel*** [1999] 3 All ER 673 Toulson J considered the Civil Procedure Act 1997 s 1 and Sch 1 para 4. The latter says that 'Civil Procedure Rules may modify the rules of evidence as they apply to proceedings in any court within the scope of the rules'. Under this power the Civil Procedure Rules r 48.7(3) purported to authorise the court considering a wasted costs application to order disclosure of documents covered by legal professional privilege. ***Held*** Rule 48.7(3) is ultra vires since legal professional privilege is, as Lord Taylor of Gosforth CJ said in ***R v Derby Magistrates' Court, ex p B*** [1996] AC 487 at 507 (in a thorough account of its history), not a merely a rule of evidence but 'a fundamental condition on which the administration of justice as a whole rests'. See also the note on legal professional privilege at p 000 below, related to Code s 264

Has effect as if made by Act (p 175)

R v Lord Chancellor, ex p Lightfoot [1998] 4 All ER 764 (see footnote 7 and Supplement) was affirmed at [1999] 4 All ER 583.

Types of delegated legislation: (5) byelaws (Code s 65)

It is unlawful for the authority concerned to display invalid byelaws: ***Secretary of State for Defence v Percy*** [1999] 1 All ER 732.

Meaning of 'amendment' (Code s 77)

Construction of an amendment

'In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the

amended statute itself as if it were a free-standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute. However in certain circumstances it may be necessary to look at the amending statute as well . . . The expression of the relevant parliamentary intention is the *amending* Act. It is the amending Act which is the operative provision and which alters the law from that which it had been before': *Inco Europe Ltd v First Choice distribution (a firm)* [1999] 1 All ER 820, *per* Hobhouse LJ at 823 (emphasis in original).

Consequential amendment (Code s 82)

Interpretation of consequential provisions (p 218)

In *Inco Europe Ltd v First Choice distribution (a firm)* [1999] 1 All ER 820 the Court of Appeal held that a so-called consequential amendment in the Arbitration Act 1996 Sch 3 withdrawing a right of appeal would, if applied literally, have had a substantive effect which was not in fact consequential. Accordingly a strained construction was applied.

Implied repeal (Code s 87)

Example 87.1A (added in the Supplement) should be deleted in view of the fact that in *Re Celtic Extraction Ltd (in liquidation) Re Bluestone Chemicals Ltd (in liquidation)* [1999] 4 All ER 684 the Court of Appeal allowed an appeal from *Re Mineral Resources Ltd, Environment Agency v Stout* [1999] 1 All ER 746 on the ground that there is no conflict between the Insolvency Act 1986 s 178 and the Environmental Protection Act 1990 s 35(11).

Transitional provisions (Code s 96)

In *Chief Adjudication Officer v Maguire* [1999] 2 All ER 859 Clarke LJ, in relation to doubts as to the application of the Interpretation Act 1978 s 16(1)(c) caused by the absence of transitional provisions in the relevant Act, stressed the need to include such provisions.

Presumption against retrospective application (Code s 97)

This section of the Code was relied on by Toulson J in *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673 at 692.

Meaning of 'Wales' (Code s 127)

The principle is laid down by the Welsh Language Act 1993 that in the administration of justice in Wales the English and Welsh languages should be treated on a basis of equality: see *Practice Direction* [1999] 1 All ER 575.

Application to foreigners and foreign matters within the territory (Code s 129)

Privileges and immunities (pp 280-281)

Section 20(1) of the State Immunity Act 1978 recognises that sovereign immunity applies to a head of state as it applies to the head of a diplomatic mission. This does not extend to crimes under international law, such as torture and hostage taking: *R v Bow Street Metropolitan*

Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International and others intervening) (No 3) [1999] 2 All ER 97.

The factual outline (Code s 143)

Actus reus (p 322)

In *Attorney General's Reference (No 3 of 1998)* [1999] 3 All ER 40 the Court of Appeal adopted the definition of *actus reus* given in Smith and Hogan, *Criminal Law* (8th edn, 1996) p 28, namely the causing of an event, or being responsible for the existence of a state of affairs, which is forbidden by criminal law. The case concerned the legal meaning of the phrase 'did the act or made the omission charged' in the Trial of Lunatics Act 1883 s 2(1). *Held* The change in wording from 'committed the offence' in the preceding Criminal Lunatics Act 1800 (requiring proof of *mens rea* as well as *actus reus*) had the deliberate intention of thereafter requiring proof only of *actus reus*.

