INTERPRETATION AND LAWMAKING BY THE COURTS IN ENGLISH COMMON LAW SYSTEM

(İngiliz Teamül Hukuku Sisteminde Mahkemelerin Yorum ve Kanun Yapması)

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ABSTRACT

Parliaments have a supremacy in the making Law in the most of the states regardless it has the common law system or civil law system. Parliament as an elected power that adopts, replaces, or repeal laws whereas courts implement and interpret the enacted laws and makes laws where a relevant law or precedent is absent to solve a problem in a specific case. The more for the parliament is clarifying, modifying or replacing the common law precedents and jurisprudence. The judges' main task is to interpret the statutes utilizing the rules of interpretation.

This essay aims to give brief explanation on the rules of interpretation in the United Kingdom as a foremost common law example. These rules are examined under the mainly four titles: the literal rule, the golden rule, the mischief rule and the purposive approach. Apart from this issue the article mentions the tasks of the courts beyond the interpretation.

Keywords: Common Law, Parliament, court, judge, Interpretation Rules.

ÖZ

Anglo-Sakson hukuk sistemi veya kıta Avrupası hukuk sistemine sahip olup olmadığına bakılmaksızın ülkelerin çoğunda kanun yapımında parlamentolar önceliğe sahiptirler. Parlamento seçilmiş bir organ olarak kanun çıkartır veya kanunu değiştirir ya da iptal ederken mahkemeler ise çıkarılan kanunları uygular ve yorumlar veya önündeki somut bir davayı çözmesini sağlayacak kanun veya içtihat yok ise kendisi kanun koyucu gibi kanun yapar. Parlamento için daha da ötesi, teamül hukukunun içtihatlarını açıklamak, dönüştürmek ve değiştirmektir. Hakimin esas görevi

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yorum tekniklerine başvurarak kanunları yorumlamaktır.

Bu makale Anglo-Saxon hukuk sisteminin önde gelen uygulayıcısı olan İngiltere'deki kanun yorumlama kuralları hakkında kısa bir açıklama yapmayı amaçlamıştır. Bu kurallar başlıca dört başlık altında ele alınmıştır: lafzi kural, altın kural, problemli kural ve amaçsal yaklaşımdır. Bunun dışında, çalışmada mahkemelerin yorum yapma dışındaki görevlerinden de bahsedilmektedir.

Anahtar Kelimeler: Teamül hukuku, parlamento, mahkeme, hakim, yorum kuralları.

INTRODUCTION

Common law briefly is based on two institutions; Parliament as an elected power that adopts, replaces, or repeal laws, and courts that implement and interpret the enacted laws and makes laws where a relevant law or precedent is absent to solve a problem in a specific case. However, when it comes to the making of law the supremacy of Parliament is undeniable and foreclosed from discussion since the power of Parliament is to clarify or modify or replace common law precedent and jurisprudence. The judges' main task is to interpret the statutes utilizing the rules of interpretation.

Unlike the civil law system, in a common law system precedents outnumber statutes in many aspects. Codifications are enacted where common law precedents need to be replaced. Once there was not a parliament in the legal system to make statutes or law, except rules declared by the monarch. Therefore, even if Parliament is the primary source of law, the practice does not tell us that in many cases.

This article is aimed at providing remarkable sample cases to illustrate how significant a role is played by courts, interpreting and creating law in a common law legal system in parallel to the Parliament.

I. WHAT IS COMMON LAW?

The common law which is the formation of the English Common Law system goes back 1250, used to be known by the people of old England as the 'folk law' or 'peoples' law' that had essentials designated by custom rather than by than politicians and parliamentary legislation.[2] Fowler stated that 'Common law countries, unlike other countries, have had no "reception" of Roman law, except in certain peculiar jurisdictions. Consequently the common law owes very little to the civilians, compared with that which it owes to the rugged and, in the main, unscientific sources which have fed

