Thesis Title -

A Doctrinal Analysis of the Academic Judgment Immunity within Higher Education in England

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November 2022

This thesis is submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy

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Author’s Declaration

This thesis results entirely from my own work and has not been offered previously for any other degree or diploma.

Word Court: 45,206

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Abstract

A Doctrinal Analysis of the Academic Judgment Immunity within Higher Education in England

Patricia Sara Perlen

In England, decisions involving matters of academic judgment are the only type of university decision provided with legal immunity. However, adverse academic decisions with respect to assessment can have long-lasting impacts upon students. A significant issue with respect to the academic judgment immunity is that it is opaque. No singular legal definition or legal test exists despite being applied by the judiciary for centuries and subsequently codified into legislation. Further, academic judgment is a core component of academic decision-making in the university context but remains an elusive concept in higher education research. To define what academic judgment encompasses, the doctrinal research methodology was applied to analyse 76 cases and to interpret relevant legislation. To avoid a highly theoretical outcome, higher education literature was utilised to establish where academic judgment resides in the university context. The outcomes of this thesis have provided several significant original contributions to knowledge including articulating the scope of the academic judgment immunity in the university context, defining the scope of the academic judgment immunity in the legal context, developing a common law and legislative definition of academic judgment, and explaining the importance of following prescribed university policies and procedures. A further significant outcome, and original contribution of this thesis, was the determination that while decisions made with respect to a student's final assessment result were protected by the academic judgment immunity this did not extend to decisions made with respect to the assessment process. It was determined that a student can challenge a university decision, even when it touches upon matters of academic judgment, where it can be evidenced that a university has failed to follow its own internal assessment processes and procedures or, where there is an element of unfairness in the decision-making process.

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Acknowledgements

To my supervisor, Professor Paul Ashwin, thank you. Your support, insightful feedback, advice, research expertise and patience have been instrumental as I have persevered through this PhD journey. If not for your support, I would not have persisted.

Thank you to the wonderful team at the Centre for Higher Education Research and Evaluation at Lancaster University, especially Kathryn Doherty. To my module leaders, Professor Murray Saunders, Professor Paul Trowler, Dr Brett Bligh and Dr Natasa Lackovic, thank you for your guidance and feedback in Part 1. Thank you to my examiners, Dr Jan McArthur and Professor Rachael Field, for an insightful, enjoyable and thought provoking viva which improved the clarity of my thesis.

To my colleagues and mentors - Associate Professor Dominique Allen, Professor Julie Clarke, Dr Sharon Erbacher, Kelly Green, Associate Professor Vicki Huang, Professor Jenni Lightowlers, Professor Claire Macken, Professor Marilyn McMahon, Kim Phu, Associate Professor Jason Taliadoros, Dr Kim Teh, Associate Professor Gabrielle Wolf and Helen Wood - thank you for your humour, support and encouragement. A special thank you to my amazing law librarian and friend, Michelle Bendall. To my friends - Jessie and Liza Djayaprabha, Sheirly Lugito, Liye and Chips Tan, Jessica and Dr Theresa Savage, Jing (Elva) Zhang, Stephannie and Craig Rossi, Tina Dinh, The Preston Parents Group, Tanya Bethune, Alice Cooney, Wai Ching Chan and Caroline Keating - thank you for holding space for me. A special acknowledgement of my brilliant friend Nia Daves (RIP) who passed away in 2014. Thank you to Rae Tan, Bill and Lizzy Rossi, Escher John, Charlotte Green and Ada Crowther for keeping Matilda company during my many hours of writing. Thank you to the outstanding teachers and educators at the University of Melbourne ELC - Sonia, Bow, Angelique, Faye, Chinh and Jiawen.

Thank you to my family - Stanisław Michalski (RIP), Irena Perlen (RIP), Jessica, Michael, James and William Webster, Nicholas Tay and Helen Lee Nyuk Yin (RIP), Pythagoras and Ptolemy. To my parents, Grazyna and Henry Perlen, this thesis would not have been possible without your unwavering support, care, and compassion. To my partner, Dr Adeline Yi Lin Tay, thank you for your levity and reminding me of all the wonderful adventures yet to come. I dedicate this thesis to my 94 year old Babcia, Halina Michalska, in honour of the past and to my 3 year old daughter, Matilda Helen Ziyin, in hope for the future.

List of Abbreviations and Organisations

Abramova	Abramova (Maria) v Oxford Institute of Legal Practice [2011] EWHC 613 (QB)
Budd	Budd (R on the application of) v Office of The Independent Adjudicator For Higher Education [2010] EWHC 1056 (Admin) QBD
Cardao-Pito	The Queen (on the application of Tiago Cardao-Pito) and the Office of the Independent Adjudicator for Higher Education and London Business School [2012] EWHC 203
Chilab	Chilab v Kings College London [2013] EWCA Civ 147 CA
Clark	Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988
Gopikrishna	R (Gopikrishna) v Office of the Independent Adjudicator for Higher Education [2015] EWHC 207 (Admin) QBD
Hamilton	Hamilton v Open University [2011] EWHC 1922
HEFCE	Higher Education Funding Council for England
Kwao	Kwao v University of Keele [2013] EWHC 56 (Admin) QBD
Mabaso	Mabaso (David) (R on the application of) v College of St Mark & St John [2004] EWCA Civ 1298 CA
Moroney	Moroney v Anglo European College of Chiropractic [2008] EWHC 2633 (QB).
Mustafa	R (Mustafa) v Office of the Independent Adjudicator [2013] EWHC 1379 (Admin) QBD
OIA	Office of the Independent Adjudicator for Higher Education
Patel	Patel v University of Bradford Senate [1978] 1 WLR 1488
Persaud	R v Cambridge University ex parte Persaud [2001] EWCA Civ 534 CA

QAA	Quality Assurance Agency for Higher Education
Senior-Milne	Senior-Milne (R on the application of) v University Of Northumberland At Newcastle (2007) (Application) [2007] EWHC 3391 (Admin) QBD
Siborurema	R (Siborurema) v Office of the Independent Adjudicator [2007] EWCA Civ 1365
Siddiqui	Siddiqui v University of Oxford [2016] EWHC 3150 (QB) QBD
Sindhu	The Queen on the Application of Abdullah Sindhu v Office of the Independent Adjudicator [2018] EWHC 575 (Admin)
Sivasubramaniyam	R (Zahid) v University of Manchester (R (Rafique-Aldawery) v St George's, University of London, R (Sivasubramaniyam) v University of Leicester) [2017]
Thomson	Thomson v The University of London [1864] 33 LJCh 625
Thorne	Thorne v University of London (1966) 2 QB 237
Van Mellaert	Van Mellaert v Oxford University [2006] EWHC 1565 (QB) QBD
Vijayatunga	R. v HM Queen in Council Ex p. Vijayatunga Court of Appeal (Civil Division) [1990] 2 QB 444

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Chapter 1: Introduction

1.1 The Need for This Research

One sentence from the seminal text, 'The Law of Higher Education' inspired this thesis. Farrington and Palfreyman (2012, p. 360), in discussing the legal relationship between university and student, explained that 'a special feature of the law of higher education is the immunity from judicial scrutiny of expert academic judgment'. As a legally trained academic, working in higher education, this was astonishing to me. Numerous questions immediately arose. What comes within the scope of an expert academic judgment? Is it legally accurate that a student cannot challenge a mark received in an assessment task or, is this a broad simplification of the common law? What has the judiciary specifically stated with respect to the scope of the academic judgment immunity? Why were academics immune from students seeking to challenge a core component of their professional role? What does this actually mean in practice for an academic who is marking an assessment? Why are academics specifically the only professional group in England whose expert judgment cannot be legally challenged? Given that the academic judgment immunity is found both in English case law and legislation, I assumed that many of my questions would be succinctly answered by reading the relevant common law decisions and parliamentary statutes. I would then simply move on to reading the next section of Farrington and Palfreyman's text. What I discovered was that the academic judgment immunity is a legal doctrine, that has been applied for centuries, to prevent students from challenging purely academic university decisions without an agreed upon legal definition. More specifically, to prevent students from legally challenging their final assessment results with the view that 'it is for the examiner and not the court to mark a paper' (Hamilton v Open University [2011] 'Hamilton', para. 11) and that it would be 'jejune and inappropriate' for the court to determine issues of 'what mark or class a student ought to be awarded' (Clark v University of Lincolnshire and Humberside [2000] 'Clark', para. 1992F). As a lawyer, I can understand these conclusions from a legal perspective. As an academic working in higher

education, the academic judgment immunity creates a niggling unease in terms of both scope and impact.

Decisions involving academic judgment have ramifications for a student and require closer examination. Academic decisions made with respect to issues such as assessment results and degree classification can have significant and long-lasting impacts. Students invest significant sums of money, as well as time, to undertake a university education. For students who fail to complete a course, or are unable to graduate with a particular degree classification, adverse impacts can include the loss of job opportunities and as a result, life-time income. Despite the move in higher education towards greater transparency and fairness in the assessment process, which has seen an increase in the use of various mechanisms, processes and procedures including learning outcomes and assessment criteria, there remains an 'inherent frailty of marking practices and variability of standards' (Bloxham, 2009, p. 209). As explained by Partington (1994, p. 57) 'mark differences of 8 or 9 marks out of 25 or even greater' are common with respect to the marking of essays. As a result, 'when this happens cumulatively, one can easily see that a student's final degree classification may depend as much on having the right or wrong examiners as on talent or mastery of a syllabus'.

Given the potentially serious consequences that can result from an adverse academic decision, it is curious that decisions of academic judgment are the only type of decision which have been provided with a continued immunity from being legally challenged. Further, this legal immunity has been afforded without a legal definition or clearly defined scope. There also appears to be an inconsistency between the legal understanding of assessment and what practically occurs in the higher education assessment context. This is a key rationale for bringing together the disciplines of law and higher education research. Determining the extent of the inconsistency could result in a much narrower application of the academic judgment immunity then perhaps understood or envisioned by the law. This would have consequences for both university and student alike. It would narrow the protection of the academic judgment immunity for universities but extend the scope of the types of academic decisions students could challenge,

potentially including assessment results. It is these issues that from the basis for the research questions of this thesis. Before considering the specific research questions addressed by this thesis, it is first necessary to explore the broader higher education context in which academic judgment resides.

1.2 Scope

As astutely noted by Ashby (1959, p. 5), 'the corridors of academic power have many ramifications… decision-making is not concentrated or centralised: it is diffused through the whole of academic society'. As a result, students have sought to legally challenge adverse university decisions for centuries, in a wide range of areas including admission (Moran v University College Salford (No 1) (1993)), discrimination (Orphanos v Queen Mary College [1985]), failure to run a course specified in the university's undergraduate prospectus (Casson v University of Aston in Birmingham [1983]), academic judgment (Clark), disciplinary procedures (Ceylon University v Fernando [1960]; R v Manchester Metropolitan University; ex parte Nolan [1994]), and academic progress (R (Gopikrishna) v Office of the Independent Adjudicator for Higher Education [2015] 'Gopikrishna'). However, only one specific type of university decision has been provided with legal immunity, decisions involving academic judgment. The academic judgment immunity is a legal doctrine entrenched in common law and legislation. As a result, this thesis does not seek to challenge the existence of the academic judgment immunity nor question whether the immunity should continue to exist. Rather, the scope of this thesis is to understand the academic judgment immunity as it relates to students challenging university decisions. Specifically, how students challenge internal university decisions, involving matters of academic judgment, through external processes.

At present academic judgment, a legal concept, is being applied in both the internal and external adjudication of student complaints, without an agreed upon definition, to prevent students from challenging university decisions. This, as noted by Farrington and Palfreyman (2020, para. 12.07) provides a 'thick cloak' behind which 'allegedly poor teaching and/or assessment practices' can hide…

‘an armour-plated veil that the student’s legal attack is not able to penetrate’. This thesis does not propose that students should be able to challenge every mark that they receive during their university studies. Rather, there needs to be legal clarification as to what academic judgment means in the context of students seeking to challenge academic decision-making.

The legal relationship between a student and university is complex. It is governed by both public and private law principles and has considerably evolved with the codification of the common law, abolishment of the University Visitor and creation of the OIA. As a result, there are three ways in which students can seek to challenge a university decision. First, students can seek to challenge an adverse academic decision through internal dispute resolution procedures, specific to the university in which they are enrolled. For the purposes of this thesis, the internal processes and procedures of each individual university will not be specifically examined. Internal university decisions, with respect to student appeals over matters of academic judgment, are confidential and not accessible to the public. Further, many of the supplementary documents created to support the interpretation and application of published procedures are also not publicly accessible. As a result, it not possible to access the necessary data to accurately determine exactly where academic judgment resides in each specific university context. To understand where academic judgment resides in the university context, the focus of this thesis is on the internal university decisions which have been challenged externally either via the judiciary, the Visitor (prior to it being abolished) or the OIA system, and reported in the public domain.

Second, students can seek to challenge an internal university decision through the common law by applying principles of public or private law. Prior to the creation of the OIA, and introduction of statutory universities, the prevalent way that students attempted to externally challenge an internal university decision was through judicial review (public law). As a university is recognised as a public body in the legal context students sought to utilise the public law principles of administrative law, namely unreasonableness, irrationality, illegality and procedural impropriety, as the basis to challenge university decisions and subvert the sole and exclusive jurisdiction of the Visitor. As explained in Siborurema,

‘there is a strong public element and public interest in the proper determination of complaints by students to higher education institutions’ (R (Siborurema) v Office of the Independent Adjudicator [2007], para. 49F ‘Siborurema’). This was confirmed in Sivasubramaniyam where the court re-affirmed that universities were ‘susceptible to challenge by way of juridical review’ (R (Zahid) v University of Manchester (R (Rafique-Aldawery) v St George’s, University of London, R (Sivasubramaniyam) v University of Leicester) [2017], para. 39 ‘Sivasubramaniyam’). Despite the abolishment of the Visitor, with the introduction of the Higher Education Act 2004, the case law remains relevant to determining the current scope of the common law with respect to judicial review. Students can also attempt to challenge an adverse academic decision through private common law principles of contract law and the law of torts as evidenced by the cases of Clark and Abramova (Maria) v Oxford Institute of Legal Practice [2011] (‘Abramova’). Clark sought to utilise the law of contract to argue that there had been a breach of an express term when the university’s board of examiners failed him for plagiarism and awarded zero marks (Clark). Abramova contended there had been a breach of the implied term with respect to teaching and assessment practices, under the Supply of Goods and Services Act 1982, which states that ‘that educational services would be provided with reasonable care and skill’ (Abramova, para. 58).

Third, students can challenge an internal university decision through the external complaints system established by the Higher Education Act 2004 and implemented by the OIA. As explained above, the vast majority of student complaints are currently determined by the OIA, as opposed to judicial review. As explained by Lord Justice Mummery, ‘the new processes have the advantage of being able to produce outcomes that are more flexible, constructive and acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law’. (Maxwell (r on the application of) v Office of the Independent Adjudicator [2011] ‘Maxwell’, para. 37). As a result, in addition to considering how the courts have determined student challenges to university decisions, it is also important to ascertain how academic judgment has been determined and applied by the OIA in the context of resolving student disputes. This will be achieved by analysing cases where decision of the OIA have been subject to judicial review.

1.3 Context

1.3.1 Student Complaints

Historically, 'the very idea that a mere student would have the temerity to pursue a legal claim against one of [their] instructors, [their] college or [their] university would have been unthinkable' (Hoye and Palfreyman, 2004, p. 97). However, in an 'increasingly commodified, commercialised, corporatised and consumerised' (Farrington and Palfreyman, 2012, p. 361) higher education sector, students are increasingly seeking legal redress outside the internal dispute resolution processes of their university. As noted by Sir Ron Dearing in the 1997 Dearing Report of the National Committee of Inquiry into Higher Education ('Dearing Report'), 'we were told that complaints from students are likely to increase, particularly as assessment criteria become more explicit and student expectations and financial commitments increase' (para. 15.58). The statement made by Dearing in 1997 is consistent with the current volume of complaints received by the Office of the Independent Adjudicator ('OIA') who regularly receive complaints with respect to service issues, academic appeals, financial welfare, academic and non-academic disciplinary matters, human rights, fitness to practice matters, and more recently complaints arising from the impact of the COVID-19 pandemic. The Annual Report of the OIA noted that in 2021 the OIA received the highest ever number of student complaints, 2,763. An increase of 6% on the 2,604 student complaints received in 2020 (OIA, 2021, p. 6), with the 'rise in complaints in 2021 continuing the trend of annual increases since 2017' (OIA, 2021, p. 6). This trend continued into 2022, with the OIA Annual Report noting that 2,850 complaints were received, an increase of 3% on 2021 (OIA, 2022, p. 7).

In considering the broader student complaints context, it is important to acknowledge the well documented 'complaints culture' that has emerged in higher education (Baty and Wainwright, 2005; Cook and Leckey, 1999; Fazackerley, 2006; Harris 2007; Jackson et al., 2009; Jones, 2006). The research questions posed in this thesis need to be understood against the current 'commodification' climate. In the academic literature, there has been much written

on the concept of the student as a consumer (Gabriel and Lang, 2006; Gross and Hogler, 2005; Kaye, Bickel and Birtwistle, 2006; Kerby, Branham and Mallinger 2014; McMillan and Cheney, 1996; Molesworth, Nixon and Scullion, 2009; Portfilio and Yu, 2006; Potts, 2005; Williams, 2012). As noted by Williams (2012, p. 6), the concept of the student as consumer is 'someone, who, as a result of financial exchange, considers themselves to have purchased, and is therefore entitled to possess a particular product (degree) or to expect access to a certain level of service (staff and resources)'. Students have been also been consistently characterised as 'customers' of higher education (Barnett, 2011; Franz, 1998; Kerby, Branham and Mallinger, 2014; Hwarng and Teo, 2001; Kanji and Tambi, 1999; Kotler and Fox, 1985; Pereira and De Silva, 2003; Reavill, 1998; White, 2007). Trout (1997, p. 50) characterises students as customers of higher education who 'study only when it is convenient (like shopping), expect satisfaction regardless of effort and assume that academic success, including graduation is guaranteed'. It is not within the scope of this thesis to ascertain whether the classification of consumer or customer is more appropriate or to add to the literature on complaints culture. What can be concluded from the literature is that the process of learning is increasingly becoming a commodity (Brancaleone and O'Brien, 2011; Hussey and Smith, 2002; Naidoo and Jamieson, 2005; Roberts, 1998; Schwartzman, 1995) with students seeking to ensure, through legal redress if necessary, that they receive the product that they paid for - their degree.

The commodification and consumerisation of higher education has emerged against the background of government investment in higher education spending reached £7.5 billion in 2002/3 (Education and Skills Committee, 2003), increasing levels of student debt (Teaching and Higher Education Act 1998*;* The Future of Higher Education: White Paper 2003*)* and a focus on widening participation with funding from HEFCE. Concerns have also been expressed by government agencies (Olliffe and Stukmcke, 2007, pp. 204 – 5) about the perceived increase in volume and complexity of litigation by students against universities (Aston, 2008, p. 160). These circumstances led to the passing of the Higher Education Act 2004, which established the OIA, in order to provide 'a common and transparent means of redress for student complaints' (HC Deb, 27 January 2004,

vol. 417, col. 167). There was however one notable exception. Student complaints, which pertain to a matter involving academic judgment, were expressly excluded from legal challenge. Lord Triesman succinctly explained the rationale for excluding academic judgment from the purview of the OIA stating that 'traditionally the Visitors and the courts have not intervened in matters of academic judgment. This legislation would continue that practice' (HL Deb, 10 May 2004, vol. 661, col. 119). It is this notable exception that forms the basis of this thesis.

1.3.2 Student Complaints and the COVID-19 Pandemic

While the impact of the COVID-19 pandemic on student complaints are outside the scope this thesis, fascinating contextual data emerges. Of particular relevance are the statistics with respect to academic appeals, as this is the broader context in which academic judgment resides. Almost half (48%) of complaints received by the OIA pre-pandemic pertained to academic appeals (OIA, 2019, p. 11). As explained by the OIA, in their 2019 Annual Report, 'academic appeals still account for around half of all complaints to us. This reflects the importance students place on achieving their chosen qualification, with a grade they feel fairly reflects their ability and performance. Nearly half of these complaints are directly related to requests for special consideration in exams or assessments' (2019 OIA, p. 11). What is interesting to note is that student complaints, with respect to academic appeals to the OIA, decreased during the pandemic. Despite the pandemic creating significant challenges with respect to governance, equity, accessibly, teaching, learning and assessment in the higher education sector there was an 18% drop in the number academic appeal complaints to the OIA in 2020 (OIA, 2020, p. 9). This trend continued in 2021 with a further reduction in complaints relating to academic appeals. In 2022, the OIA Annual Report noted that there was a 'rebalancing' of student complaints, with academic appeals accounting for 38% of complaints received (2022, p. 10) concluding that 'this rebalancing was at least in part related to emerging from the pandemic' (2022, p. 10). This raises the question of what occurred, or did not occur during the pandemic, which reduced student complaints with respect to academic appeals, despite overall complaints increasing on a yearly basis. Did

changes to assessment, forced by the pandemic, result in a decrease of student complaints pertaining to academic appeals?

In their 2020 Annual Report, the OIA made an interesting observation noting that 'the pandemic has also had an effect on complaints students haven't brought to us, in particular in relation to academic appeals' (2020, p. 7). The OIA explained that 'the reduction has been most significant in complaints that are directly related to requests for additional consideration in exams or assessments' (2020, p. 9). It is fascinating that this reduction in academic appeals occurred against the background of significant and rapid change in the higher education sector. To ensure that teaching and learning could continue, and that students could graduate on time, higher education institutions had to rapidly transform on-campus learning activities to online learning environments and adapt assessment. As a result of the changes that had to be made, there was an inherent assumption that 'assessment designed for face-to face contexts, often with years of curriculum planning and experimenting… suddenly became obsolete in the efforts to apply them in online learning contexts' (Chan 2022, p. 2). However, from the research completed to date, it would appear that while the manner in which assessment practices were adapted is varied and context specific, a common theme emerged. Irrespective of discipline, academics focused on making changes to assessment modality, as opposed to substantive changes to the learning outcomes or the curriculum content which was being assessed. In a 2022 study completed by Slade et al. (p. 594), it was determined that very few academics opted to make significant changes to assessment, 'instead preferring to translate their existing assessment into online modes'. For example, 'most academics approached translating their examinations online simply by using a different mode of delivery' (Slade et al., 2022, p. 598). Several studies discussed the adaption of assessment formats into online alternatives, particularly in subject-areas that utilise traditional hands-on practical assessment, such as health sciences (Hoog 2020; Pather 2020; Sandi-Urena 2020). Fergus, Botha and Scott (2020) considered how the pandemic required laboratory assessments to be transferred online. Gao, Lloyd and Kim (2020) considered how the pandemic changed face-to-face chemistry laboratory instruction and student performance in virtual biochemistry laboratories. Major et al. (2020)

considered how Zoom teleconferencing allowed medical students' clinical training to continue. Based on the research conducted to date, it is unlikely that changes to the modality of assessment can account for the significant reduction of student complaints to the OIA pertaining to academic appeals. However, it would appear that one particular policy pertaining to assessment results, did have a significant impact on the reduction of academic appeals to the OIA.

In addition to each university having to adapt their teaching and assessment practices to a new online learning environment, new policies and procedures were being written. One particular policy, implemented by universities across England, appears responsible for the significant reduction in student complaints pertaining to academic appeals over the pandemic period. The OIA noted that the reduction 'was most notable in the last four months of the year' (OIA, 2020, p. 9), which coincided with universities adopting 'no detriment' policies, leading the OIA to conclude that the use of these policies had 'been a major factor' (OIA, 2020, p. 9). The 2021 Annual Report of the OIA, reiterated the observations of the 2020 report noting that

> the pandemic has also continued to have an effect on complaints students haven't brought to us, in particular in relation to academic appeals which had not returned to pre-pandemic proportions (OIA, 2021, p. 7).

The OIA further confirmed that, from their perspective, 'the continuing lower proportion of this type of complaint in our caseload may be because some students were still benefiting from "no detriment" or safety net policies' (OIA, 2021, p. 7). It would therefore appear that there is correlation between the no detriment policy and reduction in student complaints pertaining to academic appeals. As explained by the QAA, 'no detriment policy seeks to mitigate against the impact of a set of circumstances, by ensuring that an individual is not unfairly disadvantaged by a requirement to change rules or regulations, in session' (QAA, 2020, p. 1). The QAA further clarified that in practice, for many higher education institutions, 'no detriment means students are guaranteed that their final grade will be no lower than their average academic performance in advance of the pandemic' (QAA, 2020, p. 1). The application of a 'no detriment' policy seemingly

removed a significant element of academic judgment from the assessment process, by essentially guaranteeing students a minimum result based on past performance, thereby providing certainty during an unpreceded time. It will be interesting to observe whether the 2023 OIA Annual Report notes an increase in student complaints pertaining to academic appeals as ‘no detriment’ policies are wound back across the higher education sector.

1.4 Research Questions and Research Objectives

The aim of this thesis is to bring clarity to the academic judgment immunity by seeking to understand the types of academic decisions that are currently protected from legal challenge. The research objectives of this thesis are to:

1. Identify where, in the university context, decisions of academic judgment exist.
2. Determine the understanding of academic judgment as a concept in higher education.
3. Articulate the legal definition of an academic judgment.
4. Identify the scope of the academic judgment immunity in the higher education context.
5. Determine whether the academic judgment immunity protects all academic decisions.
6. Ascertain whether the assessment process, as opposed to the assessment outcome, is immune from legal challenge.

These research objectives are embedded within three research questions.

1.4.1 Research Question 1: Where does Academic Judgment Exist in the University Context?

Academic judgment is not a purely theoretical concept. Decisions involving academic judgment are made in the university context every day. The aim of research question one is to identify where academic judgment specifically exists

in the university context and how it is understood within the current literature. Academics and university decision makers need to recognise what an academic judgment is, understand the scope of the academic judgment immunity and, be able to identify within their own areas of responsibility where academic judgments can and do occur. Research question one also undertakes an important function with respect to a core component of the doctrinal research methodology adopted by this thesis. The academic judgment immunity is a legal doctrine however, the law does not exist in a vacuum. Identifying and understanding the higher education context, in which academic judgment exists, is paramount to situating the research in the real-world university context. The outcome of research question one, provides the context and scope for considering research question three.

1.4.2 Research Question 2: Within the Legal Framework of Higher Education in England what Constitutes the Academic Judgment Immunity?

Universities in England have consistently been granted immunity from the judicial scrutiny of academic judgments. However, what legally constitutes an academic judgment has never been clearly defined by the common law or legislation. Research question two will analyse relevant cases and legislation to determine what an academic judgment entails in the legal context. A key outcome of research question two is to define what an academic judgment is and to identify the scope of the current academic judgment immunity, in order to provide a clearer understanding of the concept for academics and university decision makers.

1.4.3 Research Question 3: Is the Assessment Process Immune from Legal Challenge?

Research question three seeks to determine whether the academic judgment immunity protects all academic decisions with respect to assessment. In considering what constitutes the academic judgment immunity, common law decisions have gone to considerable lengths to emphasise that there is a difference between a challenge to an academic judgment as opposed to a

challenge to process. This is also reflected in the statutory context. This distinction forms the basis of research question three. First, to determine whether the academic judgment immunity protects the assessment process from legal challenge, as distinct from the final assessment result. Second, to ascertain whether the assessment process could be legally challenged by arguing that the process by which the final assessment result has been decided is unfair.

1.4.4 Audience

Given the nature of the research questions posed, it is important to address the intended audience of this thesis, to justify the discussion and analysis undertaken. As academic judgment is applied in several contexts, including the internal and external adjudication of student complaints to prevent students from challenging university decisions, the outcomes of this thesis may be of interest to a range of audiences including university students, academics involved in assessment, internal university decision-making bodies, external examiners, OIA decision makers, judicial officers and Members of Parliament. The aim of this thesis is not to provide legal advice, or a template for students to challenge university decisions pertaining to academic judgment. Rather, the intended audience of this thesis are members of the higher education assessment community who are engaged in the research, design, implementation and certification of university assessment across England. Given my professional background, as a legally trained academic teaching and assessing in a law school, the discipline of law is utilised a case study in Chapter Six. However, the concepts analysed throughout this thesis, and associated outcomes, can be utilised and adapted by all members of the higher education community who are engaged in the assessment of students.

1.5 Research Strategy and Methodology

No scholar has sought to bring together the disciplines of law and higher education research to examine the concept of the academic judgment within the university decision-making context. This is an original contribution to knowledge provided by this thesis. As a result, important considerations with respect to the

research strategy and methodology were undertaken. Numerous qualitative and quantitative approaches were considered for this thesis including critical discourse analysis and content analysis. Ravid and Schneider (2019) have explored changes in legal meaning using discourse analysis and Kirkham and O'Loughlin (2019) have undertaken a content analysis of judicial decision-making. In investigating the suitability of each method, there were incompatibilities between the method and the outcome that this thesis is seeking to achieve. For example, unlike content analysis, this thesis is not focused on the language and linguistic features of texts, nor the 'patterns and trends in communicative content' (Weber, 1990, p. 9). This thesis also does not propose to enter into fields of coding, linguistics or semiotics. A key focus of critical discourse analysis is 'the way in which texts of different kinds reproduce power and inequalities in society' (Fairclough, 1992 p. 353). It is acknowledged that there is a power imbalance between students and higher education institutions however this is peripheral to the aims of this thesis. This thesis also does not seek to challenge the legitimacy of the courts and parliament as law making powers.

The doctrinal approach has been chosen as the academic judgment immunity is a legal doctrine. To answer research questions two and three, a comprehensive legal analysis of the academic judgment immunity needs to be undertaken. What is important to emphasise about the doctrinal research methodology is that it is more than objectively establishing what the law is. The researcher must engage in a process of 'selecting and weighing materials, taking into account hierarchy and authority, as well as understanding social context and interpretation' (Dobinson and Johns, 2017, p. 24). This is where the discipline of higher education research is important. The law does not exist in a vacuum. To avoid a highly theoretical thesis, with limited practical application, understanding the real-world context in which the concept of academic judgment is applied is paramount. As a result, the importance of research question one, establishing where academic judgment resides in the university context, cannot be overstated.

1.6 Significance of Research

Academic judgment has been written about by academic commenters, decided upon by jurists of the High Court of Justice and debated at length by Members of Parliament yet there is no singular legal definition of what academic judgment actually is. Why does this matter? As astutely noted by Member of Parliament Jonathan Shaw, in the parliamentary debates seeking to legislate academic judgment, 'there is no beginning or end to academic judgment. One can understand the anxiety of staff that this provision may become law and that they will have no idea of the parameters of academic judgment' (HC Deb, 12 February 2004, col. 94). In 2004, the Higher Education Act became law, with no further clarification of what decisions would come within the scope of academic judgment. Centuries of judicial decisions have been made with respect to academic judgment yet courts have been careful to avoid defining the concept. A holistic understanding of academic judgment, grounded in doctrinal legal research, is an important gap which this thesis seeks to fill and an original contribution to the literature. It is also hoped that understanding the scope of the academic judgment immunity will provide clarity for members of the higher education community who are engaged in the assessment of students. It is also necessary to acknowledge that while determining the legal definition of what constitutes an academic judgment is an important contribution of this thesis, it is just one component of understanding the scope of the academic judgment immunity in the higher education context. It is recognised that a legal definition, in and of itself, is theoretical. For this thesis to provide a practical outcome, it is also necessary to identify and contextualise where academic judgment resides in the university context, which is the focus of research question one.

1.7 Overview of Thesis

This thesis comprises seven chapters. Chapter one provides the introduction by outlining context and scope, articulating the research questions and research strategy, and explaining the significance of the research. Chapter two, literature review, provides a summary of the relevant literature with respect to both the legal

discipline and the discipline of higher education research in order to elucidate common themes and to identify where gaps in knowledge currently exist. Chapter three, methodology, explains the research strategy, research design and methodology adopted, justifies the decision to utilise doctrinal legal research, and notes the limitations of the doctrinal legal research methodology. To assist in readability, each research question comprises a separate chapter. Chapter four establishes where academic judgment resides in the university context in order to address research question one. The research outcomes determined in chapter four are of particular importance as they identify and provide the context necessary to apply doctrinal legal research, to a real-world assessment scenario, in chapter six. Chapter five applies the doctrinal methodology to determine the meaning and scope of academic judgment from a legal perspective in order to address research question two. Academic judgment is defined and analysed from both the common law and legislative perspective and seven research outcomes are discussed. Chapter six addresses research question three by drawing on the research outcomes elicited in chapters four and five to interrogate whether the assessment process, as distinct from the assessment outcome, is protected by the academic judgment immunity. Chapter six specifically considers whether assessment can be challenged as a matter of process before interrogating whether the assessment process can be legally challenged on the basis of fairness, resulting in three research outcomes. Chapter seven draws together the research undertaken by this thesis to justify how this thesis has addressed each research question, explains the original contributions to knowledge made by this thesis from a holistic perspective, notes the research limitations, and provides recommendations for future research.

Chapter 2: Literature Review

2.1 Introduction

As noted by Boote and Beile (2005, p. 4), the literature review is the ‘foundation of any research project’ and ‘sets the broad context of the study, clearly demarcates what is and what is not within the scope of the investigation, and justifies those decisions’. In order to establish ‘the context of the problem and rationalise its significance’, it is necessary to consider the existing literature in order to delineate ‘what has been done from what needs to be done’ (Hart, 1998, p. 27). The logical starting point of this literature review would be to synthesise existing academic knowledge from the disciplines of law and higher education research, with respect to academic judgment, to identify common themes and demonstrate where gaps in knowledge exist. Herein lies the quandary. Literature which specifically focuses on academic judgment is limited. From the legal perspective, an immunity exists to protect decisions involving matters of academic judgment. The existence of the academic judgment immunity is not a contentious issue as it is an established legal doctrine in both common law and legislation. From the higher education research perspective, academic judgment is deeply intertwined with assessment and academic standards. However, no literature to date has discussed academic judgment as an independent concept. Rather, academic judgment appears to be considered as an inherent element of the assessment process. As a result, this literature review draws together the literature that currently exists to ascertain where and how academic judgment has been discussed in higher education research and the academic judgment immunity in the legal discipline. This literature review also considers some of the broader themes which help contextualise the concept of academic judgment including university dispute resolution processes. Finally, the literature review identifies gaps that exist, in order to explain the research questions posed by this thesis, and to justify the original contribution that this thesis seeks to make.