The legal thrust (Code s 144)

Cause of action (pp 326-327)

Because the essential facts are different, an unintentional injury may found a different cause of action from an intentional injury though both are based on the same circumstances: see *Paragon Finance plc v D B Thaker & Co (a firm)* [1999] ! All ER 400, where Pill LJ cited (at 420) Bowen LJ's famous dictum in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 that 'the state of a man's mind is as much a fact as the state of his digestion'. In *Paragon Finance* Millett LJ said (at 407) that the cause of action is 'essentially a common law concept' to which equity provides its own counterparts.

Opposing constructions of an enactment (Code s 149)

Inquisitorial system (pp 336-337)

Wall J said 'proceedings relating to children are non-adversarial' and 'care proceedings under the Children Act 1989 are non-adversarial': *Re G and others (children) (care proceedings: wasted costs)* [1999] 4 All ER 371 at 378-379. The judgment contains useful information about the consequences of a hearing being non-adversarial or inquisitorial rather than adversarial.

When implications are legitimate (Code s 174)

Implied ancillary powers (pp 388-389)

The Court of Appeal in *Ex parte Guardian Newspapers Ltd* [1999] 1 All ER 65 held that 'all or part of a trial' in the Crown Court Rules 1982 r 24A(1) includes a pre-trial application because this is ancillary to a trial. The Local Government Act 1972 s 111(1) has been extended to the police: *R v Director of Public Prosecutions, ex p Duckenfield* [1999] 2 All ER 873.

When legislative implications affect related law (Code s 175)

For examples of how the medieval common law used statutory provisions by analogy see ***R v Oxfordshire County Council, ex p Sunningwell Parish Council*** [1999] 3 All ER 385, ***per*** Lord Hoffmann at 390-391 (prescription and limitation of actions).

In footnote 6 on page 391 (as amended by Supplement), for '***Fitzpatrick v Sterling Housing Association Ltd*** [1997] 4 All ER 991' substitute '***Fitzpatrick v Sterling Housing Association Ltd*** [1999] 4 All ER 705'.

Commonsense construction rule (Code s 197)

Common sense indicates that a power to extend a period cannot be exercised after the period has expired, because there is then nothing to extend: ***R v Shergill*** [1999] 2 All ER 485 at 489 (***cf R v Chief Constable of Greater Manchester Police, ex p Linton*** (1999) ***The Times,*** 13 July).

Skeleton arguments (Code s 206)

'A skeleton argument is a document prepared by the advocate, which identifies and summarises the points which will be relied on without arguing them fully' (***Practice Note*** [1999] 1 All ER 186, para 25) For guidance on the form and content of skeleton arguments see ***Practice Direction (Court of Appeal, Civil Division)*** [1999] 2 All ER 490 para 3.

Legislative history as a guide to construction (Code s 208)

In ***Camden London Borough Council v Gunby*** [1999] 4 All ER 602 the Court of Appeal held that, because the Environmental Protection Act 1990 s 81A(9) defines 'owner' only as used in that section, the use of 'owner' in s 80(2) without definition created an ambiguity which could be resolved only be reference to the legislative history of the Act (stated in the long title to be a 'restatement' of previous legislation in the field).

Use of Hansard (Code s 217)

Duty of advocates (pp 479-482)

If counsel do not carry out adequate research in Hansard the court may do it for them. In ***R v Taylor-Sabori*** [1999] 1 All ER 160 at 170 Henry LJ said: 'Though both counsel had consulted Parliamentary material, neither specifically relied on any before us. In our search for the policy behind [a relevant enactment], we looked at some such material . . .'

Use of explanatory memoranda (Code s 219)

The Government prepares Notes on Clauses explaining the purpose of each provision of a Government Bill. Formerly these were for the use of Ministers only, but in the 1990s the practice developed of making them available also to backbench and Opposition members. They are now made generally available to the public. For an example of their use in statutory interpretation see ***R v St Helens Justices, ex p Jones*** [1999] 2 All ER 73.