2 FOWLER Robert Ludlow, 'The Future of the Common Law', (1913), 13 Colum LR, 5, 596.

it'.[3] Fowler continued to propound the judge in the common law system, saying that 'the common law judge who is the servant and not the master of the law. The common law judge may only ascertain what the law is, and then he must apply it fairly and impartially. He is not allowed to remodel it on some arbitrary and indeterminate theory of his own. He cannot in giving judgment substitute his own conceptions for positive law. If he should attempt this, and ignore the stem unbending law of the land, he would soon be discredited'.[4]

Unlike the statutes, the origin of any piece of common law is created by a judge, and developed over the years by precedents to adapt to contemporary conditions and the level of society. In fact, when a judge faces neither a new case which is not within the scope of any legislation nor precedents the judge will have two options; dismiss the case or create a law to find a solution. The latter option is what a common law judge does that means common law develops reactively, in response to actual cases brought forward to the courts.[5]

II. MAKING LAW IN CASE LAW

Where judges attempt to find a fair solution to a case which was not considered before, they struggle to choose from competing precedents or constrict the meaning of provisions, which is called 'creating law'.[6] In order to accomplish this task, the interpretation techniques assist the judges. Nevertheless, such cases are brought forward so that new law can be developed to find a precedent fitting the facts. Judges apply a wide measure of discretion to make very high sensitive and difficult decisions in order to cope with the case.[7]

As Slapper/Kelly stated case law refers to the creation and refinement of law in the course of judicial decisions. The foregoing has highlighted the increased importance of legislation in its various guises in today's society but, even allowing for this and the fact that case law can be overturned by legislation, the UK is still a common law system and the importance and effectiveness of judicial creativity and common law principles and practices cannot be discounted'.[8]

The law of negligence is a tangible example for the law created by judges as a whole. The determination of 'reasonable care' or 'duties of care' and 'foreseeable result' have been fashioned by judges over the

3 FOWLER, 598.
4 FOWLER, 598.
5 SLAPPER Gary and KELLY David, **The English Legal System**, 13th edn, 115.
6 MALLESON Kate, **The Legal Systems**, 75.
7 MALLESON, 75.
8 SLAPPER/KELLY, 7.

ages.[9]

III. PARLIAMENTARY SOVEREIGNITY

Although courts are a significant actor in creating law, there has been a gradual increase in statutory law made by Parliament in the 20th and 21st centuries.[10] As the supreme legislative body of England, Parliament resides at the top of the political system. Parliament is considered vital and that makes the institutions, including the courts, more widely legitimate, trusted, and responsive to the people served.[11]

The courts interpreting the statutes made by Parliament to apply in a case may produce results different from the intentions of the Parliament. In this case, Parliament has to endure the result or can enact additional legislation by using its power in order to bring the courts in line with the original purpose of the enactment.[12]

it is stated that judges do not prefer to be called law-makers, in that in principle the task of determining penalties, miscellaneous provisions or prohibiting some behaviours belong to politicians, in other words to legislative powers, , in a parliamentary system. Within the system, designating their job as explicitly as lawmakers may mean challenging the elected legislators, and undermining parliamentary sovereignty.[13] Nevertheless, some judges called for a joint task to be carried out by both parliament and the judiciary, as Lord Woolf did, stating that 'I see the courts and Parliament as being partners both engaged in a common enterprise involving the uphold of the rule of law'.[14] In a similar expression to this, Sales concluded that 'Judges operate in a sort of partnership with Parliament, to carry through the intention of Parliament as identified by them to the outcome of the particular case which Parliament may not have had directly in mind when it legislated. The judges complete the law promulgated by Parliament by applying it'.[15]

Courts, as can be observed in the statements below, have not undermined Parliamentary supremacy. The *British Railways Board v Pickin* case clarified parliamentary sovereignty, reemphasizing that the courts are not able to go behind an enacted act of Parliament even if a fraud occurred in the legislative process. [16]

9 ADAMS John N and BROWNSWORD Roger, **Understanding Law**, 3th edn, 115.
10 SLAPPER/KELLY, 7.
11 ELLIOTT Catherine, **English Legal System: Essential Cases and Materials**, 21.
12 MALLESON, 61.
13 SLAPPER/KELLY, 147; MALLESON 78.
14 WOOLF Lord 'Droit Public - English Style' (1995) PL 57.
15 SALES Philip, 'Judges and Legislature: Values into Law', (2012) CLJ 71(2), 292.
16 *British Railways Board v Pickin* [1974] 1 All ER 609.

