

Legal skills and debates in Scotland



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Introduction and guidance

Introduction and guidance

Welcome to this badged open course, *Legal skills and debates in Scotland*.

The free course lasts eight weeks, with approximately three hours of study each week. You can work through the course at your own pace, so if you have more time one week there is no problem with pushing on to complete another week's study.

The course explores law and legal skills in Scotland. You will consider how laws are interpreted and applied. You will read legislation, court judgments and learn about logic, argument and judicial reasoning. The concept of precedent is introduced and you consider perceptions of law and justice too. Human Rights are discussed and the legal capacity of children explored.

The relationship between society's values and the law and the role of law in Scotland is considered through a number of examples which explore the balance between policy, rights and law. Throughout problem solving and legal writing are considered.

In this course, you will explore the role, function and purpose of the courts in Scotland and their relationship with the law. You will gain an understanding of both the complexity of issues in the application and interpretation of law, and of human rights and their role in Scotland.

Following this course, you will also be able to explain and demonstrate a number of skills, including problem solving, argument and reasoning.

After completing this course, you should be able to:

- understand the complexity of issues in the application and interpretation of law
- have an understanding of human rights and their role in Scotland
- be able to explain and demonstrate a number of skills such as problem solving, argument and reasoning.

After completing *Legal skills and debates in Scotland*, you may like to enrol on these free OpenLearn courses:

[*The Scottish Parliament and law making*](#)

[*Scottish courts and the law*](#)

[*Law and change: Scottish legal heroes*](#)

And if you would like to take your study in this subject area further, sign up to the Open University course [*Law making in Scotland*](#).

Moving around the course

In the 'Summary' at the end of each week, you can find a link to the next week. If at any time you want to return to the start of the course, click on 'Course content'. From here you can navigate to any part of the course. Alternatively, use the week links at the top of every page of the course.

It's also good practice, if you access a link from within a course page (including links to the quizzes), to open it in a new window or tab. That way you can easily return to where you've come from without having to use the back button on your browser.

What is a badged course?

While studying *Legal skills and debates in Scotland* you have the option to work towards gaining a digital badge.

Badged courses are a key part of The Open University's mission *to promote the educational well-being of the community*. The courses also provide another way of helping you to progress from informal to formal learning.

To complete a course you need to be able to find about 24 hours of study time, over a period of about 8 weeks. However, it is possible to study them at any time, and at a pace to suit you.

Badged courses are all available on The Open University's [OpenLearn](#) website and do not cost anything to study. They differ from Open University courses because you do not receive support from a tutor. But you do get useful feedback from the interactive quizzes.

What is a badge?

Digital badges are a new way of demonstrating online that you have gained a skill. Schools, colleges and universities are working with employers and other organisations to develop open badges that help learners gain recognition for their skills, and support employers to identify the right candidate for a job.

Badges demonstrate your work and achievement on the course. You can share your achievement with friends, family and employers, and on social media. Badges are a great motivation, helping you to reach the end of the course. Gaining a badge often boosts confidence in the skills and abilities that underpin successful study. So, completing this course should encourage you to think about taking other courses.



How to get a badge

Getting a badge is straightforward! Here's what you have to do:

- read each week of the course
- score 50% or more in the two badge quizzes in Week 4 and Week 8.

For all the quizzes, you can have three attempts at most of the questions (for true or false type questions you usually only get one attempt). If you get the answer right first time you will get more marks than for a correct answer the second or third time. If one of your answers is incorrect you will often receive helpful feedback and suggestions about how to work out the correct answer.

For the badge quizzes, if you're not successful in getting 50% the first time, after 24 hours you can attempt the whole quiz, and come back as many times as you like.

We hope that as many people as possible will gain an Open University badge – so you should see getting a badge as an opportunity to reflect on what you have learned rather than as a test.

If you need more guidance on getting a badge and what you can do with it, take a look at the [OpenLearn FAQs](#). When you gain your badge you will receive an email to notify you and you will be able to view and manage all your badges in [My OpenLearn](#) within 24 hours of completing the criteria to gain a badge.

Get started with [Week 1](#).

Week 1: What is law?

Introduction

During this week you consider and explore what law is. Law plays a central role in society and is influenced by social, political and economic change. Opinions about law, lawyers, judges and the function of the legal system vary. The role and function of law is often in the news and much debated. Whether law is used to protect, regulate, uphold rights, challenge authority, resolve disputes or govern, it is central to society.

In this week you are encouraged to explore your own thoughts and views about law and the legal system. Later weeks will build on this by considering different aspects of law, how it is developed, and the skills required to interpret and apply it. Throughout you consider whether an understanding of law and legal culture underpin an understanding of the society in which they operate.

Following your study of this week you should have an understanding of:

- what the 'law' means to you
- the relationship between law, morals and justice
- the evolving nature of law and its role in society.

1 What is law?

Before considering how law is interpreted and the role it plays in a society we need to be clear about what we mean when we refer to 'law'. What is 'law', how do we know it exists and how is it defined? By asking you to think about what you mean when you use the word 'law', we are asking you to draw upon your own knowledge, views and experience.

The 'law' is rarely out of the news and is often the focus for fictional drama. It is something that touches our lives on a daily basis, it governs what we can and cannot do, it is used to settle disputes, to punish and to govern. There are laws which are widely accepted and laws which generate controversy. Laws play a central role in society and in social, political and economic life.



Figure 1 Picture of the words 'The Law'

Many people think they know what the law is when they see it and your individual viewpoint will affect how you define law. Many lawyers feel that a society cannot be properly understood or explained without an understanding of its law and legal culture. There are many definitions of law and Activity 1 asks you to think about how law affects us all and how it can be defined in more detail.

Activity 1 Thinking about law

 (Allow 15 minutes)

Part 1

Take a few moments to think about situations in which you have had contact with the law during the past 24 hours; for example, buying something, driving or walking across a road. In the box make notes on the contact you have had.

Provide your answer...

Comment

There is no one correct way in which to answer this question as there are a number of ways in which you could have come into contact with the law in the last 24 hours. It will depend on your personal circumstances and what activities you have undertaken in that time. For example, did you go to the supermarket, school or to work? How did you travel? Did you go out with friends? Did you visit family? Did you visit your doctor? Did you go away? Have you visited an exhibition? Did you take part in sport? Did you buy a coffee or take-away meal? Did you use the internet to search for information or contact friends? Have you watched catch-up TV?

Have a look at the suggestions that follow, as some of these contacts with the law may also appear on your list.

- **Travel:** if you have driven a car then you will have had to drive in an appropriate manner to comply with the law, taking reasonable care for the safety of other road users, obeying the speed limit and ensuring that the car is roadworthy and that you have appropriate insurance to allow you to drive. If you have travelled by public transport, such as a bus, tram or train, then a fare would have been payable or a bus pass or rail card shown.
- **Employment:** if you work then you have a contract with your employer. A number of laws have to be complied with. One example is the contract of employment which sets out certain rights and duties of both the employer and the employee.
- **Leisure activities:** you may have gone to the cinema or to a restaurant or had a takeaway meal. Here you have entered into a contract to pay for the services you receive (the film or the meal). The owners of the premises have to comply with laws that ensure your safety, and places that sell food have to comply with strict food and hygiene laws.

These represent just a few examples and they do not include direct contact with people involved with the law, for example police officers, solicitors, advocates and other personnel of the Scottish legal system.

Part 2

Having thought about how you may have had contact with laws in the last 24 hours try to identify what you think the particular laws have in common. If you want to use other examples try to think about what the laws on speeding vehicles (such as cars or motorbikes) may share in common with the laws on buying and selling goods (such as coffee, clothes, a kettle, car or fridge) and how these differ from an agreement to meet up with a friend or family member. What may happen if those laws/ agreements are broken?

Provide your answer...

Comment

Again, there was no one way in which to approach this question. The examples provided were designed to encourage you to think about the difference between the laws and other systems of rules such as informal agreements to meet friends or that you don't step off a moving tram. We thought about the following:

- Both the laws and agreements represent some form of rule. The laws are an example of a particular type of rule. An agreement to meet up with friends is a form of social rule. The consequences of breaking the law differ from those of breaking the social rule.
- The rules in relation to vehicles speeding and buying and selling goods had the status of law (they weren't something we had agreed with a friend or family member).
- The rules were created in different ways. The laws were created by different processes to the agreement. The processes to create law are determined by the legal system which has the authority of the state.
- What sanctions (penalties) exist and how they are applied differs. The rules which were laws had clear sanctions which were widely known about and applied across society. For speeding, penalties include points on your driving licence and a fine. If you fail to honour a contract, you may be asked to pay monetary compensation. A failure to turn up for a meeting with a friend or family member breaches the agreement but the consequences are less clear and would not apply across society.
- In order for the sanctions to be applied, someone or somebody had to do something. In relation to the laws these would be applied through enforcement mechanisms developed by the state.

This brings us to the definition of law that is used throughout this course. Law is a set of rules created by state institutions which make laws through the authority of the state. The laws have sanctions which are recognised by the state and enforced by state-authorised bodies. This is quite a wordy definition but it highlights some of the important factors in law-making:

- the authority of the state is needed
- only certain institutions can make law
- the institutions that make law have been given the authority to do so
- sanctions exist for breaking the law
- the sanctions are imposed by those given state authority to do so.

2 The ideal of law

Law and legal meaning are affected by the perspective from which they are viewed. Whatever your background and motivation for taking this course, you already possess some knowledge about the law. You know what 'law' means to you.

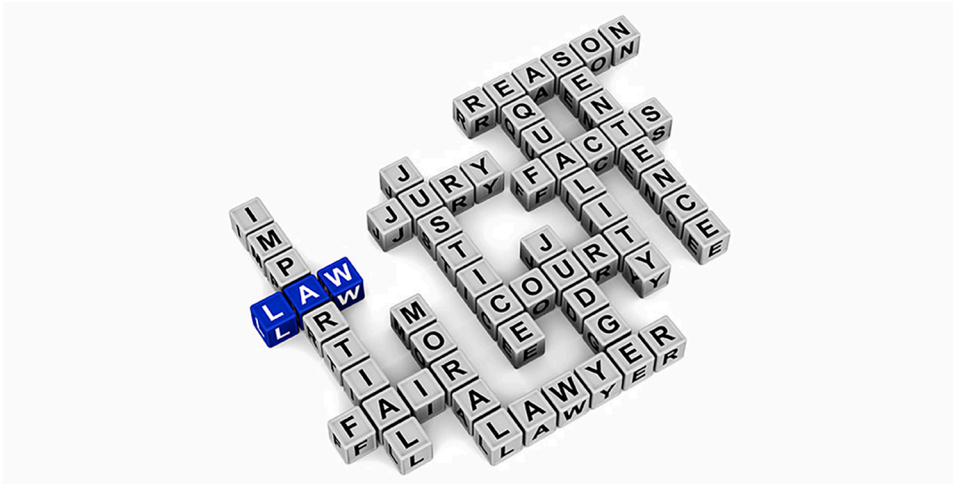


Figure 2 Words associated with law

As individuals we all have preconceptions about what the 'law' is and its role, and this inevitably affects our understanding. During this week you are being asked to examine your ideas about 'law' in order to develop, and in some cases challenge, your initial perceptions of law. You will also be asked to think about the views of others. An appreciation of the views of others is essential to understanding how the role of law within society is perceived. The role and place of law is often miscommunicated in the media and this also has an impact on perception.