Special restriction on Parliamentary materials (the exclusionary rule) (Code s 220)

Parliamentary privilege (pp 510-515)

The wider proposition (see Code page 512) was adopted by Parliament in the Defamation Act 1996 s 13(1), which refers to 'any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament'. This may be taken to settle the question. See also *Hamilton v Al Fayed* [1999] 3 All ER 317.

Residuary right to admit parliamentary materials (pp 521-523)

The fact (see Supplement) that in *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 at 1114-1115 Ward LJ referred to Hansard although there was no suggestion that the *Pepper v Hart* conditions were satisfied received adverse comment from Lord Hobhouse of Woodborough when the case reached the House of Lords: see *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705 at 745. Lord Hobhouse is evidently unaware of the residuary right to admit parliamentary materials deriving from the authorities cited in this part of the Code.

Use of enacting history to ascertain Parliament's view of pre-Act law (Code s 226)

The law may be 'developed' by judicial decision after the passing of the enactment in question. This occurred in *Director of Public Prosecutions v Jones* [1999] 2 All ER 257. The Public Order Act 1986 s 14A(9) (inserted by the Criminal Justice and Public Order Act 1994 s 70) referred to land of which the use by the public 'is restricted to use for a particular purpose (as in the case of a highway or road)'. This referred to the common law rule that public use of land as a highway is restricted to passing and repassing (and uses incidental to that), and showed that Parliament understood the rule regarding use of a highway to be in that form. In *Jones* the House of Lords, by three to two, purported to widen the rule to permit general use by the public. This inevitably altered the effect of the enactment.

Use of official statements on meaning of Act (Code s 232)

Admissibility of statements (pp 539-540)

An Act may itself provide for official guidelines to be issued. Thus the Local Authority Social Services Act 1970 s 7(1) requires a council 'to act under the general guidance of the secretary of state'. Such guidance has to be followed unless there is a good reason to deviate from it: *R v Islington London Borough Council, ex p Rixon* [1997] ELR 66. In *R v Cornwall County Council, ex p L,* (1999) *Times* 25 November the relevant guidelines were *Working Together Under the Children Act 1989* (HMSO 1991). Where these envisaged that at a case conference the parent would be accompanied by a lawyer, and stated that the minutes should be sent to all who attended, it was held unlawful for an authority to adopt a policy contrary to this. 'But there are great dangers in treating government pronouncements, however helpful, as an aid to statutory construction': *R v Director of Public Prosecutions, ex p Duckenfield* [1999] 2 All ER 873, *per* Laws LJ at 895.

Use of delegated legislation made under Act (Code s 233)

In *Dimond v Lovell* [1999] 3 All ER 1 at 10 Sir Richard Scott V-C said-

> 'I am very doubtful . . . whether it is proper to attempt to construe [the Consumer Credit Act 1974] in the context of the 1983 regulations. It is certainly right to try and construe the 1974 Act as a whole. But the 1983 regulations postdated the Act by some

> nine years and I do not think the content of the regulations can be taken to be a guide to what Parliament intended by the language used in the Act.'

As the draftsman of the 1974 Act the present author can confirm that an incorrect result would have been obtained if the Court of Appeal had accepted counsel's argument and construed the Act by reference to the 1983 regulations. This is because the drafter of the regulations appears to have misunderstood the Act, a not infrequent occurrence.

Use of later Acts *in pari materia* (Code s 234)

In *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791 at 808 Laws LJ treated the Landlord and Tenant Act 1730 and the Distress for Rent Act 1737 as 'a single code'. He cited *Timmins v Rowlison* (1764) 1 Wm Bl 533 at 534; 96 ER 309 at 309, where Lord Mansfield said: 'Statutes *in pari materia* are to be all taken as one system to suppress the mischief . . . The Legislature [in the 1730 Act] made a provision where the landlord gives notice; and afterwards, in [the 1737 Act], this additional provision in case the notice comes from the tenant. The two laws are only parts of the same provision'.

