CHAPTER 1

General law and background

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1.1 Legal system
The United Kingdom consists of three distinct jurisdictions, each with its own court system and legal profession: England and Wales, Scotland, and Northern Ireland. The UK joined the European Economic Community (EEC) (now the European Union [EU]) in 1973, which means that we are required to incorporate European legislation into UK law, and to recognize the jurisdiction of the European Court of Justice (ECJ) in matters of EU law. The ECJ, broadly speaking, hears two types of case. One type relates to disputes between member states or actions brought by the Commission against member states. The other is ‘preliminary rulings’, where a court in a member state refers a point of EU law – the case then returns to the court of origin for a decision in light of the ruling.

When the Labour Party came to power in 1997, they embarked on a number of constitutional reforms. These included the introduction of freedom of information legislation, the implementation of the European Convention on Human Rights (ECHR) into UK law, and a programme of devolved government. We now have a separate Scottish Parliament and Welsh Assembly. Northern Ireland already had its own Assembly.

The Scottish Parliament legislates in areas of domestic policy, but matters best dealt with at UK level remain reserved to the UK Parliament and government. These include defence, foreign affairs, economic and fiscal policy, social security, employment law, and aspects of transport and energy policy.

The Government of Wales Act 1998 gave the Welsh Assembly powers to legislate in domestic areas and the Assembly’s powers were strengthened under the
Government of Wales Act 2006, which sets out in Schedule 5 those areas that have been devolved. This excludes foreign affairs and defence, taxation, overall economic policy, energy, immigration and nationality. Legislation put forward by the Welsh Assembly Government is subject to scrutiny and approval by the National Assembly for Wales. Initially, the National Assembly didn’t have full law-making powers and the Welsh Assembly could only pass subordinate legislation. However, a referendum was held on 3 March 2011 in which 63.49% of the votes cast were in favour of the motion: ‘Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?’ (see www.aboutmyvote.co.uk/PDF/Wales-Referendum-Booklet-English-Final.pdf). As a result, the Welsh Assembly will be able to make laws, known as Acts of the Assembly, on all matters in the subject areas, without needing the UK Parliament’s agreement.

The UK is a signatory of the ECHR (Council of Europe, 1950) and this was incorporated into UK law through the Human Rights Act 1998.

There is no written constitution as such for the UK. The constitutional law of the UK consists of statute law and case law. In November 2010 a draft Cabinet manual was published setting out the main laws, rules and conventions affecting the conduct and operation of government (Cabinet Office, 2011). Some commentators see this as a step towards a written constitution, whilst others see it merely as a document explaining how government operates.

In addition there are international treaties and conventions to which the UK is a signatory, which have binding force.

There are two basic systems of law: the common law system, which is used in England and Wales; and the civil law system, which is used by most of Continental Europe and parts of Latin America. The legal systems of England, Wales and Northern Ireland are very similar. Scotland has a hybrid system of civil and common law.

1.1.1 Common law system

English law is called common law because it aims to be the same, whichever court makes the decision. It began soon after the Norman Conquest of 1066, when the king and court travelled around the country hearing grievances. The common law system is based on the principle of deciding cases by reference to previous judicial decisions (known as ‘precedents’), rather than to written statutes drafted by legislative bodies. A body of English law evolved from the 12th century onwards.

Reported cases present specific problems out of which a point of law is extracted. Formulation of the law is bottom-up from a specific event to a general principle. Judicial decisions accumulate around a particular kind of dispute and general rules or precedents emerge. These precedents are binding on other courts at the same or a lower level in the hierarchy. The same decision must result from another situation in which the material or relevant facts are the same. The law
evolves by means of opinion changing as to which facts are relevant; and by novel situations arising.

1.1.2 Civil law system
The civil law system is used by most of Continental Europe and parts of Latin America. The law is written down in statutes in a very logical and organized (codified) way across all the subject areas. In such systems, precedent is not normally recognized as a source of law, although it can be used as a supplementary source. This results in a top-down system of a codified law book, which is based upon broad principles and then broken down into legal topics similar to those of the common law countries.

In the civil law system, case law is illustrative, as the court relies more on commentaries from professors and judges published in books and journal articles. The civil law system – which is based on ancient Roman law – arose from many countries being given the Napoleonic code when occupied during the Napoleonic era. Since then national laws have diverged, but remain basically similar.