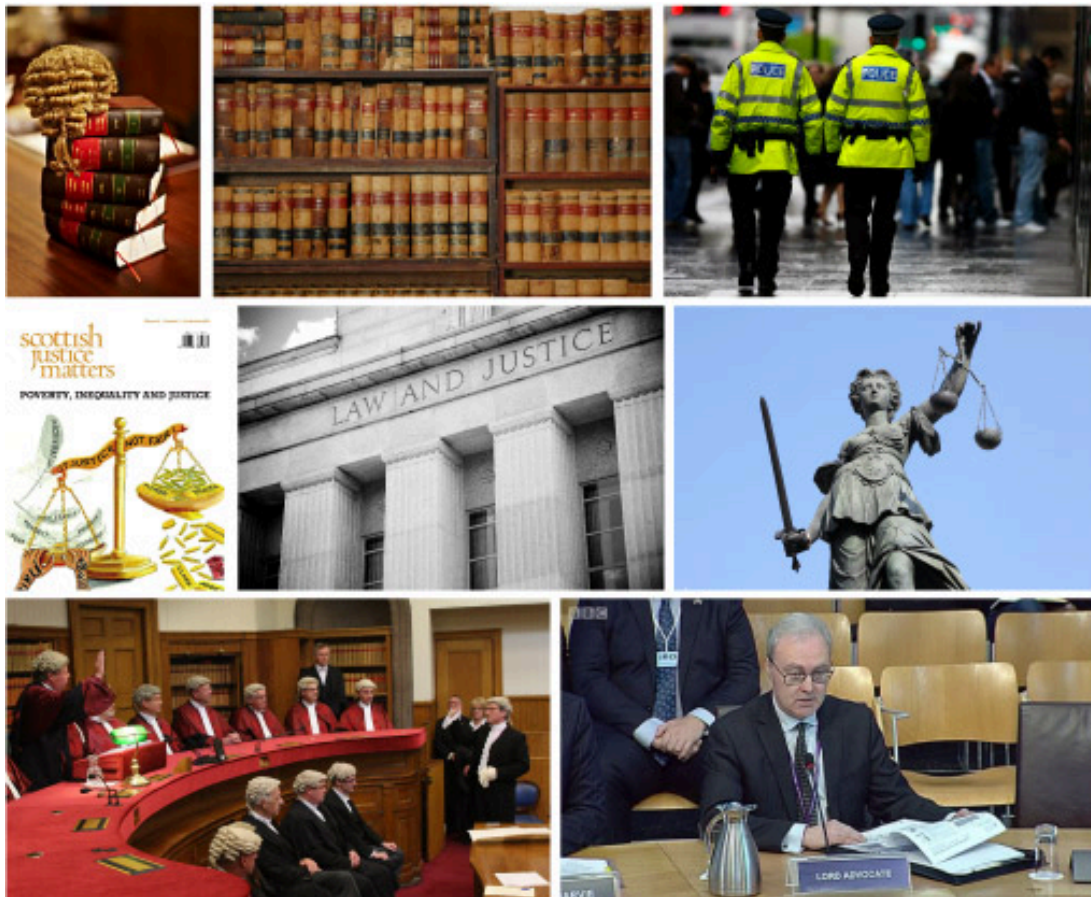


Figure 3 Images associated with the law in Scotland

2.1 The idea of law

Our ideas about law are shaped through the images we have seen and encounters we have. These affect our expectations of law as an area of study, practice and its role in society. They also have an impact on our reaction to legal interventions and legal cases. Law tends to be something we encounter when something has gone awry. The next activity asks you to think about the meaning of law and your own impressions of law.

Activity 2 Perceptions of law

 (Allow 15 minutes)

Write down any words or images you associate with 'law'. Figures 2 and 3 are there to help you, but do not feel constrained by them, and try to focus on what law means to you personally. Think about where you have come across the law, whether in the media, film, drama, study or personal experience.

Once you have compiled a list, see if you can separate your observations into positive and negative attributes. Is your overall view positive or negative?

Provide your answer...

Comment

There is no right answer to Activity 2 and its discussion. It was designed to encourage you to think about your own response to the word 'law' and any ideas about law you have. Figure 4 has been compiled from the responses we had from students when asked this question.

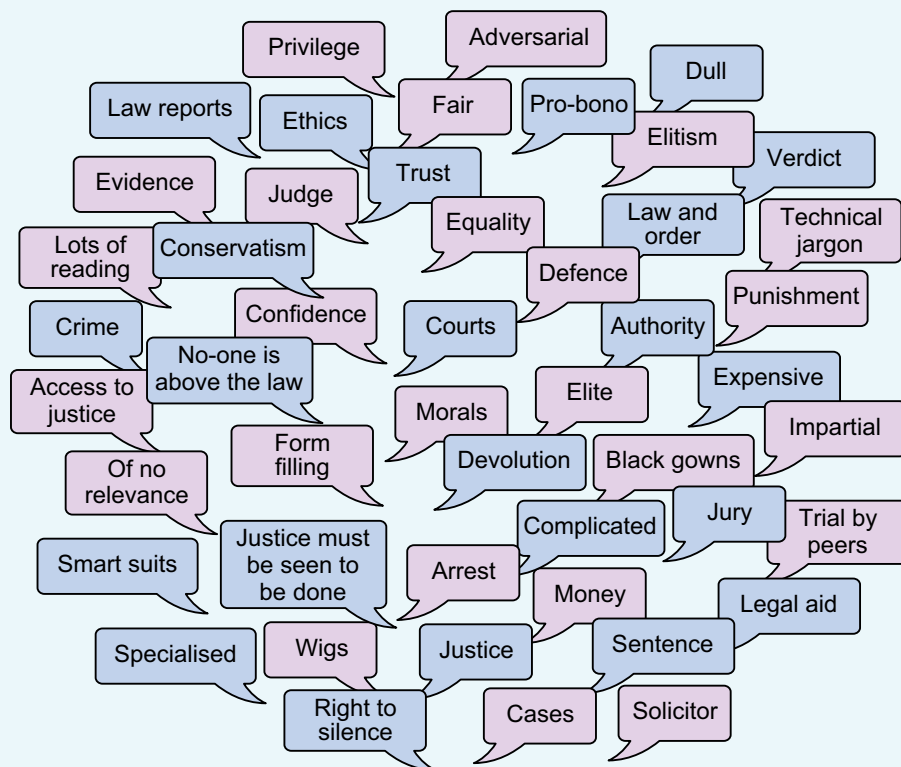


Figure 4 Responses of some of our students to the law

Your future studies on this course will either reinforce or challenge your initial ideas and impressions. Making a record of your initial impressions enables you to recognise your pre-existing knowledge and your personal values which relate to law.

An understanding of law, the legal system and law's role in society can be empowering. Law however, as mentioned above, has an image problem. This may not be entirely undeserved with the traditional images of lawyers and courtrooms that are often found in the media, in TV dramas and films. Such images can however be a barrier to accessibility to justice and an understanding of the role played by law within society.



Figure 5An image associated with law: justice

You should now watch the following video, in which Professor Simon Lee discusses the importance of keeping an open mind when thinking about the law.

Video content is not available in this format.

Video 1 Professor Simon Lee



3 Thinking about law

In Section 1 we outlined the definition of law that would be used in this course. This is the working definition used here but the meaning of 'law' is much debated and legal theorists do not agree on its meaning (or even why we obey the law).

There is a difference between common sense understandings of 'law' and the debates that legal theorists and lawyers have about law. At first this may seem illogical, unsatisfactory and difficult to comprehend, but it is an important point to note and one that goes towards an appreciation of the relationship between law and society.

Some see law as technical and difficult and that studying law involves remembering an endless series of rules. Others recognise that the content of law changes over time, that law is not a fixed body of rules and does not always provide a clear answer.

Understanding the underlying principles, developing the skills of how to find relevant law, to read and apply it in practice, keeping abreast of legal developments, thinking about its place and role in society are essential to gain an understanding of the role of law within society.

One of the areas of debate concerns the relationship between law and morals. Law and moral values both set out acceptable behaviours within society. Is law separate from the moral values of the society in which it operates or are they inextricably linked? The following sections explore this.

3.1 Law or morality

Historically, the moral and religious values of a society influenced the development of law. Early philosophical writers believed in a higher law known as 'natural law', deriving from God. In principle, natural law principles should be reflected in man-made laws and if they are not then those laws should not be regarded as laws at all.

In the nineteenth century, writers such as Jeremy Bentham (1748–1832) and John Stuart Mill (1806–1873) rejected the concept of natural law, arguing for a rational man-made view of law. They asked the question: what is the use of law? And their answer was that its purpose was to work towards the greatest good for the greatest number of people and to minimise suffering. This became known as utilitarianism, but what does this theory mean in practice?

The following activity provides you with an opportunity to think about this.

Activity 3 The dilemma of utilitarianism



(Allow 10 minutes)

Imagine that you have been shipwrecked and have survived in a lifeboat with three others. You are in the middle of the ocean with a shortage of water and food. It is unlikely that you will all live; however, if there were only three people in the boat (Figure 6) then there might be a better chance of survival.



Figure 6A life raft containing three people

Think about the following questions:

- a. Would it be an immoral act to kill one person so that the others have a better chance of surviving? Consider what the utilitarian position would be.
- b. How should you decide who should die?

Provide your answer...

Comment

- a. A utilitarian would argue that it would be right for someone to die as it would save the lives of three people, rather than all four people in the boat dying; the good outweighs the harm. Others would argue that it is always morally wrong to kill another person.
- b. There are different options for deciding who should be killed.

You could draw lots as to who should be killed – this could be regarded as fair as it favours no one person over another. However, it does not discriminate between young and old, or strong and weak.

You may have decided that it would be preferable to kill the weakest person in the boat as they are less likely to survive anyway – a utilitarian is likely to approve of this option, as it would appear to offer the greatest good. However, this may be the youngest person who is the weakest now but could be the most economically productive later in life. So where does the greatest good lie here?

You could kill the oldest person in the boat on the grounds that they have already lived longer than the others. Again, this option might satisfy utilitarians as it may offer the greatest good, but it may seem morally reprehensible to many in society.

You may think that the scenario in Activity 3 is fanciful, but the utilitarian dilemma does arise in more realistic situations:

- The decision is to force a system of mass inoculation on the children in a population to ensure that a disease is eradicated and no more deaths occur. A utilitarian would consider that it was morally better to inoculate, even without consent of the children's parents, to save more lives at little cost to the children themselves.
- The decision is to drop a bomb on a country which will kill thousands of people but will have the effect of bringing a war with that country to an end quicker, ultimately saving more lives. A utilitarian would consider that it was morally better to drop the bomb and save the extra lives.

Utilitarians believe that law should follow the greatest good. Under the utilitarian construct, individual freedom is important; people should be free to choose their own conduct so long as they do not harm others. Or, if they do, the harm should not outweigh the harm done by the restriction of people's personal freedom.



Figure 7 Signs showing the words right way and wrong way

3.2 Differences between law and morality

Behaviour which is commonly regarded as immoral is often also illegal. However, legal and moral principles can be distinguished from each other. For instance, parking on a double yellow line is illegal but not commonly regarded as immoral.

Table 1 Some differences between morality and law

Law	Morality
Sanctions are invariably imposed for the infringement of a legal obligation	There is no official sanction for immoral behaviour, although society often creates its own form of censorship

Law is deliberately changed by Parliament and/or the courts	Morality cannot be deliberately changed, rather it evolves slowly
Legal principles need to incorporate a degree of certainty	Morality is invariably much more flexible and variable

3.3 The relationship between law and morals

Major breaches of a moral code are also likely to be against the law; criminal law provides the obvious example of where morality and law often merge.

The influence of morality in a very general sense is also implicit in a wide range of different laws. For instance, in the commercial world, laws criminalising bribery and the imposition of legal duties on company directors embody what would commonly be considered the 'right' or moral way to conduct business. However, law is influenced by a wide range of political, social, economic and cultural factors, and the moral climate of society is only one of these factors. In practice, many laws have a bureaucratic, administrative and technical function. They operate as an essential part of a complex modern society and have little or no connection with morality.