IV. INTERPRETATION OF STATUTORY LAWS

In fact, unlike parliaments, judges have a very limited power of autonomy in decision-making and interpreting statutory provisions. The interpretation task, in many occasions, is restricted to the literal meanings of provisions or the presumed intentions of Parliament. Judges using interpretation principles adapt the statutes to new circumstances, or give them better expressions.[17] Sales summarises the factors to be taken into account when interpreting a law, saying that 'the language used, the scheme of the Act and the purpose the Act is designed to achieve (the mischief it is aimed at)'.[18]

When judges deal with three types of cases: clear cases, difficult cases and hard cases, and the position of the judge in these cases respectively as happy interpreter, puzzled interpreter, and unhappy interpreter is classified by Adam/Brownsword. In clear cases, the judge's background and the meaning of the statute takes him to a routine application of the statutes. In difficult cases, statutes lack a clear meaning so that the judge seeks for a decent solution by using his background values. In hard cases, a judge hesitates to apply routines and several possibilities are revealed according to the judge's approaches or preferences. Some judges just follow the pure meaning of the statute. Other judges follow their sense of justice.[19]

The interpretation of the provisions, sticking to the texts creates problem where the text is not clear. Conversely, following the legislative intent will be another problem if the intention is unclear.[20] As Lord Reid stated in the *Maunsell v Olins* case, 'The interpretative criteria apposite in a given situation may, by themselves, be mutually irreconcilable. It is the task of the Court to decide which one, in the light of all relevant circumstances, ought to prevail. The rules of interpretation are useful servants but quite often tend to become difficult masters'. [21]

A. The Literal Rule

As Lord Reid said 'the meaning of an ordinary word in the English language is not a question of law' literal rule first method to look at when interpreting a provision.[22]

If a rule has a single clear and precise aim that has no room for doubt

17 SALES, 291.
18 SALES, 294.
19 ADAM/BROWNSWORD, 98-99.
20 ADAM/BROWNSWORD, 90.
21 *Maunsell v Olins* [1975] 1 All ER 16.
22 *Brutus v Cozens* [1972] 2 All ER 1297.

and no loopholes; it is coextensive with its aim. Ready to accomplish its purpose without side effects, it is a perfect rule as Twining/Miers considered.[23] However, Hart argued that attempting to create perfect rules is technically impossible and undesirable since whenever men attempt to make certain and in advance regulation, they will meet two handicaps: 'The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live where characterized only by a finite number of features, and these together with all the modes in which they combine were known to us, then provision could be made in advance for every possibility...this would be a world fit for "mechanical" jurisprudence.'[24]

According to the literal rule, the judges must interpret the provisions, considering only the plain grammatical meaning of the words regardless whether the conclusion is sensible or senseless even unfair, as Lord Esher asserted: 'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity.'[25]

Although the literal rule is received by many critics as being too restrictive, the approach dominates in the English legal system that judges should look primarily to the words of the legislation in order to analyze the meaning of the provisions or statutes.[26] Only plain or everyday meanings of the words are taken into consideration. To achieve this aim, the judge pays attention to 'what the statute actually says rather than considering what it might mean'.[27] Even in hard cases, judges apply the pure meaning of the statute due to the fidelity to the legislators.[28] However, the literal rule does not provide a method for difficult cases in which a proper provision is absent regarding the case.[29]

The Fisher v Bell case is one of the significant examples of the literal interpretation. [30] The defendant shopkeeper had displayed a flick knife marked with a price in his shop window but he had not actually sold any. The defendant was charged under s1(1) of the Restriction of Offensive Weapons Act of 1959. The section says that 'any person who sells or hires or offers for sale or hire a flick-knife guilty of an offence'. The court found