2.2 Academic Judgment and the Discipline of Law

2.2.1 Overview

The legal relationship between university and student has developed over centuries and has been comprehensively examined by the literature (Birtwistle and Askew, 1999; Davis, 2001; Fulford, 2019; Harris, 2007; Hoye and Palfreyman, 2004; Kamvounias and Varnham, 2006; Kamvounias and Varnham, 2010; Kaye and Birtwistle, 2006; Lewis, 1983; Lindsay, 2007; Rochford, 2015). This thesis accepts that there is a legal relationship between university and student and does not propose to add to the existing literature justifying the existence of a legal relationship. Rather, this thesis will examine the legal relationship between university and student in the context of challenging university decision-making, specifically decisions involving academic judgment. Literature which specifically focuses on academic judgment in the discipline of law is limited and primarily published before the creation and implementation of the Higher Education Act 2004. For clarity, academic judgment is also referred to in the literature as: 'academic immunity', 'pure academic decision', 'academic judgment immunity', 'pure academic judgment' and 'pure academic judgment immunity'. The concept of academic judgment has a complex legal history. As a result, academic legal literature discussing the academic judgment immunity is often intertwined with related issues such as the scope of the Visitor's jurisdiction and the university dispute resolution process. This literature will be considered first. Where the academic judgment immunity has been written about specifically there are two common themes. The first affirming the existence of the academic judgment immunity with reference to relevant primary sources of law. The second confirming the judicial deference shown towards academic decision-making.

2.2.2 The Role and Jurisdiction of the Visitor

The exclusive jurisdiction of the Visitor has been recognised for centuries (Philips v Bury (1694)). As succinctly explained by the House of Lords in Regina v Lord President of the Privy Council, Ex Parte Page [1993] (para. 700):

> the authorities demonstrate that for over 300 years the law has been clearly established that the Visitor of an eleemosynary charity has an exclusive jurisdiction to determine what are the internal laws of the charity and the proper application of those laws to those within his jurisdiction.

As a result, the exclusive jurisdiction of the Visitor precluded intervention by courts where a student sought to challenge an adverse university decision. In the case of Thorne v University of London [1966] ('Thorne', para. 240), where the issue was whether the University of London had negligently misjudged the plaintiff's examination papers. Lord Justice Diplock confirmed that 'in disputes of this kind the sole jurisdiction vests with the Visitor to the university, not with the courts'. This line of reasoning continued until the Visitor was abolished in 2004. In 1992 Lord Browne-Wilkinson noted that 'the advantages of having an informal system which produces a speedy, cheap and final answer to internal disputes has been repeatedly emphasised in the authorities' (R v Lord President of the Privy Council ex Parte Page [1992], para. 1116). Lord Justice Auld in the Court of Appeal stated that 'the exclusive Visitorial jurisdiction, certainly over academic decisions and the proper application of university procedures in reaching them, is alive and well' (R v University of Nottingham ex parte K [1998], para. 192F). Despite the long sovereignty of the Visitorial system over students challenging university decision-making it was not without its flaws. These inadequacies resulted in academic commentators proposing ways in which the common law, both public and private, could be utilised by students to challenge university decisions in order to avoid the exclusive jurisdiction of the Visitor. This is discussed further in section 2.2.3 below.

Prior to the enactment of the Higher Education Act 2004 there was no uniform system or process which enabled students to externally challenge a university decision. As questioned by Birtwistle (2000, p. 144), 'if there is a single university system, should that system have a single appeals and complaints framework?'. Until the creation of the OIA in 2004, how a university was legally established would determine which body would hear the matter. A university established by Royal Charter came under the jurisdiction of the Visitor. A university created by

a parliamentary statue resulted in the courts as arbiters. These disparate approaches led to the academic literature questioning the role and function of the Visitor within the context of students challenging university decisions (Birtwistle, 2000; Khan, 1991; Khan and Davison, 1995; Price et al., 1996; Whalley and Evans, 1998). Numerous reviews of Higher Education, including the Dearing Report, recommended the establishment of an external independent body to review student complaints. Sir Robert Megarry posed the following question, 'why, it may be said, should most university students be precluded from access to the courts in matters of dispute with the university authority?' (Patel v University of Bradford Senate [1978], para. 1499). Academic questioning about the suitability of the Visitor centred around two concerns. The first was with respect to the finality of Visitors' decisions and the extent to which they should be subject to judicial review in a changing social climate of accountability. The second was whether the courts should have at least concurrent jurisdiction with the Visitor (Price, Whalley and Whalley,1996, p. 47; Whalley and Evans, 1998, p. 110). As a result, the academic literature began considering ways in which public and private law could be utilised by students to challenge university decisions in order to avoid the purported exclusive jurisdiction of the Visitor.

2.2.3 University Dispute Resolution Process

Academic commentary on the internal dispute resolution process within higher education has focused on principles of public law, questioning whether students were afforded due process and procedural fairness in the internal dispute resolution procedures of their university (Kamvounias and Varnham, 2006; Lewis, 1983; Rochford, 2005). Put another way, was the decision-making in question legally flawed and therefore subject to judicial review by the courts. To challenge an internal university decision, students had to demonstrate that the decision came within the jurisdiction of the judiciary, namely within principles of public law. Numerous academics (Birtwistle, 2000, p. 141; Kamvounias and Varnham, p. 9, 2006; Lindsay, 2007, p. 10; Rochford, 2005, p. 26; Sampson, 2011, p. 233) have also explored the extent to which private law, specifically that of contract and negligence, could be relied upon to challenge a university decision. Birtwistle (2000, p. 142), Davies (2004, p. 79) and Kaye (1999, p. 171) considered the

scope of the Human Rights Act 1998 and whether administrative law principles could be utilised to seek remedies against public authorities by arguing that a higher education institution falls within the scope of a public authority for the purposes of the Human Rights Act and is therefore subject to judicial review. Kamvounias and Varnham (2006), Lindsay (2007), and Lewis (1985) analysed the role of public law principles, due process and procedural fairness, to determine whether the decision-making in question was legally flawed and could therefore be judicially challenged. It is important to acknowledge that the majority of the relevant literature on challenging university decision-making was written and published before the creation of the OIA, and the abolishment of the Visitor system in 2004. However, this literature remains relevant for the purposes of this thesis and provides the context for considering research question two.

2.2.4 The Existence of the Academic Judgment Immunity

The academic literature to date views the existence and application of the academic judgment immunity as a legal certainty (Andoh and Jones, 2019; Birtwistle, 2000; Davies, 2004; Harris, 2013; Kaye, 1999; Palfreyman, 2010; Robertson, 2000; Sampson, 2011). As explained by Davies (2004, p. 75), 'academics in higher education institutions have been immune from legal challenge to their key professional activities'. As noted by Harris (2013, p. 161), 'no one is seriously questioning the appropriateness of this limitation'. This perspective is unsurprising. To date, every article written about the academic judgment immunity has been authored by a law academic or an academic who is legally trained. This is relevant as lawyers are trained to locate, analyse and apply the law. There is a long line of common law cases which provide that courts will not interfere in matters of academic judgment (Clark; Gopikrishna; R (Mustafa) v Office of the Independent Adjudicator [2013] 'Mustafa'; Thomson v The University of London [1864] 'Thomson'; Thorne; R. v HM Queen in Council Ex p. Vijayatunga Court of Appeal (Civil Division) [1990] 'Vijayatunga'). This position was codified in section 12(2) of the Higher Education Act 2004 which clearly states that matters of academic judgment cannot be legally determined by the OIA. Therefore, the academic judgment immunity exists as a legal doctrine and its existence is not a contentious legal issue. As noted by Kaye (1999, p. 165) 'academics have

traditionally been jealous guardians of what they have seen as their exclusive right to make academic judgments'. This has been confirmed in judicial decisions and codified into legislation resulting in the creation, and application of, the academic judgment immunity.

2.2.5 Judicial Deference to Academic Decision-Making

As noted by Davies (2004, p. 76), 'judicial deference to the sanctity of academic decision-making has long common law roots'. For centuries, courts have been consistently reluctant to interfere with internal university decisions confirming that it was the University Visitor who had the exclusive jurisdiction to resolve internal university disputes (Philips v Bury). The judicial deference to academic decision-making can be seen in numerous cases considering issues from marking plagiarised assessment tasks (Clark), poor academic performance (Moroney v Anglo European College of Chiropractic [2008] 'Moroney'), and failed examinations (Abramova). The academic judgment immunity was discussed in significant detail by the High Court of Justice in Gopikrishna, a 2015 decision where the court authoritatively stated that 'purely academic judgments have a general immunity from judicial scrutiny' (para. 143). However, the continued application of the academic judgment immunity has resulted in more questions than answers in the academic literature. Kamvounias and Varnham (2006, p. 13), question 'why, unlike other professional groups, should academic remain largely immune from judicial interference and why should universities, unlike other publicly funded statutory institutions, remain relatively free from judicial review?'. Davies (2004, p. 76) also notes that 'unlike other professional groups, academics have largely remained immune from judicial interference', hypothesising that the judicial deference shown to academic decision-making 'maybe seen as an integral part of the tradition of academic freedom'.

2.2.6 Gaps in the Literature

In considering how students challenge university decisions an important element has been missing, a substantive analysis of the definition and scope of what academic judgment actually is. Generally, where articles raise academic

judgment, the focus has been on proving that there is judicial deference shown to academic judgments, thus resulting in an immunity when students seek to challenge university decisions which are purely academic in nature. This is largely because academic judgment is not the focus of the literature to date. Rather, academic judgment is utilised as an example within a broader analysis of university decision-making and how it can be challenged. It is acknowledged that this is an important focus. In an increasingly commercialise and commodified higher education environment there should be scrutiny with respect to how university decisions can be legally challenged. There is one exception. Andoh and Jones (2019) seek to define academic judgment and distinguish it from other university decisions. The article provides a helpful overview of the current legislation with respect to academic judgment. This contributes to the existing literature because the majority of articles which discuss the academic judgment immunity were published before the Higher Education Act 2004 became law. Andoh and Jones have articulated where academic judgment fits into the legislative scope of university decision-making.

The same gap identified in the academic literature exists in the law itself. The academic judgment immunity was initially developed as a legal mechanism to ensure that decision involving academic judgment could only be determined by the exclusive jurisdiction of the Visitor thereby preventing interference by the common law courts. Over the centuries, the academic judgment immunity developed and expanded into a legal question that could be considered by common law courts and in 2004 was statutorily enshrined by section 12(2) of the Higher Education Act. However, despite the common law development of the academic judgment immunity, and the creation of a statutory academic judgment immunity, a significant gap still exists. There is no agreed upon legal definition of what constitutes an academic judgment. Therefore, defining what constitutes academic judgment, within the legal framework of higher education in England, is an original contribution of this thesis and forms the basis of research question two, discussed in chapter five.

2.3 Academic Judgment and Higher Education Research

2.3.1 Overview

Academic judgment is a core component of academic decision-making in the university context yet remains an elusive concept in higher education research. A common theme that emerges from the literature is that academic judgment is an inherent element in academic decision-making with respect to assessment but is often overlooked as a concept which requires express analysis or discussion. Academic judgment has been written about, usually in an implied way, in the context of assessment in higher education with respect to issues such as the reliability and validity of assessment (Baird, Greatorex and Bell, 2005; Baume, Yorke and Coffey, 2004; Bell, 1980; Bird and Yucel, 2013; Bloxham and Boyd, 2007; Bloxham, 2009; Collier, 1986; Dracup, 1997; George-Williams et al., 2019; Hailikari et al., 2014, Herbert, Joyce and Hassall, 2014; McConlogue, 2020; Newton, 2017; QAA, 2018; Williams and Kemp, 2019), assessment processes (Campbell, 2005; Ecclestone and Swann, 1999; Grainger, 2008; Partington, 1994; Shay, 2005; Simper, 2020), marking practices (Bloxham et al 2016; Bloxham, Boyd and Orr, 2011; Bridges et al., 2002; Dalziel, 1998; Ecclestone 2001; Hand and Clewes, 2000; O'Hagan and Wigglesworth, 2015; Orr, 2007; Sadler 2005; Yorke, 2007), and academic standards (Bloxham and Boyd, 2012; Bloxham et al., 2015; Price, 2005; Watty et al., 2014). It is within the context of assessment that academic judgment will be analysed for the purposes of this literature review.

2.3.2 Scope: Academic Judgment in Higher Education Research

No higher education literature, published to date, has specifically and holistically considered the definition and scope of an academic judgment in the assessment context. Even in journal articles where academic judgment features in the title, no definition is provided (George-Williams et al., 2019; Bretag and Mahmud, 2009). Ascertaining the scope of an academic judgment, and establishing where it exists within the assessment process, is a gap that this thesis seeks to address.

The current higher education literature tends to view academic judgment as an inherent element of academic decision-making with respect to the marking process as well as a concept that underpins discussions about accountability and quality assurance in the context of university assessment practices. Joughin (2009, p. 3) notes that 'assessment as judging achievement draws attention to the nature of assessment as the exercise of professional judgment'. Grainger et al. (2008, p. 134) explain that the 'assessment of student work undertaken by markers [is] a formal process to judge the quality of student work'. Sadler (2005, p. 175) notes that judgments about the quality of student performance are made and appropriate results allocated. Bloxham and Boyd (2012, p. 615) consider that grading practices are 'the professional judgment that [embody] our sense of academic standards'. Winter (1994, p. 93) discusses the context in which judgments are made noting that 'agreed judgments need to be transmitted between 'strangers' separated by boundaries of academic discipline' and therefore requiring explicit and precise assessment criteria as the basis for these judgments. It is therefore primarily within the assessment context that references to academic judgment are located and will form the basis for the analysis undertaken below.

It is important to clarify that the focus of this thesis is distinct from two developing bodies of literature with respect to the concept of judgment. The first being higher education literature that focuses on improving learning and developing judgment from the student perspective, often referred to as evaluative judgment (Bearman et al., 2021; Boud et al., 2018; Fitzgerald, Vaughan and Tai, 2021; Joughin 2009; Sadler, 1989). The second being the process of making judgments from the discipline of psychology. This body of literature is often referred to as the psychology of judgment or theories of judgment and focuses on characterising the psychology of judgment (Crisp, 2008; Elander and Hardman, 2002; Keren and Teigen 2004; Garry, McCool and O'Neill, 2005) with a focus on the relationship between rational and intuitive thought (Gilovich and Griffin, 2000; Hardman, 2009; Suto and Greatorex, 2008). The focus of this thesis is on academic judgments, made by an academic, which occur within the assessment context as distinct from considering the cognitive process that a marker undertakes (Brooks, 2012; Crisp, 2008).

2.3.3 Academic Judgment and the Higher Education Assessment Context

The importance of assessment cannot be overstated. It is higher education lore that assessment drives student learning (Biggs, 2003; Brown and Knight, 1994; Bryan and Clegg, 2006; Gibbs, 1992; Gibbs, 2006; Ramsden, 2003; Rowntree, 1987; Rust, O'Donovan and Price, 2005), student approaches to learning (Boud and Falchikov, 2006; Elton and Laurillard, 1979; Marton and Säljö, 1997; Nightingale and O'Neil 1994) and, from a student perspective, 'assessment defines the actual curriculum' (Ramsden, 2003, p. 182). It is acknowledged that 'the literature on assessment in higher education is now so vast that a comprehensive review of the literature would be ambitious under any circumstances' (Joughin, 2009, p. 13). As a result, this section will specifically focus on contextualising the scope of 'assessment' for the purposes of this thesis. Given the intricacy of assessment, there is no singular agreed upon definition. Academic articles which discuss assessment frequently do not provide a definition. Rather, analysis is focused on articulating what assessment is, what assessment does, what assessment could or should do, and the problems associated with assessment. When considering the process of assessment, the QAA Code of Practice defines assessment as 'any processes that appraise an individual's knowledge, understanding, abilities or skills' (QAA, 2006, p. 4). According to Brown and Knight (1994), assessment is the process by which assessors make inferences about the learning development accomplished by students and gain information for improving teaching and learning strategies. Sadler (2005, p. 177) defines assessment as the 'process of forming a judgment about the quality and extent of student achievement or performance and therefore by inference a judgment about the learning that has taken place'. Grainger, Purnell and Zipf (2008, p. 134) note that assessment refers to the 'assessment of student work undertaken by markers as a formal process to judge quality of student work'. This classification brings 'assessment' within the scope of 'assessment of learning', as distinct from assessment for learning and assessment as learning. As explained by Bloxham and Boyd (2007, p. 15), assessment of learning 'involves making judgments about students' summative achievements for purposes of selection and certification, and it also acts as a focus for institutional accountability and quality assurance'.

As the aim of this thesis is to complete a doctrinal analysis of the academic judgment immunity within higher education, it is important to acknowledge that this thesis considers 'assessment' within the context of academic judgment. As explained in Chapter Four, academic judgment exists in the university context as an inherent element of the academic decision-making process with respect to assessment and the marking process. As a result, this is the specific assessment context that forms the basis for this literature review, and is analysed below. This, however, is just one lens through which to view and consider assessment. Recent assessment literature is diverse in scope and has focused on themes around feedback literacy from both the learner and the educator perspectives (Arts, Jaspers and Joosten-ten Brinke, 2021; Carless and Winstone, 2020; Harris, Blundell-Birtill and Pownall, 2023; McCallum and Milner, 2021; Molloy, Boud and Henderson, 2020; Stein et al., 2021; Voelke, Varga-Atkins and Mello, 2020; Winstone et al., 2017; Winstone, Balloo and Carless, 2022), the benefits and challenges of online assessment (Bearman and Luckin, 2020; Bearman, Nieminen and Ajjwai, 2023; Bennett et al., 2017; Bretag et al., 2019; Dawson, 2016; Dawson, 2021; Ellis and Han, 2020; Huber et al., 2023; Kung 2022; Parkinson et al., 2022; Sefcik, Striepe and Yorke, 2020; Selwyn et al., 2023; Slack and Priestley, 2023; Steel et al., 2019), authentic assessment (Ajjwai et al., 2020; McArthur, 2023; Nieminen, Bearman and Ajjwai, 2023; Nurmikko-Fuller and Hart, 2020; Schultz et al., 2022; Sokhanvar, Salehi and Sokhanvar, 2021; Tepper, Bishop and Forrest, 2020; Way et al., 2021; Villarroel et al., 2018;) and gradeless learning (Blum, 2020; Golding, 2019; Kjærgaard et al., 2023; McMorran and Ragupathi, 2020; Rapchak, Hands and Hensley, 2023; Stommel 2020). Within the broader concept of academic judgment, authentic assessment and gradeless learning raise interesting questions and provide scope for future research.

Recent literature published in the area of authentic assessment considers a range of issues including how authentic assessment intersects with the digital world (Nieminen, Bearman and Ajjwai, 2023; Tepper, Bishop and Forrest, 2020). McArthur (2023) proposes three principles on which the idea of authentic assessment can re-considered. Way et al. (2021) empirically test the relationship between the elements of authentic assessment and student outcomes in the context of online learning environments. Schultz et al. (2022) consider how to

design, define and measure authentic assessment the relationship between constructive alignment and authentic assessment analysed (Ajjwai et al., 2020; Nurmikko-Fuller and Hart, 2020). Numerous articles have also sought to define what is meant by the term ‘authentic assessment’ (Gulikers et al., 2004; Herrington and Herrington, 1998; Reeves and Okey, 1996; Resnick and Resnick, 1992; Villarroel et al., 2018; Vu and Dall’Alba, 2014; Wiggins 1990) with a recent systematic review of the literature conducted by Villarroel et al. (2018) identifying thirteen consistent characteristics of authentic assessment beginning with Archbald and Newmann (1988) who first utilised the term ‘authentic’ in the assessment and learning context when discussing ‘authentic performance’. McArthur (2023) provides a history of authentic assessment, which outlines key developments and debates, and helpfully provides a context against which to read the systematic analysis of Villarroel et al. Consistent characteristics of authentic assessment, identified by Villarroel et al. (2018), include the ‘ability to problem solve’ (Elliot and Higgins, 2005; Newmann, King and Carmichael, 2007; Wu et al., 2015), ‘decision-making’ (Newman et al., 2001; Ohaja et al., 2013), relevance in assessment ‘which have worth beyond the classroom’ (Wiggins and Mc Tighe, 2006; Saye, 2013) and that assessment criteria should be transparent and known in advance (Swan and Hofer, 2013; Wiggins, 1990). This systematic analysis led Villarroel et al. (2018, p. 845) to ‘distinguish three dimensions that represent the essence of authentic assessment’, realism, cognitive challenge and evaluative judgment.

Drawing on the current literature, Ajjwai et al. (2020) identify four dimensions of authentic assessment. Authentic assessment should ‘reflect actual practices of a profession within or in similar physical or social context of that profession’ (Bosco and Ferns, 2014; Gulikers et al., 2004; Swan and Hofer, 2013;), be cognitively challenging (Ashford - Rowe et al., 2014; Elliott and Higgins, 2005; Villarroel et al., 2018), encourage reflexivity (Field, Duffy and Huggins, 2013; Lingard et al., 2003) and, provide the opportunity and capabilities for students to evaluate the quality of their own work (Tai et al., 2018). As ‘authenticity is a vexing concept’ which ‘promises so much and yet is so easily devalued’ (McArthur 2023, p. 91), the realism dimension raises interesting questions with respect to assessment design and implementation. According to Villarroel et al. (2018, p. 845), realism

comes in two forms - in the ‘presence of a real context that describes and delivers a frame for the problem to be solved’ (Bosco and Ferns, 2014) and, as a task to be solved that is ‘similar to what is faced in real and/or professional life’ (Saye, 2013). The ‘real context’ is present when students are required problem solve situations or questions that arise from real and/or professional life (Ashford et al., 2014; Swan and Hofer, 2013; Wiggins and McTighe, 2006;). For performance based tasks, students are ‘required to produce or demonstrate knowledge and skills in activities close to the profession’ (Ajjwai et al., 2020). This could include proxy-based ‘real-world’ assessment tasks including examinations, case analyses, problem solve and extensive essay questions (Villarroel et al., 2018, p. 845). The current discourse around what is encapsulated by the term ‘authentic assessment’ also raises issues around the actual implementation of authentic assessment tasks. As discovered by Schultz et al (2022, p. 79), as academics ‘tasked with implementing authentic assessment will use the term according to their own understanding and with reference to their own specific discipline, this leads to inherent difficulties in achieving consistency within institutions, faculties and even individual discipline departments’. This lack of consistency, in terms of understanding, assessment design and implementation, provides another interesting case study from which to consider research question three when future research is undertaken.

There is also an emerging body of literature referred to as ‘gradeless learning’ (Golding, 2019; Kjærgaard, Buhl-Wiggers and Mikkelsen, 2023; McMorran and Ragupathi, 2020) or ‘ungrading’ (Blum, 2020; Ferns, Hickey and Williams, 2021; Gorichanaz, 2022; Kehlenbach, 2023; Rapchak, Hands and Hensley, 2023; Stommel, 2020;). As explained by Rapchak, Hands and Hensley (2023), ‘ungrading or gradeless approaches are methods of shifting focus from traditional grading systems to more student and learning centered ways of evaluating student performance’. Ferns, Hickey and Williams (2021, p. 4500) note that the process of ungrading replaces letter grade or marks with ‘formative feedback provided through strategies such as individual feedback, peer review and self-assessment’. Kjærgaard, Buhl-Wiggers and Mikkelsen (2023) adopt the term ‘gradeless learning to refer to replacing traditional numerical or letter-based grades with pass/fail assessment and feedback’. Kehlenbach (2023, p. 397)

describes ungrading as a ‘pedagogical structure that adopts a radical, nonhierarchical approach’. Characteristics of ungrading include an emphasis on feedback, a focus on competence, self-paced, the opportunity for students to re-submit work and a supportive learning community (Ferns, Hickey and Williams 2021, p. 4501). Davidson (2015, para. 1) views ungrading as instigating the ‘greatest possible student success, creativity, individuality, and achievement, rather than a more traditional hierarchies organized around a priori standards of selectivity, credentialing, standardization, ranking and the status quo’.

Ungrading has been considered in several studies. Gorichanaz (2022) undertook an interpretative phenomenological analysis study of students’ experiences with ungrading. Taylor (2022, p. 79), in the context of the pandemic and pedagogy experimentation, considered how ‘ungrading can help reduce cognitive and structural barriers to learning, including those that arise from persistent inequalities in social, economic and educational systems’. Kjærgaard, Buhl-Wiggers and Mikkelsen (2023) investigated whether gradeless learning affect students’ academic performance over time. Kehlenbach (2023) used qualitative student reflections from three courses, which utilised ungrading, to conduct a comprehensive reflection on the pedagogy of ungrading. Renesse and Wegner (2023) discuss their experiences of ungrading within the discipline of mathematics, in both a small public university in the United States and a large public university in Germany. Kalbarcyzk et al. (2023) explore the implications of implementing ungrading in two graduate-level global health courses. The emerging literature appears to suggest is that students generally react positively to ungrading (Kalbarczyk et al., 2023; Kehlenbach, 2023; Rapchak, Hands and Hensley, 2023; Renesse and Wegner, 2023). Students feel encouraged to focus on their learning and to take risks. Students also noted a reduction of stress and an increase in well-being (Kalbarczyk et al., 2023; Kehlenbach 2023; Mc Morran et al., 2017; McMorran and Ragupathi, 2020; Rapchak, Hands and Hensley, 2023). However, as analysed by McMorran and Ragupathi (2020), there are both ‘promises and pitfalls’ to gradeless learning. In their study, which received over 3000 responses from students and nearly 500 responses from faculty at the National University of Singapore, McMorran and Ragupathi noted that students were more supportive of gradeless learning than faulty. However, when asked

‘what is the most problematic thing about the gradeless first semester’?, the most common response from both students and faculty was ‘a negative impact on student attitudes and behaviours towards learning’ (p. 930). This raises interesting questions about the impact of gradeless learning on academic performance. As explained by Kjærgaard, Buhl-Wiggers and Mikkelsen (2023, p. 2) in their study on gradeless learning and academic performance, ‘universities looking to institute gradeless learning need to be aware of the negative as well as the positive effects on a broader set of outcomes, including academic performance’. The emerging literature with respect to ungrading, while outside the scope of this thesis, provides a fascinating future context from which to consider the academic judgment immunity and the assessment process.

As the aim of this thesis is to complete a doctrinal analysis of the academic judgment immunity within higher education, it is important to acknowledge that this thesis considers ‘assessment’ within the context of academic judgment. What is evident from the higher education literature analysed below, is that academic judgment is embedded in two specific assessment contexts. The first context is as an inherent element of academic decision-making with respect to the assessment process. In this context, ‘assessment’ is defined as a ‘process’ by which a ‘judgment’ is formed, with respect to the ‘learning’ that has (or has not) occurred. It is this specific definition of assessment that correlates to the concept of academic judgment and contextualises ‘assessment’ for the purposes of this thesis. As a result, the majority of literature relevant to this thesis was published between 2000 - 2016, with only a handful of articles published post-2016. This is not unexpected. Academic judgment, as a concept, appears to underpin higher education literature focused on the marking process as well as quality assurance in the context of university assessment practices. Given key events which occurred in the English Higher Education System, including the establishment of the QAA and the implementation of subsequent regulatory frameworks, it is consistent that there was a heightened focus in higher education research on what the QAA’s agenda of greater transparency in assessment and of assessment standards would mean for the higher education sector. The second context in which academic judgment is embedded is in the assessment of learning from a broader quality assurance perspective with respect to two

fundamental principles of assessment: validity and reliability. As articulated in the Revised UK Quality Code for Higher Education, it is a 'core practice' that universities 'use assessment and classification processes that are reliable, fair and transparent' (QAA, 2018A, p. 3). This core practice is further explained in the UK Quality Code for Higher Education, Advice and Guidance: Assessment where the QAA notes that 'deliberate systematic quality assurance ensures that assessment processes, standards and other criteria are applied consistently and equitably with reliability, validity and fairness' (QAA, 2018B, p. 2). From the perspective of the QAA, what does a valid and reliable assessment process entail? Assessment is reliable, where 'markers acting independently of each other but using the same assessment criteria would reach the same judgment on a piece of work' (QAA, 2011, p. 5). 'Assessment is understood to be valid when it is testing precisely what the examiners want to test, bearing in mind the learning outcomes for the module' (QAA, 2011, p. 5). Both of these contexts will be analysed below.

2.3.4 Accountability, Assessment and Academic Judgment

Academic judgment, as a concept, appears to underpin discussions around accountability and quality assurance in the context of university assessment practices. The QAA Code of Practice requirements have seen a move towards assessment policies, regulations and processes that are explicit and transparent. This has been achieved through the implementation of explicit learning outcomes, constructive alignment, criteria-based marking, benchmark statements, and structured feedback on students' work (Grainger, Purnell and Zipf, 2008; McConlogue 2020; Price 2005). As a result, 'professional judgment of the "I know good work when I see it kind" has been overturned not least because of the current environment of accountability and quality assurance' (Grainger, Purnell and Zipf, 2008, p. 134). Universities are now 'expected to provide details of assessment standards; for example, module and program assessment criteria, rubrics and level descriptors' (McConlogue 2020, p. 85). In addition, 'external examining is [a] widespread, often mandatory, key tool in assuring assessment standards in undergraduate education (Bloxham et al., 2015, p. 1071). As noted by Sadler (2009, p. 159), 'each scheme is designed to

offer clear benefits for students. Breaking down holistic judgments into more manageable parts is seen as a way to increase openness for students and achieve more objectivity in grading'. According to Price (2005, p. 215), 'for students such transparency is seen as bringing new and real benefits for their learning but for academics merely the recording of commonly held views of assessment standards'. It would appear that the move towards utilising validating practices, and the focus on transparency, attempts to minimise the overall impact of an individual academic judgment made in the context of assessment. As explained by Partington (1994, p. 57), 'mark differences of 8 or 9 marks out of 25 or even greater in essay marking are common'. This conclusion is supported by the research conducted by Read, Francis and Robson (2005), where 50 assessors, from different universities, marked two different history essays. In this study, six different degree classifications ranging from fail through to upper second were awarded. As well as research conducted by Bloxham et al. (2016) where 24 experiences assessors, from four divergent disciplines, were recruited from 20 UK universities. In this study 'only 1 of the 20 pieces [of assessment] was assigned the same rank by all six assessors in any of the disciplines. Further, 'nine of the twenty assignments were ranked both best and worst by different assessors' (Bloxham et al., 2016, p. 468).

Despite the increasing levels of accountability and the perception that assessment and marking practices are a highly regulated process, 'in the UK, assessment practices have consistently been one of the weakest features identified by the QAA in subject reviews across the disciplines' (Rust, O'Donovan and Price, 2005, p. 231). The academic literature has continually sought to ascertain why issues continue to arise with respect to the assessment process. As explained by Bloxham, Boyd and Orr (2011, p. 655), 'assessment in higher education involves decentralised, subject-specific decision-making processes, given credence in the UK by processes of quality assurance involving national agencies and review systems, external examining and local moderation' which creates challenges around consistency, validity, and reliability. Of specific relevance to this thesis is higher education research literature which has analysed issues with respect to the fallibility of academic judgment.

2.3.5 Academic Judgment and the Marking Process

Marking has historically been regarded as an opaque process and '… until quite recently it seemed quite acceptable, in higher education at least, to leave the nature of this process as a tacit, almost private affair' (Winter 1994, p. 92). It was not uncommon to hear the claim ' I know a 2:1 when I see it', which according to Ecclestone (2001, p. 305), 'is both the articulation of an ability to arrive almost intuitively at accurate judgments without mechanically following a set of criteria and a professional claim for expert status'. 'Control of teaching, the syllabus and assessment were seen as the remit of the individual academic with no obligation to account for, or even discuss, these with others' (Price, 2005, p. 218). However, with the inception of the QAA came the era of transparency and fairness. Marking currently exists within the broader paradigm of accountability where explicit learning outcomes, constructive alignment, rubrics, marking schemes and criteria-based marking seek to create a 'reliable, consistent, fair and valid' process (QAA, 2018, p. 4). Despite this, the academic literature has continued to find issues of reliability and variability with respect to the marking process, primarily in areas where academic judgment occurs (Baird, Greatorex and Bell, 2005; Baume, Yorke and Coffey, 2004; Bell, 1980; Bird and Yucel, 2013; Bloxham and Boyd, 2007; Bloxham, 2009; Collier, 1986; Dracup, 1997; George-Williams et al., 2019; Hailikari et al., 2014, Herbert, Joyce and Hassall, 2014; McConlogue, 2020; Newstead and Dennis, 1994; Newton, 2017; O'Hagan and Wigglesworth, 2015; QAA, 2018; Read, Francis and Robson, 2005; Williams and Kemp, 2019).

Variability has been attributed to differing level of professional knowledge and experience between markers (Read, Francis and Robson, 2005), the numerous challenges of using of assessment criteria (Baume, Yorke and Coffey, 2004; Ecclestone, 2001; Orrell, 2008; Smith and Coombe, 2006; Webster, Pepper and Jenkins, 2000), and the intuitive nature of the marking process (Ecclestone, 2001; Smith and Coombe, 2006). Issues of reliability have been raised with respect to the type of learning being measured (Eisner, 1985; Elton and Johnston, 2002; Knight, 2006), the connection between assessment criteria, and the final mark awarded to a student (Price, 2005) and the individual markers approach to

interpreting standards (Ecclestone, 2001). The focus of this literature review is to consider specific areas of the marking process where issues of academic judgment have arisen, and potential solutions proposed, in an attempt to ensure a fairer and more transparent assessment process.

As 'the basis for reliability lies with the application of agreed assessment standards' (Price, 2005, p. 217), there have been attempts through the implementation of external Subject Benchmark Statements, Qualifications Frameworks and the Quality Code by the QAA to attain a level of consistency. As a result, assessment is one of the most highly regulated activities within a university. With this internal and external regulation comes the assumption that there is a homogeneity in the marking process and that the results produced are reliable. However, this is not always the case. There have been several studies that have determined that a significant variation in marks arises where standards are applied by multiple markers (George-Williams et al., 2019; Kuisma, 1999; Laming, 1990; Newstead and Dennis, 1994; Saunders, 1998; Read, Francis and Robson, 2005). As explained by McConlogue (2020, p. 91), 'written descriptions of standards are notoriously difficult to interpret; the language used in criteria such as: argument, 'structured; and 'critically can be interpreted differently be different markers'. Further, research shows that markers may ignore or choose not to utilise the prescribed standards (Eccelestone, 2001; Price and Rust, 1999; Smith and Coombe, 2006) or apply implicit standards (Baume, Yorke and Coffey, 2004; Hunter and Docherty, 2011; Price, 2005; Read, Francis and Robson, 2005). As explained by Ecclestone (2001, p. 305), markers become 'more intuitive and less deliberative and are unable to articulate the tacit knowledge on which much of their decision-making has come to depend'. Higgins et al. (2002, p. 56) point out that teachers 'struggle to articulate exactly what they are looking for [in a good performance] because conceptions of quality usually take the form of tacit knowledge', 'we know more than we can tell' (Polanyi, 1998, p. 136). As markers are utilising locally constructed (Knight, 2006) and tacit standards to make their decisions it is unsurprising that numerous studies have established a significant discrepancy between markers in their understanding and application of assessment criteria and the grades they accord to assignments (Baume, Yorke and Coffey, 2004; Norton, 2004; Price, 2005). Further, Hawe (2003, p. 374)

identified that there was an overarching reluctance for markers to award a fail noting that despite numerous university policies and procedures to the contrary, ‘departments, course teams and individual lecturers made arrangements to receive and mark work well after units had ended’.