Moral values are not static, they evolve over time and laws may change as a consequence. For instance, rape within marriage was criminalised in Scotland in 1989, reflecting the change in social and moral attitudes to the role and status of women. It may be that law pre-empted the change of moral values; the decriminalisation of homosexuality, under the Sexual Offences Act 1967, is an often cited example of how law influenced a change in this way.

The issue of whether law should be involved in enforcing a moral code in matters that concern the personal lives of people, such as their sexuality, has long been a controversial issue, as was demonstrated in the Wolfenden Report.

Box 1 The Wolfenden Report

In the 1950s a commission was established by the government under the chairmanship of Sir John Wolfenden to investigate the issue of whether the laws that criminalised homosexuality and prostitution should be changed. Its findings were published in the Wolfenden Report in 1957. It recommended that homosexuality and prostitution should be legalised, with some restrictions. It argued that some areas of behaviour should be left to individual morality, rather than legal regulation.

Paragraph 14 of the report stated:

It is not, in our view, the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary ... It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behaviour. Certain forms of sexual behaviour are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious, or cultural tradition; and such actions may be reprobated on these grounds. But the criminal law does not cover all such actions at the present time; for instance, adultery and fornication are not offences for which a person can be punished by the criminal law. Nor indeed is prostitution as such.

(Wolfenden, 1957)

This approach provoked a reaction from Lord Devlin, a leading judge at the time. He envisaged law and morality as being fundamentally interconnected. He argued that a common morality, with basic agreement on good and evil, was the cement of society without which it would begin to disintegrate. Devlin argued that law had a right, in fact a duty, to uphold that common morality.

Hart, a leading academic, disagreed arguing that using law to enforce moral values was unnecessary, as society was capable of containing different moral standards without disintegrating. It was also undesirable as it would freeze morality at a particular point and morally unacceptable as it infringes the liberty of the individual.

Hart set out some reasons why moral censure should not necessarily lead to legal censure:

- it may punish behaviour that may not have proved harmful to another person
- the exercise of free choice by individuals is a moral value with which it is wrong to interfere.

This debate continues today. For instance, it arises in the debate over the legalisation of assisted suicide. The 'Right to Die' campaign challenges the law which criminalises those who help the terminally ill to die. Campaigners argue that people with life-threatening illnesses or severely disabling conditions should be able to choose to die and that those who help them to do so should not face criminal sanctions. In many of these cases people are physically incapacitated and so cannot take their own lives. However, others believe that it is morally wrong in any circumstances to help someone to die and campaign against the right to die.

4 Law and justice

Interconnected with the ideas of law and morality is the notion of justice. Achieving justice is often regarded as the main aim or function of the law – it is the ideal or the ultimate goal towards which the law should strive.

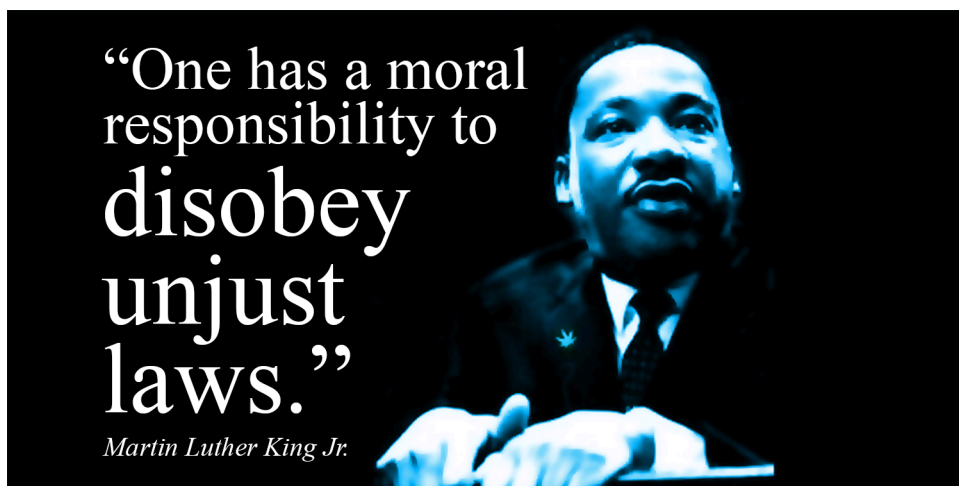


Figure 8 Image with Martin Luther King quotation

The following activity asks you to think about the meaning of justice.

Activity 4 What is justice?

 (Allow 5 minutes)

Take a few minutes to think about what the word 'justice' means to you and write some notes in the box provided.

Provide your answer...

Comment

If you looked up the word 'just' in a dictionary you would find it defined along the lines of fairness or impartiality in action or judgement, conforming to high moral standards – honest, legally valid, unbiased, reasonable and rightful. This is not an exhaustive list and your definitions will vary.

At its most basic level, justice refers to a situation where there is fairness in the way the situation is handled and in the result. In everyday life we expect parents, teachers, employers and referees of sporting activities to be fair in their handling of their children, students, employees and players. In the same way, we expect law to be fair and just in its principles and in the way in which it is applied.

Images of justice can typically be found outside or inside court buildings. They take different forms but have common features. Most commonly these are a set of scales and a sword. Some images may also show a blindfold (such as Figure 7). The scales, sword and blindfold represent the image of justice.

The Scales of Justice represent the balance of the individual against the needs of society and a fair balance between interests of one individual and those of another. The personification of justice balancing the scales dates back to the Egyptian goddess of justice, Maat, who stood for truth and fairness. The Greek goddess of justice, Themis, was traditionally represented carrying scales in which she measured the different aspects of the argument.

The Sword of Justice represents a symbol of power, protection, authority, vigilance and might. The sword is double-edged, symbolising the power of justice, which may be wielded either for or against any party. It also serves as a reminder of the link between law and punishment. If the law is broken, then punishment will follow. At the time of development of this imagery penalties such as hanging, burning at the stake, transportation and hard labour all existed. The law still has the power to determine life or death. In recent years there have been a number of cases where families, medical staff and individuals have gone to court to seek a ruling to confirm that a decision they wish to take is a legal one. These decisions would result in life or death. Examples that have been referred to the courts include:

- the separation of conjoined twins, with lethal consequences certain for at least one of them
- whether life support should be maintained
- whether a life-support machine should be switched off
- whether individuals have a right to choose to die
- assisted suicide.

The blindfold, a symbol of blind justice, represents equality. Justice sees no difference between the parties involved. This symbol of justice is most commonly found in European images of justice.

Images of justice are usually portrayed as female and wearing Greek or Roman costume. This reflects the origins of the symbolism which emerged when women (and men) had very different roles in society. These images have an impact on perceptions of justice, and although these perceptions have altered over the centuries, in a modern world of equality these symbols continue to represent justice.



Figure 9 A traditional image of justice

The meaning of justice has been considered over the centuries by successive philosophers, academics and lawyers, and there are many different theories. These would take a whole course in themselves, so here you consider two aspects, substantive justice and formal justice.

4.1 Substantive justice

This is concerned with the content of the law. The legal principles created by Parliament and the courts need to be regarded as 'just'. The moral and cultural values of the society in which the law is created are especially influential in determining whether the law is regarded as just. For instance, whether the laws on abortion or drugs are regarded as just will largely depend on the attitudes that are prevalent in that society.

Where law is considered unjust the consequences for social order can be potentially far reaching. In the eighteenth century the catalyst for the American War of Independence was the British Government's decision to impose a tax on tea imported into the American colonies. The American colonists regarded this as unjust as they had no right of representation in the British Parliament and therefore no say in the imposition of taxation. More recently, in the 1990s the imposition of a community charge (more popularly known as the 'Poll Tax') imposing a flat rate local authority tax on every adult, regardless of income, was considered unfair by many and led to social unrest.



Figure 10A group of people protesting the Poll Tax in a Scottish street

4.2 Formal justice

This is concerned that the legal principles are applied in a way which is fair. This invariably involves treating people in a similar situation in the same way; like cases should be treated alike. It is important that judges are unbiased when they hear cases, and that the same rules of procedure are applied to everyone in the same way. It is also important that regulatory frameworks such as health and safety laws, planning laws and financial services laws operate and are applied in a way that is fair and consistent.

The promotion of justice is reflected in the concept of 'the rule of law'. In the nineteenth century Professor A. V. Dicey (1835–1922) set out the three elements essential for the rule of law. Put simply, these are:

- The state's power must be controlled by the law; the law sets limits on what the state can or cannot do.
- No person is above the law; every individual regardless of their position is subject to it. The law applies to everyone in the same way regardless of their social, economic or political status.
- No individual should be subjected to arbitrary arrest or punishment. People should only be arrested in accordance with the law for breaches of the law.

This concept has evolved and been developed over the last 150 years into something much more sophisticated and complex but at its core lies the role of law in the creation of a fair and just society.

You should now watch the following video clip in which Professor Simon Lee discusses the role of justice.

Video content is not available in this format.

Video 2 Discussion of justice by Professor Simon Lee



The next activity asks you to think about justice and its role in the Scottish legal system.

Activity 5 Thinking about the ambition of justice

 (Allow 10 minutes)

Reflect on the statements in Box 2 below. These are all drawn from government or legal sources. What words and ambitions do these have in common?

Provide your answer...

Comment

The statements are drawn from the Scottish Government's Justice Strategy, the website of the judiciary in Scotland (who are separate from and independent of government), the Law Society in Scotland and the Faculty of Advocates.

Although not necessary for your studies on this course, if you wish to explore any of these further you can visit their websites at:

- [Scottish Government](#)
- [Judiciary of Scotland](#)
- [Law Society of Scotland](#)
- [Faculty of Advocates.](#)

The statements share a vision and ambition for the legal system in Scotland. This includes a 'fairer and just society' where 'justice is not only seen to be done but that it operates in an open and transparent way'. Words such as justice, fairness, equality, rights, access, inclusive, upholding the law, varied, open and transparent were used. Were any of these words on your list for Activity 2? Has your reading of these statements influenced your views?

Having considered these visions you will now return to exploring 'law'.

Box 2 Examples of statements on law and justice in Scotland

Vision for justice in Scotland

Our vision is of a justice system that helps Scotland flourish, creates an inclusive and respectful society where all people live in safety and security, where individual and collective rights are supported and disputes are resolved fairly and swiftly. Upholding the law and protecting society are essential to help people lead productive lives in safe and secure communities and contribute to a flourishing economy in Scotland.

Message from the Lord President



Welcome to the judicial website. We hope that you find this website both helpful and informative. It is our intention to publish as much information as we can, as quickly as we can. We believe it is vital in a democracy that justice is not only seen to be done, but that it operates in an open and transparent way and contributes to public understanding and awareness of what takes place in courts each day across Scotland.

The Law Society also has a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

Promoting access to Justice for almost 500 years

5 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 1 quiz](#)

Open the quiz in a new window or tab and then come back here when you've finished.

6 Summary

During this week you considered what is 'law' and perceptions of law. You learnt that the idea of the state in the definition of law is an important one. The law is produced by institutions authorised by the state to make law. Sanctions exist if laws are broken; they are imposed by the institutions given the state authority to do so. You also examined the relationship between law and morality and explored the meaning of justice.

We hope that as part of your studies here you have become more familiar with the 'law', its role and relevance to you. Also that you are becoming more familiar with the role played by law in society, the contribution it makes to society and how it changes and adapts to meet the needs of modern society.

Following your study of this week you should have an understanding of:

- what the 'law' means to you
- the relationship between law, morals and justice
- the evolving nature of law and its role in society.

Later weeks build on your knowledge by considering a number of aspects of law-making, the interpretation of legislation, judicial precedent, before looking at legal skills and considering a number of areas of debate.