23 TWINING William and MIERS David, **How to Do Things with Rules**, 5th edn, 148.
24 H L A Hart, **The Concept of Law**, 2nd ed, 127, 128.
25 *R* v *Judge of the City of London Court* [1892] 1 QB 273 at 290.
26 SLAPPER/KELLY, 92.
27 SLAPPER/KELLY, 98.
28 ADAM/BROWNSWORD, 102; Literal rule has significance owing to the respect for parliamentary sovereignty; see, MALLESON, 63.
29 ADAM/BROWNSWORD, 102.
30 *Fisher v Bell* [1960] 1 QB 394.

him guilty of offering the knife for sale. However, the Court of Appeal held that the conviction should be set aside for the reason that the technical meaning in contract law of 'offer' was not equal to the display of an item in a shop window. This was not an offer; it was only an invitation to treat. Under the literal legal meaning of 'offer', the shop-keeper had not made an offer to sell.

In the *Sussex Peerage Case,*[31] Lord Tindale asserted that 'If the words of the statute are in themselves precise and unambiguous, then no more can be necessary then to expound those words in their natural and ordinary sense. The words alone do, in such a case, best declare the intention of the lawgiver'.

B. The Golden Rule

'The golden rule is safety valve to avoid unpalatable effects of the literal rule', states Zander.[32] Under the golden rule for statutory interpretation, courts have to follow the literal rule first if the literal rule gives an absurd result that the Parliament could not intend, the judge can find a second or other meaning assessing the statute as a whole.[33] As stated by Lord Blackburn, 'we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear.'[34] For instance at the *R v Allen* case, Offences Against the Person Act 1861 s57 offence to 'marry' whilst the original spouse was still alive. The Defendant who charged with bigamy argued that he did not marry as he could not 'legally marry' as he was not divorced. The court held the word 'marry' means 'to go through a ceremony of marriage'. [35]

The case of *Adler v George*[36] is another classic example of how the courts implement the golden rule. The defendant was found guilty of an offence contrary to section 3 of the Official Secrets Act of 1920, in that, in the vicinity of a prohibited place, he obstructed a member of Her Majesty's Forces engaged in security duty in relation to the mentioned prohibited place. According to Section 3, 'No person in the vicinity of any prohibited

31 *Sussex Peerage Case* [1884] 8 ER 1034.
32 ZANDER Michael, **The Law-Making Process**, 6th edn, 149.
33 ZANDER, 131.
34 *River Wear Commissioners v Adamson* [1876-77] LR 2 App Cas 743.
35 *R v Allen* [1872] LR 1 CCR 367.
36 *Adler v George* [1964] 1 All ER 628.

place shall obstruct, knowingly mislead or otherwise interfere with or impede, the chief officer or a superintendent or other officer of police, or any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place, and, if any person acts in contravention of, or fails to comply with, this provision, he shall be guilty of a misdemeanour'. The defendant played with the word vicinity, referring to the natural meaning and saying that if he was on the station he could not be in the vicinity of the station, and it is only an offence under this section to obstruct a member of Her Majesty's Forces while he is in the vicinity of the station.

However, the Court of Appeal upheld the decision employing the golden rule to avoid an absurdity, stating that ' "vicinity" must be confined to its literal meaning of "being near in space" but under this section, I am quite clear that the context demands that the words should be construed in the way I have said'.[37]

C. The Mischief Rule

The mischief rule is quite different from the literal and the golden rules which follow the words in provisions on the similar grounds with Viscount Simons statements in *Attorney General v Prince Ernest Augustus of Hanover* case: 'Words, particularly general words, cannot be read in isolation, their colour and content is derived from their context'[38]. Zagner provides the aim of the rule that 'the mischief rule is designed to get the court to consider why the Act was passed and then to apply that knowledge in giving the words under consideration whatever meaning will best accord with the social purpose of the legislation.'[39] Briefly, this approach seeks to determine the parliamentary wish in order to interpret statutes in a manner that makes the rule similar with a purposive approach.[40]

The Barons of the Court of Exchequer in *Heydon's Case*[41] had provided the mischief rule for the first time, stating that for the sure and true interpretation of all statutes in general three things are to be discerned and considered:

-What was the Common Law before the making of the act?

-What was the mischief and defect for which the Common Law did not provide?