In order to attempt to address the issues raised with respect to academic judgment, the marking process and the application of standards, the literature has developed, analysed, and evaluated a range of processes and procedures including the use of marking guides, grade descriptors and annotated exemplars (Bell, Mladenvoic and Price, 2013), double marking of students work (Dracup, 1997; Partington, 1994;), model answers (Baird, Greatorex and Bell, 2004; Peeters, Schmude and Steinmiller, 2014), providing detailed assessment criteria (Bloxham, Boyd and Orr, 2011; Bloxham et al., 2016; Ecclestone and Swann 1999; Hunter and Docherty, 2011; Rust, O’Donovan and Price, 2005), involving external examiners in changes to assessment (Bloxham et al., 2015; Ecclestone and Swann, 1999; Medland, 2015), moderation procedures (Bird and Yucel, 2013; Ecclestone, 2001; Orr, 2007; Watty et al., 2014), utilising portfolios (Baume, Yorke and Coffey, 2004), establishing communities of practice (Grainger, Purnell and Zipf, 2008; Herbert, Joyce and Hassall, 2014; Price, 2005;), ensuring constructive alignment occurs (Biggs, 1996; Rust, O’Donovan and Price, 2005), the creation of rubrics (Bloxham and Boyd, 2007; Campbell, 2005; Williams and Kemp, 2019) and utilising criteria-based assessment (Sadler, 2005). However, despite the ‘massive increase in quality procedures designed to ensure robust practices’ (Bloxham and Boyd, 2007), the research results depict some positive outcomes but fundamentally continues to reveal the intrinsic imperfections of the marking process.

The development and use of the ‘marking rubric’ provides an interesting case study when considering academic judgment and the marking process. As exclaimed by Popham in 1997, (p. 72), ‘rubrics are all the rage these days. It’s difficult to attend an educational conference without running into relentless support for the educational payoffs of rubrics’. Dawson notes that in the last two decades, there has been a ‘proliferation of research and writing around rubrics’, with the 5000th paper mentioning assessment rubrics being published in 2013

(2017, p. 348). In their 2020 critical review of rubrics, Panadero and Jonsson (2020, p. 1) re-affirm that 'rubrics and the use of rubrics [are] one of the "hottest" research topics in education and education psychology'. The current research on rubrics has followed two over-arching themes. A summative approach, with a focus on inter-rater and intra-rater reliability and a formative approach, which considers how rubrics can be utilised to enhance student's learning and self-management skills by promoting self-reflection (Andrade and Valtcheva, 2009; Brookhart and Chen, 2015; Jonsson and Svingby, 2007; Panadero and Jonsson, 2013; Panadero and Jonsson 2020; Postmes, Haslam and Jans, 2013; Sadler and Good, 2006; Stellmack et al., 2009). As rubrics are frequently utilised where the 'constructed response being judged is fairly significant' (Popham, 1997, p. 72), the research conducted on the summative approach is of specific interest. As noted by Sadler (2009), 'the use of criteria is designed to make the 'processes and judgments of assessment more transparent… and to reduce the arbitrariness of staff decisions'. This is reiterated by Chakraborty et al. (2021, p. 1) who explain that 'in order to reduce the marking variation and increase reliability and validity, rubrics were introduced'. It would appear that 'from the bulk of empirical research, we know that the use of rubrics can have significant and positive effects on students' learning, academic performance and self-regulation' (Panadero and Jonsson 2020), however this is contingent on the design of the rubric and the implementation of the rubric (Brookhart and Chen, 2015; Panadero and Jonsson, 2013).

The creation or existence of a rubric as part of the marking process raises interesting academic judgment questions, as there is an inherent assumption that where criteria is explicitly stated it reduces the 'potential for inconsistency of marking practice or perceived lack of fairness' (QAA, 2006, p. 8). In theory, rubrics are designed to assist 'assessors in judging the quality of student performance' (Panadero and Jonsson, 2020) by containing 'criteria appropriate to an assessment's purpose [and a description of the criteria] across a continuum of performance levels' (Brookhart, 2018). However, as noted by Price and Rust (1999, p. 143), one of the fundamental issues with using criteria and grade descriptors is interpretation. Bloxham (2009) shares a similar view explaining that 'the issue of variation in tutors' marking applies particularly to the interpretation

of assessment criteria and marking standards'. 'Even the most carefully drafted criteria have to be translated into concrete and situation specific terms' (Knight and Yorke 2003, p. 23) resulting in different expectations of the standards of quality required at various levels, potentially resulting in a disagreement over the marks awarded (Baume, Yorke and Coffey, 2004; Grainger, Purnell and Zipf, 2008; Hand and Clewes, 2000). Even where markers agreed on the criteria against which an assessment task is marked, they may not be cohesive agreement on 'how well the various criteria have been achieved' (Grainger, Purnell and Zipf, 2008, p. 134). The discrepancies identified in the higher education literature provide the basis from which Chapter Six will consider research question three, is the assessment process immune from legal challenge?

2.3.6 Gaps in the Literature

Despite academic judgment being a core component of academic decision-making, explaining what academic judgment is and how and where it occurs has remained an elusive concept in the literature. No academic literature has been published to date which holistically considers the definition, scope and context of an academic judgment in the university context. Baume, Yorke and Coffey (2004, p. 451) note that 'the complex and problematic nature of assessment has been addressed extensively [however] the actual process of assessment has received rather less research attention'. Bloxham and Boyd (2007, p. 81) share a similar view explaining that 'the assessment literature has not examined the process of marking in depth'. This is a gap that this thesis seeks to address through research question one by undertaking a comprehensive analysis of where academic judgment resides in the university context in chapter four.

2.4 Chapter Conclusion

Chapter two began by acknowledging the inherent problem with undertaking a literature review with respect to academic judgment in legal scholarship and higher education research. Within both disciplines, literature which expressly

focused on the concept of academic judgment was limited. It was therefore necessary to begin by considering the broader context within which the concept of academic judgment resided. From here, specific legal literature was considered with two specific themes emerging. Academic literature confirming the existence of the academic judgment immunity as a legal certainty and, the on-going judicial deference to academic decision-making. In the higher education research context, it was ascertained that although academic judgment is a core component of academic decision-making in the university context, it remains an intrinsic concept. Academic judgment, as a concept, underpins decisions around accountability and quality assurance with respect to assessment practices, but not in an explicit way and not in a way that any scholar has expressly sought to define or analyse. It is these common themes and gaps in the literature that form the basis for the three research questions considered by this thesis.

Chapter 3: Research Design and Methodology

3.1 Introduction

As astutely noted by Chynoweth (2008, p. 28), 'legal researchers have always struggled to explain the nature of their activities to colleagues in other disciplines'. It is therefore important to clearly articulate the method and methodology of this thesis to validate doctrinal research as the appropriate research strategy. Doctrinal legal research is fundamentally concerned with the formulation of legal doctrines through the analysis of legal rules. The doctrinal approach has been chosen as academic judgment is a legal doctrine, developed by the judiciary and codified by parliament. To answer research question two, a comprehensive legal analysis of the academic judgment immunity will be undertaken in chapter five, applying the doctrinal methodology explained in this chapter. What is important to emphasise about the doctrinal research methodology is that it is more than objectively establishing what the law is. The researcher must engage in a process of 'selecting and weighing materials, taking into account hierarchy and authority, as well as understanding social context and interpretation' (Dobinson and Johns, 2017, p. 24). This is where the discipline of higher education research is important as the law does not exist in an 'objective doctrinal vacuum' (Singhal and Malik, 2012, p. 253). To avoid a highly theoretical thesis, with limited practical application, understanding the higher education context in which the concept of academic judgment is applied is paramount. The outcomes of research question one, establishing where academic judgment resides in the university context, will provide 'a range of real-world factual circumstances' (Dobinson and Johns, 2017, p. 24) where the outcomes of research question two will be applied, in order to address research question three. Chapter three begins by explaining doctrinal legal research in section 3.2. Section 3.3 identifies the relevant law and section 3.4 undertakes an interpretation and analysis of the relevant law. Application of the relevant law is discussed in section 3.5, with the limits of doctrinal legal research discussed in section 3.6. Section 3.7 provides the chapter conclusion.

3.2 Doctrinal Legal Research

3.2.1 Overview

Salter and Mason (2007, p. 49) define doctrinal research as 'a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine'. Hutchinson (2018, p. 51), one of the leading commentators on doctrinal research, notes that 'the doctrinal method is a two-part process because it involves both finding the law, and interpreting the document or text. Vick (2004, p. 178) states that doctrinal research 'treats the law and legal systems as distinctive social institutions and is characterized by a fairly unique method of reasoning and analysis'. Doctrinal legal research is fundamentally concerned with the formulation of legal doctrines through the analysis of legal rules. It can be articulated as a three-step process:

1. Identification of the relevant law;
2. Interpretation and analysis of the relevant law; and
3. Application of the relevant law.

Before legal rules can be analysed, it is first necessary to establish that the concept of academic judgment can be defined as legal doctrine.

3.2.2 Academic Judgment as Legal Doctrine

Etymologically, 'the word doctrine is derived from the Latin noun *doctrina* which means instruction, knowledge or learning' (Hutchinson and Duncan, 2012, p. 84). Historically the law was passed down, from lawyer to lawyer, as a set of doctrine which consisted of legal principles based on judicial determinations known as the common law. As the law evolved so did legal doctrines to encapsulate cases, principles, legal concepts, statutes, interpretive guidelines, values, norms and rules (Mann, 2010, p. 197). Not all legal rules are considered legal doctrines. Hutchinson provides a useful definition to assist in determining whether a legal rule constitutes a doctrine: 'legal rules take on the quality of being doctrinal

because they are not just casual or convenient norms, but because they are meant to be rules which apply consistently and which evolve organically and slowly' (Hutchinson and Duncan, 2012, p. 84). The academic judgment immunity is an example of what Hutchinson is describing. Evolving from a factual concept about academic decision-making, into a legal doctrine consistently used to justify why English courts will not hear matters which pertain to academic judgment and, subsequently codified into legislation by parliament.

As noted by Davies (2004, p. 76), 'judicial deference to the sanctity of academic decision-making has long common law roots'. For centuries, courts have been consistently reluctant to interfere with internal university decisions confirming that it was the University Visitor who had the exclusive jurisdiction to resolve internal university disputes (Philips v Bury (1694)). What is now referred to as the 'academic judgment immunity', a firmly established legal doctrine, initially arose from students challenging the marking of examination papers which can first be seen in the case of *Thomson*. What is interesting to note in the case of *Thomson*, and subsequent cases, is that the legal issue contested was whether the court had the power to hear an internal university dispute (Glynn v Keele University [1970]; Patel v University of Bradford Senate [1978]; Rex v Dunsheath ex Parte Meredith [1951]; Thomas v University of Bradford [1987]; Thorne; Vijayatunga). However, what developed alongside the issue of jurisdiction, was the academic judgment immunity. Courts would make clear that they did not have the requisite jurisdiction to hear the matter, which was legally correct, but were also at pains to note that it was not the purview of the court to interfere with internal academic decision-making. The judicial deference to academic decision-making continued through numerous cases considering issues from marking plagiarised assessment tasks, poor academic performance and failed examinations. The academic judgment immunity was discussed in significant detail by the High Court of Justice in Gopikrishna, a 2015 decision where the court authoritatively stated that 'purely academic judgments have a general immunity from judicial scrutiny ' (para. 143). This line of common law authorities demonstrates that the academic judgment immunity has developed over centuries from a legal rule into a legal doctrine consistently applied by the judiciary.

3.3 Identification of Relevant Law

3.3.1 Overview

As doctrinal research ‘constitutes the core methodology within the legal research paradigm’ (Hutchinson, 2018, p. 67), the process begins by asking ‘what is the law’ (Dobinson and Johns, 2017, p. 21). As articulated by Hutchinson (2015, p. 130), ‘the essential feature of doctrinal scholarship involves a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation’. Dobinson and Johns (2017, p. 25) and Hutchinson (2015, p. 112) have postulated that the identification of relevant legislation, cases and secondary materials in the doctrinal research methodology can be see an analogous to a social science literature review. To be able to accurately state what the law is with respect to academic judgment, this thesis must locate and analyse key primary sources, extrinsic materials and secondary sources. The objective of the researcher, in applying the doctrinal research framework, ‘will always be to base any statement about what the law is on primary authority: that is, either legislation or case law’ (Dobinson and Johns, 2017, p. 26). This requires the researcher to utilise a range of methods to ensure appropriate data collection. It is important to note that doctrinal research is more than simply locating the law. The researcher, in asking what is the law with respect to academic judgment, must engage in a ‘thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statues and other primary sources’ (Vick, 2004, p. 178). Before analysing the law relevant to this thesis, it is important to acknowledge that parliament, as the sovereign law maker, has legislated the meaning of what constitutes a ‘qualifying complaint’ for the purposes of section 12 of the Higher Education Act 2004 and chose to specifically exclude ‘academic judgment’ from that definition. This thesis accepts that parliament has the power to create and pass such legislation. This thesis also accepts that as the supreme law maker in England, it is always open to parliament to change the definition and choose to define ‘academic judgment’. Were parliament to legislate the meaning, it would likely do so consistently with the academic judgment immunity doctrine developed by the common law.

Therefore, a comprehensive analysis of the common law, to determine how the courts have defined academic judgment, is an original contribution to knowledge provided by this thesis.

3.3.2 Identifying and Classifying Relevant Legislation

Statues, and subordinate legislation made under them, are the most abundant source of legal rules in the United Kingdom (Cross et al., 1995, p. 1). A 2019 House of Commons Library Briefing Paper notes that there have been approximately 4,200 Acts passed from 1950 to 2019 (Chris Watson Briefing Paper CBP 7438, 4 November 2019 Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019, p. 4). Accordingly, the majority of legal issues can only be resolved with reference to relevant legislation. The research questions posed by this thesis are no different. Partington (2012, p. 37) classifies legislation as primary, secondary and tertiary. Primary legislation comprises the legislation that is passed by Parliament. In the context of this thesis, the relevant primary legislation is Higher Education Act 2004, which in its definition of ‘qualifying complaint’ expressly excludes ‘academic judgment’, without providing a definition of what constitutes academic judgment. To define academic judgment, the next step is to consider whether any secondary or tertiary legislation has provided a definition. Secondary legislation, also known as 'delegated' or ‘subordinate’ legislation, is law usually created by a minister or body (other than parliament) utilising the powers given to them by an Act. Delegated legislation often takes the form of a statutory instrument which requires parliamentary oversight to ultimately approve or reject the statutory instrument. Parliament, with respect to the Higher Education Act, empowered the Secretary of State under section 13 to designate an independent body [currently the OIA] to operate a student complaints scheme. Under section 14, the designated operator is obliged to comply with the duties set out in Schedule 3. Therefore, in line with its statutory obligations, the OIA formulated a complaints scheme, the ‘OIA Scheme Rules’. However, these rules cannot be classified as secondary, or delegated legislation, as parliament did not require these rules to take the form of a statutory instrument. It is therefore more appropriate to classify the OIA Scheme Rules as tertiary legislation. A legislative

instrument, made under the authority of an Act of Parliament, but which is not subject to the scrutiny of parliament (Partington, 2012, p. 36).

3.3.3 Identifying Relevant Cases

The common law in England dates back to the 12th century. Some branches of English law are 'almost entirely the product of the decisions of judges whose reasoned judgments have been reported in various types of law report for close to 700 years' (Cross and Harris, 1991, p. 4). Simply typing 'academic judgment' or 'academic judgment' into the ICLR legal database brings up over 8,000 cases. The same search replicated on Lexis Advance Research brings up over 10,000 cases. It is therefore responsibility of the doctrinal researcher to engage in a process of 'selecting and weighing materials, taking into account hierarchy and authority as well as understanding social context and interpretation' (Dobinson and Johns, 2017, p. 24) to determine which cases are relevant to answering the research questions posed in this thesis. There is no concrete formula for determining the relevance of a case, this is the responsibility of the researcher. Relevance is fundamentally determined by what is being sought. Factors can include the material facts of a case, where the court sits in the jurisdictional hierarchy, the judicial reasoning provided by the court, and the final outcome. At this stage, 76 cases have been identified as being potentially relevant based solely on the material facts of the case. Each case raises academic judgment in some way. However, it is important to understand that this is just the preliminary identification. Simply raising the subject matter of academic judgment is not enough to constitute relevance for the purposes of this thesis. A further analysis will be conducted in step 2 to ascertain relevance.

3.4 Interpretation and Analysis of Relevant Law

3.4.1 Overview

As doctrinal research is qualitative, this recognises that 'the law is reasoned and not found' (Dobinson and Johns, 2017, p. 25). Therefore, once the relevant law

has been identified the next step involves analysis and interpretation of the located law. Hutchinson has asked whether is it possible to plan and describe this aspect of the doctrinal research methodology in an intelligible way for an 'outsider'. Samuel (2009) has queried whether the process of legal reasoning can actually be 'demystified'. Vick (2004, p. 179) notes that 'some have dismissed doctrinal research as being merely descriptive or expository, or about the dry, mechanical application of rules'. However, as explained by Vick (2004, p. 179), doctrinal research requires the 'sophistication of interpretative tools that have been developed and the critical techniques applied in doctrinal analysis'. As noted by Chynoweth (2008, p. 29),

> deciding on which rules to apply to a particular situation is made easier by the existence of legal doctrines. These are systematic formulations of the law in particular contexts. They clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules.

With respect to legislation, the relevant method is statutory interpretation.

3.4.2 Statutory Interpretation

The method of statutory interpretation evolved as 'it seldom happens that the framer of an Act of Parliament has in contemplation all the cases that are likely to arise under it, therefore the language used seldom fits every possible case' (Scott v Legg 23 Nov 1876). When interpreting legislation, the aim is to arrive at the legal meaning of the relevant provision. In the context of this thesis, there will be significant focus on section 12(2) of the Higher Education Act 2004. Section 12(2) stipulates what constitutes a 'qualifying complaint', and expressly excludes 'matters of an academic judgment'. Parliament, in creating the Higher Education Act did not provide a definition of what 'academic judgment' actually encompasses. This conscious omission forms basis of research question two. In order to arrive at a legal meaning, the statutory interpretation framework notes that the researcher must be cognisant of legislative intention, context and purpose. Extrinsic materials are documents which can be used to assist in the

interpretation of legislation, but do not form part of the Act. ‘In order to understand a statute fully the words must be construed in light of the legal, social and political context at the time at which it was passed’ (Re Hawthorne’s Application for Judicial Review [2018], para. 64). These documents include second reading speeches and parliamentary debates. The interpretation and analysis of the Higher Education Act 2004 will occur in chapter five, and will provide the legal basis for answering research question two.

3.4.3 Case Analysis

Historically, the common law was the primary source of legal rules. The origins of the English common law can be traced back to the Battle of Hastings in 1066, with the foundation of the doctrine of precedent, from the Latin *maxim stare decisis et non quieta movere* (to stand by decisions and not disturb the undisturbed). As explained by (Cross and Harris, 1991, p. 3) ‘it is a basic principle of the administration of justice that like cases should be decided alike’. The doctrine of precedent provides a framework for how past judicial decisions should be considered, and applied, by judges in future cases. It is the doctrine of precedent that helps explain the development of the academic judgment immunity as a legal doctrine. The doctrine of precedent does not however dictate how cases are to be analysed and interpreted. When analysing and interpreting cases, the researcher will undertake a process of inductive and deductive reasoning, methods of reasoning borrowed from philosophy and logic (Hutchinson, 2015). Cases will be reviewed and synthesised with the aim of articulating the overall legal principle. When analysing a case it is important to note the jurisdiction, the specific factual scenario and the outcome based on the legal reasoning process undertaken by the judiciary. This information is important in terms of both context and authority.

Research question two seeks to define what constitutes academic judgment in the legal context. Relevant cases would include those where the judiciary has sought to define, explain or question academic judgment. To consider the scope of the academic judgment immunity, cases of relevance would include where the court has examined, explained or applied the jurisdiction of the Visitor, the

judiciary (via judicial review) or the OIA with respect to student complaints. Relevant cases would also consider situations where the courts have determined that there has been a challenge to process as opposed to a challenge to academic judgment. Table 3.1 below depicts the outcomes of the case analysis process. Of the 76 cases identified in step one, 32 are regarded as potentially relevant to answering research two. This determination was made by considering the material facts of the case, as well as the judicial reasoning provided. A further analysis process will occur in step three, where the cases are applied to the relevant 'social context', namely assessment in higher education.

	Case Name	Date	Relevance
1.	Thomson v The University of London [1864]	1864	Relevant
2.	Rex v Dunsheath ex parte Meredith [1951]	1950	Relevant
3.	Thorne v University of London (1966)	1966	Relevant
4.	Regina v Aston University Senate ex parte Roffey and Another (1969)	1969	Relevant
5.	Glynn v Keele University (1970)	1970	Irrelevant – outside scope (disciplinary student matter)
6.	Patel v University of Bradford Senate (1978)	1978	Relevant
7.	Thomas v University of Bradford (1987)	1987	Irrelevant – outside scope (academic employment matter)
8.	R. v HM Queen in Council Ex p. Vijayatunga Court of Appeal (Civil Division) [1990]	1990	Relevant
9.	R v Higher Education Funding Council, Ex parte Institute of Dental Surgery (Institute of Dental Surgery, Ex parte) [1994]	1994	Irrelevant – outside scope (allocation of research grant funding)
10.	Clark v University of Lincolnshire and Humberside [2000]	2000	Relevant
11.	AFP Gaisiance [2001]	2001	Irrelevant – outside scope (application for judicial review)
12.	AFP Jemchi [2001]	2001	Irrelevant – outside scope (human rights issues)
13.	Plunkett (R on the Application of) v King's College London [2001]	2001	Irrelevant – outside scope (mental health)
14.	R v Cambridge University ex parte Persaud [2001]	2001	Relevant
15.	R v Nash ex parte Chelsea College Of Art And Design [2001]	2001	Irrelevant – outside scope (error or law issue)
16.	AFP Clotworthy [2002]	2002	Irrelevant – outside scope (immigration matter)
17.	Clarke (The Queen on the Application of) v Middlesex University [2002]	2002	Irrelevant – outside scope (procedural issue)
18.	Jemchi (R on the application of) v Visitor of Brunel University [2002]	2002	Irrelevant – outside scope (procedural issue)
19.	Ferguson (Michael) (R on the application of) v The Visitor of the University of Leicester [2003]	2002	Irrelevant – discussion of Visitorial jurisdiction

20.	Griffith (R on the application of) v London Guildhall University [2003]	2003	Irrelevant – outside scope (procedural issue)
21.	Tiyamiyu (Suraju-Deen) v University of Durham [2003]	2003	Irrelevant – outside scope (racial discrimination issue)
22.	Ul-Haq (Iftikar) (R on the application of) v Visitor of Brunel University [2003]	2003	Irrelevant – outside scope (applicant failed to show at hearing)
23.	Haque (Helim) (R on the application of) v University of Northumbria at Newcastle [2004]	2004	Irrelevant – outside scope (applicant failed to show at hearing)
24.	Mabaso (David) (R on the application of) v College of St Mark & St John [2004]	2004	Relevant
25.	Interchange Trust (R on the application of) v London Metropolitan University & Quality Assurance Agency For Higher Education (Interested Party) [2005]	2005	Irrelevant – outside scope (QAA issue)
26.	Van Mellaert v Oxford University [2006]	2006	Relevant
27.	Aisbitt v South Bank University [2007]	2007	Irrelevant – outside scope (claim against lawyer)
28.	Senior-Milne (R on the application of) v University Of Northumberland At Newcastle (2007) (Application) [2007]	2007	Relevant
29.	Arratoon (R on the application of) v Office of the Independent Adjudicator [2008]	2008	Irrelevant – judicial review of OIA decision
30.	Moroney v Anglo European College of Chiropractic [2008]	2008	Relevant
31.	Queen Mary University of London (R on the application of) v Higher Education Funding Council for England [2008]	2008	Irrelevant – outside scope (research grant funding)
32.	S v Chapman & Anor [2008]	2008	Irrelevant – outside scope (school)
33.	Yorkshire Land Ltd (R on the application of) v Barnsley Metropolitan Borough Council [2008]	2008	Irrelevant – outside scope (Council mater)
34.	Azad (R on the Application of) v College Of Optometrists [2010]	2010	Irrelevant – outside scope (disability discrimination issue)
35.	Budd (R on the application of) v Office Of The Independent Adjudicator For Higher Education [2010]	2010	Relevant
36.	Abramova (Maria) v Oxford Institute of Legal Practice [2011]	2011	Relevant
37.	Maxwell (r on the application of) v Office of the Independent Adjudicator [2011]	2011	Irrelevant – outside scope (disability discrimination issue)
38.	Sandhar v Office of the Independent Adjudicator for Higher Education [2011]	2011	Irrelevant – outside scope (applicant seeking emergency procedure from OIA)
39.	Hamilton v Open University [2011]	2011	Relevant
40.	Echendu (R on the application of) v School of Law University of Leeds [2012]	2012	Relevant
41.	The Queen (on the application of Tiago Cardao-Pito) and the Office of the Independent Adjudicator for Higher Education and London Business School [2012]	2012	Relevant
42.	Burger (R on the application of) v London School Of Economics And Political Science [2013]	2013	Irrelevant – material facts (no issue of academic judgment)
43.	Chilab v Kings College London [2013]	2013	Relevant
44.	Hakeem v London Borough of Enfield [2013]	2013	Irrelevant – outside scope (Council matter)
45.	Kwao v University of Keele [2013]	2013	Relevant

46.	London Borough Of Lewisham (R on the application of) v Assessment And Qualifications Alliance [2013]	2013	Irrelevant – outside scope (high school assessment matter)
47.	R (Mustafa) v Office of the Independent Adjudicator [2013]	2013	Relevant
48.	Warnborough College Ltd (R on the application of) v Secretary of State for the Home Department [2013]	2013	Irrelevant – outside scope (non-university)
49.	Winstanley v Sleeman [2013]	2013	Irrelevant – application to strike out claim
50.	AFP Matin (R on the application of) v University Of Cambridge [2014]	2014	Irrelevant – outside scope (application for permission to apply for judicial review)
51.	Alexander (R on the application of) v The Office of the Independent Adjudicator for Higher Education [2014]	2014	Relevant
52.	Crawford (R on the application of) v The University of Newcastle Upon Tyne [2014]	2014	Irrelevant – no discussion of academic judgment in findings
53.	Emery (R on the application of) v Office of the Independent Adjudicator of Higher Education [2014]	2014	Irrelevant – applicant challenging decision of OIA
54.	Estrin v Imperial College London [2014]	2014	Irrelevant – outside scope (procedural issue, out of time)
55.	Ighagbon (R on the application of) v Office Of Independent Adjudicator [2014]	2014	Irrelevant – outside scope (application for permission to apply for judicial review)
56.	R (Wilson) v Office of the Independent Adjudicator for Higher Education [2014]	2014	Relevant
57.	Gopikrishna (R on the application of) v Office Of Independent Adjudicator For Higher Education [2015]	2015	Relevant
58.	Jordan (R on the application of) v Higher Education Funding Council for England [2016]	2016	Irrelevant – outside scope (admission to university, application for permission to appeal)
59.	R (NHS Property Services Ltd) v Surrey County Council [2016]	2016	Irrelevant – outside scope (Council matter)
60.	Siddiqui v University of Oxford [2016]	2016	Irrelevant – outside scope (negligence issue)
61.	London School of Science and Technology (R on the application of) v SSHD [2017]	2017	Irrelevant – outside scope (immigration matter)
62.	Queen on Application of Gaisiance v BPP University Law School [2017]	2017	Irrelevant – outside scope (no basis for proceedings against university)
63.	R (Oakley) v South Cambridgeshire District Council [2017]	2017	Irrelevant – outside scope (Council matter)
64.	The Queen on the Application of Asad Jamil v University of Westminster [2017]	2017	Irrelevant – outside scope (time barred)
65.	R (Zahid) v University of Manchester (R (Rafique-Aldawery) v St George's, University of London, R (Sivasubramaniyam) v University of Leicester) [2017]		Relevant – judicial review scope
66.	R (B) v Office of the Independent Adjudicator [2018]	2018	Irrelevant – outside scope (fitness to practice based on mental state and behaviour)
67.	R (Thilakawardhana) v Office of the Independent Adjudicator for Higher Education [2018]	2018	Irrelevant – outside scope (fitness to practice)

68.	The Queen on the Application of Abdullah Sindhu v Office of the Independent Adjudicator [2018]	2018	Relevant
69.	The Queen on the Application of Shehan Wijesingha v The Office of the Independent Adjudicator [2018]	2018	Irrelevant – outside scope (fitness to practice based on mental state and behaviour)
70.	R (Ngole) v University of Sheffield [2019]	2019	Irrelevant – outside scope (human rights, freedom of religious belief or expression)
71.	R (Zahid) v University of Manchester (R (Rafique-Aldawery) v St George's, University of London, R (Sivasubramaniyam) v University of Leicester) [2019]	2019	Irrelevant – outside scope (fitness to practice)
72.	The Queen on the Application of James Caspian v University of Bath SPA [2019]	2019	Irrelevant – time barred, no grounds for extending time in order to proceed to judicial review.
73.	The Queen on the Application of Poonam Thapa v Office of the Independent Adjudicator for Higher Education [2019]	2019	Relevant
74.	Cody v Remus White Ltd [2021]	2021	Irrelevant – outside scope (high school)
75.	Girgis, R (On the Application Of) v Joint Committee on Intercollegiate Examinations [2021]	2021	Irrelevant – outside scope (non-university matter)
76.	R (Connell) v Secretary of State for the Home Department [2021]	2021	Irrelevant – outside scope (immigration matter)

Table 3.1 Outcome of the case analysis process

It is important to explain, as part of step two, why particular cases are irrelevant for the context of this thesis. The first category of cases that are deemed irrelevant are where the concept of academic judgment may have been raised, but the material facts are outside the scope of this thesis, namely higher education. Cases involving assessment in high schools (Cody v Remus White Ltd; London Borough of Lewisham (R on the application of) v Assessment and Qualifications Alliance), immigration matters (R (Connell) v Secretary of State for the Home Department; London School of Science and Technology (R on the application of) v SSHD; Warnborough College Ltd (R on the application of) v), and Council matters (R (Oakley) v South Cambridgeshire District Council); R (NHS Property Services Ltd) v Surrey County Council; Hakeem v London Borough Of Enfield) have been excluded.

There are cases that come within the higher education context that have been excluded as they fall outside the scope of this thesis. Cases which do not seek to apply domestic law have been excluded (AFP Jemchi; R (Ngole) v University of Sheffield). Cases that have raised issues of discrimination, such as racial

discrimination or disability discrimination, but not in the context of assessment have also been excluded (Tiyamiyu (Suraju-Deen) v University of Durham; Azad (R on the Application of) v College Of Optometrists; Maxwell (r on the application of) v Office of the Independent Adjudicator). Cases where issues of mental health and capacity are raised, outside the assessment decision-making context, have also been excluded (Plunkett (R on the Application of) v King's College London; R (B) v Office of the Independent Adjudicator; The Queen on the Application of Shehan Wijesingha v The Office of the Independent Adjudicator).

Cases where academic judgment has been raised in the factual context, but the legal issue for the court to consider is a procedural one, have also been excluded. Procedural matters can include cases that have been declined due to a lapse in time (The Queen on the Application of James Caspian v University of Bath SPA; Estrin v Imperial College London), a failure by the applicant to appeal (Haque (Helim) (R on the application of) v University of Northumbria at Newcastle; Ul-Haq (Iftikar) (R on the application of) v Visitor of Brunel University), and where the applicant is seeking permission for judicial review which does not expressly pertain to issues to academic judgment (AFP Matin (R on the application of) v University Of Cambridge; Griffith (R on the application of) v London Guildhall University; Jemchi (R on the application of) v Visitor of Brunel University).

3.5 Application of the Relevant Law

In order to articulate what academic judgment is and how it can be challenged, the law ascertained and analysed above must be applied to a contextual situation. As articulated by Chynoweth (2008, p. 29), 'within the common law jurisdictions legal rules are to be found within statutes and cases but it is important to appreciate that they cannot in themselves provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration'. This third step, application, is of particular importance as it aims to address one of the potential limitations of doctrinal research. The law does not exist in an 'objective doctrinal vacuum' and it is important consider the context in

which academic judgment occurs (Singhal and Malik, 2012, p. 253). The third step will occur in two ways. First, cases classified as 'relevant' in the previous section will be further analysed in chapter five to define what academic judgment is in the context of the common law. This will be done by considering the factual scenario as well as the legal conclusions. These factual scenarios are important as they help scope the parametres of this thesis. Cases such as Mustafa and Clark have raised issues with respect to academic judgment and plagiarism. Hamilton, Abramova and Siddiqui (Siddiqui v University of Oxford [2016] 'Siddiqui') have sought to challenge teaching materials and practices. University decision-making, with respect to issues such as the appointment of examiners (The Queen (on the application of Tiago Cardao-Pito) and the Office of the Independent Adjudicator for Higher Education and London Business School [2012] 'Cardao-Pito'; Gopikrishna; R v Cambridge University ex parte Persaud [2001] 'Persaud'; Vijayatunga) and withdrawal from university based on assessment outcomes (Roffey) have also been raised. However, it is in the context of marking that academic judgment has been most frequently discussed (Cardao-Pito; Gopikrishna; Kwao v University of Keele [2013] 'Kwao' Moroney; Senior-Milne (R on the application of) v University Of Northumberland At Newcastle [2007] 'Senior-Milne'; Siddiqui; Thomson; Thorne; Van Mellaert v Oxford University [2006] 'Van Mellaert'). The second way in which the legal rules will be applied to 'a range of real-world factual circumstances' (Dobinson and Johns, 2017 p. 24) is by considering whether the academic judgment immunity protects the assessment process or only the assessment outcome. Chapter six will utilise the context provided by research question one, where does academic judgment exist in the university context, and apply the analysis and outcomes provided by research question two, what is the academic judgment immunity in the legal context, in order to:

1. determine whether the academic judgment immunity protects the assessment process from legal challenge, as distinct from the final assessment result; and

2. ascertain whether the assessment process could be legally challenged by arguing that the process by which the final assessment result has been decided is unfair.