Punctuation (Code s 258)

In *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791 at 807 Laws LJ gave the following example of the effect of the placing of a comma: 'In Marlowe's *Edward II* there is the message "Edward to kill fear not to do the deed is good". With a comma after "fear", it tells the recipient not to kill the king; if the comma is after "not" it commends his murder. With no comma at all, it is in the true sense ambiguous.'

Archival drafting (Code s 260)

Archival drafting was used to give the Court of Appeal a part of its present jurisdiction. The Supreme Court Act 1981 s 15(1) says-

> 'Subject to the provisions of this Act, there shall be exercisable by the Court of Appeal- (a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and (b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act'.

Paragraph (b) of this constitutes the archival element. In ***R v Secretary of State for the Home Department, ex p Adan*** [1999] 4 All ER 774 at 778-781 the Court of Appeal used it to trace an original jurisdiction it possesses to exercise judicial review.

Nature of legal policy (Code s 263)

Points of legal policy abound in relation to the processes of litigation. For example it is legal policy that, other things being equal, costs should follow the event. In proceedings in the Supreme Court this is laid down by rules of court. RSC Ord 62, r3(3) said that the court shall order the costs to follow the event unless some other order should be made. Similar provision is made by the Civil Procedure Rules 1998 (see *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299 at 313). In proceedings where no such rule is laid down expressly it is to be presumed that this principle of legal policy should be applied. *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299 concerned the construction of the power to order payment of costs conferred by the Copyright Tribunal

Rules 1989, r 48. This does not expressly apply the principle of legal policy referred to above. The Court of Appeal upheld a reversal of the finding of the Copyright Tribunal that the principle did apply. However it seems that the correct analysis is that the principle did not apply in the instant case because there was no 'event' to follow, but that in cases before the tribunal where there is a winner and a loser the principle should be applied.

R v Lord Chancellor, ex p Lightfoot [1998] 4 All ER 764 (see Supplement) was affirmed in ***R v Lord Chancellor, ex p Lightfoot*** [1999] 4 All ER 583.

Law should serve the public interest (Code s 264)

Legal professional privilege

At the root of legal professional privilege 'lies the obligation of confidence which a legal adviser owes his client in relation to any confidential professional communication passing between them. For readily intelligible reasons of public policy the law has . . . accorded to such communications a degree of protection denied to communications, however confidential, between clients and other professional advisers. Save where client and legal adviser have abused their confidential relationship to facilitate crime or fraud, the protection is absolute unless the client (whose privilege it is) waives it, whether expressly or impliedly': ***Paragon Finance plc (formerly National Home Loans Corp plc) v Freshfields (a firm)*** [1999] 1 WLR 1183, *per* Lord Bingham of Cornhill at 1188 (cited in ***General Mediterranean Holdings SA v Patel*** [1999] 3 All ER 673, *per* Toulmin J at 684-685). See also the note on ***General Mediterranean Holdings SA v Patel*** at p 000 above, related to Code s 50.

Law should be just (Code s 265)

A court ought not to make an order requiring a person to commit a criminal offence: ***Rowell v Pratt*** [1938] AC 101, *per* Lord Wright at 106; ***C v*** S [1999] 2 All ER 343, per Lord Woolf MR at 347. Where statutory provisions designed to achieve a public purpose, such as combating crime, may have the effect of interfering with individual rights the court will assert a duty to mediate: ***C v*** S [1999] 2 All ER 343 (tipping-off provisions of Criminal Justice Act 1988 s 93D).

Statutory interference with human life or health (Code s 272)

The principle stated in this section of the Code applies to the exercise of a statutory discretion. In ***R v Lord Savill of Newdigate and others, ex p A and others*** [1999] 4 All ER 860 it was held that where a tribunal set up under the Tribunals Of Inquiry (Evidence) Act 1921 to investigate shootings by British soldiers in Londonderry exercised its discretion to withhold anonymity from witnesses in a way that was unfair to the witnesses because it unnecessarily risked endangering their lives this was unlawful.