37 In the other words court read the section as 'in or in the vicinity', see MARTIN Jacqueline, **Key Cases in the English Legal System**, 35.
38 *Attorney General v Prince Ernest Augustus of Hanover* [1957] 1 All ER 49.
39 ZANDER, 149.
40 MALLESON, 64.
41 *Heydon's Case* [1584] 76 ER 637.

-What remedy the Parliament that resolved and appointed to cure the disease?

Bell/Engle/Cross stated; *'Heydon's* case is only applicable when the court finds that the statutory words are obscure or ambiguous whether the purpose of the statute is not something which may be taken into account at an earlier stage'.[42]

In the *Seaford Court Estates Ltd v Asher* case, Lord Denning ventured: 'We do not sit here to pull the language of Parliament to pieces and to make nonsense of it. That is an easy thing to do and a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis'.[43]

In the *Smith v Hughes* case,[44] the judges attempted to understand underlying purpose or intention of the provision.[45] The defendant used her accommodation for prostitution. She was accused of soliciting people passing by on the street from her apartment's balcony in violation of section 1(1) of the Street Offences Act, 1959. She was making noise to attract men's attention passing through the street to invite them to her flat. The defendant argued that she was not soliciting in the street due to the fact that she was at her own balcony that was not a street. According to section (1), 'It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution'. In fact her defence was correct in terms of either the literal or the golden rule that she was not in the street during the duration of the offence.

Lord Parker: 'I approach the matter by considering what the mischief is aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street'.

D. The Purposive Approach

The purposive approach refuses to confine judges to the literal meaning of statutes to seek for the legislators' intention, since the judges having

42 BELL John and ENGLE George, **Cross Statutory Interpretation**, 2th edn, 14.
43 *Seaford Court Estates Ltd v Asher* [1950] 2 All ER 1236.
44 *Smith v Hughes* [1960] 1 WLR 830.
45 ADAMS/BROWNSWORD, 86.

difficulty finding solutions to contemporary cases turned to legislators' intention when enacting the law as civil law systems already did. [46] With the effect of *Pepper v Hart*[47] lawyers were permitted access to *Hansard* to reveal the legislators' actual purpose. However, the judges, contingent upon three general rules of the interpretation, then followed the other secondary aids to construction.[48] If the words are dubious, the best way to interpret a statute is to pondering on the reason and spirit that caused the enactment of the statute.[49]

The courts did not scrutinize the parliamentary debates published in *Hansard*[50] until the court made an exception to this tradition to interpret the Finance Act 1976 in order to calculate the amount of the tax to be paid by some teachers in the *Pepper v Hart* case. However, later on the House of Lords put restrictions on the case to investigate *Hansard* that only Ministers' statements and statements by other promoters of the legislation were allowed to be looked at by the courts.[51]

The term of 'intention of Parliament' has been considered a very problematic argument since the capacity of having an intention for parliament is doubtful. That is to say, parliament consists of its members who have individual and diverse intentions in their mind when they are even voting for the statute.[52]

R v S of S for Health ex parte Quintavalle [53] is an example of the purposive approach. In this case, the Pro Life Alliance argued that the Human Fertilisation and Embryology Authority did not have the authority to licence for cloning. The Human Fertilisation and Embryology Act 1990 granted the Authority the right to licence research with regards to embryos. An embryo was defined in the Act as 'a live human embryo where fertilisation is complete'. However, in the present case, embryos were created using a cloning method.

The House of Lords held that the cloned embryos were covered by the statute, taking a purposive approach to statutory interpretation. Lord Bingham: 'The court's task, within the permissible bounds of interpretation,

46 SLABBERY/KELLY, 92.
47 *Pepper v Hart* [1993] AC 593.
48 SLABBERY/KELLY, 93.
49 BELL/ENGLE, 21.
50 The term 'Hansard' that is used to define the minutes of the Parliamentary Debates in the UK and her colonies, comes from Thomas Curson Hansard (1776-1833) who was the first official printer of Westminster. The prohibition of the referring to Hansard stems from the s. 9 of the 1689 Bill of Rights. The aim was to preserve parliamentary authority and protect MP's from oppressive action in the court. See MALLESON, 66.
51 *Wilson v Secretary of State for Trade and Industry* [2004] 1 AC 816.
52 GARDNER John, 'Some Types of Law' in *Common Law Theory*, Douglas E Edlin (ed), 56.
53 *R v S of S for Health ex parte Quintavalle* [2003] 2 WLR 692.

is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment'.