1.2 Court system
England and Wales, Scotland, and Northern Ireland have their own hierarchy of courts, although they are all divided into two sections – criminal and civil.

1.2.1 England and Wales
The lowest criminal courts are the Magistrates’ Courts, which deal with minor offences. More serious cases are heard in the Crown Court in front of a judge and jury. The Crown Court also hears cases that are appealed from the Magistrates’ Courts on factual points. Cases can be appealed on points of law to the High Court (Queen’s Bench Division [QBD]). Appeals against conviction and sentence go to the Court of Appeal, Criminal Division(CACD).

Civil cases at first instance are heard in the County Courts for minor claims. More serious cases are dealt with by the High Court, which is divided into three divisions:

1 The QBD hears civil claims involving tort, such as personal injury, other negligence actions and contracts.
2 The Chancery Division hears cases involving areas such as land, wills, and trusts; as well as intellectual property, company and tax cases.
3 The Family Division hears cases relating to family law, such as divorce.

Cases may be appealed to the Court of Appeal (Civil Division), and in turn these may be appealed to the Supreme Court. It should be noted, however, that appeals
can only be brought with permission – either from the judge hearing the original case or from a Court of Appeal judge.

The Supreme Court hears appeals on arguable points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases. In October 2009 it replaced the system of Law Lords operating as a committee of the House of Lords as the highest court in the United Kingdom. Moving the UK’s top court from Parliament was an integral part of demonstrating its independence from government.

In December 2010 the Supreme Court published a set of interim practice guidance on the use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting which said that the Justices of the Supreme Court were content with legal teams, journalists and members of the public communicating to the outside world what is happening in the courtroom; the exceptions being cases where there are formal reporting restrictions in place, family cases involving the welfare of a child, and cases where publication of proceedings might prejudice a pending jury trial. In such instances notices placed at the doors of the courtroom will indicate that restrictions are in place. The guidance was limited to the Supreme Court and took into account its unique role as the highest appeal court in the land. A consultation document on the use of live text-based forms of communication from the Supreme Court was launched in February 2011.

### 1.2.1.1 Judicial reviews

The QBD of the High Court has a supervisory role in which it is responsible for supervising subordinate bodies and tribunals in the exercise of their powers. This is achieved primarily by means of the procedure known as judicial review in which the decisions of any inferior court, tribunal or other decision-making public body may be challenged or called into question on any one of three possible grounds:

1. **Illegality:** where the decision-maker acted beyond their powers.
2. **Unfairness:** where there has been a procedural irregularity or breach of natural justice, such as not permitting applicants to put their case properly, or bias.
3. **Irrationality:** where the decision that has been reached is one that no properly informed decision-maker could rationally reach.

A couple of examples relevant to library and information professionals of where judicial reviews have been used to challenge legislation include the case of R v. Ealing, London Borough Council, ex parte Times Newspapers Ltd [1987] 85 LGR 316 where the decision of several libraries to ban *The Times* on political grounds
(specifically, in support of print workers in an industrial dispute) was challenged (see Section 17.7) because of their legal duty under the Public Libraries and Museums Act 1964 to provide a comprehensive library service. A more recent example was British Telecommunications PLC and TalkTalk Telecom Group PLC v. Secretary of State for Business Innovation and Skills [2011] EWHC 1021 (Admin) in which BT and TalkTalk applied for a judicial review of the provisions in the Digital Economy Act 2010 governing the online infringement of copyright.

### 1.2.1.2 Civil court procedure

Procedure in the civil courts is governed by the Civil Procedure Rules, which took effect in April 1999, after the Woolf Report ‘Access to Justice’, which instigated the most wide-ranging changes to civil litigation since the turn of the 20th century. These were developed from a number of overriding objectives: the Rules sought to change the adversarial nature of litigation and to introduce a fairer, faster and cheaper system of civil justice in which the courts exercised more control over the proceedings.

#### 1.2.2 Scotland

There are three levels of court procedure in criminal matters in Scotland. The lowest criminal courts are the District Courts, which are presided over by justices of the peace and in some cases stipendiary magistrates. These courts deal with minor offences such as breach of the peace and shoplifting, and their powers to sentence are limited.