Week 2: Legislation

Introduction

In this week you explore how legislation is interpreted and applied. Legislation is one of the main sources of law in Scotland. You consider why the need for interpretation arises and how the courts interpret the meaning of words over which a dispute arises. Although the meaning of law in legislation should be clear and explicit, this is not always achieved.

After studying this week, you should be able to:

- demonstrate an understanding of how legislation is interpreted
- apply sections of legislation to solve a problem
- understand why (and by whom) legislation may be interpreted.

1 Legislation: an introduction

Both the Scottish and UK Parliaments create law that applies to Scotland. The Scottish Parliament can create laws in relation to devolved matters and the UK Parliament in relation to reserved matters. Through the use of legislative consent motions the Scottish Parliament can also agree to the UK Parliament making law for Scotland on devolved matters, for example, where a UK-wide approach is seen as sensible.

DEVOLVED	RESERVED
• Agriculture, forestry and fisheries • Culture and creative industries • Economic development • Education and training • Environment and planning • Fire Services • Health and Social Services • Housing • Justice • Land use planning • Local Government and local government officers • Social work • Some forms of taxation • Sport • Tourism • Many aspects of transport (excluding a number of powers, for example, over aviation and shipping)	• Broadcasting • Constitution • Consumer Protection • Defence and Security • Employment • Equal opportunities • Energy (including the generation of renewable energy generation and energy efficiency) • Economic and monetary policy • Foreign Policy • Immigration • Social security • Telecommunications • Trade and industry

Figure 1 Examples of devolved matters and reserved matters

In general, legislation is the term given to law made by Parliament. It covers both primary legislation (Acts, which are also sometimes referred to as statutes) and subordinate legislation (which is sometimes referred to as delegated, subordinate or secondary legislation). Subordinate legislation is made and is created under power given in a primary Act. The primary Act sets out the scope of the powers being delegated and whom is entitled to make secondary legislation under the Act.

The term subordinate legislation tends to be used by the Scottish Parliament and Welsh Parliament (the Senedd). The terms secondary or delegated legislation tends to be used by the UK Parliament.

Many of the laws in Scotland have been created by way of legislation. This covers the following:

- Acts of the Scottish Parliament (on devolved matters)
- Subordinate legislation derived from powers delegated by the Scottish Parliament
- Acts of the UK Parliament
- Secondary legislation derived from powers delegated by the UK Parliament
- Acts of the old Scottish Parliament (the pre-1707 Parliament).



Figure 2 Images associated with the creation of legislation in Scotland

Both the Scottish and UK Parliaments are referred to as domestic sources of law. This course concentrates on these sources. Other sources of law, such as international Treaties, may have an impact on domestic legislation. But these are outside the scope of this course.

Whilst every care is taken when drafting legislation (whether Acts of Parliament or subordinate legislation) there are times when the words in an Act may not be clear. Activity 1 asks you to think about the meaning of words.

Activity 1 Meaning of words

 (Allow 10 minutes)

Take a few moments to think about the following:

1. What does read mean?
2. What does book mean?
3. What does change mean?
4. What does order mean?
5. What does left mean?

Comment

These words were chosen as they are homonyms or homographs. The same word, spelled or pronounced same way, can have a different meaning. The meaning is determined by the words that surround the word or the context in which it is spoken. Without a context it is difficult to determine the precise meaning.

1. Read has a number of meanings. These are just three we identified:
 - a. to look at and interpret letters or other information that is in a written format (read a book)

- b. to infer a meaning or significance (read into something, for example, the actions of a colleague or friend)
 - c. to make a study of (I am reading law at university).
2. Book has a number of meanings. These are just three we identified:
 - a. a number of pages bound together
 - b. to reserve something (I have booked a table at the restaurant)
 - c. a collection of items, for example, a book of stamps.
3. Change has a number of meanings. These are just three we identified:
 - a. process of becoming something different (changing from a caterpillar to a butterfly, change of clothing)
 - b. collection of small coins or money given back
 - c. a transfer of some sort (you need to change trains at Inverness).
4. Order has a number of meanings. These are just three we identified:
 - a. some form of arrangement or organisation (for example the order of a marriage ceremony)
 - b. a form of command
 - c. a request for something, for example, ordering goods online.
5. Left has a number of meanings. These are just three we identified:
 - a. a form of direction, for example, take the next left
 - b. something that remains, for example, there are three apples left
 - c. a side of the body, for example, left hand.

You may have thought up other meanings (or looked them up online). This contextually dependent difference in meaning is just one of the challenges faced by those drafting legislation.

There are a number of factors which can lead to a word in legislation having an unclear meaning.

- A broad term – there may be words designed to cover several possibilities and it is left to the user to judge what situations fall within it.
- Ambiguity – a word may have two or more meanings and it may not be clear which meaning should be used.
- A drafting error – the Parliamentary Counsel who drafted the original Bill may have made an error that has not been noticed by Parliament. This is more likely to occur where a Bill has been amended several times during debates.
- Wording may be inadequate – there may be many ways in which the wording may be inadequate, for example, a printing error, or another error such as the use of a word with a wide meaning which is not defined.
- New developments – new technology may mean that an old Act of Parliament does not apparently cover present-day situations.
- Changes in the use of language – the meaning of words can change over the years.
- Certain words not used – the Parliamentary Counsel may refrain from using certain words that they regard as being implied. The problem here is that users may not realise that this is the case.
- Failure of legislation to cover a specific point – the legislation may have been drafted in detail, with the aim of trying to cover every possible contingency. Despite this, situations could arise which are not specifically covered. The question then is

whether the court should interpret the legislation so as to include the situation which was omitted or whether they should limit the legislation to the precise points listed by Parliament.

Activity 2 now asks you to consider the challenges of interpreting wording where legislation has been poorly drafted through ambiguity or inadequate wording.

Activity 2 Interpreting legislation

 (Allow 10 minutes)

Think about the following questions and make a note of your answer in the box below.

1. Railway regulations state that a lookout should be provided for teams working on the other railway line 'for the purposes of relaying or repairing it'. A and B were working on the railway line maintaining the rails. No look-out was provided as they were carrying out maintenance work. They were hit and killed by a train. Could the families of A and B claim compensation for their deaths?
2. Would the phrase 'any type of dog of the type known as the pit bull terrier' include only the breed of pit bull terriers?

Provide your answer...

Comment

Both questions were based on the facts of actual cases. Many cases involve difficult circumstances where individuals have had recourse to the law to gain clarification of a situation or compensation for loss.

Question 1 was drawn from the facts of *London and North Eastern Railway Company v Berriman* [1946] 1 All ER 255. Mr Berriman was a railway worker who was hit and killed by a train while he was doing maintenance work. Regulations stated that a lookout should be provided for men working on the other railway line 'for the purposes of relaying or repairing it'. Mr Berriman was maintaining the line. His widow tried to claim compensation for his death because the railway company had not provided a lookout man. The court ruled that the relevant regulation did not cover maintenance work and so Mrs Berriman's claim failed. The court looked at the specific words in the regulation and was not prepared to look at any broad principle that the purpose of making a regulation that a lookout man should be provided was to protect those working on railway lines.

In *London and North Eastern Railway Company* differences in the reasoning between their Lordships (the term given to the judges hearing the case) emerged in the respective speeches of Lord Macmillan (at p. 295) and of Lord Wright (at p. 301), they reached opposite conclusions on the basis of what was the 'fair and ordinary' (Lord Macmillan) and the 'natural and ordinary' (Lord Wright) meaning of 'repairing' in Rule 9 of the Prevention of Accidents Rules 1902, and thought it necessary to refer to the *Oxford English Dictionary*, a will from 1577, Milton's *Paradise Lost* and Dr. Johnson, to throw light on the meaning of repairing. You will explore why such differences in reasoning emerge in later sections.

In Question 1, applying the words 'for the purposes of relaying or repairing it' do not include maintaining it.

Question 2 was drawn from the facts of *Brock v DPP* [1993] 4 All ER 491. In Section 1 of the Dangerous Dogs Act 1991 (original unamended) there was a phrase 'any dog of the type known as the pit bull terrier'. This led to a debate as to whether 'type' means the same as 'breed'. In *Brock*, the court decided that 'type' had a wider meaning than 'breed' and it could cover dogs that were not pedigree pit bulls but which had a substantial number of characteristics of such a dog. In Question 2 the words 'any type of dog of the type known as the pit bull terrier' are broader than breed. Type has a different meaning to breed.

A number of commission and committee reports have considered the interpretation of legislation. These include a joint report of the Scottish Law Commission and Law Commission in 1969 (which is considered in later sections) and The Renton Committee on the Preparation of Legislation in 1975. The Renton Committee divided complaints about legislation into four main headings, obscurity of language; over-elaboration of provisions; illogicality of structure and confusion arising from the amendment of existing provisions. You may recognise some of these criticisms if you have had to work with or read legislation.

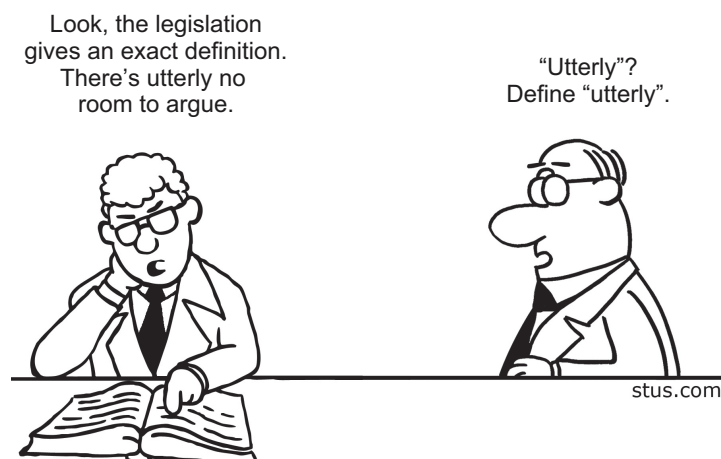


Figure 3 A cartoon about legislation

When the meaning of the wording of legislation is unclear the judiciary may be required to determine the meaning. There are a number of cases where the courts have been asked to determine the meaning of a word or phrase in legislation. This leads to a number of interesting questions.

- How do the courts determine the intention of a Parliament?
- How can a consistent approach be achieved?

You explore the answers to these questions in later sections.

There are debates about the interpretation of legislation by the judiciary. Legislation is created by Parliament (whether Scottish or UK), a democratically elected body. When a case is brought to determine the meaning of a word or phrase in legislation a court presided over by one (or more) unelected individuals (judges) determines the meaning. Debates exist as to the relationship between the courts and judiciary and Parliament in these circumstances. Are judges making law when they determine the meaning of a word in legislation or are they merely confirming the intention of Parliament? Parliament can of

course pass new legislation determining the meaning if it does not agree with the determination of meaning given in the court judgment.

The interpretation of legislation continues to be debated in academia and beyond. There have been a number of commissions and reports all of whom have made recommendations. Many still see the interpretation of legislation as a creative process which inevitably involves the judiciary in the process of creating law. Rules (the rules of statutory interpretation) which assist judges in interpreting legislation have evolved to establish some certainty and consistency. However, these rules have been produced over the centuries by judges themselves and Parliaments have played no role in their development.