V. TASKS OF COURTS BEYOND INTERPRETATION

A. Courts Decide Where Even a Piece of Legislation is Absent to Apply

When Judges render a decision, they take into consideration the laws and precedents. However, some cases can be very original; making it difficult to find any piece of regulation or any similar precedent helping the judges decides how to deal with the case. One of the remarkable cases is the case of Siamese Twins.[54] The case was related to deciding whether it was legal to prefer someone's life to another. Doctors diagnosed that one of the twins, Jodie, had an almost 99% chance of survival after immediate separation surgery, or they could wait until the natural death of Mary, reducing Jodie's chances to 36%. More than that, the twins had a high probability of both dying within six months if they remain as they were.

The case was seeking for a legal ground for the surgery which would result in one of the twins' certain death, and that meant manslaughter. The appeal accordingly ranged quite widely over many aspects of the interaction between the relevant principles of medical law, family law, criminal law, and fundamental human rights.[55]

The judge in the first instance court concluded that the operation proposed was equivalent to switching off a mechanical aid; ratio decidendi was a sort of passive euthanasia.

The Court of Appeal dismissed the appeal, altering the grounds of the legality of the surgery with self defence. The proposed operation would be in the best interests of each of the twins. The decision did not require the court to value one life above another. Mary's death would be foreseen as an inevitable consequence of an operation which was intended, and was necessary, to save Jodie's life. But Mary's death would not be the purpose or intention of the surgery, and she would die because tragically her body, on its own, was not and never had been viable.

54 *Re A (Children)* [2001] 2 WLR 480.

55 ELLIOTT, 16, besides, for the summary and explanations of the case see the pages 15-19.

B. Courts Create Original Precedence Expanding or Limiting the Liability

McLoughlin v O'Brain[56] is one of the remarkable cases expanding secondary liability due to nervous shock. Briefly, the chain of the events was as follows: Mr McLaughlin was driving while his three children were in the car and with the involvement of another two cars, an accident occurred due to the failure of the other cars' drivers. One of the children died at the scene, and rest were taken to the nearest hospital as seriously injured. Mrs McLaughlin went to the hospital that was two miles distance away as soon as she was told about the accidents. She was told that one of her children was slaughtered, and that the others were suffering with pain. As a result of this, she received a severe nervous shock and organic depression, changing her personality.

Mrs McLaughlin succeeded on the grounds of the application of the reasonable foreseebility test in nervous shock fulfilled in the case as stated by Lord Wilberforce:

1- Proximity to the accident both in time and distance

2- Proximity of relationship with the injured person

3- Proximity to the accident right after by seeing or hearing of the incident

However, Lord Bridge put forward a more flexible approach that 'The law should adopt a robust and categorical approach to determining which type of claimant should succeed in a claim for psychiatric injury as a result of what they had witnessed – on the facts the claimant's case fulfilled this criteria.

Alcock and others v Chief Constable of the South Yorkshire Police,[57] the claimants were family members of the victims of the Hillsborough football stadium catastrophe in which ninety-six football supporters died as a result of the negligence of South Yorkshire Police. Some claimants had lost children, brothers, brothers-in-law and grandchildren, some people were at Hillsborough, others watched the events unfold on live-TV, some of them participated in the mortuary to identify their loved ones and relatives.

Regarding the Lord Wilberforce's conditional approach to the nervous shock these claimants could not succeed: the proximities of time and space, perception and relationship could not be fulfilled. All judges hearing this

56 *McLoughlin v O'Brian* [1983] 1 AC 410.
57 *Alcock and others v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310.

long and drawn out case agreed: the approach to be adopted was that of Lord Wilberforce with a slight modification. All the claimants would therefore fail.