3.6 Limitations of Doctrinal Legal Research

3.6.1 Data

When conducting doctrinal research, one significant challenge is data, namely cases and OIA determinations. It is acknowledged that this can impose several limitations. When analysing the law, this thesis can only focus on cases which have been published and are available to the public. There are thousands of judicial decisions made every year, and as a general rule, decisions of inferior courts and administrative agencies are not reported. It is only the decisions of appellate courts or cases of "importance" that are published. This can result in the practices of lower courts and administrative agencies remaining unexplored. Where cases can be located, it is important to be aware that the facts of the case are not an objective transcript of the judicial proceedings. The facts have been summarised by members of judiciary and may not reveal information that would otherwise have been pertinent to the research being undertaken. This is also accurate with respect to the reasoning undertaken by the judiciary. The intellectual legal reasoning process that the judge will undertake to come to their conclusion will not necessarily be contained within the written judgment. The decision provided is not an intricate step-by-step account of each thought, presumption or deduction that the judge engaged in to come to their final determination.

It is also important to acknowledge the specific challenge of collecting data with respect to OIA determinations. The OIA does not publicly release or publish their determinations in full. Rather, the OIA publishes 'case summaries' on their website which provide a truncated version of events. It is not possible from the case summaries to ascertain the material facts of what occur, nor the process that the OIA took to reach their final decision. Further, not every case decided by

the OIA is amalgamated into a case summary. Only cases which are deemed to be a ‘public interest case’ are made publicly available on the OIA website. The decisions made by the OIA are technically not ‘the law’, but an interpretation of what the law is. These determinations can be helpful in understanding how the OIA interprets and applies the law with respect to academic judgment. In an attempt mitigate this particular issue, this thesis will utilise public judicial decisions, where OIA decisions have been reviewed, and the court has examined the decision-making process of the OIA. These cases will assist in providing a valuable insight into how the OIA defines and applies the concept of academic judgment.

3.6.2 Legal Rules and an Objective Reality

When undertaking doctrinal research, the researcher is attempting to determine an ‘objective reality’, that is, a statement of the law encapsulated in legislation or an entrenched common law principle’ (Hutchinson, 2010, p. 37). Legislation for example is created by parliament, written down and published as an Act. This is a positive statement of the law, an objective reality. However, it is the interpretation of the law that is rarely certain. As famously described by Hart (1961) legal rules have an ‘open texture’ and therefore capable of interpretation in more than one sense. As a result, there will always be an element of doubt (Chynoweth, 2008). As McCrudden (2006, p. 648) comments, ‘an applicable legal norm on anything but the most banal question is likely to be complex, nuanced and contested’. It is accepted that a limitation of this thesis is that the law is open to more than one interpretation. It is the notion that the law is rarely certain that forms the basis of the adversarial legal system that England operates under. One strategy that this thesis has adopted, in order to minimise issues of interpretation, is to clearly and explicitly explain the methodology and method utilised to determine which law is being interpreted and how the law is being interpreted.

3.6.3 Law and the Social Context

Doctrinal legal research has been criticised as being too theoretical as it ‘does not offer an adequate framework for addressing issues that arise because it

assumes that the law exists in an objective doctrinal vacuum rather than within a social framework or context' (Singhal and Malik, 2012, p. 253). It is acknowledged that doctrinal research can be highly theoretical however, it is argued that doctrinal research is more than locating relevant cases and legislation and making objectively verifiable statements of law. As noted by Dobinson and Johns (2017, p. 24)

> it is a process of understanding social context and interpretation. It is not simply textual analysis. It is not merely a self-referential exercise. A researcher comes to understand the social context of decisions and draws inferences which need to be considered in a range of real-world factual circumstances.

Identifying what academic judgment is, and what the scope of academic judgment entails, based on the relevant law is highly theoretical. However, this is why this thesis has sought to bring together the disciplines of law and higher education research in order to holistically understand the concept of academic judgment. This thesis seeks to take the doctrinal analysis of the academic judgment immunity completed in chapter five and apply it to a real-world social context, identified in chapter four, in order to answer research question three in chapter six.

3.7 Chapter Conclusion

Chapter three explained the research design and methodology upon which this thesis is based. The doctrinal approach has been chosen as the academic judgment immunity is a legal doctrine. Each research question is therefore framed through a legal lens. However, this thesis recognises that the law does not exist in a vacuum. In order to address and avoid a commonly identified limitation of doctrinal legal research, that the doctrinal approach is too theoretical and 'does not offer an adequate framework for addressing issues that arise (Singhal and Malik, 2012, p. 253), research question three specifically focuses on identifying and understanding the social context within which the academic

judgment immunity exists. The real-world factual circumstances, where decisions involving academic judgment occur on a daily basis, is provided by the analysis of higher education literature pertaining to assessment and the marking process in chapter four. Understanding the assessment process provides the context necessary to understand how and where the concept of academic judgment operates in the higher education environment from a real-world perspective and providers the necessary grounding to ascertain whether the assessment process is protected by the academic judgment immunity, which is the basis of research question three.

Chapter 4: Academic Judgment and the University Context

4.1 Introduction

In order to answer research question one, the purpose of chapter four is to elucidate where academic judgment exists in the university context. The first context that will be considered, in section 4.2, is academic judgment as a category of university decision-making. This leads into the second context, academic judgment as an inherent element of the decision-making process with respect to assessment and the marking process, discussed in section 4.3. As explained by Farrington and Palfreyman (2020, p. 329) for the vast majority of universities, the largest area of activity is the teaching and assessment of undergraduate students. It is therefore unsurprising that decisions involving academic judgment also forms one of the most likely areas of dispute in the relationship between university and student. Section 4.4 will consider the third area, academic judgment as a type of university decision that students seek to challenge. Section 4.5 discusses the research outcomes, with respect to research question one, and section 4.6 provides the chapter conclusion. In addition to addressing research question one, the analysis undertaken in chapter four and the relevant research outcomes, provide the scope and context for addressing research question three in chapter six.

4.2 Academic Judgment as a Category of University Decision-Making

4.2.1 Overview

Within the prescribed parametres of university rules, regulations and ordinances, the scope and breadth of university decision-making is essentially limitless. Every day hundreds, if not thousands, of decisions are made in universities which impact students. The administrator in charge of timetabling deciding the day and

time that a first-year political science seminar will be taught. The Chief Technology Officer deciding whether unlimited access to streaming services is included in a Computer User Agreement. The Head of Campus Security assigning where a commuter student can park their vehicle on campus. An academic determining that a student has failed their final examination. Decisions can be made quickly, in minutes or hours: granting an extension request, the final mark on a piece of assessed work, course admission, a finding of academic misconduct. Other decisions take weeks or months of planning and deliberation: amendments to curriculum, assessment changes, the introduction of a new course. Numerous areas of law encompass university decisions including, contract law, landlord and tenant law, public law, discrimination law, tort law, defamation, health and safety law, human rights law, data protection, freedom of information and intellectual property (Farrington and Palfreyman, 2020, p. 258). The administration of university decision-making is just as vast. Decisions can be made by individual academics, schools, faculties, departments, committees, centres, colleges and then administered by finance, human resources, information technology services, teaching and learning support and libraries. The focus of research question one is to identify where one specific type of university decision, academic judgment, exists within the university decision-making context.

4.2.2 Scope of Academic Judgment

As discussed in the literature review, there is no agreed upon definition of what constitutes an academic judgment in either the legal context or the discipline of higher education research. As will be discussed in chapter five, from a legal perspective, the judiciary has been 'cautious in determining what constitutes an exercise of academic judgment' (Mustafa*)* and parliament specifically chose not to define what constitutes an academic judgment. The current legal literature has attempted to identify decisions involving academic judgment in an indirect way. Davies (2004, p. 75), has noted that a core aspect of the academic professional role are 'purely academic decisions'. Dalziel (2011, p. 118) views these decisions as forming a 'vast component of any lecturer's employment from assessment grading and differentiation planning to discipline issues'. The higher education

literature tends to view an academic judgment as an inherent element of the academic decision-making with respect to assessment noting that the process of marking student work requires the exercise of expert judgment (Bloxham and Boyd, 2012; Grainger, Purnell and Zipf, 2008; Joughin, 2009; Sadler, 2005).

Understandably, internal university rules and regulations in England tend to adopt the definition of academic judgment published by the OIA in their April 2018 Guidance Note, or a variation of this definition. The current OIA Guidance Note (April, 2018) provides in paragraph 30.2 that 'academic judgment is not any judgment made by an academic, it is a judgment that is made about a matter where the opinion of an academic expert is essential'. Providing a holistic legal definition of what constitutes an academic judgment will be an original contribution of this thesis, and is the basis for research question two, which will be considered in chapter five. Understanding the OIA definition is helpful in chapter four as it assists in narrowing the scope of university decision-making specifically to decisions which are made by an academic, where the opinion of an academic expert is essential. These types of academic decisions will be considered below.

4.2.3 Types of Academic Decisions

Academic decision-making can be classified into four categories:

1. purely academic decisions;
2. academic decisions involving questions of fact;
3. disciplinary decisions; and
4. academic offences.

As depicted in the figures below, each category of decision-making pertains to specific processes and procedures within the internal university context.

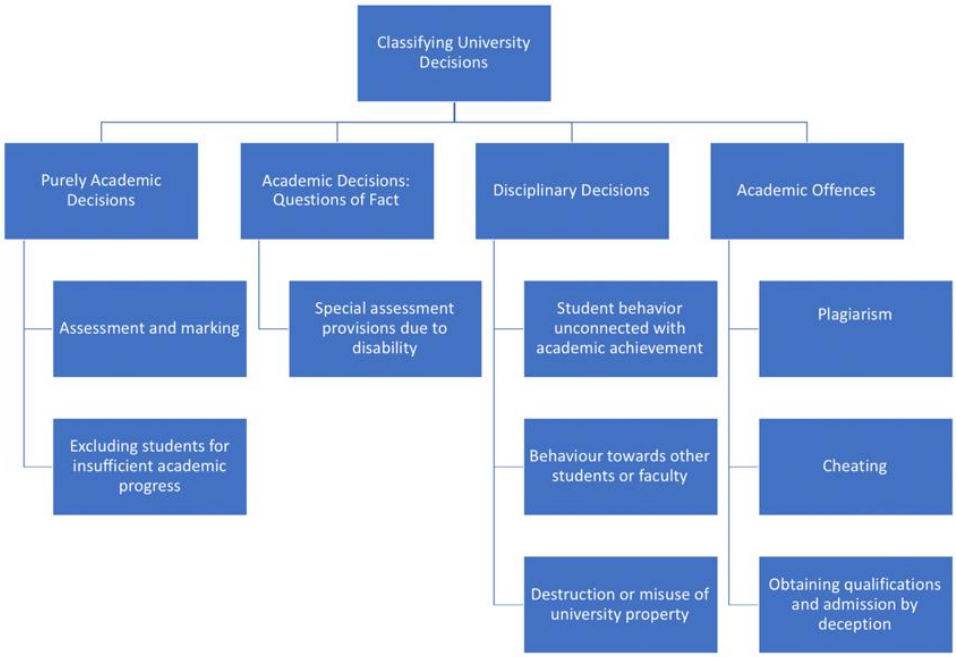

Figure 4.1: Classifying university decisions

According to Lewis (1985, p. 316), decisions are 'purely academic' when they 'involve a subjective evaluation of the academic merit of a student's work'. This can involve the 'marking of examination scripts or the assessment of the academic capability of the student, [where] the university has a legitimate claim to expertise'. Kamvounias and Varnham (2006, p. 2) note that 'there are decisions which involve academic judgment for example, the grade to be given to a particular piece of work, whether to pass or fail a student on academic grounds, or whether to exclude a student from a course for insufficient progress'. Lewis (1985, p. 320) distinguishes purely academic decisions from academic decisions which involve objective questions of fact, such as 'whether a student's disability merits special treatment at an examination', noting that 'these types of cases involve more than academic assessments'. Lewis (1985) and Kamvounias and Varnham (2006) also draw distinctions between disciplinary decisions unconnected with academic achievement and disciplinary decisions which follow a finding of academic misconduct. According to Lewis (1985, p. 328), academic offences encompass 'academic integrity… activities such as plagiarism, cheating and obtaining qualifications and admission by deception'. Kamvounias and Varnham (2006, p. 2) note that academic misconduct can include 'cheating in examinations, plagiarism in written work, or some other form of misconduct which

has the effect of bringing the student's research into question'. Disciplinary decisions unconnected with academic achievement include 'a student's behaviour towards other students or university property (Kamvounias and Varnham, 2006, p. 2) and are decisions where 'the university has no obvious claim to special expertise as it has, for example, in the area of academic evaluation' (Lewis, 1985, p. 324). It would appear from the literature that purely academic decisions relating to assessment, and decisions relating to academic offences, both require an academic to exercise a judgment where the opinion of the academic expert is essential. As a result, it is likely that both would be protected by the academic judgment immunity.

Academic decisions with respect to academic offences such as plagiarism *prima facie* come within the academic judgment immunity but are provided an important caveat. As explained by the OIA, 'decisions about whether the work of a student contains plagiarism and the extent of that plagiarism will normally involve academic judgment, but that judgment must be evidence based' (OIA Guidance Note April 2018, para. 30.4). Further, the 2013 High Court of Justice decision of Mustafa assists in determining the parametres of academic judgment. The issue for the court to consider was the scope of the statutory exclusion of matters of academic judgment in section 12(2) of the Higher Education Act 2004, 'whether the determination of plagiarism is necessarily a matter of judgment and so always outside the OIA's jurisdiction' (para. 3). With specific regard to the issue of plagiarism, Justice Males concluded that 'it is reasonably clear that the question whether plagiarism has been committed often (and perhaps usually) will require an exercise of academic judgment, but that it need not necessarily do so'. The court however, also provided examples of where no academic judgment is required in determining plagiarism. Justice Males provided the example of a student who 'lifts wholesale an article from the internet which he presents as his own work without attribution or other acknowledgement. The computer programme will demonstrate 100% copying and no judgment is required, academic or otherwise, in order to determine that there has been plagiarism' (Mustafa, para. 54). Here, Justice Males draws an important distinction between determining whether plagiarism occurred as opposed to what should be done as a result of the plagiarism. His Honour notes that

> It may be that such a case will be referred to an academic to decide what to do, but that will be a decision on what to do about the plagiarism and not a determination whether plagiarism has taken place – or even if it is, it is not a determination which requires any exercise of judgment (Mustafa, para. 54).

It is for these reasons that the focus of this thesis will consider academic judgment within the scope of academic decision-making relating to assessment and marking.

4.3 Academic Judgment as an Inherent Element of the Assessment Process

4.3.1 The Assessment Process

As depicted in figure 4.2 below, the assessment process is complex, guided by internal and external requirements and (hopefully) grounded in higher education pedagogy.

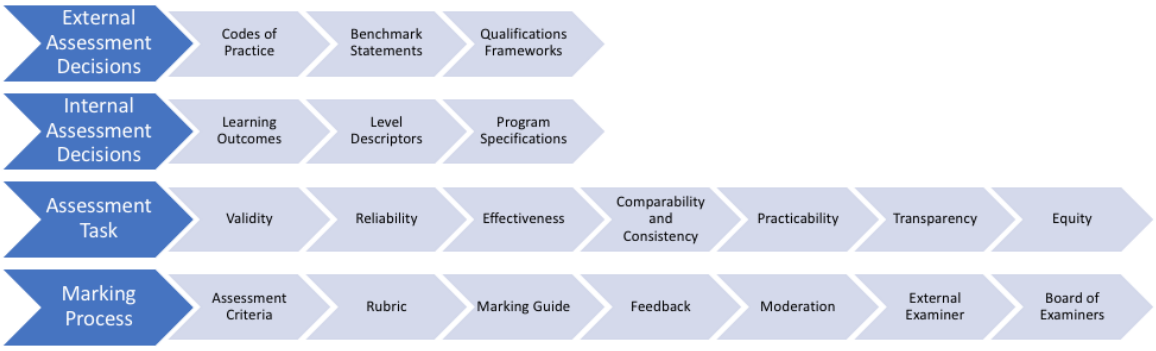

Figure 4.2: Assessment process

At the external level, Codes of Practice, Benchmark Statements and Qualifications Frameworks provide the context in which assessment operates. At present, it is the QAA who is 'trusted by higher education providers and regulatory bodies to maintain and enhance quality and standards (QAA, 'Our Focus', p. 1). A key focus of the QAA, since its 1997 inception, has been greater transparency in assessment with the Revised UK Quality Code for Higher Education 2018

stating that higher education providers are required to use ‘external expertise, assessment and classification processes that are reliable, fair and transparent’ (2018A, p. 4). This appears to be framed in the context of accountability where universities, specifically academics engaged in the assessment of students, are required to justify assessment decisions (Dunn, Parry and Morgan, 2002; Grainger, Purnell and Zipf, 2008). These external standards are translated, into internal university policies and procedures, usually by a series of people (Deans, Heads of Department, Heads of School, Teaching and Learning Committees, Pro-Vice Chancellors). This results in the creation of university specific learning outcomes, level descriptors and program specifications which may then be translated at a Departmental Level, Course Level or Subject/Unit/Module Level. These decisions ultimately provide the framework against which an assessment task is created at the module level.

The decisions involved in the translation of external standards into internal university policy and procedures are likely to involve academic judgment. However, the creation and implementation of external standards are outside the scope of this thesis as these are not decisions which individual academics or academic module teams have autonomy over. The focus of this thesis is on the internal assessment process that occurs within a university, specifically with respect to the marking process, and identifying where academic judgments are made. The reason for this focus is that despite the increasing levels of accountability and the perception that marking practices are a highly regulated process, ‘assessment practices have consistently been one of the weakest features identified by the QAA in subject reviews across the disciplines’ (Rust, O’Donovan and Price, 2005, p. 231). In 2009, a QAA report noted that its own audit and review reports ‘typically make more recommendations linked to assessment than to any other area’ (p. 3). As a result, issues may arise with respect to the fairness of the marking process, which will be further explored in chapter six.

4.3.2 Academic Judgment and the Marking Process

In the higher education context, marking is a multifaceted process requiring numerous academic judgments to be made by numerous people. Gone are the times described by Winter (1994, p. 92), 'where assessment judgments are made within a clearly defined, predictable, and familiar arena (e.g. a conventional single subject academic course taught by a small group of specialist colleagues within a single institution)'. As noted by Price (2005, p. 216), 'increasing student numbers within higher education institutions means that teams of staff rather than individuals now have to apply agreed standards in the marking of student work'. It is acknowledged that the marking process is not homogeneous across all universities or even across all disciplines. Further, there are university or discipline specific policies and procedures with respect to issues such as penalties for late submission, how confirmed marks can be released to students, anonymous marking and the specific circumstances under which students results can be reconsidered or adjusted. There are however common decisions, involving academic judgment, that will occur as part of the marking process. It is these decisions which form the focus of this thesis.

The marking process consists of three fundamental decision-making phases. Decisions which are made before marking, decisions which are made during marking, and decisions which are made after marking. Each stage requires numerous academic judgments to be made, often by more than one person. In the 'before' phase academic decisions need to be made in order to ensure that the marking process is 'reliable, consistent, fair and valid' (QAA, 2018B, p. 4). Considerations may include, what marking tools or resources will be developed and provided to markers, whether markers will be explicitly involved in the design of assessment tasks and marking tools, what mechanisms will be relied upon to help ensure that the outcome of the assessment process is transparent and fair, and whether the assessment and marking procedures will be made available to students in order to guide learning and manage expectations. As explained by Price (2005, p. 216), 'for a module team engaged in assessment shared resources may include written and oral briefing of the aims, outcomes and assessment of the modules, assessment criteria and descriptors and samples of

marked work'. Each of these considerations, and the development of shared resources, require one or more academic judgments to be made by more than member of the higher education assessment community.

Establishing the requisite standards, against which an assessment task will be judged, is one of the most important decisions involving academic judgment with respect to the marking process. The process of establishing assessment standards has been described as 'complex and fluid' (Ecclestone, 2001, p. 312) with the 'control of teaching, syllabus and assessment [previously] seen as the remit of the individual academic with no obligation to account for, or even discuss, with others' (Price, 2005, p. 218). However, in the era of transparency and accountability overarching frameworks for establishing assessment standards, guided by university specific learning outcomes, level descriptors and program specifications have been created from requisite Codes of Practice, Benchmark Statements and Qualifications Frameworks. These decisions are usually made at a University or Program Level. However, as 'the basis for reliability lies with the application of agreed assessment standards' (Price, 2005, p. 217), in practice it remains the responsibility of the Module Convenor to not only develop the assessment task, but to also establish the standards against which the assessment task will be judged by individual markers. The current preference is to develop criterion-referenced assessment, which is 'firmly linked to outcome-based learning in that student achievement is tested against a set of criteria such as those linked to the learning outcomes for the assignment' (Bloxham and Boyd, 2007, p. 82). In order to mark a specific assessment task, assessment standards such as assessment criteria, rubrics and marking guides are created under the rationale that 'task standardisation should enable more reliable marking and make the black box of academic judgment and discretion transparent' (Herbert, Joyce and Hassall, 2014, p. 545).

The development of assessment criteria and rubrics requires academic judgment to be exercised. As explained by Sadler (2005, p. 179), 'criteria are attributes or rules that are useful as levers for making judgments. Although judgments can be made either analytically or holistically, it is practically impossible to explain a particular judgment, once it has been made, without referring to criteria'. Once

explicit criteria has been developed for the assessment task, the criteria is elaborated into a detailed rubric which provides a transparent mechanism by which students are assessed. The rubric not only serves as the objective basis upon which academic judgments are made by individual markers, but also details to students the explicit criteria upon which they are being assessed.

The process of marking an assessment task requires an individual marker to exercise their academic judgment. It is however, not a singular academic judgment, which results in the final grade. There are a series of academic judgments which occur during the marking process. First, the individual marker has to understand the rubric and assessment criteria. Then the marker needs to read the assessment task and utilise their academic judgment to determine how well the individual assessment task met the assessment criteria. From here, the marker has to use their academic judgment to determine how well each criterion was demonstrated against the rubric provided. The process of marking an assessment task also requires the Module Convenor to utilise their academic judgment to make decisions with respect to issues of sample marking, anonymous marking, standardisation, calibration and accountability. A large number of markers are often involved in the marking of an individual assessment task within a module. As noted by Hunter and Doherty (2011, p. 111), markers not only 'have the potential to interpret criteria idiosyncratically because they apply principles differently from within the same conceptual framework to the criteria, but they may also bring different frameworks to bear on the criteria and this widens the range of potential interpretations'. As a result, when the process of marking is due to begin, decisions need to be made with respect to whether the marking team will gather to discuss the assessment criteria and rubric as a way of addressing the issue of multiple interpretations. As discussed by Herbert, Joyce and Hassall (2014, p. 543), 'where student cohorts are large, marking is invariably a team undertaking and a standardisation meeting may be held in an attempt to establish consistency of marking amongst the team. Standardisation attempts to ensure that markers' perceptions and judgments are consistent in relation to an essentially common task.

As noted by Bloxham (2009, p. 212), ‘anxieties about standards of marking have contributed to a growth in procedures to assure standards’. As discussed above, transparency in assessment has been a significant focus with the Revised UK Quality Code for Higher Education 2018 stating that higher education providers are required to use ‘external expertise, assessment and classification processes that are reliable, fair and transparent’ (QAA, 2018A, p. 4). As a result, once the marking has been completed by individual makers, module convenor’s need to decide, by utilising their academic judgment, what internal moderation processes will be adopted. Processes of second-marking, double marking, sample marking and audit marking maybe utilised to review the consistency of academic judgments made by individual markers. A holistic review of results needs to be undertaken, by the module convenor, in order to identify and examine any inconsistencies or anomalies in the marking process in order to make any necessary adjustments. Academic judgment decisions also need to be made with respect to the review of borderline results and where there is a discrepancy or disagreement between two markers on the same assessment task. External examiners may also be engaged at this point to review a sample of the marked assessment tasks to ensure that the assessment process has operated fairly and is equitable in the classification of students.

4.4 Academic Judgment as a Type of University Decision that Students Seek to Challenge

4.4.1 Overview

The third area that academic judgment resides, within the university context, is as one type of university decisions that students seek to challenge. Academic judgment resides in both the internal dispute resolution context of a specific university, as well as the broader external dispute resolution context which all universities are subject to. To understand where academic judgment currently resides in the university context, it is first necessary to consider the historical context which established the process for students to externally challenge an internal university decision.

4.4.2 Historical Context of Challenging University Decision-Making

Initially, questions of academic judgment arose as part of the material facts of a case. This was because the Visitor was recognised as having exclusive jurisdiction to determine the internal laws of the university and to ensure the proper application of those laws (Regina v Lord President of the Privy Council, Ex Parte Page ([1993]). As affirmed in the 2010 decision of Budd (R on the application of) v Office of The Independent Adjudicator For Higher Education [2010] ('Budd'), 'traditionally, universities and colleges had a Visitor, to whom complaints could be referred after internal procedures had been exhausted' (para. 15). As a result, the legal question for the court to consider was one of jurisdiction, who had the legal authority to hear and determine the dispute with respect to matters of academic judgment? An example of this can be seen in the case of Thomson. The Courts of the Chancery were of the view that matters pertaining to university assessment were firmly within the jurisdiction of the Visitor, and not the court. This was not because the court regarded matters of academic judgment to be non-justiciable. Rather, the legal question was whether a challenge to a university decision comes within the jurisdiction of the Visitor. In coming to a decision, the Courts of Chancery were emphatic that the 'holding of examinations and the conferring of degrees' was one of the fundamental objectives of a University and that 'all regulations come within the jurisdiction of the Visitor' (para. 634).

The reasoning of Thomson was applied in the subsequent case of Thorne which affirmed the legal principle that it is the Visitor and not the court that has the jurisdiction to determine disputes with respect to academic judgment between a student and their respective university. Thorne, a law student, claimed damages against the University of London, for 'negligently misjudging his examination papers for the intermediate and final LLB degree… and sought that the university award him the grade at least justified' (para. 237). Thorne had failed to pass examinations required for the Bachelor of Laws (LLB) degree. He argued that his failure to pass the required examinations were as the result of 'negligence on the part of the examiners in judging his papers' (para. 238D). The Queen's Bench Division dismissed the application with Lord Justice Diplock noting that 'actions

of this kind relating to domestic disputes between members of the University of London (as is the case with other universities) are matters which are to be dealt with by the Visitor, and the court has no jurisdiction to deal with them' (para. 242). The 1978 decision of Patel v University of Bradford Senate ('Patel') brought further clarity to the scope of the Visitor's jurisdiction with respect to matters of academic judgment. Patel had failed to pass his examinations twice and as a result was required to withdraw. He was also 'refused re-admission until he could provide proof of greater academic ability' (para. 1488D). One of the legal issues that the court considered was whether the nature of the Visitors jurisdiction was sole and exclusive. Megarry VC, drawing on the decisions of Thomson and Thorne, determined that 'on the authorities it seems to be clear that the Visitor has a sole and exclusive jurisdiction, and that the courts have no jurisdiction over matters within the Visitor's jurisdiction' (para. 1493E). This was the approach adopted by the Queen's Bench in Vijayatunga (1987) where Justice Brown concluded that 'the Visitor enjoys untrammelled jurisdiction to investigate and correct wrongs done in the administration of the internal law of the foundation to which he is appointed: a general power to right wrongs and redress grievances' (para. 344).

It is clear from the common law decisions that matters of academic judgment came within the sole and exclusive jurisdiction of the Visitor, thus establishing the common law academic judgment immunity. As famously stated by Lord Justice Diplock in Thorne, the judiciary was not prepared to 'act as a court of appeal from university examiners' (para. 243A). As a result, students were unable to seek legal redress directly from a court with respect to a matter regarding academic judgment. With the creation of the Education Reform Act 1988 and the Further and Higher Education Act 1992 new universities were established which did not come within the jurisdiction of the Visitor. This raised the important question of whether the academic judgment immunity would continue to apply.

In the 2000 Court of Appeal case of Clark, the University of Lincolnshire and Humberside was one of the 'new universities' created under the Education Reform Act 1988. As a result, there was no Charter or no provision for a Visitor. Clark was the first case where the judiciary was specifically required to consider

whether a complaint, which raises matters of academic judgment, was justiciable. In coming to a decision, the Court of Appeal noted that if the University of Lincolnshire and Humberside had a Visitor, 'it is common ground that the present dispute would lie within the Visitor's exclusive jurisdiction' (para. 1992D). The court confirmed that the relationship between university and fee-paying student was a contractual one noting that 'like many other contracts, it contains its own binding procedures for dispute resolution, principally in the form of student regulations' (para. 1992D). However, the court went on to distinguish the contract between a university and student from other contracts, stating that

> disputes suitable for adjudication under its procedures may be unsuitable for adjudication in the courts… because there are issues of academic or pastoral judgment which the university is equipped to consider the in breadth and in depth, but one which any judgment of the courts would be jejune and inappropriate' (para. 1992E).

The Court of Appeal stated that what constitutes an academic judgment would include 'such questions as what mark or class a student ought to be awarded or whether an aegrotat is justified' (para. 1992F). The decision in Clark confirms the common law position that matters of academic judgment are not justiciable thus confirming the continued existence of the academic judgment immunity at common law.

The exclusive jurisdiction of the Visitor, with respect to student complaints, was 'swept away' by Parliament with the passing of the Higher Education Act 2004. Section 20 of the Higher Education Act provides that the Visitor no longer had jurisdiction over student complaints, rather an operator would be designated for the student complains scheme created by the Higher Education Act. As noted by Member of Parliament Phil Willis, in the House of Commons Standing Committee debating the Higher Education Bill, 'we acknowledge that the Visitor system is outdated and unsuitable for the resolution of student complaints' (HC Deb, 12 February 2004, col. 90). The OIA was designated as the operator to run the student complaints scheme in 2004 and created the tertiary legislation which currently governs how students can externally challenge an internal university

decision. It is important to note that despite the abolishment of the Visitor, the academic judgment immunity remains at common law, and will be discussed in the current context below.

4.4.3 Challenging an Internal University Decision

At present there is no uniform legislation which mandates how students can challenge a university decision internally and what the process should involve. Every university must have internal rules which govern how students can challenge university decision-making. However, each university retains the discretion to write their own specific policies, and to determine what comes within the scope of the internal complaints process. Recommendation 60 of the Dearing Report noted that 'it is essential for good governance… that all complaints are dealt with fairly, transparently and in a timely way' (para. 15.57). Key aspects of Recommendation 60 were adopted through the creation of the 'Good Practice Framework: handling student complaints and academic appeals', first published by the OIA in December 2014. The OIA Framework 'complements the expectations and indicators set out in Chapter B9 of the UK Quality Code' (p. 1) published by the QAA in 2000 and most recently updated in 2013. It is important to understand that these external reference points only provide a framework. They do not specify a comprehensive internal complaints process that can be directly implemented by universities. As a result, each university has the autonomy to create and implement their own policies and procedures.

Academic judgment exists within the internal complaint, review and appeals procedures of universities across England to prevent students from challenging academic decision-making primarily with respect to appeals against examination results. The University of London, Bristol University and Oxford University have been chosen as examples as their procedures are publicly available. In the University of London's Procedure for Student Complaints and Academic Appeals 2022/23, 'academic judgment refers to the determination of a matter where the opinion of an academic expert is essential. You may not complain about, or appeal against, a matter of academic judgment. For example, disagreement with an assessment mark or classification decision is not grounds for appeal' (p. 1).

The University Assessment Regulations 2022/23 which govern Bristol University state that with respect to grounds of appeal that are not permissible, 'disagreement with the academic judgment of the board of examiners will not constitute a ground for appeal' (Regulation 10.3.1, p. 17). The University Academic Appeals Procedure, from the University of Oxford, states 'there is no right of appeal over matters of academic judgment' (p. 1). In the broader information published, with respect to Academic Appeals, it is further explained that 'there is no right of appeal over matters of academic judgment – i.e. decisions that can only be made by applying an academic expert opinion. Therefore, a student cannot appeal because they disagree with the examiners' assessment of how well they met the assessment criteria (University of Oxford, 2022). As can be seen from the examples above, the wording utilised by each university, with respect to academic judgment varies slightly, however the outcome is the same. Students cannot challenge an academic judgment through internal university processes. Put another way, there is no internal right of appeal with respect to decisions involving a matter of academic judgment.

For the purposes of this thesis, the internal processes and procedures of each individual university will not be specifically examined. Internal university decisions, with respect to student appeals over matters of academic judgment, are confidential and not accessible to the public. Further, many of the supplementary documents created to support the interpretation and application of published procedures are also not publicly accessible. As a result, it not possible to access the necessary data, to accurately determine exactly where academic judgment resides in each specific university context. To understand where academic judgment resides in the university context, the focus of this thesis is on the internal university decisions which have been challenged externally either via the judiciary, the Visitor (prior to it being abolished) or the OIA system and reported in the public domain.

4.4.4 Challenging an Internal University Decision Externally

As explained in section 1.3, students primarily challenge internal university decisions through the OIA as it provides a cheaper and more expedient option

than the common law courts. However, this system took centuries to develop. The historical development of the process by which a university decision can be challenged, discussed above in section 4.4.2, is particularly relevant to understanding the types of university decisions that students have sought to challenge. The starting point for the common law framework can be traced back to the 1864 case of Thomson. What can be gleaned from the common law decisions is that academic judgment appears to reside in several key contexts. Academic judgment is involved in the awarding of marks (Chilab v Kings College London [2013] 'Chilab'; Clark; Gopikrishna; Kwao; Moroney; Mustafa; Senior-Milne; Thomson; Thorne), the decision to exclude students due to insufficient academic performance (Mabaso (David) (R on the application of) v College of St Mark & St John [2004] 'Mabaso', Patel), the selection of PhD examiners (Vijayatunga) and in the decision of what class a student ought to be awarded (Clark; Hamilton). These common law cases will be analysed further in chapter five.

Academic judgment, also resides in the legislative context, with respect to student complaints against university decisions. Part 2 of the Higher Education Act 2004 established the statutory framework for reviewing student complaints. Section 12(2) of the Act provides that 'matters of academic judgment' are excluded from constituting a 'qualifying complaint'. As discussed further in chapter five, this is essentially a codification of established common law principles, that matters involving academic judgment cannot be legally challenged by students. The legislation delegated power to the Office of the Independent Adjudicator to hear and determine student disputes, as well as to determine what comes within the scope of an academic judgment and therefore cannot be challenged. The current OIA Guidance Note (April 2018), classified as tertiary legislation, provides in paragraph 30.2 that:

> an academic judgment is not any judgment made by an academic, it is a judgment that is made about a matter where the opinion of an academic expert is essential. So for example a judgment about marks awarded, degree classification, research methodology, whether feedback is correct

> or adequate, and the content or outcomes of a course will normally involve academic judgment.