Statutory restraint of the person (Code s 273)

Technicalities (p 647)

In ***Roberts v Chief Constable of the Cheshire Constabulary*** [1999] 2 All ER 326 the Chief Constable appealed from an award of £500 damages for false imprisonment arising from what the judge at first instance described as 'a largely technical error' by the police in delaying for two hours and twenty minutes a review under the Police and Criminal Evidence Act 1984 s

40 of the circumstances under which the respondent was held in prison after arrest. Clarke LJ said (at 332): 'The question is whether the judge should have awarded only nominal damages on the basis that if the police had acted properly and carried out a review the respondent would have been detained anyway'. *Held* The respondent was entitled to substantial damages.

Statutory interference with family rights (Code s 274)

It is the policy of the law to protect children and young persons against parents and others who, motivated by cultural and/or religious values driving from countries outside the United Kingdom, seek to subject them to coercion by such means as forced marriages or forced residence overseas. This was laid down in ***Re KR (a child) (abduction: forcible removal by parents)*** [1999] 4 All ER 954. The case, said Singer J at 955 'throws into sharp focus these difficult situations, most frequently involving minority ethnic and religious groups within our community . . . My hope is that practitioners who may not be fully aware of these issues may become so; that the likely attitude of the English courts may be made clear to parents and families in the relevant communities; and that perhaps greater vigilance and protection may be afforded by local authorities'. Singer J added (at 960) that parents of such children need to understand that 'they may face considerable difficulties if they hope on the one hand to bring them up in an English educational system and society but at the same time to retain every aspect of their own traditions and expectations'.

Statutory interference with free assembly and free association (Code s 276)

The principle of freedom of association does not mean the police are required to deploy disproportionate forces in its defence. In ***R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd*** [1999] 1 All ER 129 [for facts see Example 346.4] Lord Nolan said of the decision in that case (at 146): 'The result may be seen as the acceptance by the courts of a victory for the violent elements in the crowds at Shoreham over the forces of law. I would describe it myself as an acceptance of the plain fact that there are limits to the extent to which the police can control unlawful violence in any given situation. If these limits are felt to be too narrow, the remedy lies in increasing the resources of the police'. It may be added that an answer may also be found in reducing the violence by prosecuting the main organisers for criminal conspiracy, a remedy nowadays often neglected by the authorities.

Statutory interference with economic interests (Code s 278)

The law has a general policy in relation to property of 'favouring alienability over inalienability': ***Bettison v Langton*** [1999] 2 All ER 367, ***per*** Robert Walker LJ at 381. This has long been legal policy, going back beyond the Statutes of Mortmain to Magna Carta (1217) c 36.

Common law rights (pp 654-655)

In ***Ropaigealach v Barclays Bank plc*** [1999] 4 All ER 235 the Court of Appeal held that the fact that the Administration of Justice Act 1970 s 36 empowers the court to delay the taking of possession of a dwelling where a mortgagee applies for this does not by implication remove his common law right to take possession without a court order.

Statutory interference with rights of legal process (Code s 281)

Access to courts (p 659)

For the reference in the Supplement to ***R v Lord Chancellor, ex p Lightfoot*** (1999) ***Times*** 18 August substitute a reference to ***R v Lord Chancellor, ex p Lightfoot*** [1999] 4 All ER 583.

Presumption that rectifying construction to be given (Code s 287)

Meaning wider than the object (casus male inclusus) (pp 684-685)

Sometimes the cause of a ***casus male inclusus*** lies in a report on which the Act was based. In ***Paragon Finance plc v D B Thaker & Co (a firm)*** [1999] 1 All ER 400 at 412 Millett LJ said: 'The actual recommendation of the Law Reform (sic) Committee went wider than the mischief to which it drew attention, and it is an open question whether Parliament intended to adopt the wider recommendation or merely to put an end to the mischief'. The reference (see 411) is to the 5th Interim Report (Statutes of Limitation) (1936) (Cmd 5334) of the Law Revision Committee.

Presumption that updating construction to be given (Code s 288)

In ***Fitzpatrick v Sterling Housing Association Ltd*** [1999] 4 All ER 705 at 711 Lord Slynn of Hadley cited this section of the Code, while at 726 Lord Clyde said 'The general presumption is that an updating construction is to be applied (see Bennion ***Statutory Interpretation*** (3rd edn, 1997) p 686'.