Next are the Sheriff Courts, which deal with minor offences (where a sheriff presides), while more serious offences, except murder and rape, are dealt with by a sheriff sitting with a jury. A sheriff sitting alone has limited sentencing powers in comparison to a sheriff sitting with a jury.

The most serious criminal offences in Scotland are heard by the High Court of Justiciary. The principal forms of civil procedure in Scotland are small claims, summary cause and ordinary procedure in the Sheriff Court, and Court of Session procedure.

Small claims are intended to be simple and cheap and designed for claims where the value of the claim is up to (and including) £3000. Summary cause is for sums over £3000 and up to (and including) £5000. An ordinary cause action is a court procedure dealing with claims which have a value of more than £5000 or civil cases in the Sheriff Court that involve complicated law. Ordinary cause procedure and Court of Session procedure are more formal with full written pleadings.

The Outer House of the Court of Session can hear most types of civil case. The Inner House of the Court of Session is generally the court of appeal from the Outer House, sheriffs and certain tribunals. Thereafter appeals in civil cases can be made to the Supreme Court.
1.2.3 Northern Ireland

The highest court in Northern Ireland is the Court of Judicature, which consists of the Court of Appeal, the High Court and the Crown Court. There are then the lower courts: the County Courts with criminal and civil jurisdiction, and the Magistrates’ Courts. Cases which start in either the Crown Court or the High Court can be appealed to the Court of Appeal in Belfast; and, where leave is given, to the Supreme Court of the United Kingdom. Cases which start in either the County Courts or the Magistrates’ Courts can only be appealed as far as the Court of Appeal in Belfast; and, unlike the equivalent in England and Wales, this is not split into a Civil Division and a Criminal Division.

1.2.4 Tribunals

In addition to the courts there are also a number of specialized tribunals, which hear appeals on decisions made by various public bodies and government departments. Tribunals cover areas such as employment, immigration, social security, tax and land. Three tribunals relate to areas of law covered in this book:


2. The Investigatory Powers Tribunal considers all complaints against the Intelligence Services (security service, Secret Intelligence Service [SIS] and Government Communications Headquarters [GCHQ]), and those against law enforcement agencies and public authorities in respect of powers granted by The Regulation of Investigatory Powers Act 2000 (RIPA); and considers proceedings brought under Section 7 of the Human Rights Act 1998 against the intelligence services and law enforcement agencies in respect of these powers.

3. The other tribunal relevant to the topics covered in this book is the Copyright Tribunal (see Section 2.5). In October 2010 the government announced its intention to merge the Copyright Tribunal with the Ministry of Justice’s Tribunals Service.

1.3 Sources of law

Statutory legislation and case law are the primary sources of law, with textbooks, journal articles, encyclopedias, indices and digests making up a body of secondary sources.

Legislation in the UK can apply to the country as a whole; or, bearing in mind
the impact of devolved government, there can also be Scottish legislation, Welsh legislation, and Northern Irish legislation.

United Kingdom primary legislation consists of public and general Acts; and local and personal Acts – such as ones that are of specific and limited nature – for example, the Manchester City Council Act 2010. Acts of Parliament typically have a section just before any schedules which is headed ‘short title, commencement, extent’ and which outlines the short title the Act is known by, the arrangements for the coming into force of the Act, and whether the Act applies to particular countries. Either there will be an extent section at the end of the Act setting out the geographical extent of the Act; or else it will be silent on the matter, in which case the Act applies to the whole of the UK.

When considering Acts of Parliament, one needs to ask whether an Act is yet in force – few Acts come into force immediately on being passed. The reader should look for a commencement section at the end of the Act (which would appear before any schedules). It will either give a specific day for commencement or else it will refer to ‘a day to be appointed’ which will then be prescribed in one or more commencement orders in the form of Statutory Instruments. If the Act doesn’t contain a commencement section, this means that the Act came into force on the date it received the Royal Assent. Where an Act has been brought into force, the question to ask is whether the Act is still – wholly or partly – in force. This isn’t always easy to establish. For example, an Act could be repealed by another Act, but one would then need to check whether the repealing Act has yet come into force.