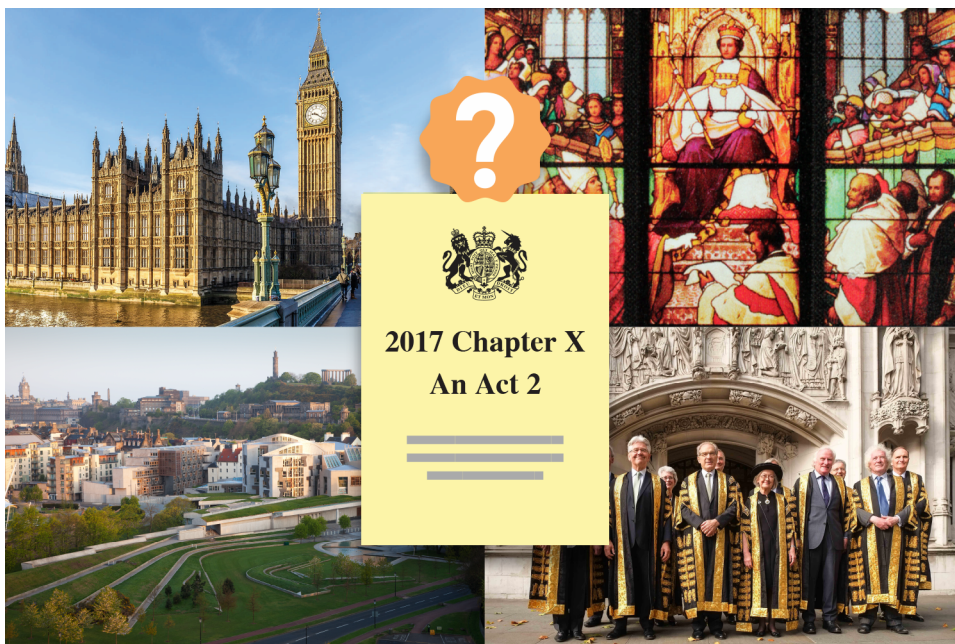


Figure 4 Images of the Judiciary and Parliaments

Activity 3 asks you to consider how you would define a word in proposed legislation.

Activity 3 Words and legislation

 (Allow 10 minutes)

Imagine you are part of a team drafting new legislation which is designed to bring peace to the countryside and regulate or stop activities such as off-roading, green-laning, paragliding, air ballooning, mountain biking and firework displays. The Bill on which the legislation will be based has been drafted following a number of fires which destroyed significant parts of moorland which were sites of special scientific interest and a number of incidents where animals have died as a result of being frightened by the noise and speed of vehicles. These have all been linked to leisure activities.

You have been asked to provide feedback to a colleague who has drafted a (fictitious) section which states:

The purpose of this Act is to bring peace and quiet to the countryside and prevent damage to property, persons and livestock and stop fire hazards.

Section 1: Everyone who uses the countryside is entitled to peace and quiet as they do so.

Section 2: Use of any vehicle in the countryside requires a special licence to be obtained from the Ministry of Vehicles.

Can you identify any possible issues with the wording of these sections?

Provide your answer...

Comment

There are a number of potential issues with the wording. These are the main ones we thought of:

- What does 'peace and quiet' mean? The countryside has wild animals and livestock. Would chirping birds disturb peace and quiet?
- The countryside is a working environment for farmers and others, all of whom use vehicles in one form or another. A provision intended to prevent what could be defined as leisure activities would impact on those working in the countryside and who perform vital roles in that countryside.
- There is a possible omission as vehicles are not included in the wording relating to prevention of damage.

You may have thought of others. The purpose of this activity was to illustrate how words can be used over which disputes may later arise because of their impact or interpretation.

2 Legislation and the Scottish Parliament

The Scottish Parliament has had power to make law on devolved matters since 1999 (the first Act was passed by the Parliament on 8 September 1999). This section covers legislation of the current Scottish Parliament. Some Acts of the old Scottish Parliament (1424 till 1707) are still valid, but are not covered here. There are a number of differences between the drafting and consideration of legislation in the Scottish and UK Parliaments and this section explores legislation in the Scottish Parliament.

2.1 Within competence?

The Scotland Act 1998 (as amended) sets out the law-making powers of the Scottish Parliament. Laws passed by the Scottish Parliament must fulfil the requirements set out in Section 29(1) of the Scotland Act 1998 (as amended). These state that Acts have to:

- only apply in Scotland
- only apply to devolved matters
- be compatible with rights set out in the European Convention on Human Rights (ECHR) (and EU law).
- comply with the laws, rules and regulations in relation to retained EU law.

And the requirements state the Act cannot:

- remove the Lord Advocate from their office
- breach Schedule 4 of the Scotland Act. This schedule contains a number of existing legislative provisions such as free trade in the Acts of Union (English Parliament's Union with Scotland Act 1706 and the Scottish Parliament's Union with England Act 1707), which cannot be modified or repealed by the Scottish Parliament.

Box 1 Section 29 Scotland Act 1998 (as amended)

29 Legislative competence.

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or ^{F1}in breach of the restriction in section 30A(1)],

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

(4) A provision which—

(a) would otherwise not relate to reserved matters, but

(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,

is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.

[^{F2} (5) Subsection (1) is subject to section 30(6).]

Annotations:

Amendments (Textual)

F1 Words in s. 29(2)(d) substituted (31.12.2020) by European Union (Withdrawal) Act 2018 (c. 16), **ss. 12(1)**, 25(4) (with s. 19, Sch. 8 paras. 37, 41); S.I. 2020/1622, reg. 3(g) (with reg. 10)

F2 S. 29(5) inserted (3.7.2012) by Scotland Act 2012 (c. 11), **ss. 9(2)**, 44(5); S.I. 2012/1710, art. 2(d)

Modifications etc. (not altering text)

C1 S. 29(2)(b)(c) excluded by 1974 c. 53, Sch. 3 para. 9(1) (as inserted (13.4.2015) by Criminal Justice and Courts Act 2015 (c. 2), **ss. 19**, 95(1); S.I. 2015/778, art. 3, Sch. 1 para. 15)

C2 S. 29(2)(d) restricted (1.3.2019) by European Union (Withdrawal) Act 2018 (c. 16), s. 25(4), Sch. 8 para. 41(3)(**9**) (with s. 19, Sch. 8 para. 37); S.I. 2019/399, reg. 2

C3 S. 29(2)(d) excluded (14.11.2020) by Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (c. 20), s. 9(4), **Sch. 2 para. 2**; S.I. 2020/1279, reg. 2(c)

When considering legislation of the Scottish Parliament the first question is whether it is within the competence of the Scottish Parliament. Subsequent weeks explore a number of the legal challenges that have been made on this ground. If legislation is not within competence, it is void (not valid).

All legislation of the Scottish Parliament must be interpreted so as to be compatible with the ECHR (the European Convention of Fundamental Human Rights and Freedoms to give it its full title). If it is not within the legislative competence, the provision is void and does not have the status of law.

2.2 Invalidity in proceedings

Section 28(5) of the Scotland Act 1998 (as amended) states that any invalidity in the parliamentary proceedings will not invalidate the act created by those proceedings.

Box 2 Section 28 Scotland Act 1998 (as amended)

28 Acts of the Scottish Parliament.

- (1) Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.
- (2) Proposed Acts of the Scottish Parliament shall be known as Bills; and a Bill shall become an Act of the Scottish Parliament when it has been passed by the Parliament and has received Royal Assent.
- (3) A Bill receives Royal Assent at the beginning of the day on which Letters Patent under the Scottish Seal signed with Her Majesty's own hand signifying Her Assent are recorded in the Register of the Great Seal.
- (4) The date of Royal Assent shall be written on the Act of the Scottish Parliament by the Clerk, and shall form part of the Act.
- (5) The validity of an Act of the Scottish Parliament is not affected by any invalidity in the proceedings of the Parliament leading to its enactment.
- (6) Every Act of the Scottish Parliament shall be judicially noticed.
- (7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

[^{F1} (8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.]

Annotations:

Amendments (Textual)

F1 S. 28(8) added (23.5.2016) by Scotland Act 2016 (c. 11), **ss. 2, 72(7)**

2.3 Powers to intervene

The Secretary of State for Scotland (a UK Government Cabinet Minister representing the interests of Scotland) can, in certain circumstances, intervene if a Bill of the Scottish Parliament fails to meet one of the following conditions (Section 35 Scotland Act 1998 (as amended)). Where there are reasonable grounds (note reasonable is not defined) to believe that:

- the Bill is incompatible with the UK's international obligations or interests
- in the interests of defence or national security
- it applies to reserved matters
- it would have an adverse effect on the laws relating to reserved matters.

If one of these conditions exists, then the Secretary of State for Scotland can make an order prohibiting the Bill from going for Royal Assent.

Section 35 contains the words 'reasonable grounds' and in the 'interests of defence or national security'. They are not defined and are not uncommon in legislation. Such terms

are criticised by some as being too vague but supported by others in covering situations that have yet to be determined.

Box 3 Section 35 Scotland Act 1998 (as amended)

35 Power to intervene in certain cases.

- (1) If a Bill contains provisions—
- (a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or
 - (b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters,
- he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent.
- (2) The order must identify the Bill and the provisions in question and state the reasons for making the order.
- (3) The order may be made at any time during—
- (a) the period of four weeks beginning with the passing of the Bill,
 - (b) any period of four weeks beginning with any ^{F1}... approval of the Bill in accordance with standing orders made by virtue of section 36(5),
 - (c) if a reference is made in relation to the Bill under section [^{F2}32A(2)(b) or] 33, the period of four weeks beginning with the reference being decided or otherwise disposed of by the [^{F3}Supreme Court].
- (4) The Secretary of State shall not make an order in relation to a Bill if he has notified the Presiding Officer that he does not intend to do so, unless the Bill has been approved as mentioned in subsection (3)(b) since the notification.
- (5) An order in force under this section at a time when such approval is given shall cease to have effect.

Annotations:

Amendments (Textual)

F1 Word in s. 35(3)(b) omitted (18.5.2017) by virtue of Scotland Act 2016 (c. 11), **ss. 11(14)(a)**, 72(4)(a); S.I. 2017/608, reg. 2(1)(i)

F2 Words in s. 35(3)(c) inserted (18.5.2017) by Scotland Act 2016 (c. 11), **ss. 11(14)(b)**, 72(4)(a); S.I. 2017/608, reg. 2(1)(i)

F3 Words in s. 35(3)(c) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40(4), 148(1), **Sch. 9 para. 98**; S.I. 2009/1604, **art. 2**

2.4 Interpretation sections

Some legislation contains an interpretation section which defines the meaning of certain words. The contents page of an Act will indicate whether or not there is an interpretations

section. Legislation for both the Scottish and UK Parliaments can be accessed online at www.legislation.gov.uk. This site contains both original Acts as enacted and updated versions of Acts.



Figure 5 Screen shot of the table of contents: National Galleries of Scotland Act 2016

For example, Section 3 of the National Galleries of Scotland Act 2016 sets out the definition for ‘the relevant land’, ‘the Council’ and ‘grid reference’. The Act relates to further extensions to the National Gallery of Scotland. The Act says the gardens in which the National Galleries are based are common land and cannot be built on without a court order or primary Act of Parliament.

Box 4 Interpretation: Section 3 National Galleries Scotland Act 2016

3 Interpretation

(1) In this Act—

“the Council” means The City of Edinburgh Council; and

“the relevant land” means the piece of land which, prior to the coming into force of this Act—

(a) formed part of that part of Princes Street Gardens in the City of Edinburgh which lies east of, and adjacent to, the Mound; and

(b) comprises an area of approximately 737 square metres bounded by the line of the existing eastern border of the Gallery commencing at grid reference NT254522737900 then proceeding southerly for a distance of approximately 90 metres to grid reference NT254778737041 then proceeding westerly for a distance of approximately 4.5 metres across the bottom of the Playfair Steps to grid reference NT254733737027 then proceeding southerly for a distance of approximately 10 metres along the western boundary of the Playfair Steps to grid reference NT254761736934 then proceeding easterly for a distance of approximately 20 metres across the Playfair Steps and beyond to grid reference NT254957736993 then proceeding northerly along an imaginary line for a distance of approximately 7.5 metres to grid reference NT254935737064 then proceeding

north westerly along an imaginary line for a distance of approximately 20 metres to grid reference NT254787737196 then proceeding northerly for a distance of approximately 75 metres to grid reference NT254574737915 in line with the most easterly part of the existing eastward Gallery extension into Princes Street Gardens and then returning westerly for a distance of approximately 5.5 metres to the point of commencement.