In footnote 5 on page 696 (as amended by Supplement), for '***Fitzpatrick v Sterling Housing Association Ltd*** [1997] 4 All ER 991' substitute '***Fitzpatrick v Sterling Housing Association Ltd*** [1999] 4 All ER 705'.

In ***Victor Chandler International v Commissioners of Customs and Excise*** (1999) ***The Times*** 17 August Lightman J said: 'The [Betting and Gaming Duties Act 1981] is to be treated as "always speaking" and accordingly construed as continuously updating its wording to allow for changes since [it] was written'. Cf ***R v Bristol City Council, ex p Everett*** [1999] 2 All ER 193 where, in a case regarding an abatement notice issued under the Environmental Protection Act 1990 s 80(10), it was held that the 'always speaking' principle did not require an updating construction because the literal meaning still fulfilled the legislative purpose. Buxton LJ said (at 204): 'Reading through [the 1990 Act], and referring to its predecessors [the Public Health Acts], it cries out from the page that the target of the legislators was disease and not physical injury'. So 'injury to health' still did not include physical injury by an accident such as falling down the excessively steep stairs complained of.

Avoiding an unworkable or impracticable result (Code s 313)

Logical impossibility (p 754)

Where an enactment refers to a thing it is assumed to mean, unless the context otherwise requires, a thing which exists in the form denoted or described by the enactment. So the reference to 'an application for planning permission' in the Town and Country Planning Act 1990 s 78(1) (which gives a right of appeal to the Secretary of State against refusal etc of such an application) does not cover purported applications 'which are so deficient in form and substance that no reasonable local authority or Secretary of State could reasonably treat them as "applications" within the meaning of the legislation': ***R v Secretary of State for the Environment, Transport and the Regions, ex p Bath and North East Somerset District Council*** [1999] 4 All ER 418, ***per*** Pill LJ at 428. The case decided that a purported application did not

fail to be within s 78(1) merely because the local planning authority considered it to be invalid on technical grounds, provided it was not so seriously deficient as mentioned.

Avoiding an inconvenient result (Code s 314)

Avoiding delay (pp762-763)

The Civil Procedure Rules (CPR), which came into operation on 26 April 1999, have as their main object the avoiding of delay in legal proceedings by giving the courts an increased power over case management. Under the CPR 'judges have to be trusted to exercise the wide discretions which they have fairly and justly in all the circumstances, while recognising their responsibility to litigants in general not to allow the same defaults to occur in the future as have occurred in the past . . . The whole purpose of making the CPR a self-contained code was to send out the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies': ***Biguzzi v Rank Leisure plc*** [1999] 4 All ER 934, ***per*** Lord Woolf MR at 941.

Avoiding an artificial result (Code s 317)

In construing an ambiguous enactment 'one can, and surely should, assume that Parliament intended the less artificial result': ***Re R (a child) North Yorkshire County Council v Wiltshire County Council*** [1999] 4 All ER 291, ***per*** Holman J at 301.

Methods of evasion: doing indirectly what must not be done directly (Code s 322)

The principle in ***Street v Mountford*** [1985] AC 825 (see Example 322.2) applies as between the parties even though the grantor lacked the necessary power. In ***Bruton v London and Quadrant Housing Trust*** [1999] 3 All ER 481 a housing association granted a 'licence' which under ***Street v Mountford*** fell to be treated as a tenancy. ***Held*** This was to be treated as between the parties as a tenancy even though the housing association, being themselves mere licensees, had (by virtue of the principle ***nemo dat quod non habet***) no power to grant a legal tenancy valid against all the world.

Presumption that ancillary rules of law intended to apply (Code s 327)

Rules of law (p 809)

Having regard to the common law rule whereby the discharge of one joint debtor also releases the other, where an order for costs is made against two parties jointly and severally, and the court disallows the costs against one paying party under RSC Ord 62 r 28(2) the effect is to disallow them also against the other party: ***Mainwaring v Goldtech Investments Ltd (No 2)*** [1999] 1 All ER 456.