There are a number of commercially available annotated versions of statutes such as Halsbury’s Statutes, or the Blackstone’s Statutes Series, or those available on the online services LexisNexis (www.lexisnexis.com) or Westlaw (www.westlaw.co.uk).

1.3.1 Progress of UK government legislation

UK government Bills can start in either the House of Commons or the House of Lords, although Bills whose main purpose is taxation or expenditure start in the House of Commons. Some Bills may have been preceded by a consultation document (Green Paper) and/or by a statement of policy (White Paper), although this is optional. Bills are broken up into clauses whereas Acts of Parliament are broken up into sections. In the introductory part of the Act it will set out its purpose in a series of provisions. For example, the Digital Economy Act 2010 (www.legislation.gov.uk/ukpga/2010/24/introduction) says:

An Act to make provision about the functions of the Office of Communications; to make provision about the online infringement of copyright and about penalties for infringement of copyright and performers’ rights; to make provision about internet domain registries.
Her Majesty’s Government’s (HMG) code of practice on consultations (Better Regulation Executive, 2008) says that an impact assessment should be carried out where appropriate; and an earlier edition of the code of practice on written consultations (Cabinet Office, 2000) said that it would be appropriate where the regulatory proposals may create burdens for business, charities or voluntary organizations.

Bills are drafted by lawyers in the Office of the Parliamentary Counsel, which is part of the Cabinet Office. The Daily Order Paper contains a Notice of Presentation of the Bill and this is the first reading of the Bill. The Minister or a government whip then names a day for the Bill’s second reading. The Bill is then allocated a Bill number and is printed by The Stationery Office (TSO) – for example, Localism Bill [HC] Bill 126 of Session 2010/11. The text of Bills can also be found on the internet (parliament.uk, 2011a). Explanatory notes are published to accompany Bills. These normally include a summary of the main purpose of the Bill and a commentary on individual clauses and schedules; for example, Localism Bill Explanatory Notes [HC] Bill 126-EN of Session 2010/11.

The second reading debate is announced by the Leader of the House in a Business Statement. The second reading is the time for the House to consider the principles of the Bill. The debate on second reading is printed in Hansard (parliament.uk, 2011b). After the second reading, the Bill has its Committee stage. This would normally take place in a Standing Committee, but it may be taken in a committee of the whole House or a Special Standing Committee depending on the nature of the Bill.

The next stage is the consideration or report stage. The House can make further amendments to the Bill at that stage, but does not consider the clauses and schedules to which no amendments have been tabled. The final Commons stage of the Bill is the third reading. This enables the House to take an overview of the Bill as amended in Committee. No amendments can be made at this stage. Once it has passed its third reading in the Commons, the Bill is then sent to the House of Lords.

The legislative process in the House of Lords is broadly similar to that in the House of Commons. However, there are a few important differences:

1. After the second reading, Bills are usually submitted to a committee of the whole House.
2. There is no guillotine, and debate on amendments is unrestricted.
3. Amendments can be made at the third reading as well as at committee and consideration stage.

The House of Lords and House of Commons must finally agree the text of each Bill. In practice, in order for this to happen a Bill can travel backwards and
forwards between the two Houses several times. If the Lords have not amended a Commons Bill, they must inform the Commons of that fact.

Once the text of a Bill has been approved by both Houses, the Bill is then submitted for Royal Assent. The UK Parliament website (2011a) can be used in order to monitor the progress of Bills through Parliament.

Statutory Instruments are regulations, orders or rules made under the authority of an Act of Parliament. They often provide the detail required for the application of the Statute such as what forms to fill in, the level of fees to be paid or provisions for the commencement of an Act (i.e. when it comes into force). Statutory Instruments are ‘revoked’ rather than ‘repealed’.

1.3.1.1 Sunset clauses
The Coalition Government (which came to power in May 2010) intends to ensure that each new regulation is subject to a sunset clause under which the regulations will be regularly reviewed. This will ensure that where regulations are no longer needed or impose disproportionate burdens on business or civil society they can be removed; whilst in other cases it will help to ensure that regulations are kept up to date. The first statutory review should normally be carried out and published no later than five years after the regulation comes into force; and where the regulation is subject to automatic expiry this should be no later than seven years after the regulations come into force.