(2) In this section, “grid reference” means Ordnance Survey National Grid reference.

2.5 Interpretation and Legislative Reform (Scotland) Act 2010

In January 2009 the Scottish Government issued a consultation paper in relation to a number of technical procedures, including those for making secondary legislation and for interpreting Acts. The consultation paper noted that the Renton Committee 1975 report stated ‘A general Interpretation Act can help to shorten and simplify particular Acts of Parliament, to clarify their effects by enacting rules of construction, and to standardise common-form provisions’. The Interpretation and Legislative Reform (Scotland) Bill aimed to achieve this and the subsequent Act defines a number of words and expressions that are commonly used in legislation.

Box 5 Extract from Schedule 1 of Interpretation and Legislative Reform (Scotland) Act 2010

Meaning of words and expressions used in legislation

22 Number

In an Act of the Scottish Parliament or a Scottish instrument—

- (a) words in the singular include the plural
- (b) words in the plural include the singular.

23 References to time of day

- (1) An expression of time that occurs in an Act of the Scottish Parliament or a Scottish instrument is to be read as a reference to Greenwich mean time.
- (2) Subsection (1) is subject to section 3 of the Summer Time Act 1972 (c. 6) (construction of references to points of time during the period of summer time).

24 Meaning of words and expressions used in instruments

A word or expression used in a Scottish instrument has the same meaning as it has in the Act of the Scottish Parliament by virtue of which the instrument is made.

25 Definitions

- (1) In an Act of the Scottish Parliament or a Scottish instrument words and expressions listed in schedule 1 are to be construed according to that schedule.
- (2) The Scottish Ministers may by order modify that schedule.
- (3) An order under this section is subject to the affirmative procedure.

Schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 supplies definitions of commonly used words and expressions which are used frequently in Acts of the Scottish Parliament and Scottish instruments – they are seen to pass the ‘frequent use’ test.

Box 6 Extract from Schedule 1 of Interpretation and Legislative Reform (Scotland) Act 2010

“financial year” means a year ending with 31 March,
“functions” includes powers and duties; and “confer”, in relation to functions, includes impose,
“High Court” means the High Court of Justiciary,
“land” includes buildings and other structures, land covered with water, and any right or interest in or over land,
“Lands Clauses Acts” means the Lands Clauses Consolidation (Scotland) Act 1845 (c. 19) and the Lands Clauses Consolidation Acts Amendment Act 1860 (c. 106), and any Acts for the time being in force amending those Acts,
“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39), and “area” in relation to a local authority, means the local government area for which the authority is constituted,
[^{F2}“marriage” means marriage between persons of different sexes and marriage between persons of the same sex (and any reference to a person being (or having been) married to another person, or to two people being (or having been) married to each other, is to be read accordingly),]
“member of the Scottish Executive” has the same meaning as in section 44(1) of the Scotland Act 1998 (c. 46),
“modify” includes amend or repeal,
“month” means calendar month,
“oath” and “affidavit” include affirmation and declaration; and “swear” includes affirm and declare,
“ordnance map” means a map made under powers conferred by the Ordnance Survey Act 1841 (c. 30),
“person” includes a body of persons corporate or unincorporated and a partnership constituted under the law of Scotland,

UK Parliament Acts (and the delegated legislation made under them) are subject to the interpretation provisions in the Interpretation Act 1978 (the 1978 Act). Acts of the Scottish

Parliament (ASPs) before 2010 continue to be subject to the 1978 Act, even if they have been amended by subsequent acts of the Scottish Parliament (or subordinate legislation made under them).

If there is no interpretation section and a general interpretation Act does not apply, then the courts, if asked to determine the meaning of a word in legislation, will apply one of the rules of statutory interpretation to determine the meaning of that word.

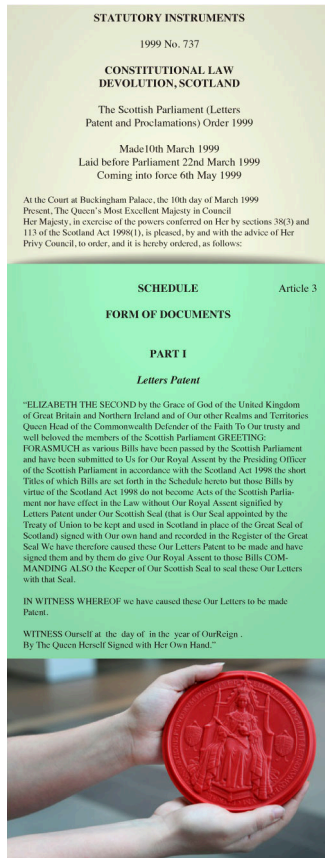


Figure 6The letters patent and seal

2.6 Section 101 of the Scotland Act 1998

The Scotland Act 1998 imposes a special (and possibly unique) requirement upon courts when interpreting legislation of the Scottish Parliament. Any provision in legislation of the Scottish Parliament (primary and subordinate legislation) which could be read in such a way as to be outwith the legislative competence of the Scottish Parliament must be:

read as narrowly as is required for it to be within competence, if such reading is possible.

Section 101 Scotland Act 1998

If it is not within the legislative competence, the provision is void and does not have the status of law.

3 Statutory interpretation: the rules

Where there is no interpretation section and a general interpretation Act does not apply then a number of rules may be applied. They are:

- the literal rule
- the golden rule
- the mischief rule
- the purposive approach.

These rules each take different approaches to interpretation of the words in legislation. Some judges prefer one rule, while other judges prefer another. Some judges also feel that their role is to fill the gaps and ambiguities in the law whilst others think that it should be left to Parliament as the supreme law-maker. As the rules can result in very different decisions, it is important to understand each of them and how they may be used.

3.1 The literal rule

Under this rule the judge considers what the legislation actually says, rather than what it might mean. In order to achieve this, the judge will give the words in the Act a literal meaning, that is, their plain ordinary everyday meaning, even if the effect of this is to produce what might be considered as an otherwise unjust or undesirable outcome.

The literal rule says that the intention of Parliament is best found in the ordinary and natural meaning of the words used. As the legislative democratic part of the state, Parliament must be taken to want to effect exactly what it says in its laws. If judges are permitted to give a non-obvious or non-literal meaning to the words of parliamentary law, then the will of Parliament, and thereby the will of the people, is being contradicted.

Lord Diplock once noted:

Where the meaning of the statutory words is plain and unambiguous it is not then for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences for doing so would be inexpedient, or even unjust or immoral.

Duport Steels Ltd and others v Sirs and others [1980] 1 All ER 529

Box 7 Example of the literal rule: *Fisher v Bell* [1960] 3 All ER 731

Fisher v Bell [1960] 3 All ER 731. The Restriction of Offensive Weapons Act 1959 made it an offence to offer for sale certain offensive weapons including flick knives. James Bell, a Bristol shopkeeper, displayed a weapon of this type in his shop window in the arcade at Broadmead. The Divisional Court held that he could not be convicted because, giving the words in the statute a tight literal meaning, Mr Bell had not offered the knives for sale. In the law of contract, placing something in a shop window is not technically an offer for sale; it is merely an invitation to treat. It is the customer who makes an offer to the shop when he proffers money for an item on sale. The court upheld that under the literal meaning of offer, the shopkeeper had not made an offer to sell and so was not guilty of the offence.

Note: The UK Parliament subsequently changed the law to make it clear that displaying a flick knife in a shop window was an offence.

3.2 The golden rule

This rule is a modification of the literal rule. It states that if the literal rule produces an absurdity, then the court should look for another meaning of the words to avoid that absurd result. The rule was closely defined by Lord Wensleydale in *Grey v Pearson* (1857) HL Cas 61, who stated:

The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther.

Box 8 Example of the golden rule: *Adler v George* [1964] 1 All ER 628

Adler v George [1964] 1 All ER 628. Under Section 3 of the Official Secrets Act 1920, it was an offence to obstruct HM Forces in the vicinity of a prohibited place. Mr Frank Adler had in fact been arrested whilst obstructing such forces within such a prohibited place (Marham Royal Air Force Station). He argued that he was not in the vicinity of a prohibited place as he was actually in a prohibited place. The court applied the golden rule to extend the literal wording of the statute to cover the action committed by the defendant. If the literal rule had been applied, it would have produced absurdity because someone protesting near the base would be committing an offence whilst someone protesting in it would not.

The rule was used in the case to avoid an absurd result.

The golden rule provides no clear means to test the existence or extent of an absurdity. It seems to depend on the result of each individual case. Whilst the golden rule has the advantage of avoiding absurdities, it therefore has the disadvantage that no test exists to determine what an absurdity is.

3.3 The mischief rule

This rule gives a judge more discretion than either the literal or the golden rule. This rule requires the court to look to what the law was before the legislation was passed in order to discover what gap or mischief the legislation was intended to cover. The court is then required to interpret the legislation in such a way to ensure that the gap is covered. The rule is contained in *Heydon's Case* (1584) 3 Co Rep 7a, where it was said that for the true interpretation of legislation, four things have to be considered.

1. What was the common law before the making of the Act.
2. What was the mischief and defect for which the common law did not provide.
3. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth.
4. The true reason of the remedy; and then the office of the Judges is to make such construction as shall suppress the mischief and advance the remedy.

This rule gives the court justification for going behind the actual wording of the legislation in order to consider the problem that the particular legislation was aimed at remedying. At one level it is clearly the most flexible rule of interpretation, but it is limited to using

previous common law to determine what mischief the legislation in question was designed to remedy. The case itself concerned a dispute about legislation passed under Henry VIII in 1540 and a legal action against Heydon for intruding into certain lands in the county of Devon. As common law gained influence in Scotland following the Acts of Union, rules and influences from the English legal system began to have an impact. Here is just one example.

Box 9 Example of the mischief rule: *Corkery v Carpenter* [1951] 1 KB 102

An example of the use of the mischief rule is found in the case of *Corkery v Carpenter* [1951] 1 KB 102. In 1950 Shane Corkery was sentenced to one month's imprisonment for being drunk in charge of a bicycle in public. At about 2.45 p.m. on 18 January 1950, the defendant was drunk and was pushing his pedal bicycle along Broad Street in Ilfracombe. He was subsequently charged under Section 12 of the Licensing Act 1872 with being drunk in charge of a carriage. The 1872 Act made no actual reference to bicycles. The court elected to use the mischief rule to decide the matter. The purpose of the Act was to prevent people from using any form of transport on a public highway whilst in a state of intoxication. The bicycle was clearly a form of transport and therefore the user was correctly charged.

Activity 4 The rules of interpretation

 (Allow 15 minutes)

Consider each of the (fictitious) scenarios below. Having read the facts of each scenario, identify which one of the three rules of interpretation would best suit the facts and apply that rule to the scenario to reach a conclusion.





Figure 7 Illustrations of scenarios

1. B puts a rare parrot in his shop window as a display. The Prevention of Displaying Parrots Act (fictitious) 2017 makes it a criminal offence to offer for sale any bird taller than 10 cm. The rare parrot is 80 cm tall. Has B committed an offence? Has B 'offered for sale'?
2. The Protection of Harry Potter Locations Act (fictitious) 1990 makes it an offence to ask a question of a tour guide in the vicinity of a Harry Potter location. C and D are on a Harry Potter location tour and ask a question of their tour guide when they are in the room where the last chapter of the last Harry Potter story was written. Have C and D committed an offence?
3. The Cake Act (fictitious) 2020 makes it illegal to drive a car or any other transport if the driver has eaten more than one piece of cake in the past 10 hours. E has been to a children's birthday party on a farm and has had three pieces of cake. The farmer lends E a horse to ride home. Has E committed an offence?

- 1.
- 2.
- 3.