Presumed application of rules of equity (Code s 330)

Displacement by statute (pp 829-830)

In ***Dimond v Lovell*** [1999] 3 All ER 1 at 18 Sir Richard Scott V-C refused to apply equitable doctrines by treating damages awarded where statutory requirements had not been complied with as subject to a trust in favour of the infringer. He said: '[The Consumer Credit Act 1974]

has enacted that an agreement not "properly executed" is unenforceable. It is not, in my judgment, the function of the courts to remedy that unenforceability by creating a trust in favour of 1st Automotive over damages payable to Mrs Dimond'.

Presumed application of rules of evidence (Code s 335)

Burden of proof (pp 849-851)

On the distinction between the evidential burden and the persuasive burden see ***R v Director of Public Prosecutions, ex p Kebilene and others*** [1999] 4 All ER 801, *per* Lord Hope of Craighead at pp 842-843.

Judge in own cause (Code s 348)

In ***R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)*** [1999] 1 All ER 577 the unique step was taken of setting aside a decision of the Appellate Committee of the House of Lords on the ground that one of its members had been disqualified from sitting because of his identification with one of the parties. Lord Nolan said (at 592) 'in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality'.

Bias in local government may be investigated by a Local Commissioner for Administration under the Local Government Act 1974 s 26. Section 30(3A) of the Act states that guidance to members of local authorities is provided by the National Code of Local Government Conduct, issued by the Secretary of State under the Local Government and Housing Act 1989 and agreed by local authority associations. In ***R v Local Commissioner for Administration in North and North East England, ex p Liverpool City Council*** [1999] 3 All ER 85 Hooper J held that on a complaint of bias as constituting maladministration a local commissioner might lawfully apply the test set out in the code. He dismissed an application for judicial review of a commissioner's finding of maladminstration where councillors deciding a planning application by a football club (1) included supporters of the club and (2) voted on party lines in contravention of paragraph 4 of the code, which reads: 'Whilst you may be strongly influenced by the views of others, and of your party in particular, it is your responsibility alone to decide what view to take on any question . . .'

Interpretation of broad terms (Code s 356)

On page 907, in passage inserted by Supplement, for '***Fitzpatrick v Sterling Housing Association Ltd*** [1997] 4 All ER 991' substitute '***Fitzpatrick v Sterling Housing Association Ltd*** [1999] 4 All ER 705'.

Ordinary meaning of words and phrases (Code s 363)

Educated or uneducated usage? (pp 919-920)

What is referred to on page 919 as 'the Cohen question' was discussed by the House of Lords in ***Fitzpatrick v Sterling Housing Association Ltd*** [1999] 4 All ER 705 at 721 and 725.

Implication where statutory description only partly met (Code s 397)

On this section of the Code see the note on *R v Secretary of State for the Environment, Transport and the Regions, ex p Bath and North East Somerset District Council* [1999] 4 All ER 418 at p 000 above, related to Code s 313.

Proportionality (Code s 406)

The fact that, in relation to the same matter, one Member State of the European Union imposes less strict rules than another Member State does not necessarily mean that the latter's rules are disproportionate. This is because of what is known as 'the margin of appreciation'. This is a form of discretion allowed as between different states in the degree to which an international obligation is required to be performed. The phrase is now creeping into domestic law. Thus it was said in *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 1 All ER 129, *per* Lord Slynn at 137: 'The courts have long made it clear that, although they will readily review the way in which decisions are reached, they will respect the margin of appreciation, or discretion, which a chief constable has'. In the same case Lord Cooke of Thornden said (at 17): '. . . on the particular facts of this case [for these see Example 346.4], the European concepts of proportionality and margin of appreciation produce the same result as, what are commonly called, the *Wednesbury* principles. Indeed, in many cases, that is likely to be so.'

Direct effect of Community law (Code s 411)

For the right to damages against a state which enacts legislation infringing Community law see *R v Secretary of State for Transport, ex p Factortame and others* [1999] 4 All ER 906 (before Merchant Shipping Act 1988 was enacted European Commission advised United Kingdom Government that the Act would infringe right of establishment under Community law; that Government held liable in damages to owners of certain fishing vessels for resulting loss).