It would therefore appear that academic judgment, in the university context, exists as a category of academic decision-making which cannot be challenged via either internal or external university dispute resolution processes. At the external level, the OIA does not have the jurisdiction to consider disputes with respect to academic judgment, only to determine whether a dispute comes within the definition of an academic judgment. The judiciary refuses to hear disputes about academic judgment, and developed the academic judgment immunity to protect such decisions. As astutely noted by Dalziel (2011, p. 118), 'if the courts are unwilling to intervene in academic judgment and the Office of the Independent Adjudicator feels they are unable to do so, what course of action does a student have? If academic judgment will not be considered, are we to conclude that academics are above the law and scrutiny?'. Importantly, it appears that the common law has accepted that there are circumstances in which an academic judgment can be challenged. Where the issue in question is one of process, for example where the student was able to demonstrate a failure in the decision-making process of the university, the court is prepared to adjudicate the matter. This will be further examined in chapter five and chapter six.

4.5 Research Outcomes

Academic judgment exists as a type of university decision, an inherent element of the assessment process, as well as the type of university decision that students have frequently sought to legally challenge. It was first determined that within the broader context of university decision-making, academic judgment exists with respect to purely academic decisions. Decisions which are classified as 'purely academic' generally require the university to have a special claim to expertise, such as in the areas of assessment and marking, the exclusion of students for insufficient academic process, and in identifying academic integrity offences. From here, it was possible to narrow the scope of this thesis to specifically consider academic judgment in the context of the assessment process. It was

determined that academic judgment is an inherent element of the assessment process from both an external as well as internal university perspective. From the external assessment perspective, decisions of academic judgment were made in the context of accountability, where universities were required to justify internal assessment decisions. External standards, namely Codes of Practice; Benchmark Statements and Qualifications Frameworks, were translated into university assessment policies and procedures and subsequently created into university specific learning outcomes, level descriptors and program specifications. The decisions involved in the translation of external standards into internal university policy and procedures are likely to involve academic judgment.

The focus again narrowed to specifically consider the marking process in order to determine where academic judgments occur. It was concluded that in the university context marking is a multifaceted process which requires numerous academic judgments to be made, by more than one person, during the three phases of the marking process in order to ensure a marking process that is 'reliable, consistent, fair and valid' (QAA, 2018B, p. 4). There were numerous academic judgments required before the act of marking could begin including establishing requisite standards against which an assessment task would be judged, and the subsequent development of assessment criteria and rubrics. Once these academic judgments were made, and implemented, the process of marking an assessment task commenced. It was concluded that the act of marking also produced multiple instances of academic judgment including the individual marker understanding the rubric and assessment criteria, reading the assessment task and then utilising their academic judgment to determine how well the assessment task met the assessment criteria. The process of marking an assessment task also requires the Module Convenor to utilise their academic judgment to make decisions with respect to issues of sample marking, anonymous marking, double-marking, standardisation, calibration and accountability. Academic judgment decisions also need to be made with respect to the review of borderline results and where there is a discrepancy or disagreement between two markers on the same assessment task. It is therefore clear, from the analysis undertaken in chapter four, that academic judgment is more than the outcome of an assessment process - the final mark. This outcome

provides the scope and context for research question three, discussed in chapter six.

As academic judgment decisions, made as part of the marking process, can have significant ramifications or a student it is unsurprising that students have sought to challenge decisions involving academic judgment. This is the third area where academic judgment has been identified in the university context. Students have sought to challenge decisions of academic judgment for centuries, through both internal and external dispute resolutions processes. The common law and legislative mechanisms by which decisions of academic judgment have been challenged will be further explored in chapter five.

4.6 Chapter Conclusion

In order to answer research question one, where does academic judgment exist in the university context, three specific areas were identified. Academic judgment is a category of university decision marking, an inherent element of the decision-making process with respect to assessment and one of the most likely areas of dispute in the relationship between university and student. It is also clear from the analysis undertaken in chapter four that academic judgment is more than the final assessment result. In addition to answering research question one, the analysis undertaken in chapter four and the relevant outcomes, also provides the real-world factual circumstances in which academic judgment exists. This provides the basis for understanding how the academic judgment immunity is interpreted and applied in the university context in order to answer research question three.

Chapter 5: Defining the Academic Judgment Immunity

5.1 Introduction

Academic judgment has been chosen as the focus of this thesis because it is the only type of university decision that has purportedly been granted an immunity from legal challenge. As noted by Davies (2004, p. 75), 'academics have largely remained immune from judicial interference with a core aspect of their professional role, so called 'pure academic decisions' despite academic judgment forming a 'vast component of any lecturer's employment from assessment grading and differentiation to discipline issues' (Dalziel, 1998, p. 118). Notwithstanding the common law development of the academic judgment immunity over centuries, and the creation of a statutory academic judgment immunity in 2004, there is no agreed upon legal definition of what constitutes an academic judgment. As astutely noted by Member of Parliament Jonathan Shaw, in the parliamentary debates seeking to legislate academic judgment, 'there is no beginning or end to academic judgment. One can understand the anxiety of staff that this provision may become law and that they will have no idea of the parameters of academic judgment' (HC Deb, 12 February 2004, col. 94). As a result, defining academic judgment within the legal framework of higher education in England, is an important original contribution to knowledge made by this thesis. In order to address research question two it is first necessary, in section 5.2, to consider the broader legal framework within which the immunity exists. Once the legal framework is established, section 5.3 seeks to define the academic judgment immunity from the common law perspective. Section 5.4 considers the definition of academic judgment from the legislative perspective and section 5.5 considers the OIA perspective with respect to the definition of academic judgment. Section 5.6 discusses the seven research outcomes which arise from the analysis undertaken in chapter five and section 5.7 provides the chapter conclusion.

5.2 Context

5.2.1 Defining the Legal Framework

It is first necessary to establish the legal framework within which academic judgment exists. As depicted in figure 5.1, there is a common law framework and a statutory framework with respect to student complaints.

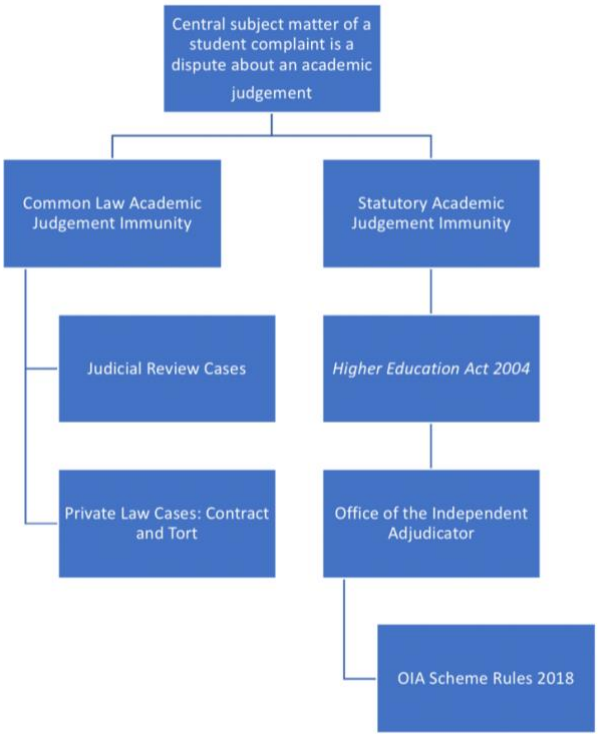

Figure 5.1: Legal framework of academic judgment

Part 2 of the Higher Education Act 2004 establishes the statutory framework for reviewing student complaints. The relevant provision of the Higher Education Act is section 12, which has two key components. Section 12(1) sets the jurisdiction, the scope of the provision. Section 12(1) provides that for the complaint to be a 'qualifying complaint' the following must be met:

1. The complaint must be about 'an act or omission';
2. The complaint must be against a 'qualifying institution'; and
3. The person making the complaint is 'a student or a former student' of the qualifying institution.

Section 12(2) provides that ‘matters of academic judgment’ are excluded from constituting a ‘qualifying complaint’. As discussed below, parliament specifically chose not to define academic judgment and left this responsibility to the OIA through the creation of the OIA Scheme Rules 2018. The current OIA Scheme Rules, effective from 1 April 2018, provide that the OIA ‘cannot review a complaint about the academic judgment of a higher education provider’ (rule 5.2). When interpreting section 12 and rule 5.2, the doctrinal methodology will be utilised to arrive at the legal meaning of the provisions. This will be achieved by analysing extrinsic materials, such as second reading speeches and parliamentary debates, as well as judicial decisions post-2004 which have specifically interpreted section 12(2) and Rule 5.2.

By legal standards the Higher Education Act is a recent piece of legislation. However, students seeking to challenge university decisions involving academic judgment is not a new phenomenon. The beginning of the common law immunity can be traced back to the 1864 case of Thomson. The common law has considered questions of academic judgment through public law principles of judicial review and private law claims in contract and tort for centuries. Despite numerous cases considering matters of academic judgment, the judiciary has been ‘cautious in determining what constitutes an exercise of academic judgment’ (Mustafa, para. 49). To answer research question two, it is necessary to meticulously consider the reasoning of each cases to ascertain exactly what academic decisions come with in the parametres of academic judgment. It is also necessary to provide context, by considering the material facts of each case, followed by the reasoning of the judiciary in coming to their conclusion about whether the decision in question falls within the scope of the academic judgment immunity.

5.2.2 Relationship between Common Law and Legislation

The judiciary has considered questions of academic judgment for centuries, leading to the development of the common law academic judgment immunity. As noted by Davies (2004, p. 75), ‘the historical position in the UK has seen both university Visitors and the courts consistently refusing to interfere with decisions

described as having the nature of academic judgment'. In 2004, legislation was enacted by parliament which created a statutory academic judgment immunity with respect to student complaints. It is important to understand that parliament, in creating the Higher Education Act, specifically chose not to supersede the common law. Rather, parliament codified the existing common law principles, removed the jurisdiction of the Visitor and granted power to the OIA to hear student complaints. As a result the jurisdiction of the common law has remained to determine student complaints. This was confirmed in the 2017 decision of *Sivasubramaniyam* where the High Court of Justice stated that 'when exercising a variety of functions, including those relating to …complaints, a HEI is exercising public functions that are susceptible to challenge by way of judicial review. The court applied the reasoning of *Siborurema*, noting that 'there is a strong public element and public interest in the proper determination of complaints by students to HEI's' (para. 49(f)). Therefore, in order to define what academic judgment is within the legal framework of higher education in England, it is necessary to undertake 'critical conceptual analysis of all relevant legislation and case law' (Hutchinson, 2015, p. 130).

5.3 Defining Academic Judgment: Common Law

5.3.1 Overview

The purpose of section 5.3 is to methodically define the parametres of what constitutes academic judgment from the common law perspective. This however is not a simple proposition. It requires more than simply locating relevant cases and extracting the judicial reasoning. Cases involving matters of academic judgment are complex and involve a range of factual and legal issues. Unlike legislation, which is deliberately drafted, debated and enacted, the common law evolves organically. With respect to academic judgment, the legal doctrine developed over centuries and has purposely remained undefined. As confirmed by the High Court of Justice in the 2013 decision of Mustafa, 'the extent of the area of exclusion remains undefined, [and] it will have to be considered case by case' (para. 49). It is also important to acknowledge that cases unlike legislation,

are not fixed in written form. Numerous cases may apply the same legal principle but each judge may use different words to express or explain the legal principle in question. As a result, to address research question two, it is necessary to meticulously consider the reasoning of each case to ascertain exactly what decisions come with in the parametres of academic judgment, taking into consideration the specific context provided by the material facts.

5.3.2 Parametres of Academic Judgment: Common Law Test

Table 3.1, in chapter three, identified the relevant cases for consideration. After undertaking a methodical examination of each case, noting the challenges discussed above, a key finding has emerged regarding the parametres of what can constitute an academic judgment. There is a clear recognition by the judiciary that 'obviously, the exercise of academic judgment does not encompass everything which academics do, and not all judgments which academics have to make will qualify as academic judgments' (Mustafa, para. 52). In the recent decision of Gopikrishna, the High Court of Justice confirmed that the academic judgment exclusion applies where the 'central subject of the complaint is a dispute about academic judgment' (para. 188). As a result the court is required in each case, based on the specific material facts, to make a determination as to what type of judgment qualifies as an academic judgment for the purposes of a student complaint. Based on the common law cases analysed below, a complaint about an academic matter does not automatically come within the purview of academic judgment. Rather, the court must make a determination between a 'pure academic judgment' complaint and a complaint about a process which pertains to an academic matter but is not substantively about an academic judgment. To define what encompasses the common law definition of an 'academic judgment' it is necessary to consider cases which have applied the academic judgment immunity. As explained in Gopikrishna, 'it is the nature and extent of the judgment that determines whether it will qualify for the academic judgment immunity' (para. 188). This is a subjective test and requires consideration of the material facts of each specific case. When analysing each case, it is necessary to consider 'whether the decision is of a purely academic

nature or whether the academic extent of the decision is only one element of it' (Gopikrishna, para. 188).

5.3.3 'Purely Academic in Nature'

This section will consider cases where the judiciary had to determine whether the university decision being challenged was purely academic in nature and therefore within the scope of the academic judgment immunity. With respect to cases that have considered assessment as part of the material facts, an important commonality emerges. As explained by Justice Langstaff, in the decision of Hamilton, 'the courts administering civil law, and in particular public law, are not well equipped to deal with matters of academic judgment. It is for the examiner and not the court to mark a paper. It is for the educational professional and not for the court to deal with the way in which education is best advanced' (para. 11). The legal reasoning provided in each decision will be considered in order to deduce broader legal principles with respect to how the parametres of academic judgment are defined with respect to assessment.

In the case of Clark, the applicant submitted a paper for her final examination, which the Board of Examiners failed for plagiarism. The finding of plagiarism was subsequently abandoned but the paper was given a mark of zero. As a result, the applicant brought proceedings for breach of contract claiming that the Board of Examiners had misconstrued the meaning of plagiarism and awarded a mark beyond the limits of academic convention (para. 1988E). The court accepted that the arrangement between a 'fee paying student and the ULH is… a contract' which contains 'its own binding procedures for dispute resolution' (para. 1992E). However, noted that 'disputes suitable for adjudication under its procedures may be unsuitable for adjudication by the courts' (para. 1992E). The Court of Appeal went on to state that:

> this is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate. This is not a consideration peculiar to academic matters: religious or aesthetic

> questions, for example may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an aegrotat is justified (para. 1992F).

The approach taken by the judiciary in Clark was subsequently applied in the 2016 decision of Siddiqui. Utilising the example of a decision to award a particular grade to a student sitting an examination, the court confirmed that 'a claim which asserts a breach of a duty owed in tort or contract arising in the exercise by the defendant's professional teaching staff of academic judgment... is not justiciable as a matter of law' (para. 42).

In Moroney an interesting argument was advanced with respect to the scope of what can constitute an academic judgment. The claimant was withdrawn from their course of study due to poor academic performance. One of the issues raised by Moroney was the mark of zero that was awarded in research in clinical practice and, whether this could constitute a decision involving academic judgment. Moroney contended that the mark awarded of zero was perverse and could not represent a *bona fide* exercise of academic judgment. Therefore, the issue for the court to consider was whether there were there were material irregularities in the process which could be justiciable as a breach of contract (para. 19), as opposed to a matter involving academic judgment which was not justiciable. In coming to a decision, the High Court of Justice looked at the paper and the comments of the tutor, and determined that the tutor reached a reasoned conclusion. Justice Underhill went on to explain that 'once it is established that the mark was given in the exercise of a *bona fide* academic judgment, it is incapable of being challenged in this Court' (para. 26). Moroney confirms that matters involving the marking of an assessment, or the class of degree, come within the definition of academic judgment. Further, Moroney provides an important qualifier to determining matters of academic judgment to avoid the limitation identified in Hamilton. In Hamilton the High Court of Justice noted that there are limitations to the academic judgment immunity, 'for instance where a power to mark is on the facts deliberately exercised so as to disadvantage a particular student' (para. 11). The court noted in Moroney that it is first necessary

to establish that the mark awarded was done so in good faith. Where this can be established, the mark comes within the purview of the academic judgment immunity and cannot be challenged.

The case of Kwao raises a similar issue to the one decided in Moroney with respect to the marking process. Kwao sought judicial review of the decision of Keele University not to award him a doctorate in education (EdD) on the examination of his thesis, but instead to award a Master's degree on the basis that it was inconsistent with his prior progress. In Moroney the question was whether a mark of zero was perverse and could not represent an exercise of academic judgment. In the case of Kwao, a similar question was asked - whether the decision was one of flawed academic judgment, or a decision which no reasonable university could arrive at. In giving his decision, Justice Wood applied the reasoning of Clark and concluded that

> this court could not possibly undertake the evaluation required to determine whether the claimant's pre-examination work and progress was of such a quality that the examiners departed from an acceptable norm and ventured into the realm of unreasonableness. Were it otherwise, the courts would be called upon to use their valuable resources to substitute academic, pastoral, or religious decisions with their own, probably, ill-informed if not hastily formed, judgment (para. 45).

5.3.4 A Challenge to Process?

The 1969 case of Roffey provides an early example of the court drawing a distinction between a decision involving academic judgment as opposed to an issue of process where some type of material procedural irregularity has entered the decision-making process. In Roffey, the applicants at the conclusion of their first year had passed examinations in the major subjects but failed subsidiary subjects. Aston University had special regulations which governed their particular course which stated that 'students who… fail in a referred examination, may at the discretion of the examiners, re-sit the whole examination or may be required to withdraw from the course' (para. 538D). Both students were subsequently re-

examined but failed again. At a consultation between examiners and tutors ‘the marks of all students who had failed the referred examinations were considered in light of their academic and personal histories’ (para. 538E). This information included that one student was ‘labouring under acute personal and family difficulties and another had crushed two vertebrae in a riding accident and had barely recovered in time for the referred examination’ (para. 545F). As a result of the consultation, the applicants received letters asking them withdraw from the behaviour science course. This decision was reviewed by the board of examiners, the board of the faculty of social science and the senate and council of the university, which affirmed the decision (para. 542G). The issue for the court to determine in Roffey was whether there was a failure to ‘observe the requirements of natural justice’ (para. 543B), in that the applicants had not been given the opportunity to be heard with respect to the decision-making process of the university. It is interesting to note that it was specifically stated in this case that that ‘the present case should be distinguished from cases where the examining of students was being attacked’ (para. 541D). The court determined that as the examiners had considered ‘extraneous factors, some of which might have been known only to the students themselves, the students should have been given the opportunity of being heard orally or in writing, personally or by representatives before a final decision was reached’ (para. 554A-B; para. 557H-558B). As this did not occur, the court determined that there was a breach of natural justice. The line of reasoning undertaken in Roffey can subsequently be seen, and confirmed, in the more recent cases of Persaud and Van Mellaert analysed below.

The 2001 decision in Persaud builds on the reasoning in Roffey, distinguishing a challenge to academic judgment from a challenge to process. Persaud was a PhD student at Cambridge University who, after a series of disputes with successive supervisors and little progress in her research, had her candidature discontinued. The question that the court had to consider was whether ‘the Board acted fairly towards the appellant when making its decision to reject her application for reinstatement as a graduate student’ (para. 37). In coming to a decision, Lord Justice Chadwick stressed that there was a key difference

between a challenge to academic judgment and a challenge to process (para. 41):

> I would accept that there is no principle of fairness which requires, as a general rule, that a person should be entitled to challenge, or make representations with a view to changing, a purely academic judgment on his or her work or potential. But each case must be examined on its own facts. On a true analysis, this case is not, as it seems to me, a challenge to academic judgment; it is a challenge to the process by which it was determined that she should not be reinstated to the Register of Graduate Students because the course of research for which she had been admitted had ceased to be viable. I am satisfied that that process failed to measure up to the standard of fairness required of the university.

Similar reasoning was adopted in the 2006 case of Van Mellaert. The court, in considering the procedural decisions made by the university, concluded that the court could only intervene if the applicant is able to demonstrate material procedural irregularity, actual bias or procedural unfairness. In Van Mellaert, the 'root of the Claimant's complaint against the University relates to the criticisms made of his thesis by the two examiners which constituted their reason for recommending that the thesis be referred back to the Candidate for further re-submission' (para. 21). In his judgment, Justice Gray applied the cases of Clark and Vijayatunga in support of the proposition that 'questions of academic judgment are generally treated by the courts as being non-justiciable and unsuitable for adjudication by the courts' (para. 23). However, His Honour also referred to situations where the exercise of academic judgment could be challenged, explaining that

> the court would no doubt in a suitable case intervene if it were shown that there had been a material procedural irregularity or if actual bias on the part of one tribunal or another were demonstrated or if it could be shown that there was some procedural unfairness to the Claimant (para. 25).

Van Mellaert re-affirmed the proposition espoused in Persaud, reinforcing the distinction the judiciary is making between a decision involving academic judgment and the process by which a decision is made.

The 1990 appellate decision of Vijayatunga provides an interesting example of the court confirming the exclusive jurisdiction of the Visitor, with respect to academic judgment, and also confirming that the decision-making power of the Visitor could be challenged if there was procedural impropriety. As succinctly described by Lord Justice Mann, the issue in Vijayatunga was to whether 'the examiners appointed by the university to examine the applicant's thesis were competent' (para. 459G). This raised the interesting question of whether there is a 'distinction between the due selection of examiners and the judgment of the examiners once duly selected' (para. 447H). The court concluded that the choice of examiner is 'wholly a matter of academic judgment in which this court should not interfere' (para. 460B) unless there is some type of 'manifest procedural impropriety' (para. 458C). The Court of Appeal noted in their decision that the examiners were 'appointed in accordance with the rules and academic practices of the University of London' (para. 456A) and were therefore 'not persuaded that the committee [Visitor] made a decision which was wrong in law' (para. 459F). As a result, there was no ground for the Court of Appeal to intervene by way of a judicial review (para. 445A).

The 2004 decision of Mabaso and the 2007 decision of Senior-Milne provide examples of the distinction the court has drawn when considering whether a decision involves academic judgment within the assessment context. In Mabaso the applicant sought permission to apply for judicial review of a decision to remove him from his course after failing a compulsory maths module twice. At the centre of Mabaso's application was a letter written by Professor Macnair which stated that: 'I have had the opportunity to examine your exam script MATA05 and do support your position that you have been unfairly assessed. My findings indicate that you should have passed the module' (para. 9). The court went to great lengths to note that there was 'no indication that the process by which the college reached its decision was unfair'. This was a fact accepted by Professor Macnair. Lord Justice Buxton went on to conclude that

> the court cannot possibly enter into the rights and wrongs of whether Professor Macnair, or alternatively the gentleman who marked the script at the College of St Mark & St John and those who assessed his marking, took the correct view of whether the script was right or not. It is unfortunate for Mr Mabaso, if it is the case, that he has been required to leave the course on the basis of a script that at least one person thinks should have been passed rather than failed. But is there no foreseeable way in which this court can intervene now to assert that Professor Macnair's view rather than that of other qualified academic persons about the script should prevail (para. 11).

This decision in Mabaso raises interesting questions for further consideration in chapter six. Would the court have come to a different conclusion had *Mabaso* argued that the marking process was unfair or unreliable. Would this have brought the complaint into the sphere of a challenge to process as opposed to one challenging an academic judgment.

Senior-Milne sought to appeal the result he received on two papers, arguing that there were several procedural irregularities in the conduct of his examinations. He alleged that the university failed to protect his anonymity in the assessment process and that an examiner was biased against him. Justice Burnton determined that there was no evidence to support his assertions and reiterated that ‘in any event it is well known that this court will not embark, save in very extreme cases, on questions depending on the academic value or academic judgment of universities, university staff or exam papers’ (para. 15). Senior-Milne re-affirms that the court is prepared to consider issues of procedural irregularity with respect to university decision-making, namely with respect to assessment, if relevant supporting evidence is provided.

In the 2013 decision of Chilab the applicant ‘claimed damages for breach of contract or for breach of duty of care… [for failure] to give proper effect to the regulations governing the award’ (para. 1). There were several issues raised with respect to assessment including, the inaccurate calculation of a mark and the incorrect application of university regulations. In deciding to hear the case, the

Court of Appeal expressly stated that the applicant 'does not challenge the academic judgment of the examiners', but rather than the claim is 'based on alleged failure to identify, interpret and apply correctly the relevant regulations' (para. 3). In their determination, the court concluded that there had been no breach of the regulations, but this case confirms the common law position that a challenge to process can be heard by the judiciary even where it touches on matters of academic judgment.

5.3.5 The Gopikrishna Decision and Academic Judgment

The decision of the High Court of Justice in Gopikrishna, one of the most significant decisions pertaining to academic judgment, was met with headlines including 'Is academic judgment now open to legal challenge?' (Lawson and Glenister, 2015). This case is legally significant for several reasons. First, it applies the Higher Education Act. Second, it considers and applies the previous academic judgment decisions analysed above. Third, it provides clear questions which need to be asked when determining what can constitute an academic judgment.

In 2011, Gopikrishna, then a second-year medical student, failed her end-of-year examination. She asked to be allowed to repeat the year and to re-sit the examination. A committee at the medical school decided that she should not be allowed to repeat the year and, that her course should be terminated. Gopikrishna appealed to a review panel acting for the whole university, which rejected her appeal. Gopikrishna then made a complaint to the OIA. Over a period of time the OIA issued two provisional decisions. Following various developments detailed below, the OIA then issued the final decision in an 'Amended Complaint Outcome.' The complaint was not upheld and Gopikrishna sought judicial review of the final decision of the OIA.

The first issue that the court had to consider was whether the statutory academic decision immunity should be co-extensive with the area of non-justiciability accepted by the courts. This is a crucial question in the context of understanding how academic judgment should be interpreted from a legal standpoint. The

question being asked is twofold. First, whether the prior judicial decisions with respect to academic judgment should exist alongside the statutory provision. Second, should these common law decisions be applied by the OIA when considering whether a university decision can be the subject of a complaint. The High Court of Justice determined in the affirmative, noting that 'it would be a surprising anomaly if there were complaints which the court could consider but the OIA could not, or vice versa' (para. 187).

The High Court of Justice went on to summarise the current common law principles with respect to the academic judgment immunity. Judge Curran confirmed that the immunity (or exclusion) applies where the central subject of the complaint is a dispute about an academic judgment' (para. 188), noting that 'questions of what class of degree, or whether a student has passed or failed an examination, are matters solely for the judgment of examiners within the relevant discipline' (para. 188). This is consistent with the previous common law decisions of Clark, Hamilton, Moroney and Mustafa. Judge Curran also confirmed that 'not all judgments which academics have to make qualify for the immunity. Nor can an academic institution expect that any claim for academic judgment immunity will be accepted uncritically' (para. 188). This is consistent with the previous decisions of Cardao-Pito and Senior-Milne. Judge Curran went on to explain that it is the 'nature and extent of the judgment that determines' (para. 188) whether it will qualify for the academic judgment immunity noting that the question to consider is

> whether the decision is of a purely academic nature -- such as a dispute over a mark, or the class of degree awarded -- or whether the academic extent of the decision is only one element of it: as where, for example, the complaint relates to procedural unfairness in reaching the decision, or to an allegation that extraneous or irrelevant matters were taken into account by the decision-maker' (para. 188).

His Honour went on to provide the example of where there is 'evidence that impropriety has occurred, such as an examiner purporting to mark a paper

without reading it all' (para. 188). This is consistent with the reasoning in the case of Moroney.

In Gopikrishna, the High Court of Justice clearly articulated two types of academic judgment complaints that form the basis of judicial review based on previous common law decisions. The first type of academic judgement complaint identified was a 'complaint about how a paper had been marked, or a decision upon the class of degree which the candidate's scripts merited' (para. 191). The examples provided by the court were all based on the previous common law decisions analysed above. Judge Curran was explicit in his reasoning that the case of Gopikrishna did not fall within the first category, as she was not seeking to challenge an academic result. The second type of academic judgment complaint identified was a complaint with respect to process. Specifically whether the university, in making a decision, followed their own internal procedures. In the case of Gopikrishna, the issue for the court to consider was whether, in making the decision to exclude her from her course of study, the university only took into consideration relevant material. Put another way 'has the process by which it was determined that the Claimant should not be allowed to repeat Year 2 failed to measure up to the standard of fairness required of the University?' (para. 197). As noted by the High Court of Justice

> plainly the decision on that issue required consideration of academic matters such as the academic history, but it also involved taking into account the bald incontrovertible fact, for example, that she had only completed 25 per cent of the SSC in Semester 4 for reasons which had been found to be acceptable. The question was whether that could rationally be regarded as demonstrating poor prospects for the future' (para. 191).

In determining the type of information that could be 'rationally regarded' or properly reasoned, the High Court of Justice noted that in administrative law terms a 'properly reasoned' or 'rational approach'

> is one which takes care to ensure that all relevant matters are considered, and that no irrelevant matter is taken into account, and that the decision is adequately explained. The legal principles found in authorities such as Cardao-Pito, Clark, Mustafa and Persaud, led to the conclusion that if, on the evidence, an 'academic judgment' was, or may have been, partly based on irrelevant considerations, it would be nevertheless be open to review' (para. 198).

The third, and final issue, that the High Court of Justice had to consider in Gopikrishna relates solely to a matter brought before the OIA and not to a matter brought before a court on public law principles, which would be determined by judicial review. Judge Curran made clear that if there is 'objective evidence of matters which suggest procedural unfairness, bias, impropriety, or the kind of administrative irrationality or perversity which the court can and does consider in many other fields, then the OIA may properly regard a complaint to it against a university's decision as one which it is competent to determine' (para. 188). This is interesting for two reasons. First, His Honour is confirming that the jurisdiction to make a determination with respect to administrative law principles are co-extensive between the OIA and the judiciary. Second, and importantly for this thesis, the High Court of Justice appears to be drawing a distinction between the common law administrative law principle of procedural fairness and the scope of the OIA powers to consider whether a university has 'followed its own assessment, marking and moderation procedures, and whether there was any unfairness… in the decision-making process' (para. 93).

5.3.6 Preliminary Conclusions: Common Law

It is clear from the analysis above that 'not all judgments which academics have to make will qualify as academic judgments' (Mustafa, para. 52) and that the academic judgment immunity only applies where the 'central subject of the complaint is a dispute about academic judgment' (Gopikrishna, para. 188). The judiciary has consistently stated that only decisions which are purely academic in nature qualify for the academic judgment immunity. Based on the common law, these decisions include the awarding of marks (Chilab; Clark; Gopikrishna;

Hamilton; Kwao; Moroney; Mustafa; Senior-Milne; Thomson; Thorne), the decision to exclude students due to insufficient academic performance (Mabaso; Patel), the selection of PhD examiners (Vijayatunga) and the decision of what class a student ought to be awarded (Clark; Hamilton). The judiciary has also clearly and consistently distinguished between cases where students have sought to challenge a process as opposed to challenge an academic judgment, noting that a challenge to process can be determined by the judiciary even where it touches on matters of academic judgment (Chilab; Mustafa; Senior-Milne).

5.4 Defining Academic Judgment: Legislation

5.4.1 Overview

The Higher Education Act 2004 specifically excludes student complaints which pertain to matters of academic judgment. This essentially codifies the common law academic judgment immunity. In creating the Higher Education Act, parliament had ample opportunity to define what legally constitutes an academic judgment. Specific questions about whether 'academic judgment' should be defined in the legislation were raised during parliamentary debates considering the Bill. Ultimately it was concluded that parliament would not define what constitutes academic judgment, noting that it was a 'difficult issue'. This difficult issue leaves a significant gap which research question two seeks to address. In order to ascertain what comes within the definition of academic judgment the principles of statutory interpretation, explained in chapter three, will be applied to the Higher Education Act. As noted by Bennion (2008, s137), the 'unit of enquiry' in statutory interpretation is 'an enactment whose legal meaning in relation to a particular factual situation falls to be determined'. Once the text and relevant wording have been established, 'the lawyer can then proceed to determine its meaning in the light of the principles of interpretation' (1995, p. 22). In the context of this thesis, the unit of enquiry is Higher Education Act 2004, which *inter alia* established an independent complaints procedure for students. The relevant provision of the Higher Education Act 2004 is section 12, which has two key components. Section 12(1) sets the jurisdiction by determining what constitutes a qualifying complaint for the purposes of the legislation. Section 12(2) removes

academic judgment from the jurisdiction of being considered a qualifying complaint. Section 12(2) states that 'a complaint which falls within subsection (1) is not a qualifying complaint to the extent that it relates to matters of academic judgment'. It is acknowledged that parliament has the authority to make such a provision. This thesis is not seeking to challenge the scope or extent of parliamentary legislative power. Rather, this thesis aims to fill a significant gap. Parliament has intentionally chosen to expressly exclude matters of academic judgment. Parliament has also intentionally chosen not to provide a definition of what constitutes an academic judgement leaving members of the higher education assessment community with no direction for how this determination is to be legally made. To address research question two, from the statutory context, it is necessary to begin by considering relevant extrinsic materials.

5.4.2 Defining Academic Judgment: Extrinsic Materials

As the Higher Education Act does not define the meaning of academic judgment, it is permitted under the rules of statutory interpretation, to consider extrinsic materials to assist in determining the intention of parliament. As emphatically stated by Lord Griffiths in Pepper v Hart [1993]

> the days have long passed when the courts adopted a strict-constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted (para. 50).

Extrinsic materials often originate from the parliamentary stages which a Bill must proceed through in order to become legislation. These parliamentary stages include the second reading stage where 'there is a debate on the main principles of the bill' and a committee stage where 'there is line by line consideration of the detail of the bill' in both the House of Commons and the House of Lords (Cabinet Office, Guidance, Legislative process: taking a bill through Parliament, 20 July 2013). This legislative history of an Act can be a rich source of data. As noted by

Cross et al. (1995, p. 152), legislative history can include both pre-parliamentary materials such as reports of committees and parliamentary materials such as explanatory memoranda, proceedings in committee and parliamentary debates. The Committee Stage, in the House of Commons, known as Standing Committee H and the Committee State in the House of Lords both provide elucidating material with respect to academic judgment. After considering 321 pages of parliamentary debates in both the House of Commons and the House of Lords no uniform definition of academic judgment has emerged. However, there are three common themes that arise from relevant extrinsic materials. In the context of statutory interpretation and doctrinal analysis, these themes can be utilised to assist in determining the scope and parametres of what constitutes an academic judgment.