In addition to primary legislation in the form of Acts of Parliament and secondary legislation in the form of Statutory Instruments, there is also a body of what one might refer to as ‘quasi-legislation’ and other regulatory materials. This would include statutory codes of practice, departmental circulars, and material emanating from governmental or non-governmental bodies that would have relevance in legal proceedings – particularly where questions of standards or reasonableness are in issue (see, for example, the codes of practice in Section 8.3).

1.3.2 Law reports
Cases in the courts are reported in numerous series of law reports. Until 1865, case reporting in England was undertaken by private court reporters, and the resultant publications were known as the nominate reports, because they were usually known by the name of the reporter. These have been gathered together in a collection called the English Reports. In 1865 the reporting of cases was systematized by the Incorporated Council of Law Reporting, which started publishing series of reports organized according to the court, collectively known as The Law Reports. These are recognized as being the most authoritative in the hierarchy of reports.

The main series of law reports in England and Wales are:
The Law Reports 1865– (in four separate series: Chancery Division [Ch.], Appeal Cases [AC], Family Division [Fam.], Queen’s Bench [QB])
Weekly Law Reports 1954–
All England Law Reports 1936–.

In Scotland, the Scottish Council of Law Reporting (a non-profit-making body) produces the most authoritative reports, but commercial publishing companies undertake most reporting.

The main reports are the Session Cases and these commenced in their present form in 1907. Previously, like the English Law Reports, the reports were known by the names of the court reporter and were collectively referred to as the nominate reports.

The other common reports are:

- Scots Law Times
- Scottish Civil Law Reports 1987–
- Scottish Criminal Case Reports 1981–
- Green’s Weekly Digest 1986–.

In Northern Ireland the official law reports are the Northern Ireland Law Reports. There are also the Northern Ireland Judgments Bulletin, the Irish Reports and the Irish Law Times Reports.

In addition, there are many specialized reports covering different areas of law. The most comprehensive list of citations in the UK is Donald Raistrick’s *Index to Legal Citations and Abbreviations* (2008).

The starting point for research on English law is Halsbury’s Laws of England, and in Scotland it is Stair’s Institutions of the Law of Scotland. When using sources of legal information it is vital to make sure that the books, journal articles or web pages you use are up to date, or that at the very least you are aware of the changes that have taken place since they were written.

Bear in mind that the law is changing rapidly in the areas covered by this book. The free web-based sources may not have been annotated or amended, so it is often necessary to use commercial subscription services in order to get the most up-to-date information.

Textbooks and other secondary sources aren’t formal sources of law, but they do nevertheless have relevance in the courts. Writings by highly regarded authors are frequently cited in court as persuasive sources.

There are a number of guides to law libraries and legal research. These include:

1.3.3 Public international law

The law governing the legal relations between states is known as ‘public international law’ and it is distinct from internal domestic law. Public international law covers topics such as the recognition of states, the law of war, treaty making and diplomatic immunity. It can also apply to individuals where it operates at an international level but only through international courts and tribunals. This covers areas such as the law on asylum, human rights or war crimes. Sources of public international law include treaties and the case law of international courts and tribunals.

1.3.4 Websites

1.3.4.1 Parliamentary websites

- United Kingdom Parliament: www.parliament.uk.
- Northern Ireland Assembly: www.niassembly.gov.uk.

1.3.4.2 Government, legislation and law report sites

- Directgov is a portal to the websites of central government: www.direct.gov.uk.
- The texts of statutes and Statutory Instruments can be found here: www.legislation.gov.uk.
- TSO is an online index to TSO publications: www.tso.co.uk.
- Parliament website for Bills: http://services.parliament.uk/bills.
- BAILII (British and Irish Legal Information Institute) provides access to British and Irish legal cases and legislation: www.bailii.org.
1.4 European Union

The first source of EU law are the treaties establishing the Communities and the Union, the subsequent amending treaties, and the treaties of accession of additional member states. Under the normal principles of public international law, the treaties require incorporation into UK domestic law. However, the novel feature of the European Communities Act 1972 was that it gave effect to all future obligations under Community law without further enactment. The second source of EU law is the secondary legislation made at Brussels, which forms part of UK law, as does the third source, the decisions of the ECJ at Luxembourg. The body of European Union law is known as the ‘acquis communitaire’. European law consists of four main strands – treaties, regulations, directives and decisions – described in further detail in Sections 1.4.1 and 1.4.2.

