

How judges develop law

In many countries in the world, France and Germany for example, the judges have to follow the written law of the land very strictly. They have almost no room for interpretation.

In England and Wales it is different. The judges of the senior courts interpret and develop the law. They do this by interpreting statutes and previous rulings by senior courts. A key phrase you will hear time and again across all the courts of England and Wales is ‘all the circumstances of the case’. Judges here take everything into account – not just the bare words of the written law or the decisions of previous judges, but they look to see if the facts are so different that the law has to be interpreted differently from before. Once judges in the senior courts make a new interpretation of the law, then all the courts below have to follow that interpretation. It’s called ‘setting a precedent’. Let’s take one small example – intention.

Intention

Courts have often been called on to decide what a person’s intention was in a particular set of circumstances. Contract law provides a good example. If you offer to buy something from someone and to pay them, and they accept your offer, then the law says that you are both bound to do what you have said you are going to do. You are ‘legally bound’. The only way out is if you both agree not to enforce the contract.

But supposing that one of you was not serious about the offer. In your mind you had a doubt, let’s say, and thus you had no intention to be ‘bound’ by the agreement. How does a court decide whether you should be bound or not?

Of course, the court cannot look into your mind. It can only make a decision based on your conduct and the other person’s conduct. So what the court says is that if someone had been standing nearby and observed you and the other person, would *they* have thought that you had both intended to be bound?

Now this someone who makes these observations isn’t just ‘anybody’. It has to be a person not connected with either of you, and it must also be a reasonable person: Mr or Ms Average if you like. And so judges will put themselves in the shoes of ‘Average’ and ask themselves what Average would have thought of your transaction.

Traditionally ‘Mr’ Average was known as ‘the man on the Clapham Omnibus’. This person was an ordinary person living in an ordinary place sitting on an ordinary vehicle.



Of course, we’ve moved on since those oldfashioned expressions, but the point remains the same. Very often, when deciding what a person’s intention was, judges will try to put themselves into the shoes of the average person of good sense: the person on the Clapham Omnibus.

The old case of Smith v Hughes

Hughes was a racehorse trainer. Now it is a fact that racehorses can eat only old oats, not new ones. Smith sold him some oats. Hughes bought the oats believing them to be old, but at no time did Smith state that the oats were old. He merely offered them for sale. Hughes bought them. The court decided that Hughes was in the wrong: you can intend to buy a horse in good health, said the judge, but if the horse is not in good health, and nobody pretended it was, then you are stuck with that horse. And so it was with the oats. Nobody told Hughes the oats were not old oats. Maybe he should have made sure first.

This case was heard in 1871. It was the first time that courts had been concerned with intention in contract law. Believe it or not, this basic idea has survived in present day law, in Section 18 of the Consumer Rights Act 2015: “.....a contract to supply goods is not to be treated as including any term about the quality of the goods or their fitness for any particular purpose, unless the term is expressly included in the contract”. So there you have it. The judges back in 1871 made an important contribution to contract law, one that has survived until the present time. The rule they devised is quite simple: when you are buying something,

make sure you stipulate the quality you want and what you intend to use the product for. The person selling you the goods cannot read your mind.