5.4.3 Common Theme 1: To Define or Not to Define?

Both Houses of Parliament engaged in substantial debate as to whether the term 'academic judgment' should be defined in the legislation and how 'qualifying complaint' should be defined in the legislation. Initially, Mr Thomas (HC Deb, 12 February 2004, col. 112) sought to amend the definition of qualifying complaint in the Bill noting that 'such Bills are usually stuffed full of definitions, but the definition of a qualifying complaint is not terribly convincing'. In drafting the legislation, he wanted to ensure that students 'who feel aggrieved have sufficient grounds to make a complaint' (HC Deb, 12 February 2004, col. 112). In response the Parliamentary Under-Secretary of State Education and Skills, Mr Lewis, stated that 'when defining a complaint or a grievance, it is sometimes better not to be too prescriptive. Otherwise, we may end up trying to achieve something that is simply not possible' (HC Deb, 12 February 2004, col. 113). Mr Lewis' concern was that there would be great difficulty if 'we sought to prescribe the definition of a complaint too clearly, too closely and too narrowly' (HC Deb, 12 February 2004, col. 113).

> The important point to make is that the adjudicator would have the power and the opportunity to judge whether the complaint was in or out of order depending on whether it fell within the category of academic judgment. To

> some extent, we have to leave that judgment to the OIA. The adjudicator would be independent, objective, and able to decide whether a complaint fell within their jurisdiction, or whether it was a matter of academic judgment. If they decided that it was a matter of academic judgment, they would judge it inappropriate for them to consider the complaint. (HC Deb,12 February 2004, col. 94)

There was agreeance in the House of Lords between Lord Shutt of Greetland and Lord Dearing that they wished to avoid a situation where the current wording, 'matters of academic judgment', could provide 'some form of hiding place' or 'could be used by a university as a refuge when it did not want to investigate a matter' (HL Deb, 19 April 2004, vol. 660, col. 113). Lord Dearing went on to note that it would be 'helpful if the Government could guide the adjudicator into an interpretation which would admit rather than shut out the consideration of a complaint' (HL Deb, 19 April 2004, vol. 660, col. 114). Baroness Perry of Southwark noted that 'there is a very real danger that the phrase "academic judgment" could become a secret garden embracing so many areas that it would be impossible for a student to query a judgment' (HL Deb, 19 April 2004, vol. 660, col. 114). Baroness Perry was concerned that academics could 'retreat into safe territory by saying "it is simply my judgment that the answer was not satisfactory. I cannot give the criteria or reasons for my decision. I made an academic judgment"' (HL Deb, 19 April 2004, vol. 660, col. 114).

Ultimately, parliament chose not to define academic judgment for three key reasons. First it was determined that it was more appropriate for the OIA to define the scope of academic judgment. Second, parliament wanted to avoid being overly prescriptive in case they inadvertently narrowed the scope of what constitutes a qualifying complain. Third, parliament chose not to define the parametres of academic judgment as they did not want the definition to be used as a shield by universities to avoid investigating student complaints.

5.4.4 Common Theme 2: Within the Scope of Academic Judgment?

Questions were asked, and not always answered, as to whether particular scenarios or circumstances would come within the scope of academic judgment. Mr Shaw (Chatham and Aylesford) (Lab) (HC Deb, 12 February 2004, col. 91) asked the Parliamentary Under-Secretary of State Education and Skills 'what are the parameters? Is curriculum design the issue? How far does academic judgment go?'. There also appeared to be a conflation between academic freedom and academic judgment but this question is outside the scope of this thesis. It would appear that the closest definition of what constitutes academic judgment came in the House of Commons when the Parliamentary Under-Secretary of State Education and Skills stated that any Minister who could define the parameters of academic judgment would be doing exceptionally well'. Mr Lewis sought to define academic judgment by providing examples of what could constitute academic judgment. According to Mr Lewis

> academic judgment is used to decide the marks awarded in examinations or other assessments, and ultimately to decide the class of degree. Only examiners are in a position to make such decisions, and to change that would be a serious infringement of their autonomy in academic matters (HC Deb, 12 February 2004, col. 94).

There were also several clear examples of 'judgment' which would not come within the scope of an academic judgment. It is clear from the question of Mr Clappison that 'a lecturer or tutor who plainly was not giving good lectures or was not qualified to give the lectures in question' would not fall within the scope of an academic judgment according to Mr Lewis. Mr Shaw sought to clarify whether an inappropriate comment in a lecture would qualify as academic judgment, for example 'if a student were to make an allegation that a lecturer made a sexist or racist comment'. In response, Mr Lewis stated

> absolutely not. If that kind of remark or comment were made, it would first be a matter for the institution's complaints process. If the student were not satisfied with that process, it would definitely be a matter for the

> independent adjudicator. There is no doubt whatsoever about that (HC Deb, 12 February 2004, col. 94).

From the extrinsic materials it can be concluded that the marks awarded in examinations and assessments come within the scope of academic judgment, as does the class of degree. This is consistent with the analysis of the common law undertaken above. Complaints that would fall outside the scope of academic judgment include a situation where an academic makes sexist or racist comments, where an academic does not have the necessary expertise to teach the lecture in question, and where the academic is teaching below the expected level of competency. As explained by members of parliament, these complaints would fall outside the ambit of academic judgment and come within the scope of a qualifying complaint which could be considered by the OIA.

5.4.5 Common Theme 3: Matters of Process

It was confirmed by the House of Commons and the House of Lords that the exclusion of academic judgment from the purview of the OIA would not include ‘complaints where such procedures were faulty or the outcome of the appeal was clearly unreasonable’ (HL Deb, 10 May 2004, vol. 661, col. 121). As explained by Lord Triesman,

> Where students' complaints are about the academic or examination appeals panel, examples of the type of complaint that will be admitted to the reviewer include where the panel is improperly constituted; where it fails to take account of relevant information provided by the student; where… some calamity has occurred in the course of the examination which has meant it is very hard for a student to do as well as she or he could; or where it fails to give the student the opportunity to make appropriate representations on his or her behalf. These are complaints that the independent reviewer can consider (HL Deb, 10 May 2004, vol. 661, col. 121).

The Parliamentary Under-Secretary of State Education and Skills also made it clear that academic judgment was different from procedural matters. He expressly noted that

> complaints would qualify if they related to procedural matters such as whether a student had access to an academic appeals committee and whether that committee was properly constituted. The OIA could consider a complaint when a university was attempting to hide behind the excuse that something was a matter of academic judgment and it could be proved that that was not appropriate or reasonable. I cannot give… a clearer and more definitive definition of academic judgment at this stage**,** but I do believe that the OIA will be best placed to make that judgment (HC Deb, 12 February 2004, col. 94-95).

The distinction drawn by parliament with respect to matters of academic judgment and matters of process involving an academic decision is consistent with the distinction drawn by common law courts. This will be considered further in chapter six.

5.5 Defining Academic Judgment: OIA Rules

5.5.1 Overview

As noted by The Secretary of State for Education and Skills, Mr Charles Clarke, in the second reading speech of the Higher Education Bill 2004: ‘the creation of the office of the independent adjudicator provides a common and transparent means of redress for student complaints, in place of the often archaic arrangements with so-called Visitors and other mechanisms - more appropriate to the nobles of CP Snow that to modern university life’ (HC Deb, 27 January 2004, vol. 417, col. 167). Through the Higher Education Act 2004, parliament provided the OIA with the power to review student complaints. It is apparent from Committee Stage of the House of Commons and House of Lords that parliament was of the view that defining what constitutes academic judgment was best left

to the OIA. It is therefore necessary to consider how the OIA has defined academic judgment, and how courts have interpreted section 12 of the Higher Education Act and the corresponding tertiary legislation, created by the OIA.

5.5.2 Defining Academic Judgment

The current OIA Scheme Rules, effective from 1 April 2018, provide that the OIA 'cannot review a complaint about the academic judgment of a higher education provider' (rule 5.2). This is consistent with section 12(2) of the Higher Education Act 2004 which states that a complaint about a matter of academic judgment is not a qualifying complaint within the jurisdiction of the legislation. The OIA Scheme Rules do not provide a definition of what constitutes academic judgment. The next step is to consider the Guidance Note published by the OIA which states that 'the Guidance Note should be read together with the Rules' (p. 1). The current Guidance Note (April 2018) states, in paragraph 30.2, that

> academic judgment is not any judgment made by an academic; it is a judgment that is made about a matter where the opinion of an academic expert is essential. So for example a judgment about marks awarded, degree classification, research methodology, whether feedback is correct or adequate, and the content or outcomes of a course will normally involve academic judgment.

It is interesting to note that this definition is not prescriptive. The use of the word 'normally' indicates that it is possible to provide circumstances which refute the definition. There is a separate Guidance Note specifically about plagiarism which provides states that 'decisions about whether a student's work contains plagiarism and the extent of that plagiarism will normally involve academic judgment, but that judgment must be evidence based' (para. 30.4). This is consistent with the recent case of Mustafa (2013) and falls outside the scope of this thesis.

Paragraph 30.3 of the Guidance Note provides the areas that the OIA does not consider to involve academic judgment which include

> decisions about the fairness of procedures and whether they have been correctly interpreted and applied, how a higher education provider has communicated with the student, whether an academic has expressed an opinion outside the areas of their academic competence, what the facts of a complaint are and the way evidence has been considered, and whether there is evidence of bias or maladministration.

This is consistent with the intention of parliament, that specified that decisions which involved procedural matters would not come under the scope of academic judgment and could be considered by the OIA.

5.5.3 Application of the Definition

An important aspect of doctrinal legal research is application. As articulated by Chynoweth (2008, p. 29),

> within the common law jurisdictions legal rules are to be found within statutes and cases but it is important to appreciate that they cannot in themselves provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.

In chapter five, the contextual situation is provided by decisions of the OIA that have been appealed to the judiciary. It is acknowledged that the OIA publishes ‘case summaries’ on their website. However, these case summaries provide a truncated version of events. It is not possible from the case summaries to ascertain the material facts of what occurred nor the process that the OIA undertook to reach their decision. Further, not every case decided by the OIA is amalgamated into a case summary. Only cases which are deemed to be a ‘public interest case’ are made publicly available on the OIA website. In order to understand how the OIA defines and applies ‘academic judgment’, an appropriate source is judicial decisions where OIA decisions have been appealed by students. The cases below have been identified as relevant because they provide

as insight into the specific wording that the OIA has utilised to describe the scope of academic judgment from their perspective.

In the case of Budd a claim was lodged in the High Court of Justice alleging that the OIA did not adopt the appropriate procedure in determining that the Open University had followed its own procedures correctly with respect to the marking process. The argument espoused by Budd, in his application for judicial review, was that 'no reasonable review body could reach an informed decision on the complaint lodged without checking the script for procedural irregularities. In other words, the OIA should have called for script and looked at' (para. 5). The legal issue being raised by Budd is outside the scope of this thesis. However, the facts provide a fascinating insight into whether the OIA considers matters of academic judgment justiciable and importantly, how they make this determination. In explaining how complaints are investigated, the OIA explained that it

> cannot interfere with the operation of an institution's academic judgment. We cannot put ourselves in the position of examiners in order to re-mark work or pass comment on the marks given. We can only look at whether an institution has breached its procedures or acted unfairly (para. 39).

This approach was re-enforced in a witness statement, provided in the case of Budd by a deputy adjudicator of the OIA, which stated that 'the OIA cannot interfere with the exercise of a university's academic judgment. It is not, therefore appropriate or necessary for us to see the contents of exam papers, or indeed other written assessments' (para. 45). The witness statement went on to explain that the OIA's

> normal practice, is to review the final decision of the University to determine whether it had followed its procedures correctly and whether any decision made by the University was reasonable in all the circumstances. It is not generally necessary to carry out a check of the physical script. Instead, we review whether the University has proper procedures in place for checking scripts and whether those procedures have been correctly followed (para. 45).

In Mustafa, the High Court of Justice, in considering the wording of the legislation, stated that section 12

> does not exclude in its entirety any complaint which involves a matter of academic judgment. The exclusion applies where the central subject of the complaint is a dispute about an academic judgment and that complaints where such disputes are peripheral are not intended to be excluded' (para. 51).

Therefore, as explained by Justice Males, the question that may arise is the

> extent to which the OIA can consider a complaint which does involve a matter of academic judgment, but where the correctness of that judgment is not a central issue. An example may be a complaint that a finding of plagiarism had been reached by a process which was unfair (para. 51).

A similar approach was adopted in the case of Cardao-Pito where the court considered the OIA Rules and confirmed that the jurisdiction of the OIA is

> intended to exclude appeals where the central subject matter of the complaint is a dispute about an academic judgment. Typical examples would be those whose substance is to dispute an academic assessment of the quality of a piece of work, or where issues are raised about the performance of a student in tutorials or seminars' (para. 97).

The court also made clear that 'misconduct, omissions or failures by an HEI which adversely affect a student are subject to the scheme' (para. 97) with Justice Gilbart noting that 'it would be extraordinary if it [the OIA] could exclude consideration of misconduct or failures by the HEI simply because their effects showed up in a poor performance of the student in his/her coursework or examinations' (para. 97). In the case of Cardao-Pito one of the matters raised was the conduct of the claimant's supervisor and the effect upon the claimant's ability to successfully write his research paper. Here the court was clear that this was not a complaint which related to a matter of academic judgment. Rather,

> it was one which related to the conduct of an academic, which is quite a different question. The fact that it had an effect on the mark given to his paper is not a question related to a matter of academic judgment within the ambit of the exclusion in rule 3.1 [Rule 5.2 in 2018] (para. 97).

The 2014 case of AFP Alexander is an unusual one. The applicant was a law student at King's College London who was due to sit final examinations in May 2010. In February 2010 he was arrested in connection with the death of his father and subsequently convicted of murder and sentenced to life in prison. As a result, King's College terminated his registration, explaining that it would not offer distance learning and 'could not agree to his request to sit examinations whilst not having received the appropriate teaching and support for those examinations' (para. 10). As articulated by Justice Lang, in the 'College's academic judgment, it would place him at a substantial disadvantage and it was not prepared to put him forward for the examinations in those circumstances' (para. 10) despite the request of the applicant. The applicant appealed to the OIA, who determine that the complaint was not justified, stating that it was a matter of academic judgment. Justice Lang noted that it was 'reasonable for the College to require a student to have completed the required period of study and attendance in order to sit the final examinations' (para. 11).

One of the issues in the case of R (Wilson) v Office of the Independent Adjudicator for Higher Education [2014] ('Wilson') was whether the start time for an online seminar was a decision that involved an academic judgment. In this case, the academic, Dr R wanted to hold an online seminar at 9.30am. The applicant requested for the seminar to be in in the evening. The request was denied and the applicant subsequently attended at the scheduled 9.30am time. During the seminar, Dr R wanted to establish the date and time for a further one hour online seminar and proposed a weekend. After objections from other students, the seminar was fixed for a week day evening. This date and time was not inconvenient for the Claimant but he felt a sense of grievance that his difficulties had been overruled in respect of the first seminar, whereas others' difficulties were accommodated in respect of the second seminar. As a result he appealed to the OIA claiming unfair treatment (para. 9). The OIA concluded that

Dr R's decision on what was an appropriate time for the first online seminar was a matter of academic judgment and therefore outside the scope of the OIA's review (para. 20).

In the 2015 case of Gopikrishna, the OIA explained that it cannot interfere with the operation of an institution's academic judgment noting that

> we cannot put ourselves in the position of examiners in order to re-mark work or pass comment on the marks given. However, we can look at whether the University has correctly followed its own assessment, marking and moderation procedures, and whether there was any unfairness … in the decision-making process [Emphasis added.] (para. 93).

In the case of The Queen on the Application of Abdullah Sindhu v Office of the Independent Adjudicator [2018] ('Sindhu'), the issue was whether the OIA could consider a decision of the University of Manchester's Postgraduate Degrees Panel, who determined that Sindhu would be awarded an MPhil degree as opposed to a PhD. In considering Sindhu's case, the OIA noted that

> the Adjudicator was not able to interfere with the operation of a university's academic judgment but could look at whether a university had correctly followed its own procedures and also could look at whether the decision-making process had entailed any element of unfairness or bias' (para. 7).

Further, the OIA clarified in Sindhu that 'academic judgment did not mean any judgment made by an academic but rather, it meant a judgment on a matter where only the opinion of an academic expert would suffice' (para. 7). Examples that were given included decisions on degree classification.

5.6 Research Outcomes

5.6.1 Outcome 1: A Common Law Definition of Academic Judgment

Based on the analysis undertaken in chapter five, it is apparent that the common law has purposely chosen not define what constitutes an academic judgment. As confirmed by the High Court of Justice in Mustafa (para. 49), 'the extent of the area of exclusion remains undefined, [and] it will have to be considered base by case'. As a result, it was not possible to determine a singular definition of what constitutes an academic judgment from the common law perspective. However, after meticulously considering the material facts and legal reasoning of relevant common law decisions, it was possible to determine the scope of the academic judgment immunity and the types of decisions that would be protected. These findings are discussed in outcome 2 and outcome 3 below.

5.6.2 Outcome 2: Common Law Scope of Academic Judgment

There is a clear recognition by the judiciary that 'obviously, the exercise of academic judgment does not encompass everything which academics do, and not all judgments which academics have to make will qualify as academic judgments' (Mustafa, para. 52). This reasoning was re-iterated by Judge Curran in Gopikrishna where he stated that 'it would be a surprising exercise in irony if a respectable academic institution attempted to defend a decision made by it which took account of irrelevant considerations, or failed to take into account relevant considerations, by saying that, as an 'academic judgment,' it needed no further explanation, and was immune from review' (para. 198). The decisions of Mustafa and Gopikrishna demonstrate that it is not sufficient to simply label a decision an academic judgment. Rather, it needs to be established utilising appropriate common law principles that a university decision is one involving academic judgment. Based on an analysis of relevant common law cases, this thesis has developed two questions to determine whether a university decision can qualify as an academic judgment:

1. Is the central subject matter of the complaint a dispute about an academic judgment?

2. Has the academic judgment been exercised in good faith?

As depicted in figure 5.2 below, for a university decision to be defined as one of academic judgment, the first question that needs to be considered is whether the central subject matter of a complaint is a dispute about academic judgment.

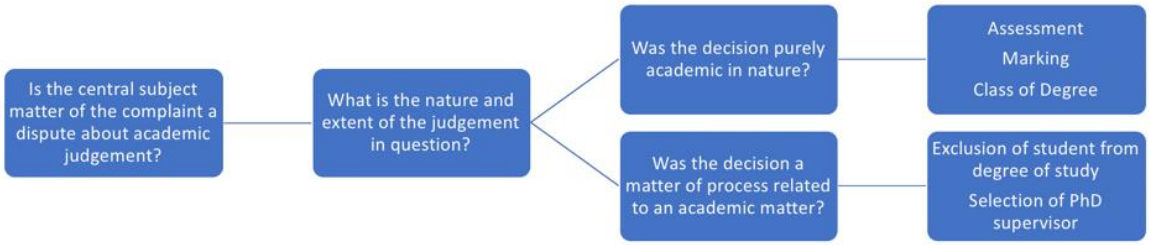

Figure 5.2: Determining the central subject matter of the complaint

For this to be determined, it is necessary to specifically consider the nature and extent of the judgment in question. This will need to be done on a case by case basis, but there are common legal principles to guide the determination. The common law has determined that there are two types of decisions, those which are purely academic in nature and those which may involve an academic element but are a matter of process. Once it has been determined that the central subject matter of a complaint is with respect to a decision which is purely academic in nature, the second question can be considered. As demonstrated in figure 5.3 below it is not sufficient that the decision is purely academic in nature. The academic judgment must also have been exercised in good faith.

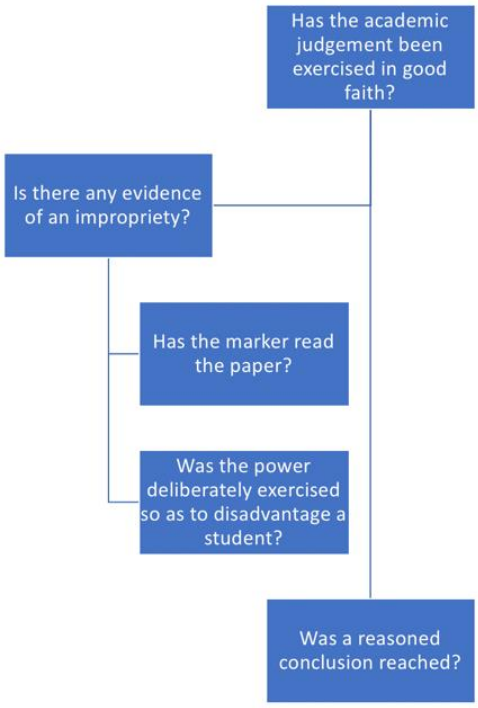

Figure 5.3: Determining whether an academic judgment has been exercised in good faith

To determine whether the exercise of the academic judgment can be described as having been done in good faith there are, at present, two factors that can be considered based on common law decisions. As noted in the decision of Gopikrishna, to determine whether the academic judgment has been exercised in good faith or without *mala fides*, the court will consider whether there is any evidence that an impropriety has occurred. For example, an examiner purporting to mark a paper without reading it at all. In the decision of Moroney, the court had to consider whether a mark of zero could be considered to represent a *bona fide* academic judgment. The High Court of Justice concluded that where it can be determined that a reasoned conclusion was reached, this is enough to establish that the academic judgment was made in good faith. The second factor that can be considered is whether 'a power to mark, is on the facts, deliberately exercised so as to disadvantage a particular student' (Hamilton, para. 11). If the answer to both questions is 'yes', then the common law will likely determine that the decision in question would qualify as an academic judgment and therefore be protected from legal challenge by the academic judgment immunity.

5.6.3 Outcome 3: Decisions Protected by the Academic Judgment Immunity

For a university decision to be protected by the academic judgment immunity it must be one which can be classified as 'purely academic in nature'. What can be concluded from the common law cases analysed above is that decisions which are 'purely academic in nature' include:

1. the awarding of marks (Chilab; Clark; Gopikrishna; Hamilton; Kwao; Moroney; Mustafa; Senior-Milne; Thomson; Thorne);
2. the decision to exclude students due to insufficient academic performance (Mabaso; Patel); the selection of PhD examiners (Vijayatunga); and
3. the decision of what class a student ought to be awarded (Clark; Hamilton).

These decisions are *prima facie* protected by the academic judgment immunity and are therefore not subject to legal challenge. These decisions do however need to be considered within the context of outcome 1, the common law scope of academic judgment.

5.6.4 Outcome 4: Decisions not Protected by the Academic Judgment Immunity

The common law has carefully and consistently drawn a distinction between matters of academic judgment and decisions involving academic matters which are procedural in nature. The common law has identified both the types of processes, as well as specific decisions, which are not protected by the academic judgment immunity. The types of processes, not protected by the academic judgment immunity, include:

1. a process which 'fails to measure up to the standard of fairness required of [a] university' (Persaud, para. 41);
2. a process which fails to 'observe the requirements of natural justice' (Roffey, para. 543B);

3. the procedural aspects of a process where the applicant is able to demonstrate material procedural irregularity, actual bias or procedural unfairness (Van Mellaert, para. 25);
4. a process which involves some type of 'manifest procedural impropriety' (Vijayatunga, para. 458C); and
5. a process where there is a failure to 'identify, interpret and apply correctly' relevant university regulations (Chilab, para. 3).

With respect to specific decisions, the courts have noted that the exclusion of students from their degree of study due to academic performance (Persaud; Roffey), the appointment of PhD supervisors (Vijayatunga), 'recommending that a thesis be referred back to the Candidate for further re-submission (Van Mellaert, para. 21), and decisions made with respect to the assessment process (Chilab; Mabaso; Senior-Milne) can be challenged where the applicant can demonstrate that there has been a failure in the decision-making process. Where the applicant seeks to challenge the process, as opposed to challenge the academic judgment, the court is prepared to adjudicate the matter, even where it touches matters of academic judgment. This distinction has also formed the basis of the current statutory academic judgment immunity contained within the Higher Education Act and continues to form the basis for common law judicial review.

5.6.5 Outcome 5: Legislative Definition of Academic Judgment

To determine the legislative definition of academic judgment, it was necessary to consider the relationship between the primary legislation created by parliament, the tertiary legislation created by the OIA and the way in which the judiciary interpreted the relevant provisions. Section 12 of the Higher Education Act 2004 provides that a complaint about an act or omission of a university can be determined by the OIA with the exception of a complaint to the extent that it relates to matters of academic judgment. As academic judgment was not defined in the Act, relevant extrinsic materials were considered. It was clear from the Hansard records that parliament, in drafting the Higher Education Act, was careful to avoid a situation where 'academic judgment' could provide 'some form of hiding place' or 'could be used by a university as a refuge when it did not want

to investigate a matter' (HL Deb, 19 April 2004, vol. 660, col. 113). Hansard also helped to establish what types of decisions parliament viewed as coming within the scope of an academic judgment. These included decisions about marks awarded in an assessment as well as the class of degree awarded. Just as importantly, Hansard also provided examples of the types of decisions that parliament viewed as falling outside the scope of an academic judgment. These included where the academic teaching was below the expected level of competency, where student complaints pertain to procedural matters, where racist or sexist comments are made by an academic in a lecture and where the academic does not have the requisite expertise to teach the class in question.

It was determined from Hansard that parliament expressly chose not to define academic judgment in the legislation for three key reasons. First, it was determined that it was more appropriate for the OIA to determine the scope of academic judgment. Second, parliament wanted to avoid being overly perspective in case they inadvertently narrowed the scope of what constituted a qualifying complaint for the purposes of section 12 of the Higher Education Act. Third, parliament chose not to define the parametres of academic judgment as they did not want the definition to be used as a shield by universities to avoid investigating student complaints. As a result, section 12(2) of the Higher Education Act was drafted with a qualification in place, stating that 'a complaint is not a qualifying complaint to the extent that it relates to matters of academic judgment'. Under a delegation of power from parliament, the OIA created the OIA Scheme Rules 2018. Rule 5.2 stated, consistently with section 12 of the Higher Education Act, that the OIA 'cannot review a complaint about the academic judgment of a higher education provider. However, just like the Higher Education Act, no definition of academic judgment was provided in the OIA Scheme Rules. It was therefore necessary to consider the OIA Guidance Note (April 2018) which provided, in paragraph 30.2 that 'academic judgment is not any judgment made by an academic, it is a judgment that is made about a matter where the opinion of an academic expert is essential'. Once the legislative definition was established, it was necessary to determine the scope.

5.6.6 Outcome 6: Legislative Scope of the Academic Judgment Immunity

It is clear from the legislation, OIA rules and relevant extrinsic materials that not every decision made by an academic qualifies as an academic judgment. As explained in the 2013 decision of Mustafa, when analysing the scope of s12(2) of the Higher Education Act and Rule 5.2, 'the exclusion applies where the central subject of the complaint is a dispute about an academic judgment and that complaints where such disputes are peripheral are not intended to be excluded' (para. 51). The OIA Guidance Note further clarifies the scope by stating that for a judgment to be classified as an academic judgment, and protected by the academic judgment immunity, it is necessary that the judgment is made 'about a matter where the opinion of an academic expert is essential' (para. 30.2). Therefore, from the legislative context, it is necessary to consider the types of circumstances or matters where the opinion of an academic expert is essential. Based on an analysis of relevant legislation, OIA rules and relevant extrinsic materials, this thesis developed two questions, and several sub-questions to assist in determining whether a university decision can qualify as an academic judgment, and is therefore outside the jurisdiction of the OIA's decision-making capabilities. These are depicted in figure 5.4 below.

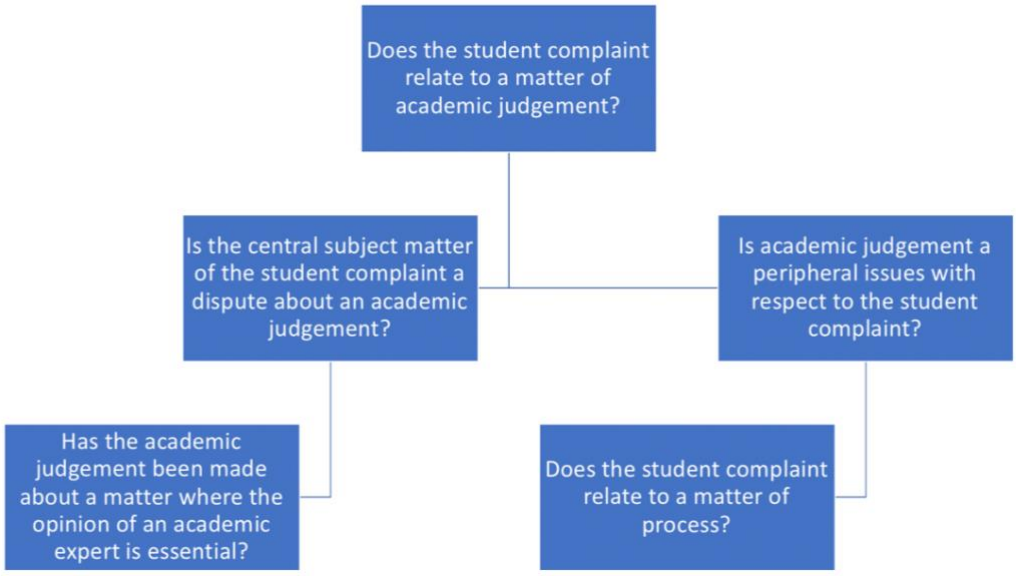

Figure 5.4: Determining whether a university decision is one relating to matter of academic judgment

The first and overarching question for consideration is whether the student complaint relates to a matter of academic judgment. To answer this question, there are two sub-questions for consideration. Is the central subject matter of the student complaint a dispute about an academic judgment? Or, is academic judgment a peripheral issue with respect to the student complaint? If it is determined that the central subject matter of the complaint is a dispute about an academic judgment, the second question that needs to be considered is whether the academic judgment has been made about a matter where the opinion of an academic expert is essential. If this question is answered in the affirmative, then the complaint is one which relates to a matter of academic judgment, and as a result falls outside the jurisdiction of the OIA.

To assist in determining whether the opinion of an academic expert is essential, both the OIA Guidance Note, as well the common law interpreting the relevant legislation, provide examples of the types of academic decisions that require the requisite expertise. The OIA Guidance Note includes academic decisions regarding the mark awarded, degree classification, research methodology, accuracy and adequacy of feedback, and the content or outcomes of a course (para. 30.2). This however is not an exhaustive list and other categories of academic decision-making may also be included. Based on an analysis of relevant common law cases, the following examples require the opinion of an academic expert, and therefore fall outside the jurisdiction of the OIA:

1. The marking of work and feedback (Budd, para. 39).
2. ‘An academic assessment of the quality of a piece of work or where issues are raised about performance in tutorials or seminars’ (Cardao-Pito, para. 97).
3. The decision that a student is required to have ‘completed the required period of study and attendance in order to sit final examinations’ (AFP Alexander, para. 11).
4. A decision with respect to the start time for an online seminar (Wilson, para. 20).

5.6.7 Outcome 7: Complaints about Process come within the Jurisdiction of the OIA

It is evident that the OIA does not have the jurisdiction to consider student complaints which relate to a matter of academic judgment. However, where a student complaint relates to a matter of process, even if academic judgment is a peripheral issue, the complaint will come within the jurisdiction of the OIA and is therefore not protected by the academic judgment immunity. Paragraph 30.3 of the OIA Guidance Note provides the types of decisions which the OIA does not consider to involve academic judgment. These include:

> decisions about the fairness of procedures and whether they have been correctly interpreted and applied, how a higher education provider has communicated with the student, whether an academic has expressed an opinion outside the areas of their academic competence, what the facts of a complaint are and the way evidence has been considered, and whether there is evidence of bias or maladministration (para. 30.3).

The practical application of the Guidance Note has been further explained by the OIA in several common law decisions. In the case of Budd (para. 39), the OIA noted that they can only consider 'whether an institution has breached it procedures or acted unfairly', explaining that it is the OIA's 'normal practice to review the final decision of the University to determine whether it had followed its procedures correctly and whether any decisions made by the University were reasonable in all the circumstances' (para. 45). This was again confirmed by the OIA in Gopikrishna, where the OIA stated that they 'can look at whether the University has correctly followed its own assessment, marking and moderation procedures, and whether these are any unfairness… in the decision-making process (para. 93). The delineation that has been drawn between a matter of academic judgment and a matter of process raises interesting legal conundrums. This is especially evident in the context of assessment decision-making. It would appear that while the assessment outcome is protected by the academic judgment immunity, and does not come within the purview of the OIA, the

assessment process may be open to legal challenge. This will be further considered in chapter six, where research question three is addressed.

5.7 Chapter Conclusion

In order to define the legal scope of the academic judgment immunity, and address research question two, chapter five began by explaining the relationship between the common law and legislation. From here chapter five identified the common law and statutory frameworks with respect to student complaints thus providing the context for considering the academic judgment immunity. Chapter five then identified the parametres of what constitutes an academic judgment from the common law perspective by methodically considering relevant common law cases identified in chapter three. Once the common law scope definition was established it was necessary to consider the statutory context, established by the creation of the Higher Education Act in 2004. The wording of section 12(2) of the legislation was analysed by considering relevant extrinsic materials and common themes were elucidated. This provided the foundation to consider the OIA Rules with respect to academic judgment. To assist in interpreting the OIA rules, and understanding the real-world university context in which these rules operate, relevant cases were considered resulting in the creation of a legislative definition of academic judgment.

Chapter 6: Is the Assessment Process Immune from Legal Challenge?

6.1 Introduction

The purpose of chapter six, and research question three, is to provide an exemplar of the real-world factual context in which academic judgment and the academic judgment immunity exist. As explained in chapter three, research design and methodology, a fundamental component of doctrinal legal research is acknowledging that the law does not 'exist in an objective doctrinal vacuum' (Singhal and Malik, p. 253). Doctrinal research is more than locating relevant cases and legislation and making objectively verifiable statements of law. As noted by Dobinson and Johns (2017, p. 24), 'it is a process of understanding social context and interpretation'. Chapter four articulated and analysed the real-world university context in which academic judgment resides. A research outcome that emerged was that academic judgment was most frequently associated with the assessment context. Chapter five undertook a doctrinal analysis of the academic judgment immunity in order to ascertain the legal definition of academic judgment and the scope of the immunity. One of the research outcomes of chapter five was that the academic judgment immunity was most frequently associated with challenges to assessment results and the law consistently confirmed that it is for an academic and not a court to mark a paper. As a result, it is within the context of assessment that chapter six resides. Chapter six begins by establishing the framework against which research question three can be considered. Section 6.2 explains why the discipline of law has been chosen as the exemplar to determine the real-world factual context in which assessment practices exist. Section 6.3 considers whether the assessment process, as distinct from the assessment mark, is protected by the academic judgment immunity and determines that the assessment process could be legally challenged on two specific grounds. The first, where the university failed to correctly follow its own assessment, marking and moderation procedures. The second, where the university acted unfairly in the decision-making process. As a result, fairness in the decision-making process provides the focus for chapter six.