C. Courts Distribute the Liability

The Fairchild v Glenhaven Funeral Services Ltd [58] case used to be one of the significant cases in tort law. The cases were related to mesothelioma, a fatal disease stemming from inhaling asbestos particles. Applicants had worked under contracts with several employers until they caught the disease. Therefore, for the court to determine which employer and what to extend each would be liable was impossible. Therefore, the court decided that each employer was jointly and severally liable against the claimants for the total amount of the compensation.

The House of Lords dealt with another asbestos case in *Barker v Corus*.[59] The only difference was that the other two employers had gone bankrupt but one had not. In this case, the court –probably perceiving that it would be fairer- decided that the defendants would be 'proportionate liable', in other words, the defendant had to pay one third of all compensation.

However, Parliament enacted the Compensation Act 2006[60]. According to 's. 3 (2) (a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos), (b) jointly and severally with any other responsible person'.

D. Courts Obviate the Ambiguities in the Statutes

Section 1 of The Hunting Act 2004 was regulated as 'a person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt'. However, the term 'hunt' was not described or defined to find the answer as to whether chasing an animal could be assumed to be hunting. In the DPP v Anthony Wright [2009] [61] case, the court said 'the term "hunt" a wild mammal with a dog, as used in section 1 of the Hunting Act 2004, does not include the mere searching for an unidentified wild mammal for the purpose of stalking or flushing it'.

E. Case Law can Provide Guidance to Statutory Ambiguities

The Theft Act 1968 s 1 (1) defines the basic meaning of the offence theft: 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other

58 *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.
59 *Barker v Corus Ltd* [2006] 2 AC 572.
60 The section is titled 'Mesothelioma: damages' that means 'proportionate liable' continuous in the other damages.
61 *DPP v Anthony Wright* [2009] EWHC 105.

of it; and "thief" and "steal" shall be construed accordingly.' The word 'dishonestly' is the key word to decide whether there is a theft offence or not. However the definition of the word is not located in the statute. Therefore in the case *R v Ghosh* the court put forward a method to help jury how to deal with the case: 'In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest'.[62]

F. Courts Change the Precedents in Line with Social Needs

Judicial law-making is not only always needed when new cases or technological developments occur but also social changes.[63] A most typical example about social needs is that a man raping his wife was not assumed to be a crime until 1991. The court was left to apply precedents which did not cover the current level of social values. Actually, it was arguably within the context of civil law to punish behaviour when there was not an applicable rule, with others saying *nulla crimen sine lege* which is the one of the basic principles of the criminal law. In *R v R*[64] the defendant husband had been charged with raping and assaulting her wife who was living with her parents due to matrimonial problems. The husband argued that rape was defined as 'unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it' in the section 1 (1) Sexual Offences Act 1976. 'Unlawful' in the provision meant extramarital intercourse. However the decision was held by Lordships on the grounds of re-defining the term 'unlawful' as 'contrary to some law or enactment or without lawful justification or excuse' in as much as in current conditions of modern society marriage was a partnership of equals'[65]

62 *R v Ghosh* [1982] 2 All ER 689.
63 MALLESON, 76.
64 *R v R* [1992] 1 AC 599.
65 After the conviction the defendant applied for ECtHR arguing that in spite of a retrospective change of the criminal law and violation of article 7 of the Convention. The Court dismissed, that the Convention states the progress in the criminal law through judicial law making was a necessary part of legal tradition. Absence of immunity had become a reasonably foreseeable development of the law, *CR v United Kingdom*, 48/1994/495/577.

G. Case Law can Allow Statutes to Keep a Pace with Contemporary Developments by Expanding the Implementation of Them

The Offences Against the Persons Act had been enacted in 1861, following this Alexander Graham Bell invented the telephone fifteen years later in 1876. However House of Lords upholds the convictions of Burstow and Ireland in 1998, for the offences of making silent and sinister telephone calls, relying on s 47 and s 20 of the Act in the *R v Burstow; R v Ireland* cases.[66]

CONCLUSION

The presented samples of case law demonstrated to us that interpreting and making law were indispensible instruments in the England Common Law System to provide the sustainability of law in contemporary conditions. New technologies such as the given example of cloning can only be covered by using interpretation methods. Sometimes creating law saves lives as Jodie's was spared thanks to open minded judges. A woman's honour and bodily integrity was protected by altering the earlier precedents in a marital rape case, relieving the public conscience as well.