1.4.1 Primary legislation

‘Treaties’ are referred to as the ‘primary’ legislation of the Community as they form the constitution and give the structure of institutions and extent of powers. The principles of European law derive from the 1957 Treaty of Rome, but this has been amended by a number of other treaties such as the Maastricht Treaty 1992 and the Treaty of Amsterdam 1997.

1.4.2 Secondary legislation

‘Regulations’ are binding in their entirety. They are directly applicable and do not need to be transposed into national law by the respective member states in order for them to take effect. An example of a regulation would be Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).

‘Directives’ are the main form of substantive law. They are formulated by the European Commission, where they are subject to extensive consultation and are thereafter passed by a combination of the parliament and the Council of Ministers. Directives only state the effects to be achieved and many directives leave the practical application to national discretion, so one needs to be aware of the non-harmonized details. Directives only take effect when enacted into national laws, which usually takes several years. The period of implementation is normally prescribed by each directive.

Taking the copyright directive 2001/29/EC as an example: the directive was published in the Official Journal on 22 June 2001 and Article 13 of the directive states that ‘member states shall bring into force the laws, regulations and
administrative provisions necessary to comply with this directive before 22 December 2002’. In fact, the European Commission was keen for the copyright directive to come into force at roughly the same time as the electronic commerce directive, and for that reason the time allowed for implementation was 18 months rather than the period of 2 years that had been expected.

With the copyright directive, Article 5 on exceptions and limitations is an example of harmonized and non-harmonized details within a directive. Article 5 has one compulsory exception where the law is harmonized throughout the European Union, but the directive then provides for a series of optional exceptions from which member states can choose the ones that they wish to implement. Because those exceptions are optional, the law isn’t harmonized across the Union as each member state can select a different mix of exceptions to implement within their own countries.

‘Decisions’ are from the Commission or the Council of Ministers, not from the ECJ. These are generally of restricted application and importance. Normally these are addressed to member states.

1.4.3 Gold plating
The United Kingdom is often said to be guilty of ‘gold plating’ with regard to European legislation, a term which refers to the practice of national bodies exceeding the terms of European Community directives when implementing them into national law. In the United Kingdom business lobbyists argue that the government often tags additional measures onto the back of European directives and in so doing puts UK business at a competitive disadvantage in relation to other EU states where directives are implemented more literally.

In a Department for Business Innovation and Skills press release of 15 December 2010 the government announced that it would put an end to gold plating and would instead copy out the text of European directives directly into UK law, saying that this direct copy out principle will mean that the way European law is interpreted will not unfairly restrict British companies.

HMG have set out a number of guiding principles that are aimed at ensuring the UK systematically transposes directives so that burdens are minimized and UK businesses are not put at a disadvantage to their European competitors (Department for Business, Innovation and Skills, 2011). One of the principles says that the government will include a statutory duty for ministerial review every five years.

1.5 Legal concepts/terminology
1.5.1 Criminal law
A crime is defined as an offence where the state acts against the individual to
defend a collective interest. Criminal law is the branch of law that defines crimes and fixes punishments for them. The punishments are fines, probation, community service (which are seen as alternatives to custody) or a prison sentence. Also included in criminal law are rules and procedures for preventing and investigating crimes and prosecuting criminals, as well as the regulations governing the constitution of courts, the conduct of trials, the organization of police forces and the administration of penal institutions. In general, the criminal law of most modern societies classifies crimes as: offences against the safety of the society; offences against the administration of justice; offences against the public welfare; offences against property; and offences threatening the lives or safety of people.

1.5.2 Civil law

Civil law deals with disputes between individuals or organizations. The state’s role is simply to provide the means by which they can be resolved. ‘Civil law’, in the context of distinguishing between civil law on the one hand and criminal law on the other, has a different meaning to that of the legal system known as the ‘civil law system’, which is used in most of Continental Europe (see Section 1.1.2). A civil claim results in a remedy, such as the payment of damages by way of compensation being granted to one party against the other, or restitution – injunction/interdict.