Section 6.4 defines fairness from both the legal and higher education perspectives and, considers fairness in the assessment process with respect to validity and reliability. Section 6.5 contextualises validity as fairness in the assessment process and applies intrinsic validity to determine whether the assessment process can be legally challenged. Section 6.6 examines the unreliability of marker judgments to determine whether marker reliability can form the basis of a legal challenge with respect to the unfairness of the assessment process. Section 6.7 discusses the three research outcomes of chapter and section 6.8 provides the chapter conclusion.

6.2 Contextualising Assessment in the Discipline of Law

In England, the substantive content of an undergraduate law program is dictated by the requirements of numerous external regulatory bodies including the QAA, the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB). These requirements are in addition to individual university rules, regulations and procedures that govern assessment practices. As a result, assessment practices within the legal discipline have been described as ‘characteristically traditional – possibly to the point of archaism’ (Bansal, 2022, p. 355) due to the numerous and vast external regulatory requirements. The QAA Subject Benchmark Statement: Law (2023, p. 11) include a list of possible assessment practices including personal research projects, essays and written communication, seen and unseen tests and examinations under timed conditions, presentations and other verbal activities, graphical presentations and reflections. However, ‘not all assessments are viewed as equal in legal education’ (Whittaker and Olcay 2022, p. 335). Law school assessment typically combines coursework, such as an essay or written assignment, with in person closed-book invigilated examinations. As explained by Bansal (2022, p. 356), ‘the efficacy of the CBE [closed-book exam] has (arguably) stood the test of time: the exams are reliable, assess and individual’s abilities, there is moderation, and academic misconduct offences are rare’. There is a perception that closed-book exams ‘tick all the boxes’ from both an internal university perspective, as well as an external stakeholder perspective. Higher order learning is assessed and academic standards are upheld.

Less common methods of assessment, such as multiple-choice questions, tend to divide opinion in the law school context. Concerns have been expressed about whether high-level cognitive learning, in the legal context, could be accurately assessed through multiple choice questions (Case and Donahue 2008; Huang 2017; Struyven, Dochy and Janssens 2005). A recent study conducted by Bozin, Deane and Duffy (2020), at an Australian law school, concluded that multiple-choice questions could be utilised effectively to assess legal reasoning, a fundamental learning outcome in the discipline of law. Further, a recent change with respect to how graduates can become a solicitor raises interesting questions about what the Solicitors Regulation Authority ('SRA') views as appropriate methods of assessment to test 'the identification and application of legal knowledge and principles' (SRA 2021).

From September 2021, the SRA implemented the Solicitors Qualifying Examination (SQE), described as 'the assessment for all aspiring solicitors in England and Wales, it is designed to assure consistent, high standards for all qualifying solicitors' (SRA, 2021). SQE1 comprises 2 x 180 multiple choice questions over 10 hours of assessment across English and Welsh law. The SQE1 assessments are closed book and 'designed to test the application of fundamental legal principles which can be expected of a newly qualified solicitor… without reference to books and notes' (SRA, 2021). SQE2 comprises 16 written and oral tasks, over 14 hours of assessment, including case and matter analysis, legal research, legal writing and legal drafting on various practice areas including criminal litigation, property practice, dispute resolution, wills and business organisations. The implementation of the Solicitors Qualifying Examinations in 2021 provides an interesting framework against which to consider the validity and reliability of the assessment process in the legal discipline within the higher education context.

6.3 Challenging Assessment as a Matter of Process

6.3.1 Overview

It is clear from the common law and legislation analysed in chapter five that the law has consistently classified assessment and marking as an outcome, the final result a student receives on an assessment task. However, in the higher education context, assessment is a multifaceted process requiring numerous academic judgments to be made by numerous people in order to ensure that the assessment process is 'reliable, consistent, fair and valid' (QAA, 2018B, p. 4). Chapter four identified numerous academic judgments involved in the assessment process from the higher education perspective. In actuality, it is these individual judgments which culminate in the final academic judgment protected by the academic judgment immunity, the final result. This raises the question as to whether the assessment process, as distinct from the outcome, is immune from legal challenge. If it could be shown that:

1. some type of irregularity or unfairness occurred within the assessment process; and
2. the student was not seeking to challenge their final assessment result

would this open the assessment process to legal challenge?

6.3.2 Scope of the Academic Judgment Immunity

As concluded in chapter five, to determine whether a university decision can qualify as an academic judgment and be protected by the academic judgment immunity, from the common law perspective, two questions need to be considered. The first question is whether the central subject matter of the complaint is a dispute about an academic judgment. The second question is whether the exercise of the academic judgment can be described as having been done in good faith, was a reasoned conclusion reached? From the legislative perspective, the first question is identical to the question asked at common law,

whether the central subject matter of the student complaint is a dispute about an academic judgment. From there, the second question to be considered is whether the academic judgment has been made about a matter where the opinion of an academic expert is essential.

To determine whether a judgment comes within the scope of the academic judgment immunity it is necessary to consider the nature and extent of the judgment in question. This is achieved by considering two sub-questions, was the decision purely academic in nature or was the decision a matter of process related to an academic matter? If the decision is purely academic in nature it is subject to the academic judgment immunity. Examples of purely academic decisions, protected by the academic judgment immunity at common law, include a mark given in the exercise of a *bona fide* academic judgment (Budd; Cardao-Pito; Clark; Moroney), the class of degree a student ought to be awarded (Clark), the decision to terminate a student's registration where the university could not provide appropriate teaching and support (AFP Alexander), and the decision to schedule an online seminar at a specific time (Wilson). From the legislative perspective, the academic judgment immunity extends to judgments that are made where the opinion of an academic expert is essential, including a judgment about marks awarded, degree classification, research methodology, whether feedback is correct or adequate, and the content or outcomes of a course (OIA Guidance Note, April 2018, para. 30.2).

A key conclusion of the research undertaken in chapter five was that both the common law and legislation have been unequivocal that a judgment about the marks awarded comes within the academic judgment immunity and therefore cannot be legally challenged. It is clear that the immunity applies where the central subject of the complaint is a dispute about an academic judgment. Judge Curran in Gopikrishna noted that '… whether a student has passed or failed an examination, [is a matter] solely for the judgment of examiners within the relevant discipline' (para. 188). This is consistent with the OIA approach which states that academic judgment includes 'judgment about the marks awarded' (Rule 30.2). This thesis accepts that the outcome of the assessment process, the final result,

comes within the scope of the academic judgment immunity and is not subject to legal challenge.

While the final result of an assessment task comes within the scope of the academic judgment immunity, this thesis contends that the scope of the academic judgment immunity may not extend to protect the assessment process from legal challenge. As determined in chapter five, it is possible to challenge the process by which an academic decision has been reached provided that the procedure was materially unfair or in breach of the universities rules for reaching such a decision. This is confirmed in Paragraph 30.3 of the OIA's guidance note which states that 'decisions about the fairness of procedures and whether they have been correctly interpreted and applied' are not considered to involve academic judgment. As explained by the High Court of Justice in the 2013 decision of Mustafa, section 12 of the Higher Education Act

> does not exclude in its entirety any complaint which involves a matter of academic judgment. The exclusion applies where the central subject of the complaint is a dispute about an academic judgment and that complaints where such disputes are peripheral are not intended to be excluded (para. 51).

Therefore, the question that arises is the 'extent to which the OIA can consider a complaint which does involve a matter of academic judgment, but where the correctness of that judgment is not a central issue' (para. 51). This question needs to be considered within the context of students seeking to challenge the assessment process as distinct from students seeking to challenge the outcome of the assessment process, the final result.

6.3.3 Legally Challenging the Assessment Process

It appears, based on the cases analysed below, that the assessment process can be legally challenged on two specific grounds. The first being where the university failed to correctly followed its own assessment, marking and moderation procedures. The second being where the university acted unfairly in the decision-

making process. In the case of Budd, the OIA explained how they investigate student complaints noting that, ‘we cannot put ourselves in the position of examiners in order to re-mark work or pass comment on the marks given. We can only look at whether an institution has breached its procedures or acted unfairly’ (para. 39). In the decision of Sindhu, an OIA adjudicator explained that the ‘OIA was not able to interfere with the operation of a university’s academic judgment but could look at whether a university had correctly followed its own procedures and also could look at whether the decision-making process had entailed any elements of unfairness or bias’ (para. 7). In the 2015 case of Gopikrishna, the OIA confirmed that ‘whether the university has correctly followed its own assessment, marking and moderation procedures, and whether there was any unfairness… in the decision-making process’ (para. 93) were matters that could be considered by the OIA and did not come within the scope of the academic judgment immunity.

The cases of Senior-Milne and Chilab provide examples of a student challenging an academic decision by arguing that the procedure applied with respect to assessment was in breach of University Rules. In Senior-Milne the student sought to appeal the result received on two exam papers, arguing that there were several procedural irregularities in the conduct of his examinations based on the university rules. He alleged that the university failed to protect his anonymity in the assessment process and that an examiner was biased against him. The court considered these procedural irregularities and concluded that there was no evidence to support the assertions made. The court also made it clear that where the applicant sought to ‘assert that his marks were unfair in the sense that they did not represent the academic value of his answers’ (para. 14), these were matters of academic judgment and therefore not susceptible to legal challenge. In Chilab there were several issues raised with respect to assessment, including the inaccurate calculation of a mark and the incorrect application of university regulations. In deciding to hear the case, the Court of Appeal expressly stated that the applicant ‘does not challenge the academic judgment of the examiners’, but rather than the claim is ‘based on alleged failure to identify, interpret and apply correctly the relevant regulations’ (para. 3). The court concluded that there had been no breach of the regulations. However, the case of Chilab confirms the

common law position that a challenge to process can be heard by the judiciary even where it touches matters of academic judgment.

It is clear from the cases discussed above that it is possible for a student to challenge a university decision where the student is able to show that a university failed to follow its own assessment, marking and moderation procedures. In this situation, academic judgment immunity would not apply to protect a university from legal challenge thus providing an avenue for a student to challenge the assessment process. As explained in chapter four, specifically section 4.4.3, it is outside the scope of this thesis to specifically consider the internal processes and procedures of each individual university. However, the analysis undertaken by this thesis confirms the importance of academics following university prescribed internal assessment, marking and moderation procedures, and provides the scope for further research to be undertaken in this area.

Students seeking to challenge the university decision-making process on the basis of unfairness, with respect to the assessment process, is currently a theoretical concept. Common law cases, and relevant legislation, both explain that it is possible to challenge a university decision on the basis of unfairness. However, no published case to date has attempted to challenge the assessment process by specifically arguing that the process is unfair. This is a novel argument. The case of Mustafa provides an interesting analogy with respect to a finding of plagiarism. In this case, the OIA noted that it 'can consider a complaint which does involve a matter of academic judgment' but this can only occur 'where the correctness of that judgment is not a central issue' (para. 51). The example provided was a 'complaint that a finding of plagiarism had been reached by a process which was unfair' (para. 51). This raises the question whether the processes, relied upon by individual markers to reach a final result, could be challenged on the basis of unfairness. If a student complaint is framed as one of process, as opposed to one of academic judgment, would this result in the assessment process being susceptible to legal challenge? Further, no academic literature has sought to bring together the legal discipline with the higher education discipline to contend that while the mark awarded unequivocally comes within the academic judgment immunity, this is distinct from the assessment

process, where questions of fairness can be raised. This is a novel question which this thesis will consider by determining what fairness in the assessment process could require and analysing areas of the assessment process which could be subject to arguments of unfairness.

6.4 Defining Fairness

6.4.1 Fairness in the Legal Context

The law, and relevant legal literature, regard ‘assessment’ in the context of an outcome. The mark provided to a student. The higher education literature regards marking as a process. This thesis will consider whether aspects of the assessment process, as defined by the higher education context, could be argued as unfair from the legal perspective. From the legal context, fairness in decision-making means that the process for making the decision is fair. This does not however mean that the decision itself is necessarily fair. Establishing fairness in the legal context is deliberately opaque, with the requirements having been described as ‘ambulatory, they will vary from one legal context to another and from one fact situation to another’ (Stuhmke, Olliffee and Evers, 2015, p. 122). As argued in Persaud, ‘the requirement of fairness demands, in any particular case, depends on the character of the decision-making body, the nature of the decision which it has to make and the regulatory framework (if any) within which it is required to operate’ (para. 33). What is clear is that fairness needs to be considered within the higher education context. Applying the principle of fairness to the assessment context would mean considering whether the assessment process is fair as distinct from the outcome of the assessment process, the final assessment mark or result.

6.4.2 Fairness in the Higher Education Context

As explained by Bazvand and Rasooli (2022, p. 1), ‘despite the enormous influence of assessment on student outcomes, research on various dimensions of fairness in assessment in higher education is yet to achieve adequate

attention'. Valentine et al. (2021; 2022) have begun to focus on fairness as a fundamental quality of assessment in the context of clinical education for health professionals. Zlatkin-Troitschanskaia et al. (2019) have considered test fairness within the context of testing standards developed by the American Educational Research Association. However, much of the research that has been conducted to date has focused on examining students' perceptions of fairness in areas including assessment (Bazvand and Rasooli, 2022; Burger, 2017; Crewswell and Poth, 2018; Koris and Pello, 2022, Mauldin, 2009; Moustakas, 1994; O'Neill 2017; Sambell, McDowell and Brown, 1997; Segers and Dochy 2001; Serers, Dochy and Gijbels, 2010); feedback (Lizzio and Wilson, 2008) and marking (Nesbit and Burton, 2006). While all are important contributions, in order to answer research question three, it is necessary to contextualise fairness within the assessment process and assessment methods utilised by universities in England. This will be achieved by focusing on how the QAA determines the concept of fairness in the assessment process.

The QAA Code of Practice requires that the assessment process is 'reliable, consistent, fair and valid' (2018A, p. 3). Further, the Code states that 'institutions should have transparent and fair mechanisms for marking and moderation' (QAA, 2006, p. 16). The elements of what constitute a fair assessment process are not defined by the QAA explicitly. However, examples are provided in the Code of Practice for the Assurance of Academic Quality and Standards in Higher Education: Section 6 – Assessment of Students (2006) as to how fairness in the assessment process can be demonstrated. This includes ensuring that 'assessment policies and principles are applied consistently and stating how agreed assessment criteria, grading schemes and moderation are used' (p. 8). The 2016 iteration provides further examples including 'clearly articulated assessment criteria, weightings and level descriptors' (p. 4) as well as 'policies and procedures for marking assessments and moderating marks [which are] clearly articulated, consistently operated and regularly reviewed' (p. 4). The research undertaken by Hailikari et al. (2014, p. 100) helps contextualise the QAA requirements of fair assessment process from a research perspective noting that

> the issue of fairness raises questions about the reliability and validity of the methods used to measure levels of attainment in higher education… with the implication that the grades awarded in assessment should be consistent, irrespective of the marker…, and they should validly reflect what they are intended to assess.

As a result, there are two areas which this thesis shall focus on, reliability as fairness in the assessment process and validity as fairness in the assessment process.

6.4.3 Fairness in the Assessment Process: Context

The purpose of research question three is to consider whether the assessment process, as distinct from the mark, is immune from legal challenge. As discussed above, this is a novel question. A question which has yet to be considered by the judiciary or the academic literature. As a result, it is necessary to explain how fairness in the assessment process will be considered, incorporating both the legal and higher education perspectives. The framework to help ascertain fairness is a legal one, grounded in the higher education context. The case of *Persaud* provides a helpful starting point to establish the fairness framework, explaining that questions of fairness in the decision-making process are dependent on three elements:

1. the decision maker;
2. the nature of the decision which needs to be made; and
3. the regulatory framework (if any) within which the decision maker is required to operate.

The context that is being considered is the assessment process which is externally governed by the QAA Code of Practice. As explained above, the QAA does not provide the elements of what constitutes a fair assessment process. However, the QAA Guiding Principles (2018, p. 4) do provide both implicit and explicit examples of what fairness in the assessment process necessitates including that assessment criteria are sufficiently robust to ensure reasonable

parity between the judgments of different assessors (reliability) and, that assessment methods and criteria are aligned to learning outcomes and teaching activities to ensure that a test measures what it claims to measure (validity). As a result, the question of whether the decision-making process is fair, will be considered within the context of the assessment process by considering the issues of reliability and validity.

6.5 Validity as Fairness in the Assessment Process

6.5.1 Contextualising Validity

As noted by Newton and Shaw (2016, p. 180), 'connotations of the word 'validity' have been debated ever since it entered the official lexicon of educational and psychological testing during the 1920s'. As explained by Newton (2017, p. 15), 'everyone agrees that [validity] is the most important concept in the field of educational assessment, however it is impossible to formulate a definition that will satisfy everyone who works in the field'. Resolving the debate around the definition of validity is not an area which this thesis seeks to enter. There are however numerous comprehensive accounts of validity history which discuss the differing viewpoints of what validity means (Kane, 2013; Messick, 1989; Newton and Shaw, 2013; Sireci, 1998; Sireci and Sukin, 2013; Twing and O'Malley, 2018). As explained by Elton and Johnston (2002, p. 29), 'validity is concerned with fitness for purpose'. As a result, there are 'different forms of validity, described and defined somewhat differently in different literature. These types of validity are overlapping, interconnected and frequently qualitatively different'. Stobart (2009, p. 161) also comments that 'in the UK, unlike the USA, validity has never seen a major theoretical debate… validity still remains and implicit and undefined concept – the fitness-for-purpose of an assessment tool or scheme'. While this thesis does not purport to construct a universally accepted definition of validity, it is important to provide a framework for what comes within the scope of validity. Fundamentally, validity seeks to ascertain whether an assessment 'measures what it is supposed to measure' (Dunn, Parry and Morgan, 2002, p. 32) by 'assessing the right thing, in the right way, to provide accurate and useful

assessment results' (Newton, 2017, p. 16). Brown, Bull and Pendlebury (1997, p. 256) describes validity as a 'form of truth-seeking'.

There are various types of validity identified within the current literature. Face validity (Mosier 1947, p. 192; Nevo 1985; Borg and Gall 1989, p. 256; Brown, Bull and Pendlebury, 1997, p. 258) implies 'that a test which is to be used in a practical situation should, in addition to pragmatic or statistical validity, appear practical, pertinent and related to the purpose of the test as well i.e. it should not only be valid, but it should also appear valid' (Mosier, 1947, p. 192). From the perspective of intrinsic validity (Brown, Bull and Pendlebury, 1997, p. 258), the question to consider is whether the method of assessment chosen is assessing the stated learning outcomes. As Bloxham and Boyd (2007, p. 34) explain, 'intrinsic validity means that assessment tasks are assessing the stated learning outcomes for the module, and this principle clearly underpins the notion of constructive alignment'. Consequential validity, developed by Messick (1989; 1994; 1995), contends that when determining the validity of assessment, consideration should also be given to 'potential and actual social consequences of applied testing' (Messick, 1989, p. 20) 'beyond the content, criterion and construct validity that statisticians refer to' (Chang and Seow, 2018, p. 31). Construct validity (Borg and Gall, 1989, p. 255; Brown, Bull and Pendlebury,1997, p. 258) measures the 'underlying theory or construct of a particular' assessment and is used to determine 'to what extent two examinations are measuring the same factors or to what extent the items in an examination are measuring the same factors' (Brown, Bull and Pendlebury, 1997, p. 259; Panadero and Jonsson, 2013). As explained by Jonsson and Svingsby (2007), in education it is not the property of a test or assessment, but rather an interpretation of the outcomes. Concurrent validity, while not always possible in the practice, asks 'does performance on the assessment tasks match that obtained by other assessments of the same group of students taken at roughly the same time?' (Brown, Bull and Pendlebury, 1997, p. 259). Content validity (Borg and Gall 1989) is defined as 'the degree to which elements of an assessment instrument are relevant to a representative of the targeted construct for a particular assessment purpose' (Haynes et al., 1995, p. 238). As noted by Alquhtani, Yusop and Halili (2023, p. 2), 'one way to achieve content validity is to

utilise ‘expert panels to consider the value and significance of items within an instrument’.

For the purposes of this thesis, intrinsic validity will be specifically considered to determine where gaps may exist within the fairness of the assessment process, thus leaving the process open to legal challenge. The rationale for this is based on the QAA’s characterisation of validity, where ‘assessment is understood to be valid when it is testing precisely what the examiners want to test, bearing in mind the learning outcomes for the module’ (QAA, 2011, p. 5). This most closely correlates to validity in context of intrinsic validity.

6.5.2 Designing a Valid Assessment from the Perspective of Intrinsic Validity

As articulated in the Revised UK Quality Code for Higher Education, it is a ‘core practice’ that universities ‘use assessment and classification processes that are reliable, fair and transparent’ (QAA, 2018A, p. 3). This core practice is further explained in the UK Quality Code for Higher Education, Advice and Guidance: Assessment where the QAA notes that ‘deliberate systematic quality assurance ensures that assessment processes, standards and other criteria are applied consistently and equitably with reliability, validity and fairness’ (2018B, p. 2). What does it mean to design a valid assessment task? From the perspective of intrinsic validity, the question to consider is whether the method of assessment chosen is assessing the stated learning outcomes. As Bloxham and Boyd (2007, p. 34) explain, ‘intrinsic validity means that assessment tasks are assessing the stated learning outcomes for the module, and this principle clearly underpins the notion of constructive alignment’. This is embedded in the QAA’s characterisation of validity, where ‘assessment is understood to be valid when it is testing precisely what the examiners want to test, bearing in mind the learning outcomes for the module’ (QAA, 2011, p. 5). It would therefore appear that intrinsic validity requires an element of judgment, to be made by an academic (the decision maker), to determine whether there is alignment between the assessment method, the assessment task and the learning outcomes intended to be assessed (the nature of the decision to be made), within the context of any relevant regulatory framework (the QAA). Where each of these elements can be evidenced, it is

arguable that an assessment has been designed by a valid process which is therefore fair not susceptible to legal challenge. However, it is important to acknowledge that each of these elements require significant academic decision-making in terms of both subject-matter as well as pedagogical expertise. As articulated by Rust (2002, p. 2), 'just because an exam question includes the instruction analyse and evaluate does not actually mean the skills of analysis and evaluation are going to be assessed'. It is therefore important to identify a 'real-world' exemplar to determine the academic judgments that are required, and identify discrepancies which may arise, resulting in an invalid and therefore unfair process.

6.5.3 Designing a Valid Assessment: Exemplar

Designing a valid assessment is a complex task, requiring numerous academic judgments to be made with respect to learning outcomes, assessment methods, types of assessment tasks and the development of criteria. As discussed in chapter four, learning outcomes are generally developed above the individual academic level. As a result, this exemplar will focus on assessment methods, types of assessment tasks and the development of criteria. Given the breadth of assessment design, it is impossible within the scope of this thesis to consider every method of assessment and type of assessment. Rather, an examination in the legal discipline, will be used as the exemplar to demonstrate the types of academic judgments that are involved in designing a valid assessment and their potential consequences on intrinsic validity. As explained in section 6.2, a written examination is a common type of assessment in the legal discipline. In fact, when completing my undergraduate law qualification, a 3.5-hour written examination only type of assessment task utilised to assess compulsory units.

When designing an examination, numerous decisions need to be made to ensure that the skills and knowledge being assessed during the examination are constructively aligned to the knowledge and skills required by the modules learning outcomes. Preliminary decisions, including whether the examination will be open book or closed book, whether the examination will be written or verbal, whether the examination will be conducted online, whether the examination will

be supervised and whether the examination will be conducted within a limited prescribed period of time are often considered ‘administrative’. However, in actuality, can have a significant impact on the validity of both the type of assessment and the method of assessment chosen. For example, if a learning outcome requires students to communicate legal arguments and advocacy through oral submissions, then a valid type of assessment would be a moot trial (a type of oral exam) where students are required to verbally present their arguments and synchronously respond to question from the adjudicator. Another example is an academic making the judgment as to whether an open book examination is valid. An open book examination, utilising constructed responses in the form of an analytical essay, can be a valid assessment where the learning outcome is designed to ascertain whether students can critically analyse the law to determine the current legal risks in a particular topic. Whereas an open-book examination, applying the factual method of assessment in the form of multiple-choice questions, maybe deemed invalid where the learning outcome is designed to ascertain whether students can recall facts or complex legal concepts.

It is important to note that the intrinsic validity of multiple-choice questions are a current topic of discussion in legal assessment literature, with no definitive conclusions. Traditionally, multiple-choice questions have divided opinion in the law school context, with debate focused on whether high-level cognitive learning can be accurately assessed through multiple choice questions (Bozin, Deane and Duffy, 2020; Case and Donahue 2008; Huang 2017; Mullen and Schultz, 2012; Parmenter, 2009; Struyven and Dochy, 2005; Whittaker et al., 2021). However, the 2021 changes by external regulators as to how graduates can become a solicitor in England, raise interesting questions about intrinsic validity and the method of assessment chosen in the legal discipline. The Solicitors Regulation Authority appear to view multiple choice questions as a valid method of assessment to test ‘the identification and application of legal knowledge and principles’ (SRA, 2021), in contrast with much of the current legal academic literature. Currently, the first Solicitors Qualifying Examination (SQE1), comprises 2 x 180 multiple choice questions over 10 hours of assessment across English and Welsh law. The multiple choice assessments are closed book and ‘designed to test the application of fundamental legal principles which can be expected of a

newly qualified solicitor… without reference to books and notes' (SRA, 2021). This raises novel questions for future research around whether multiple choice questions are an intrinsically valid method for assessing law students and should be incorporated into the law school curriculum, to prepare students for the SQE1.

Once the type of assessment has been determined, consideration of the most appropriate method or methods is required to ensure that students are able to demonstrate their learning in the most appropriate way. This raises questions such as whether the examination requires students to construct a response or to select the correct response from a series of fixed questions? If a learning outcome requires students to be able to demonstrate lower order thinking skills such as list, identify or recognise, for example the current names of the 12 Supreme Court Justices in the United Kingdom, then fixed response questions, such as multiple choice, could be a valid method of assessment. However, if a learning outcome requires students to be able to analyse judicial decisions to elucidate the relevant *ratio decidendi* and *obiter dicta*, this requires higher order thinking skills and a fixed response method may not be valid. Here a constructed response, such as a short answer question, utilising the analytical method of assessment may be more appropriate. Where it has been determined that students will be required to complete a constructed response, a judgment again needs to be made as to what assessment method is most appropriate. Where a learning outcome requires that a student can demonstrate the application of legal concepts to a factual scenario, the creation of an authentic factual scenario, to which students construct a long-form answer, would likely be a valid method of assessment.

6.5.4 Challenging the Intrinsic Validity of the Assessment Process

Based on the analysis above, it would be difficult to challenge the fairness of the assessment process with respect to intrinsic validity where it can be demonstrated that there is alignment between the assessment method, assessment task and the learning outcomes intended to be assessed. Where each of these elements can be evidenced, it is arguable that an assessment has been designed by a valid process which is therefore fair, and not susceptible to legal challenge. It is however important to acknowledge a clear limitation. The

analysis undertaken by this thesis has taken a narrow approach and only considered one aspect of validity, namely intrinsic validity, with respect to the assessment process. It is possible that the fairness of the assessment process could be challenged based on another type of validity in the context of assessment. This provides a broader scope for further research to be undertaken with respect to the validity of the assessment process and whether it could be subject to legal challenge.

6.6 Reliability as Fairness in the Assessment Process

6.6.1 Contextualising Reliability

From the higher education perspective, 'reliability is a fundamental requirement of any assessment procedure' (Dracup, 1997, p. 691). However, unlike validity, which has seen its definition debated since the 1920's, reliability has a relatively agreed upon definition within the context of standards-based assessment. As explained by Biggs and Tang (2011, p. 218), in standards-based assessment, where assessment is criterion referenced, reliability is not considered a 'property of the test, rather the ability of assessors to make consistent judgments'. This requires consideration of intra-marker and inter-marker reliability to determine whether it is possible to rely on the assessment results. This is consistent with the QAA perspective which states that assessment is reliable where 'markers acting independently of each other but using the same assessment criteria would reach the same judgment on a piece of work' (QAA, 2011, p. 5). This in turn is consistent with the approach taken by much of the higher education literature where the issue of marker reliability, or lack thereof, has been researched (Baird, Greatorex and Bell, 2005; Baume, Yorke and Coffey, 2004; Bell, 1980; Bird and Yucel, 2013; Bloxham, 2009; Bloxham, Boyd and Orr, 2011; Chakraborty et al., 2021; Collier, 1986; Dracup, 1997; Grainger and Weir, 2020; O'Hagan and Wigglesworth, 2015; Orr, 2007; Tisi et al., 2013; Williams and Kemp, 2019; Yorke, 2007). Issues of reliability have been raised with respect to the type of learning being measured (Eisner, 1985; Elton and Johnston, 2002; Knight, 2006), the alignment between assessment criteria and the final mark awarded to a student (Chakraborty et al., 2021, Grainger and Weir, 2020; Price, 2005), and the

individual markers approach to interpreting standards (Ecclestone, 2001; Williams and Kemp, 2019). Dalziel (1998, p. 352) has identified specific areas of the marking process where unfairness may arise including where there is

> capricious marking, biased marking (either positive or negative), incompetent marking (that is marking in the absence of sufficient knowledge of a subject), lack of consistency by an individual marker across assessment tasks to be marked, lack of consistency between markers, lack of consistency of marking practices across different types of assessment tasks.

For the purposes of this thesis, the issue of reliability will focus on the unreliability of marker judgments and whether this denotes an unfairness in the marking process.

6.6.2 Unreliability of Marker Judgments

As explained by Partington (1994, p. 57), reliability is important as

> mark differences of 8 or 9 marks out of 25 or even greater in essay marking are common. When this happens cumulatively, one can easily see that a student's final degree classification may depend as much on having the right or wrong examiners as on talent or mastery of the syllabus.

The unreliability of marker judgment has been a key issue for consideration in several studies on marking in higher education (Bloxham et al., 2016; Chakraborty et al., 2021; Collier, 1986; Read, Francis and Robson, 2005; Williams and Kemp, 2019). As explained by Collier (1986, p.130), 'previous work on measuring the consistency of examination markers has sometimes produced some rather disturbing results'. One study found a discrepancy in marks for one essay ranging from 16 to 96 and another essay from 26 to 92 (Cox, 1967). A more recent study conducted by Read, Francis and Robson (2005) found that when two history essays were marked by 50 assessors, there were six different degree classifications awarded, ranging from fail through to upper second.

Bloxham et al. (2016, p. 467) sought to collect ‘data about the grading judgment of experienced assessors’ by recruiting ‘24 experienced assessors from 4 contrasting disciplines from 20 diverse UK universities’. In this study, ‘borderline work’ was specifically selected, without the knowledge of the participants, to ‘tease out the nuanced deciding factors in judgment’ (p. 467). It was determined that consistency between the assessors overall judgment, as evidenced by how they graded the assignments, reflects other studies of reliability in marking in revealing little inter-assessor agreement. ‘Only 1 out of the 20 pieces were assigned the same rank by all six assessors and nine of the twenty assignments were ranked both best and worst by different assessors’ (p. 467). In an attempt to address issues regarding marker reliability the literature has developed, analysed, and evaluated a range of processes and procedures designed to ensure robust practices before, during and after the assessment process including the double marking of students work (Partington, 1994; Dracup, 1997), moderation procedures (Bird and Yucel, 2013; Ecclestone, 2001; Orr, 2007; Watty et al., 2014), involving external examiners in changes to assessment (Bloxham et al., 2015; Ecclestone and Swann, 1999; Medland, 2015), and establishing communities of practice (Price 2005; Grainger, Purnell and Zipf, 2008; Herbert, Joyce and Hassall, 2014). Of particular interest is the research that has considered the use of marking guides, grade descriptors, detailed assessment criteria and rubrics (Bell, Mladenovic and Price, 2013; Bloxham and Boyd, 2007; Bloxham, Boyd and Orr, 2011; Bloxham et al., 2016; Brookhart and Chen, 2015; Brookhart, 2018; Campbell, 2005; Chakraborty et al., 2021; Dawson, 2017; Ecclestone and Swann, 1999; Grainger and Weir, 2020; Hunter and Docherty, 2011; McConlogue, 2020; Panadero and Jonsson, 2020; Rust, O’Donovan and Price, 2005; Williams and Kemp, 2019) as there is an inherent assumption that where criteria is explicitly stated it reduces the ‘potential for inconsistency of marking practice or perceived lack of fairness’ (QAA, 2006, p. 8). Is it therefore sufficient for an assessment task to be marked against expressly stated criteria, such as a rubric aligned to the learning outcomes, to ensure that the process is fair and therefore immune from legal challenge?

6.6.3 Marker Reliability, Criteria and Standards

An inherent assumption in higher education is that in order to consistently identify student academic performance, markers require an explicit and transparent framework (Jones et al., 2017). As a result, rubrics are a common assessment tool, developed to provide consistency in the marking of students work by allowing academics to judge the quality of student work against objective criteria and standards. As articulated by Rust (2002, p. 2), 'if a particular assessment were totally reliable, assessors acting independently using the same criteria and mark scheme would come to exactly the same judgment about a given piece of work'. It would therefore appear a fair marking process is one where an assessment task is marked against expressly started criteria and standards. However, the 'inherent frailties' (Bloxham, 2009, p. 209) of the marking process, with respect to criteria and standards have been well document. Several studies have concluded that even where express standards are provided, a variation in marks awarded arises where the standards are applied by multiple markers (Kuisma, 1999; Laming, 1990; Newstead and Dennis, 1994; Read, Francis and Robson, 2005; Saunders, 1998). Further, the use of rubrics does not necessarily correlate to high reliability among markers (Albluwai, 2018; Stellmack et al., 2009). In a 2019 study, George-Williams et al., sought to determine whether the reliability of marking could be increased by reducing academic judgment through three interventions: the use of detailed marking criteria, Excel marking spreadsheets, and automated marked Moodle reports. It was concluded that even where 'all marking criteria [was] enhanced to ensure that they included detailed expectations for each mark to be allocated' (p. 883) and specific training was provided, more detailed marking criteria in and of itself had no effect on addressing marker variation. However, in a 2021 study, Chakraborty et al. specifically considered the effects of rubric quality on marker variation and concluded that 'the clarity of the criteria, scoring levels, scoring strategy, judgment complexity and quality definitions of the rubric contributes to the markers' ability to interpret the assessment intentions' (p. 7) can lead to more consistent marker judgments.

Grainger and Weir (2020, p. 3) suggest that a significant reason for the 'opacity of assessment practices is an inability to create a valid and reliable assessment rubric that feature criteria aligned with the course learning outcomes and precise descriptions of the expected quality of learning being assessed'. Therefore, one of the fundamental issues with using criteria and grade descriptors is interpretation (Bloxham, 2009; Price and Rust, 1999). As explained by McConlogue (2020, p. 91), 'written descriptions of standards are notoriously difficult to interpret; the language used in criteria such as: argument, 'structured; and 'critically can be interpreted differently be different markers'. Even where markers agreed on the criteria against which an assessment task is marked, they may not be cohesive agreement on 'how well the various criteria have been achieved' (Grainger, Purnell and Zipf, 2008, p. 134). Further, research shows that markers may ignore or choose not to utilise the prescribed standards (Ecclestone, 2001; Price and Rust, 1999; Smith and Coombe, 2006) or apply implicit standards (Baume, Yorke and Coffey, 2004; Price, 2005; Read, Francis and Robson, 2005). As explained by Ecclestone (2001, p. 305), markers become 'more intuitive and less deliberative and are unable to articulate the tacit knowledge on which much of their decision-making has come to depend'.