The supremacy and binding effect of statutes are undeniable, and courts perceive this fact. However, asserting that the common law always jumps ahead of statutory law will not be a trumpery venture. Literal mistakes in provisions made by the legislators were repaired by interpretation methods created in common law as seen in the *Fisher v Bell*, *Adler v George*, and *Smith v Hughes* cases. The legislators' omission in defining the term 'hunt' caused the courts to take the initiation to fill out an ambiguity in the provision by making new law. The results of the decisions in the asbestos exposure cases forced the parliament to enact an exceptional regulation.

To sum up, the separate tasks of Parliament and the courts are intertwined in many occasions in favour of both common law and society.

66 [1998] AC 147.

BIBLIOGRAPHY

ADAMS J N, and BROWNSWORD R, **Understanding Law**, 3th edn, Sweet&Maxwell, 2003.

BELL J and ENGLE G, **Cross Statutory Interpretation**, 2th edn, Butterworths Publishing, London, 1987.

DWORKIN R M, 'The Model of Rules', (1967), Faculty Scholarship Series, Paper 3609, 14-46.

ELLIOTT C, English **Legal System: Essential Cases and Materials**, Pearson Publishing, Harlow, 2009.

FOWLER R L, 'The Future of the Common Law', (1913), 13 Colum LR 1913, 595–611.

HART H L A, **The Concept of Law**, 2nd edn, Oxford university Press, Oxford, 1994.

GARDNER J, 'Some Types of Law' in **Common Law Theory**, Douglas E Edlin (ed), Cambridge University Press, Cambridge, 2007, 51-80.

WOOLF L, 'Droit Public - English Style' (1995) PL 57.

MALLESON K, **The Legal Systems**, Lexis Nexis, London, 2003.

MARTIN J, **Key Cases in the English Legal System**, Hodder Education Press, London, 2011.

SALES P, 'Judges and Legislature: Values into Law' (2012) CLJ 71(2), 287–296.

SLAPPER G and KELLY D, The **English Legal System**, 13th edn, (Routledge Press, London, 2013).

TWINING W and MIERS D, **How to Do Things with Rules**, 5th edn, (Cambridge University Press, Cambridge, 2010).

ZANDER M, **The Law-Making Process**, 6th edn, (Cambridge University Press, Cambridge, 2003).

CASES

Adler v George [1964] 1 All ER 628.

Alcock and others v Chief Constable of the South Yorkshire Police [1992] 1 AC 310.

Attorney General v Prince Ernest Augustus of Hanover [1957] 1 All ER 49.

Barker v Corus Ltd [2006] 2 AC 572.

British Railways Board v Pickin [1974] 1 All ER 609.

Brutus v Cozens [1972] 2 All ER 1297.

CR v United Kingdom, 48/1994/495/577 ECH.

Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32.

Fisher v Bell [1960] 1 QB 394.

Heydon's Case [1584] 76 ER 637.

Maunsell v Olins [1975] 1 All ER 16.

McLoughlin v O'Brian [1983] 1 AC 410.

Pepper v Hart [1993] AC 593.

R v R [1992] 1 AC 599.

R v S of S for Health ex parte Quintavalle, [2003] 2 WLR 692.

R v Judge of the City of London Court [1892] 1 QB 273.

R v Allen [1872] LR 1 CCR 367.

R v Ghosh [1982] 2 All ER 689.

Re A (Children) [2001] 2 WLR 480.

River Wear Commissioners v Adamson (1876-77) LR 2 App Case 743.

Seaford Court Estates Ltd. v Asher [1950] 2 All ER 1236.

Smith v Hughes [*1960*] 1 WLR 830.

Sussex Peerage Case [1884] 8 ER 1034.

Wilson v Secretary of State for Trade and Industry [2004] 1 AC 816.