Contents

Preface ix
Permissions x
Table of common law cases and practice directions xi
Table of common law legislation xvi

General introduction 1

1 What was the contribution of the medieval civilians? 12
   1.1 General remarks 12
   1.2 Glossators 14
   1.3 Methods of the glossators 17
   1.4 Post-Glossators (Commentators) 21
   1.5 Theory and methods of the Post-Glossators 24
   1.6 Ius commune and the development of method 27

2 What was the contribution of the Roman lawyers? 33
   2.1 General overview 33
   2.2 Institutes: persons, things and actions 36
   2.3 Casuistry and categorisation 38
   2.4 Philosophical and theory contexts 41
   2.5 Attitude and specific techniques 42
   2.6 Logic and rationalisation 47
   2.7 Reasoning and texts 49
   2.8 Legal fictions 51
   2.9 Assessing the contribution of the Roman jurists 52

3 What was the contribution of the later civilians and the common lawyers? 57
   3.1 Humanist re-orientation 57
   3.2 Civilian rationalists 60
   3.3 Nominalism and rights 65
   3.4 Codification and reasoning 67
   3.5 Codification and legal science 70
   3.6 Social interests 73
   3.7 Common law reaction 74
   3.8 Reacting to civilian formalism 79
Rethinking legal reasoning

3.9 Legal argumentation 82
3.10 Legal argumentation and the civilians 84
3.11 Quo vadis? 86

4 What is the institutional legacy? 87
4.1 Introduction 87
4.2 Rule model 89
4.3 Interpretation model 95
4.4 Rights model 99
4.5 Interest model 105
4.6 Policy model 109
4.7 Remedies model 111
4.8 Legal models: some concluding remarks 114

5 What is the legal literature legacy? 117
5.1 Teaching and practice of law 117
5.2 Common law teachers 120
5.3 Legal taxonomy 122
5.4 Taxonomy and reasoning 126
5.5 Taxonomy and fact 128
5.6 Mapping and reasoning 131
5.7 Representing knowledge 132
5.8 Unjust enrichment 134
5.9 Scientific and legal taxonomy 136
5.10 Empirical categories 138
5.11 Rationalisation and reasoning 140

6 How do legal reasoners treat facts? 143
6.1 Introduction: law and fact 143
6.2 Institutional model and facts 145
6.3 Ex facto ius oritur 147
6.4 Law and causation 151
6.5 Proof of causation 155
6.6 Causing damage and causing a risk 158
6.7 Ex iure factum oritur (virtual facts) 160
6.8 Competing narratives 163
6.9 Theorising fact 166

7 Is legal reasoning like medical reasoning? 168
7.1 Introduction: patients and clients 168
7.2 Legal and medical reasoning: generalities 170
7.3 Diagnosing a legal problem 171
7.4 Reasoning and models 174
7.5 Knowledge models and reasoning about facts 176
7.6 Induction 179
7.7 Deduction 181
7.8 Coherence versus policy: dialectical and functional reasoning 184
7.9 Explanation, understanding and confrontation 188
7.10 Explanation and manipulation 190

8 Is legal reasoning like reasoning in film studies? 197
8.1 Preliminary problems 197
8.2 Form and content (personification theory) 202
8.3 Role of \textit{anima} 207
8.4 Childish (and elitist) introspection 209
8.5 Representation and dimensions 211
8.6 Depicting reality: representation theory 213
8.7 Competing images 216
8.8 Reception theory 218
8.9 From theory to interpretation 222
8.10 Theory versus interpretative frameworks 225
8.11 Towards fiction theory? 228

9 Is legal reasoning based on fictions? 229
9.1 Introduction: fiction theory 229
9.2 Epistemological attitude 231
9.3 Legal reasoning and concepts 233
9.4 Reasonable person 236
9.5 \textit{Nomen iuris} 238
9.6 Inferential legal reasoning 238
9.7 Fiction and policy 241
9.8 Fact and fiction 243
9.9 Interpretation and fiction 246
9.10 Taxonomy and fiction 248
9.11 Fiction and knowledge representation 251
9.12 Conclusion: legal reasoning and reality 255

10 Can legal reasoning be rethought? 258
10.1 Introduction: demystifying legal reasoning 258
10.2 Rule model and system 260
10.3 Analogy 263
10.4 Analogy and the rule model 267
10.5 Casuistic reasoning 270
10.6 Reasoning about facts: schemes of intelligibility 273
10.7 Lessons from social science schemes 276
11 Rethinking legal reasoning: should jurists take interests more seriously?

11.1 Introduction

11.2 Rights and interests

11.3 Defining an interest

11.4 Advantages attaching to the notion of an interest

11.5 Interests attaching to the persona

11.6 Interests attaching to the res

11.7 Interests attaching to the actio

11.8 Interests and the institutional plan

12 Should jurists take interests more seriously (continued)?

12.1 Abuse of a right

12.2 Liberty, expectations and interests

12.3 Damages, debt and interests

12.4 Penalties and interests

12.5 Sectional interests

12.6 Mediating role of an interest

12.7 Diluting tendencies of interests

12.8 Rights versus interests

12.9 Taking interests seriously

Concluding remarks

Bibliography

Index