Comment

Each of the scenarios has been written to be similar to one of the cases you read about learning about the rules of interpretation.

1. The facts given here were similar to those in *Fisher v Bell* [1960] 3 All ER 731. The Restriction of Offensive Weapons Act 1959 made it an offence to offer for sale certain offensive weapons including flick knives. James Bell, a Bristol shopkeeper, displayed a weapon of this type in his shop window in the arcade at Broadmead. The Divisional Court held that he could not be convicted because, giving the words in the statute a tight literal meaning, Mr Bell had not

offered the knives for sale. Based on these facts B would not have committed an offence.

2. The facts given here were similar to those in *Adler v George* [1964] 1 All ER 628. Under Section 3 of the Official Secrets Act 1920, it was an offence to obstruct HM Forces in the vicinity of a prohibited place. Mr Frank Adler had in fact been arrested whilst obstructing such forces within such a prohibited place (Marham Royal Air Force Station). He argued that he was not in the vicinity of a prohibited place as he was actually in a prohibited place. The court applied the golden rule to extend the literal wording of the statute to cover the action committed by the defendant. Based on this application C and D would have committed an offence.
3. The facts given here were similar to those in *Corkery v Carpenter* [1951] 1 KB 102. In 1950 Shane Corkery was sentenced to one month's imprisonment for being drunk in charge of a bicycle in public. He was charged under Section 12 of the Licensing Act 1872 with being drunk in charge of a carriage. The 1872 Act made no actual reference to bicycles. The court elected to use the mischief rule to decide the matter. The purpose of the Act was to prevent people from using any form of transport on a public highway whilst in a state of intoxication. The bicycle was clearly a form of transport and therefore the user was correctly charged. Based on whether a horse is regarded as 'any other form of transport', as a horse does not have wheels, E may have committed an offence.

Remember that earlier in the course, you learned that 'Some judges prefer one rule, while other judges prefer another'. So you may have chosen to apply different rules in different ways. The purpose of Activity 4 was to encourage you to think about the way judges interpret words and why one rule may be chosen over another. There is no list which judges work through when applying these rules. You will shortly learn about the most recent, and probably most common, approach, which emerged during the last century.

3.4 Criticisms and reviews

As mentioned earlier there have been a number of reviews in relation to the interpretation and drafting of legislation. Some of these (the Renton Committee 1975) helped to inform the general interpretation Acts of the Scottish (Interpretation and Legislative Reform (Scotland) 2010) and UK Parliaments (Interpretation Act 1978 and its predecessor the Interpretation Act 1889). Others have been partially implemented whilst the observations of some remain relevant today. Box 9 contains some of the observations made in a 1969 report.

Box 10 Observations of the Scottish Law Commission and Law Commission 1969

It is evident that a programme of law reform, which must necessarily use the instrument of legislation, depends for its successful realisation on the interpretation given by the courts to the enactments in which the programme is embodied. The rules of statutory interpretation, although individually reasonably clear, are often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly

established. The difficulty which faces the courts may be enhanced by present limitations on the means, other than reference to the actual text of the statute, for ascertaining the intention of the legislature.

It is self-evident that in order to understand a statute a court has to take into account many matters which are not to be found within the statute itself. Legislation is not made in a vacuum, and a judge in interpreting it is able to take judicial notice of much information relating to legal, social, economic and other aspects of the society in which the statute is to operate. We do not think it would serve a useful purpose to attempt to provide comprehensive legislative directives as to these factors. [...]

The Law Commission and The Scottish Law Commission (LAW COM. No. 21) (SCOT. LAW COM. No. 11) THE INTERPRETATION OF STATUTES.

Take a few moments and reflect on the literal rule you learnt about earlier. Think about what this rule indicates about the relationship between Parliament and the judiciary. Some criticism is made about the way in which the rules of interpretation are used. The judiciary is interpreting the meaning of Parliament. In doing so some commentators believe that the judiciary is usurping the role of Parliament. You explore the relationship between Parliament and the judiciary in later weeks.

The literal rule constitutionally respects the right of Parliament to make any laws it wishes no matter how absurd they may seem. However, the judiciary has tended to overemphasise the literal meaning of statutory provisions without giving due weight to their meaning in a wider context. The use of this rule can sometimes lead to absurdities and loopholes which can be exploited by an unmeritorious pursuer.

3.5 The purposive approach

This approach has emerged in more recent times. Here the court is not just looking to see what the gap was in the old law, it is making a decision as to what they felt Parliament meant to achieve. Lord Denning in the Court of Appeal stated in *Magor and St. Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226

... we sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

This attitude was criticised on appeal by the House of Lords (the highest civil appeal court for Scotland until the UK Supreme Court superseded it). Lord Simmons called this approach 'a naked usurpation of the legislative function under the thin disguise of interpretation'. He went on to say that 'if a gap is disclosed, the remedy lies in an amending Act'.

These comments highlight one issue with the purposive approach. How Parliament's intentions can be determined and whether judges should really be refusing to follow the clear words of Parliament. The purposive approach is one used by most continental European countries who have a civil law jurisdiction. It is also the approach taken by the Court of Justice of the European Union in interpreting EU law.

When the UK became a member of the European Economic Community in 1973, the influence of the European preference for the purposive approach affected the approach of

the courts in the UK in a number of ways. First, from 1973, the purposive approach had to be used when deciding on EU matters. Second, as they use the purposive approach was used for EU law it began to be used to interpret domestic law. It has clear links with the existing mischief rule.

Box 11 The purposive approach: *Pickstone v Freemans plc* [1989] AC 66

Pickstone v Freemans plc [1989] AC 66. Here, women warehouse operatives were paid the same as male warehouse operatives. However, Miss Pickstone claimed that the work of the warehouse operatives was of equal value to that done by male warehouse checkers who were paid £1.22 per week more than they were. The employers argued that a woman warehouse operative was employed on like work to the male warehouse operatives, so she could not bring a claim under the Equal Pay Act 1970 Section 1(2)(c) for work of equal value. This was a literal interpretation of the Equal Pay Act 1970. The House of Lords decided that the literal approach would have left the United Kingdom in breach of its Treaty obligations to give effect to an EU directive. It therefore used the purposive approach and stated that Miss Pickstone was entitled to claim on the basis of work of equal value even though there was a male employee doing the same work as her for the same pay.

When using one of the rules of statutory interpretation the courts may rely on a presumption (that Acts are not retrospective unless expressly stated) or secondary aids (such as notes of parliamentary proceedings) to assist them in making their decision. All legislation also has to be interpreted in such a way as to bring it within the ambit of the ECHR.

Activity 5 Putting it all into practice

 (Allow 15 minutes)

This activity provides you with an opportunity to read an extract from a case and explore further what you have learnt about statutory interpretation. The case is from the late 1940s but a number of the observations reached are relevant today.

Read the facts from the case *Galashiels Gas Co Ltd v O'Donnell (or Millar)* [1949] AC 275 and the law that follows the facts. Apply the law to the facts and consider what decision you would have reached.

Box 12 *Galashiels Gas Co Ltd v O'Donnell (or Millar)* [1949] AC 275

The facts

On 1 October 1945, M., who was employed as a stoker in the appellants' gas works, was using an electrically operated lift to carry coke to a screening plant on the first floor. Having reached the first floor with a bogie full of coke, he switched off the power, opened the lift gates and ran the bogie out, leaving the gates open. He then emptied the bogie and ran it back into the lift shaft, but, owing to a failure of the brakes to operate, the lift cage had moved up in the shaft, with the result that both M. and the bogie fell to the bottom of the shaft and M. was killed. After the accident the mechanism was dismantled and examined by experts, but nothing was discovered to account for the failure and

it was found that the appellants had taken every practical step to ensure that the lift mechanism worked properly and was safe to use. In an action by the respondent, M.'s widow, for damages in respect of his death the appellants contended that they were only bound to take such steps as would ensure that the lift was in efficient working order, and that, in the absence of proof of the nature of the defect which caused the accident, the respondent could not succeed.

The law

Section 22(1) of the Factories Act, 1937: 'Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained.'

Section 152(1) of the Factories Act, 1937: '“maintained” means maintained in an efficient state, in efficient working order, and in good repair.'

Provide your answer...

Comment

The case was heard on appeal to the House of Lords. It was heard by Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid on 6 and 7 December 1948 and on 20 January 1949. The decision of that court was as follows: The words 'shall be ... properly maintained' in s 22(1), read with the definition of 'maintained' in s 152(1), were imperative and imposed on the occupiers of a factory an absolute and continuing obligation, and there was nothing in the context or the general intention of the Act which could lead to the inference that there should be any qualification of that obligation; to succeed the respondent need only prove that the mechanism of the lift had failed to work efficiently and the failure had caused the accident; and that burden she had discharged.

The word 'properly' was discussed. Lord MacDermott noted 'Why exactly “properly” was inserted is, perhaps, a matter of speculation as the Act does not appear to furnish any very obvious explanation. However this may be, the word is certainly not incompatible with the duty in question being absolute in character.'

4 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 2 quiz](#)

Open the quiz in a new window or tab and then come back here when you've finished.

5 Summary

In this week you explored why and how legislation is interpreted and applied. You considered the rules on statutory interpretation and, through a number of activities, developed some basic legal problem-solving skills.

After studying this week, you should be able to:

- demonstrate an understanding of how legislation is interpreted
- apply sections of legislation to solve a problem
- understand why (and by whom) legislation may be interpreted.

Week 3: Argument and precedent

Introduction

This week considers some important aspects of legal skills, developing an argument and judicial precedent.

To gain a fuller understanding of both law and its role we need to go beyond descriptions of law and its application. An essential skill for anyone wanting to use the law is the ability to analyse and evaluate the reasoned argument of others. Analysis, evaluation, critical thinking all contribute towards the development of a reasoned persuasive argument. They are important legal skills and ones that are transferable into everyday life and work. Critical thinking involves analysis and evaluation. You will explore both of these as you work through this week.

After this week of study you should understand:

- how to construct a reasoned argument
- the ways in which an argument can be developed and evidenced
- the development and use of judicial precedent.

1 Reasoned argument

The study of law requires learners to identify, analyse, construct and deconstruct an argument. These are transferable skills used in a range of academic subjects and studies. You may already have developed good arguing skills from previous academic experience, from voluntary work or from your workplace. Whatever your experience this section provides an opportunity for you to reflect on how you make and construct arguments.

1.1 What is an argument?

The first step is to understand what an argument is in the formal sense of the word. The art of argument and rhetoric has a long history. In western legal cultures it is linked and developed from the works of the ancient Greek and Roman writers. Before going any further Activity 1 asks you to think about what the word 'argument' means to you.

Activity 1 What is an argument?

 (Allow 5 minutes)

Take a look at the images relating to arguments in Figure 1. Reflect on how they portray 'argument' and make some notes on what the word 'argument' means to you in the box below.



Figure 1 Collage of images relating to arguments

Provide your answer...

Comment

All the images portrayed some aspects of an argument and there are different explanations of what an argument is. At its simplest an argument is an expression of a point of view on a subject. Here are a number of definitions from a dictionary:

- 1 an exchange of views, especially a contentious or prolonged one
- 2 (often followed by *for*, *against*) a reason advanced; a reasoning process (*an argument for abolition*)
- 3 a summary of the subject-matter or line of reasoning of a book.

Concise Oxford Dictionary, Eighth edition 1990

Formal arguments such as academic argument and the sort of argument utilised by lawyers in the courtroom have a more formal construction than everyday, colloquial forms of argument.

A formal argument is made of several elements, as outlined in Box 1.

Box 1 The anatomy of an argument

An argument can be divided into:

- the premise or claim – a statement, proposition, foundation or reason for a conclusion
- the factual evidence to support that premise or claim
- the conclusion – this follows logically from the premise(s), and it is what you are arguing for in regard to the factual evidence.