6.6.4 Marker Reliability and Fairness

Based on the relevant higher education research literature, it would appear that an argument could be made with respect to the unfairness of the assessment process, as it specifically pertains to marker reliability. As discussed above, from a legal perspective, when seeking to challenge the process by which an academic decision has been reached, the question is framed around whether the process for making the decision is fair. The QAA Guiding Principles (2018B, p. 4) explain that fairness in the assessment process necessitates 'assessment criteria sufficiently robust to ensure reasonable parity between the judgments of different assessors' (reliability). It is clear that despite the inherent assumption that explicit criteria reduces the 'potential for inconsistency of marking practice or perceived lack of fairness' (QAA, 2006, p. 8), the higher education literature demonstrates the imperfect nature of assessment criteria and highlights that solely relying on assessment criteria is not sufficient to address issues of marking unreliability.

This potentially leaves the assessment process, with respect to marker reliability, open to legal challenge.

6.7 Research Outcomes

6.7.1 Outcome 1: Students Can Legally Challenge the Assessment Process

A key conclusion of the research undertaken in chapter five was that both the common law and legislation have been unequivocal that a judgment about the marks awarded comes within the academic judgment immunity and therefore cannot be legally challenged. It is clear that the academic judgment immunity applies where the central subject of the complaint is a dispute about academic judgment. However, a key conclusion of the research undertaken in chapter four was that assessment is more than an outcome, it is a multifaceted process where numerous academic judgments are made. These outcomes formed the basis for research question three, whether the assessment process, as distinct from the assessment outcome is immune from legal challenge. Based on the analysis undertaken in chapter six, the assessment process as distinct from the assessment outcome, can be legally challenged. As confirmed by the High Court of Justice in Mustafa (para. 51), the OIA can consider a complaint which 'does involve a matter of academic judgment, but where the correctness of that judgment is not a central issue'. What this means from a practical perspective is that where the central subject matter of a student complaint is framed as one of process, as opposed to one of academic judgment, the complaint can be considered. These types of complaints can include, but are not limited to, whether the university failed to correctly follow its own assessment, marking and moderation procedures (Budd; Chilab; Gopikrishna; Senior-Milne; Sindhu) and whether the decision-making process had involved any elements of unfairness of bias (Budd; Gopikrishna; Senior-Milne; Sindhu).

6.7.2 Outcome 2: The Importance of Following University Prescribed Internal Assessment, Marking and Moderation Procedures

As discussed in chapter four, it was outside the scope of this thesis to specifically consider individual university policies and procedures with respect to assessment. However, in determining what types of decisions fell outside the scope of the protection of the academic judgment immunity, an important outcome was determined. It is clear from the analysis undertaken that the assessment process can be challenged where the legal issue for consideration is whether internal university policies and procedures were breached with respect to assessment. Numerous common law decisions, coupled with the OIA Rules, have confirmed that where a university has failed to correctly follow its internal assessment, marking and moderation procedures (Budd; Chilab; Gopikrishna; Senior-Milne; Sindhu), these decisions can be legally challenged and considered by the OIA and the judiciary. As explained in the case of Chilab, where one of the issues raised was the incorrect application of university regulations, this was not a challenge to the academic judgment of the examiners, but rather the claim was based on an 'alleged failure to identify, interpret and apply correctly the relevant regulations' (para. 3). As a result, it is important for members of the higher education assessment community to ensure that internally prescribed policies and procedures with respect to assessment are complied with as non-compliance provides an avenue for students to legally challenge the assessment process.

6.7.3 Outcome 3: Challenging the Assessment Process on the Basis of Unfairness

As explained in the analysis of chapter six, students seeking to challenge the university decision-making process on the basis of unfairness, with respect to the assessment process, is currently a theoretical concept. Common law cases, and relevant legislation, both explain that it is possible to challenge a university decision on the basis of unfairness. However, no published case to date has attempted to challenge the assessment process by specifically arguing that the process is unfair. This is a novel argument explored by this thesis by considering

validity as fairness in the assessment process and reliability as fairness in the assessment process from the perspective of the QAA.

Based on the analysis under taken in section 6.5, it would be difficult to challenge the fairness of the assessment process with respect to intrinsic validity where it can be demonstrated that there is alignment between the assessment method, assessment task and the learning outcomes intended to be assessed. Where each of these elements can be evidenced, it is arguable that an assessment has been designed by a valid process which is therefore fair not susceptible to legal challenge. It is however important to acknowledge a clear limitation. The analysis undertaken has taken a narrow approach and only considered one aspect of validity, namely intrinsic validity, with respect to the assessment process in the legal education context. It is possible that the fairness of the assessment process could be challenged based on another type of validity, in the context of higher education assessment. This provides a broad scope for further research to be undertaken with respect to the validity of the assessment process and whether it could be subject to legal challenge.

Based on the relevant literature, it would appear that an argument could be made with respect to the unfairness of the assessment process, as it specifically pertains to marker reliability. As discussed above in section 6.6, from a legal perspective, when seeking to challenge the process by which an academic decision has been reached, the question is framed around whether the process for making the decision is fair. The QAA Guiding Principles (2018B, p. 4) explain that fairness in the assessment process necessitates ‘assessment criteria sufficiently robust to ensure reasonable parity between the judgments of different assessors’ (reliability). It is clear that despite the inherent assumption that explicit criteria reduces the ‘potential for inconsistency of marking practice or perceived lack of fairness’ (QAA, 2006, p. 8), the higher education literature demonstrates the imperfect nature of assessment criteria and highlights that solely relying on assessment criteria is not sufficient to address issues of marking unreliability. This potentially leaves the assessment process, with respect to marker reliability, open to legal challenge.

6.8 Chapter Conclusion

Chapter six provided an exemplar of the real-world factual context in which academic judgment and the academic judgment immunity reside in higher education. This is an important step in the doctrinal research methodology. Research question three sought to understand whether the assessment process, as distinct from the assessment result, was also immune from legal challenge. First chapter six considered whether the assessment process, as distinct from the assessment result, can be legally challenged. It was concluded that while the scope of the academic judgment immunity protects the assessment result from legal challenge, the assessment process can be legally challenged on the grounds of fairness. This conclusion lead chapter six to consider what constitutes fairness from both the legal and higher education perspective in order to query whether assessment process could be legally challenged by arguing unfairness. For the purposes of chapter six, fairness was contextualised as validity and reliability in the assessment process, specifically intrinsic validity and marker reliability. Based on the analysis undertaken, it was concluded that it would be difficult to challenge the fairness of the assessment process with respect to intrinsic validity where it can be demonstrated that there is alignment between the assessment method, assessment task and the learning outcomes intended to be assessed. However, with respect to marker reliability, there is scope to argue that unfairness can be demonstrated, potentially opening up the assessment process to legal challenge.

Chapter 7: Conclusions and Potential Implications

7.1 Introduction

The overarching objective of this thesis was to understand how the academic judgment immunity operated within the context of higher education in England by bringing together key literature from the legal discipline and the higher education research discipline. Despite the practical impact of the academic judgment immunity, especially with respect to preventing students from challenging their assessment results, there was minimal literature which specifically focused on the concept of academic judgment. After considering the gaps in the existing literature discussed in chapter two, three research questions were developed. Section 7.2 explains how each of the research questions were addressed in chapters 4, 5 and 6. Section 7.3 provides a holistic summary of the original contributions to knowledge made by this thesis and supplements the individual research outcomes in sections 4.5, 5.6 and 6.6. Section 7.4 acknowledges the limitations of the research undertaken and section 7.5 explains ideas for further research. Section 7.6 provides the chapter conclusion.

7.2 Addressing the Research Questions

7.2.1 Research Question 1: Where does Academic Judgment Exist in the University Context?

The purpose of research question one was two-fold. First, to establish the university context in which academic judgment exists, as this was a gap identified from the literature review. Second, to establish the real-world factual circumstances in which academic judgment exists in order to provide the higher education context for answering research question three. Research question one was addressed in chapter four where it was determined that academic judgment exists in three university contexts. First, it was determined that an academic judgment is a type of academic decision made in the university context known as a purely academic decision. For a decision to be classified as a ‘purely academic

decision', there must be a special claim to expertise such as in the areas of assessment, excluding students for insufficient progress, and determining academic integrity offences. Second, it was determined that academic judgment is an inherent element of the assessment process in higher education, as the process of marking student work requires the exercise of expert judgment. This narrowed the focus to establishing where academic judgment existed within the marking process. The third area where academic judgment was identified was with respect to students challenging decisions involving academic judgment through internal and external dispute resolution processes.

7.2.2 Research Question 2: Within the Legal Framework of Higher Education in England what Constitutes the Academic Judgment Immunity?

Research question two was considered in chapter five. The first step was to define the legal framework within in which academic judgment existed in order to explain the legal relationship between common law and legislation. From here the doctrinal analysis methodology, explained in chapter three, was applied to define academic judgment in both the common law and legislative contexts. The scope of the common law academic judgment immunity was established and clearly articulated. The doctrinal analysis methodology was then applied to define the scope of academic judgment immunity in the legislative context.

7.2.3 Research Question 3: Is the Assessment Process Immune from Legal Challenge?

As explained in chapter three, an important component of the doctrinal research methodology is the application of the law to the real-world factual context in which the law operates. Chapter four, and research question one, articulated the real-world university context in which academic judgment resides with respect to assessment. Chapter five, and research question two, undertook a doctrinal analysis of the academic judgment immunity in order to ascertain the legal definition of academic judgment and the scope of the immunity. Research question three sought to determine whether the assessment process, as distinct

from the assessment mark, is immune from legal challenge. It was determined, based on the current law, that it is possible for a student to challenge the assessment process where the student is able to show that the university failed to followed its own internal marking and moderation procedures. Further, it was also determined that a student can challenge the process by which an academic decision has been reached provided that the process was materially unfair. From here a novel question was considered - whether the assessment process could be challenged on the basis of unfairness with respect to issues of validity and reliability? It was concluded that it would be difficult to challenge the fairness of the assessment process with respect to intrinsic validity where it could be demonstrated that there was an alignment between the assessment method, assessment task and learning outcomes intended to be assessed. With respect to reliability, specifically marker reliability, it was concluded that an argument could be made with respect to the unfairness of the assessment process thus leaving the assessment process open to legal challenge.

7.3 Original Contributions to Knowledge

7.3.1 Articulating the Scope of Academic Judgment in the University Context

A gap identified in the literature review was that while academic judgment was a core component of academic decision-making in the university context, it was an elusive concept in higher education research. Addressing this gap is important from a practical perspective. Members of the higher education assessment community who are engaged in the research, design, implementation and certification of university assessment across England need to understand what an academic judgment is, in order to be able to identify within in their own areas of responsibility, where academic judgments can and do occur. This is particularly important as the legal analysis undertaken in this thesis suggests that while an academic judgment cannot be legally challenged, a matter of process pertaining to an academic matter can be legally challenged. Articulating the scope of the academic judgment immunity, in the university context, is also important from a legal perspective. To date, examples of what constitutes an academic judgment

have been quite narrow. Identifying and understanding the types of judgments that can be classified as academic judgments may broaden the scope of what lawyers and judges view as coming within the purview of the academic judgment immunity. To address this gap, this thesis analysed the relevant literature and identified three areas where academic judgment exists in the university context. First, it established that academic decision-making can be classified into four categories, with academic judgment coming within the scope of purely academic decisions. It was determined that decisions which are purely academic in nature generally require the university to have a special claim to expertise, such as in the areas of assessment and marking. Second, it was determined that academic judgment is an inherent element of the assessment process and can occur in range of contexts including in the establishment of standards against which an assessment task will be judged, and the subsequent development of assessment criteria and rubrics. Third, it was determined that decisions involving academic judgment are a type of university decision that students seek to legally challenge.

7.3.2 Defining the Scope of the Academic Judgment Immunity in the Legal Context

Defining the scope of the academic judgment immunity is an original contribution to knowledge. This thesis analysed 76 cases, as well as relevant intrinsic and extrinsic legislative materials, in order to determine specific types of decisions that have been defined as decisions requiring academic judgment. Based on the analysis there is clear recognition by both the common law and legislation that 'obviously, the exercise of academic judgment does not encompass everything which academics do, and not all judgments which academics have to make will qualify as academic judgments' (Mustafa, para. 52). It is therefore not sufficient to simply label a decision as one involving academic judgment. Parliament, in drafting the Higher Education Act, was careful to avoid a situation where 'academic judgment' could provide 'some form of hiding place' or 'could be used by a university as a refuge when it did not want to investigate a matter' (HL Deb, 19 April 2004, vol. 660, col. 113). As a result, in determining the scope of the academic judgment immunity an additional outcome was produced, the

identification of decisions which have been expressly determined not to constitute an academic judgment.

Figure 7.1 depicts the common law classification of academic decisions and is applicable if a student seeks to challenge a university decision through the common law process.

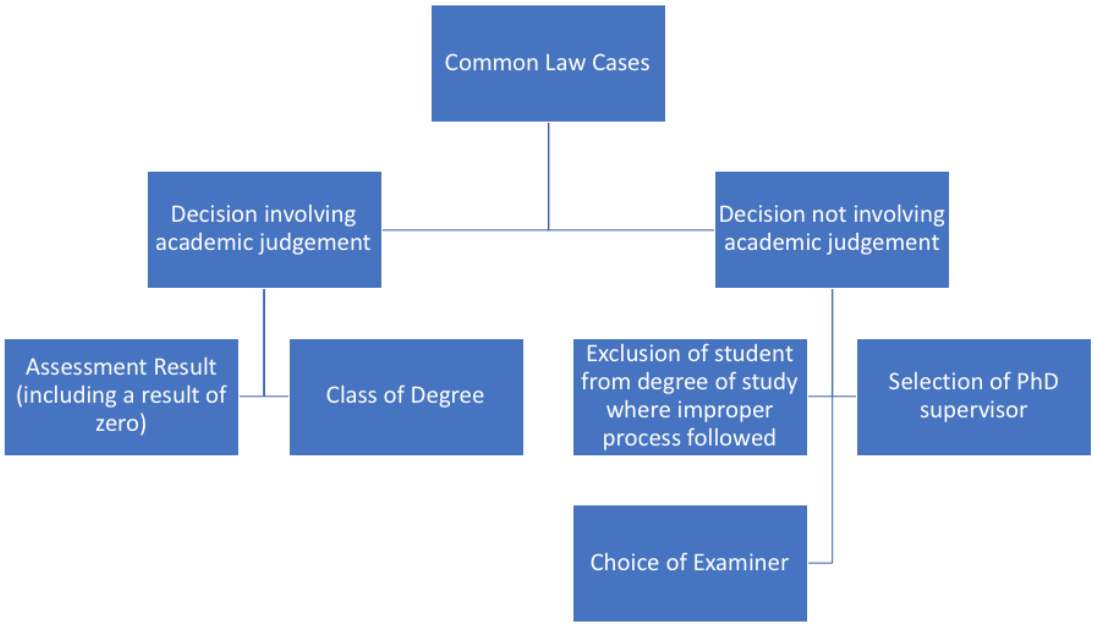

Figure 7.1: Common law classification of academic decisions

Figure 7.2 is based on the extrinsic materials utilised to assist in the interpretation of the Higher Education Act, including relevant Hansard materials such as parliamentary debates and second reading speeches. These extrinsic materials do not form part of the legislation, but can be utilised to help interpret the Higher Education Act, when determining what may constitute a matter of academic judgment.

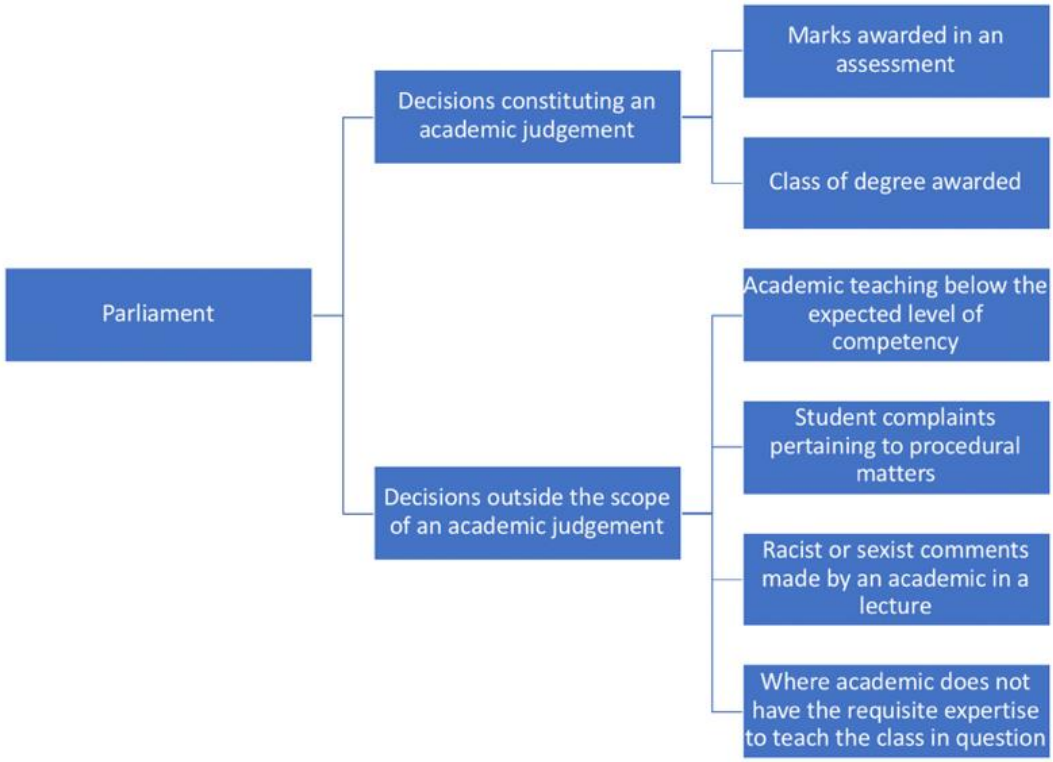

Figure 7.2: Classification of academic decision based on extrinsic materials

Figure 7.3 depicts the current OIA Rules, which interpret academic judgment, and is based on the current OIA Guidance Note and relevant common law decisions which have applied the OIA Rules.

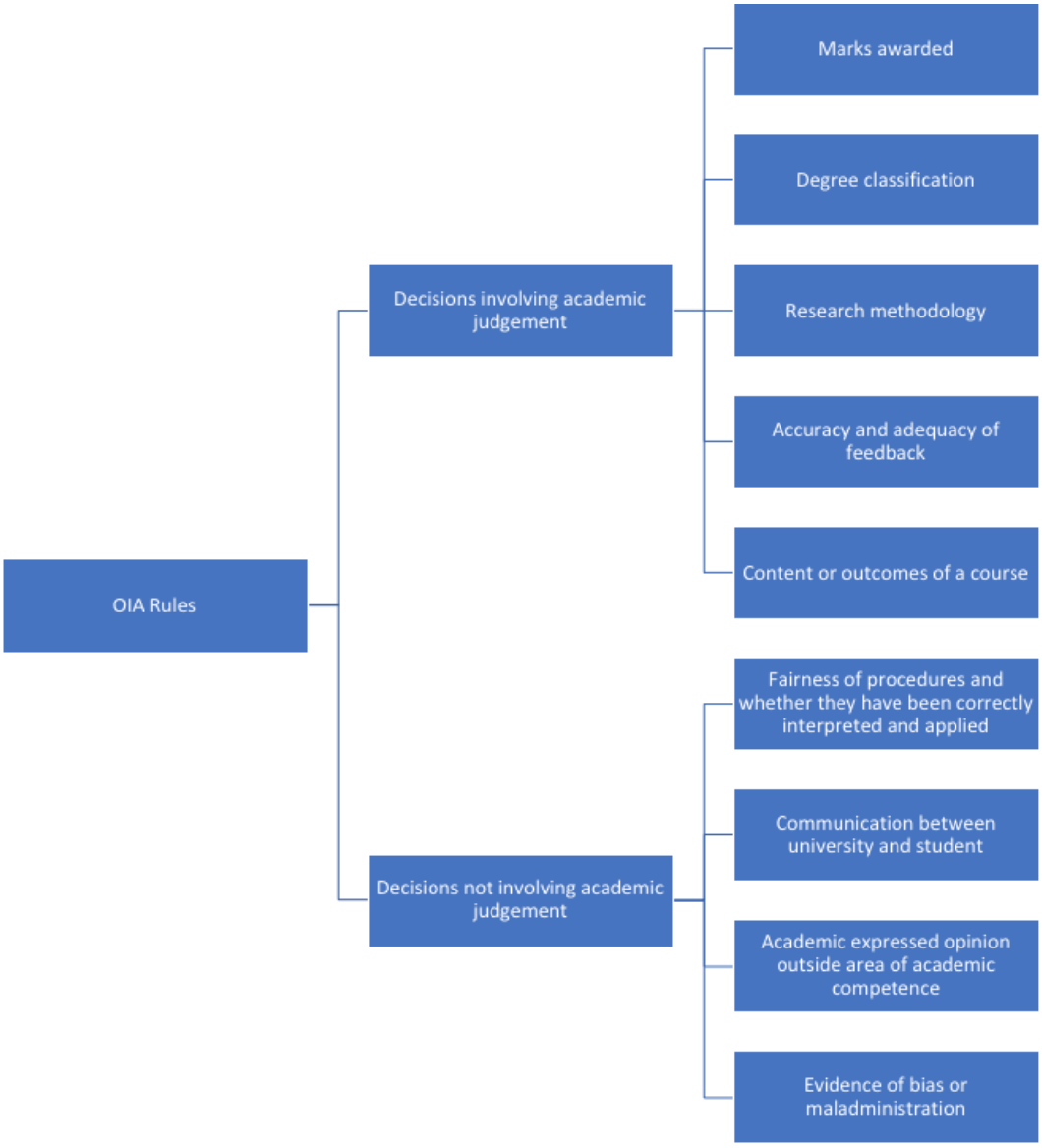

Figure 7.3: Classification of academic decision based on OIA Rules and materials

Clearly identifying and explaining the types of academic decisions that come within in the scope of an academic judgment will assist members of the higher education assessment community determine whether a student complaint, about an act or omission of their university, falls outside the protection of the academic judgment immunity and therefore can be legally challenged. Further, understanding what types of decisions do not come within the purview of

academic judgment will assist members of the higher education assessment community in reviewing the efficacy of their internal university policies and procedures, especially with respect to assessment.

7.3.3 Determining Academic Judgment: A Common Law Test

Based on an analysis of relevant common law cases in chapter five, this thesis made an original contribution to the literature through the development of a common law test. It is envisioned that this common law test will assist members of the higher education assessment community to determine whether a decision is one of academic judgment and therefore protected by the academic judgment immunity. The common law test requires two questions to be asked:

1. Is the central subject matter of the complaint a dispute about an academic judgment?

2. Has the academic judgment been exercised in good faith?

For a university decision to be defined as one of academic judgment, the first question that needs to be considered is whether the central subject matter of a complaint is a dispute about academic judgment. For this to be determined, it is necessary to specifically consider the nature and extent of the judgment in question. This will need to be done on a case by case basis but there are legal principles to guide the decision-making. The common law has determined that there are two types of decisions, those which are purely academic in nature, and those which may involve an academic element but are a matter of process. The judiciary has determined that decisions pertaining to marking and assessment, as well as the class of degree, are decisions which are purely academic in nature. Once it has been determined that the central subject matter of a complaint is with respect to a decision which is purely academic in nature, the second question can be considered. It is important to understand that it is not sufficient that the decision is purely academic in nature to come within the purview of the academic judgement immunity. The academic judgment must also have been exercised in good faith. To determine whether the exercise of the academic judgment can be

described as having been done in good faith there are two sub-questions to consider. Is there any evidence of an impropriety, and was a reasoned conclusion reached? If these questions are answered in the affirmative, an academic judgment is established under the common law, which is protected by the academic judgment immunity.

7.3.4 Determining Academic Judgment: A Statutory Test

The articulation of the statutory test, to determine whether a decision is one involving academic judgment, is an original contribution of this thesis. This is an important contribution as the majority of student complaints are determined by the OIA, and not by the common law courts. The statutory test will assist members of the higher education assessment community, who are engaged in the research, design, implementation and certification of university assessment across England, to determine whether a decision is one of academic judgment, and therefore protected by the academic judgment immunity from the perspective of the OIA. Based on an analysis of legislation, OIA rules and relevant extrinsic materials, chapter five developed two questions, and several sub-questions to assist in determining whether a university decision can qualify as an academic judgment. The first and overarching question for consideration is whether the student complaint relates to a matter of academic judgment. To answer this question, there are two sub-questions for consideration:

a. Is the central subject matter of the student complaint a dispute about an academic judgment?

b. Is academic judgment a peripheral issue with respect to the student complaint?

If it is determined that the central subject matter of the complaint is a dispute about an academic judgment, the second question that needs to be considered is whether the academic judgment has been made about a matter where the opinion of an academic expert is essential. To make this determination, several categories of academic decision-making have been identified including the

marking awarded, degree classification, research methodology, accuracy and adequacy of feedback, and the content or outcomes of a course. This however is not an exhaustive list and other categories of academic decision-making may also be included. Based on an analysis of relevant common law cases, the following examples require the opinion of an academic expert, and therefore fall outside the jurisdiction of the OIA: the marking of work and feedback, an academic assessment of the quality of a piece of work and issues raised about performance in tutorials or seminars.

7.3.5 The Importance of Following Prescribed University Policies and Procedures

In considering what types of decisions come within the scope of the academic judgment immunity, a separate line of inquiry emerged, resulting in an explanation of why it is important that members of the higher education assessment community follow prescribed university policies and procedures, especially with respect to assessment. It appears that the assessment process can be challenged, and ostensibly the mark, where the issue for consideration by the judiciary or the OIA is whether internal university policies and procedures were breached with respect to assessment. In the case of Budd, the OIA explained how they investigate student complaints noting that 'we cannot put ourselves in the position of examiners in order to re-mark work or pass comment on the marks given. We can only look at whether an institution has breached its procedures or acted unfairly' (para. 39). In the 2018 decision of Sindhu, an OIA adjudicator explained that the 'OIA was not able to interfere with the operation of a university's academic judgment but could look at whether a university had correctly followed its own procedures and also could look at whether the decision-making process had entailed any elements of unfairness or bias' (para. 7). In the 2015 case of Gopikrishna the OIA confirmed that 'whether the university has correctly followed its own assessment, marking and moderation procedures, and whether there was any unfairness… in the decision-making process' (para. 93) were matters that could be considered by the OIA and did not come within the scope of the academic judgment immunity. As a result, it would appear that where a student can demonstrate that internal university policies and procedures were

not followed with respect to assessment, marking and moderation, the academic judgment immunity does not apply. Thus leaving universities vulnerable to students legally challenging the assessment process.

7.3.6 Framing a Student Complaint

Based on an analysis of the current common law cases and OIA decisions, the way in which a complaint is framed will largely determine whether it is subject to the academic judgment immunity. This may provide an unintended way for a student to query an academic judgment, without invoking the academic judgment immunity. For a student complaint to be classified as one of academic judgment, and therefore protected by the academic judgment immunity, the main subject matter must be with respect to a dispute about an academic judgment. Where disputes have been framed as disputing a final result, these have all clearly come within the scope of the academic judgment immunity, and are protected from legal challenge. However, where student complaints have been framed as procedural irregularities, the failure to protect anonymity in examinations, examiner bias, and removing a student from a degree of study without ensuring fairness in the decision-making process the courts have consistently concluded that these fall outside the scope of the academic judgment immunity as they are matters of process. These decisions may touch upon the jurisdiction of academic judgment, but they do not seek to challenge the academic judgment decision. It is clear that if a complaint is framed as, 'I wish to dispute my final mark', this comes within the academic judgment immunity and is not subject to legal challenge. However, it would appear that it is possible to challenge an assessment mark indirectly by arguing process. Where a complaint is framed as one challenging the process by which the assessment decision was made, for example, by contending that there was an unfairness in the decision-making process or that the academic failed to follow the relevant university procedures with respect to assessment, marking and moderation, the judiciary and the OIA are prepared to consider the complaint, regardless of whether it touches on matters pertaining to academic judgment.

7.4 Limitations

7.4.1 The Nature of Law, The Researcher and the Objective Reality of Law

When undertaking doctrinal research, the researcher is attempting to determine an 'objective reality'. Legislation, for example, is created by parliament, written down and published as an Act. This is a positive statement of the law, an objective reality. However, it is the interpretation of the law that is rarely certain. It is accepted that a limitation of this thesis is that the law is open to more than one interpretation. It is the notion that the law is rarely certain that forms the basis for the adversarial legal system that England operates under. One strategy that this thesis has adopted, in order to minimise issues of interpretation, is to clearly and explicitly explain the methodology utilised to determine which law is being interpreted and how the law is being interpreted. It is also important to acknowledge that no legal certainties have been provided by this thesis. It is always open to parliament to change legislation, adopt new definitions, or remove provisions. Further, the common law has been clear that determining whether a matter is one of academic judgment will be done on a case by case basis considering the specific material facts of the situation. The Rules and accompanying Guidance Note, developed by the OIA, also provide a limitation with respect to the statutory scope developed by this thesis. Parliament delegated law making power to the OIA to create the rules which would govern how students could challenge university decision-making. In the creation of the OIA Rules, the OIA did not define how it would interpret 'academic judgment'. This was provided for in an accompanying document, a Guidance Notice, which is helpful in providing scope but it does not provide legal certainty. As a result, the questions developed by this thesis to ascertain whether from a statutory perspective a decision is one of academic judgment, are not grounded solely in legal principles. What this thesis has achieved is an analysis as to current scope of how decisions of academic judgment are treated in the legal context and how extrinsic materials have influenced these decisions. It is hoped that this analysis, an original contribution to the discipline, assists members of the higher education assessment community who are engaged in the research, design,

implementation and certification of university assessment across England understand the types of decisions that are likely to be protected from legal challenge by the academic judgment immunity.

7.4.2 Data

When conducting doctrinal research one significant challenge is data, namely cases. It is acknowledged that this imposes several limitations. When analysing the law, this thesis can only focus on cases which have been published and are available to the public. When a case can been located, it is important to be aware that the facts of the case are not an objective transcript of the judicial proceedings. The facts have been summarised by members of judiciary and may not reveal information that would otherwise have been pertinent to the research being undertaken. This is also accurate with respect to the reasoning undertaken by the judiciary. The intellectual legal reasoning process that the judge will undertake to come to their conclusion will not necessarily be contained within the written judgment. The decision provided is not an intricate step-by-step account of each thought, presumption or deduction that the judge engaged in to come to their final determination. Further, according to the 2021 Annual Report of the OIA, 2,763 complaints were received. However, the OIA does not publicly publish their decisions. Only cases which are deemed to be a 'public interest case' are made available on the OIA website. These case summaries do not provide the full transcript of the process, evidence provided by the applicant and the university and a detailed explanation of how the OIA came to its final decision. As a result, the statutory scope developed by this thesis, does not include decisions made by the OIA with respect to academic judgment. This thesis was only able to utilise excerpts of OIA decisions, which were made publicly available, due to the OIA decisions being appealed by students to the common law courts.

7.5 Ideas for Further Research

In answering the research questions posed by this thesis, numerous areas for further research emerged. This thesis determined that academic decisions with

respect to academic offences such as plagiarism *prima facie* come within the academic judgment immunity but are provided an important caveat. As explained by the OIA, 'decisions about whether the work of a student contains plagiarism and the extent of that plagiarism will normally involve academic judgment, but that judgment must be evidence based' (OIA Guidance Note April 2018, para. 30.4). This opens up an interesting avenue of inquiry as to whether all determinations of plagiarism actually require an exercise of academic judgment. For example, where a computer programme detects 100% copying, no judgment (academics or otherwise) is technically required, to determine that there has been plagiarism (Mustafa, para. 54). It would be interesting to investigate whether such a case would come within the scope of the academic judgment immunity. This also raises broader questions around the development and use of Artificial Intelligence technologies such as ChatGPT and the scope of the academic judgment immunity.

The focus of this thesis was on internal university decisions which had been challenged externally either via the judiciary, the Visitor (prior to it being abolished) or the OIA system, and reported in the public domain. As a result, published cases were analysed from a range of universities across England in order to determine the legal scope of the academic judgment immunity. However, academic judgment exists embedded within the internal complaint, review and appeals procedures of each English university to prevent students from challenging academic decision-making at the internal level. Further research could be undertaken by specifically analysing how internal university policies and procedures are structured and designed to prevent students from challenging decisions involving academic judgment. This would particularly interesting if access was gained, noting appropriate ethical and privacy considerations, to internal documentation which explained how these policies and procedures were to be interpreted and applied in the decision-making process. Further, interviews could also be conducted with relevant internal university decision-making bodies to understand how they make a determination as to whether a student complaint comes within the ambit of an academic judgment and is therefore protected from scrutiny.

A key outcome of chapter six was that students can legally challenge the assessment process where students can evidence that the university has failed to correctly follow its own assessment marking and moderation procedures and where there is evidence of unfairness or bias in the decision-making process. When analysing the issue of unfairness, this thesis used two exemplars: designing a valid assessment from the perspective of intrinsic validity and the unreliability of marker judgments in the marking process. It would be interesting to extend this analysis to consider fairness in the context of the other types of validity and reliability identified in chapter six as well as utilising other higher education disciplines as the case study exemplars.

As discussed in chapter three, one of the specific challenges with respect to the collection of data was OIA determinations. The OIA does not publicly release or publish their determinations in full. Rather, the OIA publishes ‘case summaries’ on their website which provide a truncated version of events. It would be interesting whether access could be gained to the internal decisions of the OIA, noting appropriate ethical and privacy considerations, to ascertain how the OIA decides as to whether a student complaint comes within the ambit of an academic judgment and is therefore protected from scrutiny.

7.6 Chapter Conclusion

The aim of this thesis was to bring clarity to the academic judgment immunity by seeking to understand the types of academic decisions that are currently protected from legal challenge. This was achieved by bringing together key literature from the legal discipline and the higher education research discipline to answer the three research questions and research objectives elucidated in chapter one. Chapter seven has demonstrated how each research question was answered, within the context of this thesis, as well as highlighted the original contributions to knowledge achieved. Finally, chapter seven noted relevant research limitations and explored ideas for further research.

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