1.5.3 Tort (England, Wales, Northern Ireland)/Delict (Scotland)

When a contract (see Section 1.5.4) cannot apply, third-party agreements called torts might apply. These encompass mainly obligations and duties of care. These duties of care are owed to those foreseeably affected by one’s actions, balanced by a concern not to extend this to remote and generalized effects. A standard test of reasonableness has to be applied, whereby you must take reasonable care to avoid all acts and omissions that you can reasonably foresee would be likely to injure your neighbour.

Torts are essentially civil wrongs that provide individuals with a cause of action for damages in respect of the breach of a legal duty. They include negligence, and, as far as information professionals are concerned, professional negligence covers things like the accuracy of information; and they would also include defamation. In deciding whether an information professional’s actions were negligent, they would be judged against the actions of their fellow professionals (see Chapter 14).

Basically, rights in tort are civil rights of action that are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts or statements or omissions of others in breach of a duty or in contravention of a right imposed or conferred by law, rather than by contract. Damage includes economic as well as physical damage.
1.5.4 Contract law

A contract, in law, is an agreement that creates an obligation binding upon the parties involved. It is a promise or set of promises that the law will enforce. To constitute a valid contract, there must be two or more separate and definite parties to the contract. There must be an offer, acceptance, intention to create legal relations (and capacity to do so) and consideration (although consideration is not required in Scotland) supporting those promises. There has to be a mutual exchange of promises for a contract to arise.

In general, contracts may be either oral or written. Certain classes of contracts, however, in order to be enforceable, must be written and signed. These include contracts involving the sale and transfer of real estate, and contracts to guarantee or answer for the miscarriage, debt or default of another person.

In England, Wales and Northern Ireland, the Supply of Goods and Services Act 1982 implies terms into a contract, such as implying that the service must be carried out with reasonable care and skill. Customers in Scotland continue to rely on their common law rights. However, please note that the parties can agree that the implied rights should not apply to the provision of the service but any exclusion or restriction shall be subject to the terms of the Unfair Contract Terms Act 1977 (UCTA), www.legislation.gov.uk/ukpga/1977/50.

Under the UCTA a person cannot exclude or restrict his liability for death or personal injury resulting from negligence. Only if the exclusion clauses satisfy a test of reasonableness can someone exclude or restrict liability for other loss or damage resulting from negligence. It would be for the party seeking to impose a contract term to demonstrate to the court that it was reasonable, should they be challenged.

It should be noted, however, that the UCTA specifically excludes intellectual property rights from its main provisions. In Schedule 1 it says that so far as section 2 (negligence liability), section 3 (liability arising in contract), section 4 (unreasonable indemnity clauses), and section 7 (miscellaneous contracts under which goods pass) are concerned, they do not apply to any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright [or design right], registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest.

The Unfair Terms in Consumer Contracts Regulations 1999: SI 1999/2083 provides that a term which has not been individually negotiated in a consumer contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the rights and obligations of the parties to the detriment of the consumer.

Chapter 6 considers contracts and licensing in more detail, especially as they relate to the work of information professionals, such as contracts for searching online databases or having access to proprietary information.
1.5.5 Property

The concept of property is formulated as an exclusionary right to prevent others from making use of either tangible or intangible ‘things’. Intellectual property laws, for example, cover the areas of copyright, patents, trade and service marks, and designs. They specify rights to control who may copy, perform, show or play a work, reproduce an invention, or benefit from the creative promotion of a brand.

These property rights are qualified rather than absolute rights. The interests of other stakeholders, or a broad public interest will override, limit or in some way modify what can be done. Hence there will be exceptions to the exclusive intellectual property rights (IPRs).

1.6 Conclusions

It is important to recognize that where legal matters are concerned there are very few clearly right or wrong answers, hence the reason for many issues having to be resolved in court. Dealing with legal issues is often a matter of risk management and how organizations and individuals can minimize the risk of legal action being taken against them.

Throughout the UK, the law is uniform in many respects. The laws of England, Wales and Northern Ireland are particularly close, although there are a number of differences with the law of Scotland. This book is based upon the laws of the UK, and, whilst it will be of interest to information professionals working in other parts of the world, the reader should bear in mind that it is written from a UK perspective.

References