So, a formal argument is more than a statement of a point of view – it is also an attempt to support that view with evidence. An argument should be distinguished from a disagreement, where each of the two sides believes something different. An argument provides the reason for the beliefs of the two sides.

1.2 Identifying the argument

It is important to identify the general thrust of the argument within the information that you are reading or hearing. Often material that is presented as fact is actually one person's interpretation of information. So, it is helpful to identify the different elements, outlined in Box 1 in Section 1.1, by exploring the construction of an argument in some different examples.

Example 1 Are cats the best pets?

- The premise or claim. For instance, 'cats make the best pets'.
- The evidence for that premise or claim. For example, 'because you can leave them all day and they will fend for themselves'.
- The conclusion – this is somewhat self-evident in the evidence provided. The writer argues that as cats can be left all day, they make the best pets. It is the writer's opinion that it is this attribute that makes cats the best pets.

1.3 Analysing the argument

When you evaluate, for example, academic materials, policy underlying legislation, court judgments, you should aim to understand and form a judgement on the validity of the arguments that are presented. You can do this by looking at the coherence of the argument, the supporting evidence and the conclusion reached.

Activity 2 Analysing arguments

 (Allow 5 minutes)

Look at the following statements and consider whether they conform to the definition of an argument provided in Section 1.1. What do you think of the validity of the arguments?

- a. 'The earth is round, as is demonstrated by the boat disappearing over the horizon.'
- b. 'The explosion at Chernobyl in 1986 proves that all nuclear power stations are dangerous and should be closed down.'
- c. 'The common law system based on judgments in real cases provides both a detailed and pragmatic system that cannot be matched by the more theoretical codes of the civil law system.'

Provide your answer...

Comment

- a. This statement argues that the earth is round and provides logical evidence for that claim; namely, it explains why the boat disappears over the horizon. This is now a verifiable fact rather than an argument.
- b. This statement is an argument in the sense that its premise is that nuclear power stations are dangerous. The statement provides evidence for this by referring to the explosion in 1986 of the Chernobyl nuclear power station. The conclusion that all nuclear power stations should be closed down has been made by making the assumption that the explosion at Chernobyl proves that all nuclear power stations are dangerous. The accuracy of this assumption would need to be explored.
- c. In this statement the premise is that the common law system is more detailed and pragmatic than the civil law system. Limited evidence to back up this premise is provided – namely, that the common law system is based on judgments in real cases rather than being based on theoretical principles.

1.4 Different ways of formulating an argument

As shown in Figure 2, the same argument can be formulated in different ways.

Figure 2 shows that the premise can be made first and then the evidence for that claim can be provided, or vice versa. You may have your personal preferences about which you consider to be the most effective formulation of an argument. When framing an argument it is important to consider the audience that it is intended for and to make sure that it makes sense in the context in which it is being used.

The offence of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007 has not solved the issue at the heart of the matter, which is that it is difficult to hold senior management accountable where the organisational structure of the company is chaotic and diffuse. The lamentable record of three successful prosecutions in five years reveals that the law on corporate manslaughter needs to be rethought by Parliament.

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The lamentable record of three successful prosecutions in five years reveals that the law on corporate manslaughter needs to be rethought by Parliament. The offence of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007 has not solved the issue at the heart of the matter, which is that it is difficult to hold senior management accountable where the organisational structure of the company is chaotic and diffuse.

	Premise or claim
	Evidence for that premise or claim
	Conclusion

Figure 2 Different ways of formulating an argument

Mastering short arguments provides a solid foundation for developing longer arguments. However, arguments in academic writing are often complex and take time to develop. So, for instance, the argument in Figure 2 would need to be developed further with a more detailed explanation of exactly why the author considers that the Corporate Manslaughter and Corporate Homicide Act 2007 has failed to get convictions. The author would need to explore the assertion that it is difficult to hold senior management accountable when the organisation of the company is chaotic and diffuse. The author could do this by examining the cases where convictions have been obtained and comparing them with the cases in which the prosecution failed and then analysing whether there are any factors (which support the premise) that can be distinguished between these groups of cases. In doing this, the author is looking to establish both the logic of the argument and the evidence that indicates that the premise and conclusion are correct.

1.5 The logic of the argument

It is important to identify that the argument is logical in the way it is structured. The claims made within it should be supported by the evidence provided. Look at the author's reasoning and consider whether or not it makes sense. Ask yourself whether it is valid. When looking at the validity of the argument it helps to develop a questioning and critical approach. Look at the conclusions drawn. Are they supported adequately by the claims made throughout the argument?

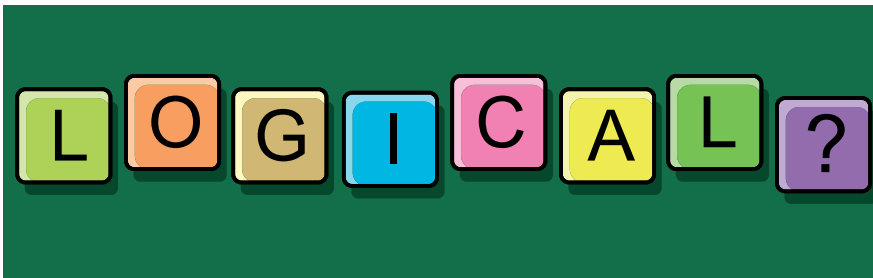
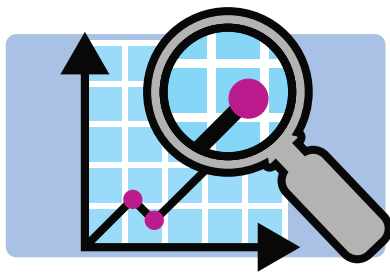


Figure 3The word logical

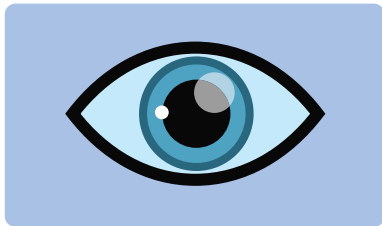
1.6 The importance of evidence in the argument

The examples in Activity 2 demonstrate that the provision of evidence to support a particular point of view is crucial to the strength of an argument. Without evidence there is only a personal opinion. So, when analysing the argument of others or developing your own arguments it is important to consider whether the premise and conclusion have been supported with acceptable sources of evidence.

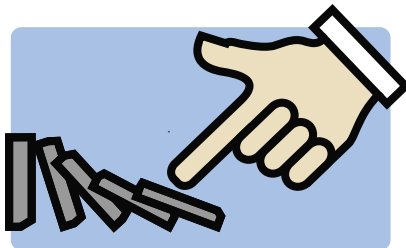
There are many different types of evidence, as shown in Figure 4 below.



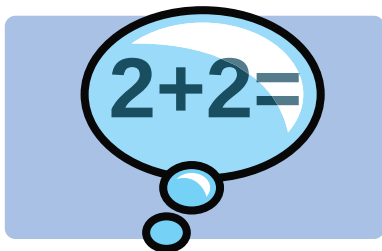
Statistical:
Based on analysis of
statistics



Observational:
Based on what the person
has observed or perceived
they observed



Causal:
Based on what fact has
caused a particular factual
result



Experiential:
Based on what
experience shows can be
inferred from the facts

Figure 4 Four types of evidence

Legal study has its own particular requirements for evidence. In many cases it requires legal authority in the form of legislation or case law. The wording of legislation and of judgments provide strong evidence in support of a legal argument.

Journal articles contain the arguments of academic writers, speeches or opinion pieces in the media and it is important to read these articles critically. The authors of these articles invariably have an agenda, something that they want the reader to agree with. So, when reading these articles or opinion pieces, or when listening to speeches, consider the evidence that the author provides for their argument very carefully and think about how they construct their argument. How do they 'persuade' you to their viewpoint?

The way that evidence is organised determines the type of argument and you will explore the different types of argument in later weeks.

Table 1 Summary of the different types of argument

Form	Example	Explanation
Deduction	If you smoke you may get lung cancer. A smokes, therefore A may get lung cancer.	Deductive argument is based on a logical connection between the premise and the conclusion. If the premise is true, then the conclusion is also true. So, it is important to establish the truth of the premise; an untrue premise inevitably results in a false conclusion. In this case the premise is true and so is the conclusion, which is that if you smoke you may get lung cancer.
Induction	Of the people I know who smoke many of them have lung cancer and therefore, if you smoke, you stand a good chance of getting lung cancer.	Inductive arguments depend on the number of observations that support the conclusion. So, it is important to examine the strength of the observations.
Abduction	Scientific studies have established a high correlation between smoking and lung cancer. Therefore, it is likely that smoking causes lung cancer.	Abductive arguments depend on the degree to which the conclusion is supported by the evidence and data. The more evidence there is, the stronger the argument.
Analogy	Breathing toxic substances such as asbestos is known to cause lung cancer. Smoke from cigarettes is toxic and so is likely to cause lung cancer.	The validity of this type of argument requires the key issues of what is being compared to be similar, and to be relevant and significant to the conclusion. You need to show that what is known to be true about one issue is likely to be true for the other issue.

When constructing your own argument, consider:

- What evidence is available?
- What type of evidence is the most appropriate to support your argument?
- Which evidence best supports the conclusion?
- Which evidence is the strongest, and which is the weakest?



Figure 5 Words relating to argument

1.7 Developing your own argument

Arguments can be constructed in different ways and take different forms. The next activity provides you with an opportunity to think about the construction of arguments.

Activity 3 More than one argument

 (Allow 10 minutes)

Read the following statements given below, which provide some facts about Killiecrankie Law School's plan to produce an environmental law module.

Using the different statements, apply the principles that you have learnt about the construction of an argument to devise your own argument about whether Killiecrankie Law School is likely to succeed in their plan.

Statements

- The Law School at Killiecrankie University will get approval from the University Approvals Committee for its new module in environmental law in September 2022.
- The Law School plans to develop an environmental law module so that it is ready to present to students in June 2023.
- It usually takes 12 months from approval of a new law module by the University Approvals Committee for it to be developed and made ready to be delivered to students.

Comment

You will probably have tackled this activity in different ways and come up with different arguments. Based on the information that you have been given in the different statements, several formulations are possible. They are likely to form some variation on one of the following:

- 'The environmental law module will not be ready for delivery in June 2023 as it takes 12 months to develop a module that would be ready to deliver to students.'
- 'The environmental law module is unlikely to be ready for delivery in June 2023.'
- 'There is considerable doubt about whether or not it will be possible for the Law School to deliver the environmental law module in nine months.'
- 'The Law School will have to work very hard to deliver the environmental law module in nine months as it usually takes 12 months from university approval being given to deliver a module to students.'

The first argument is the most categorical – it asserts that the module will not be ready in time. It leaves itself open to a counter-assertion that on occasions it would appear to be possible to deliver a module in a shorter interval of time as the use of the word 'usually' would seem to indicate that this is the case. The second argument is less categorical and appears to take this uncertainty into account, but does not explain the reason for the uncertainty – it gives no evidence for the premise and in essence offers only an opinion. The third argument does explain that it is probably not going to be possible to deliver the module by June 2019, but does not explain why this is so.

The final argument is more sophisticated as it makes the assumption that the Law School will have to do something different from the norm if they want to deliver a new module in nine months rather than the usual 12-month period. However, it may be the wrong assumption as the facts do not explain why it takes 12 months to develop a new module.

In this activity you have been given the facts on which to base your arguments. Developing your own arguments will involve finding facts and the evidence and evaluating these for yourself. This is an important skill whether being used for study, daily life or work. For example, it could be used to help construct a letter arguing for or against the granting of planning permission, to obtain funding for a project, to obtain support for a change in the law, to demonstrate entitlement to a right or benefit of some form, or to challenge a decision.

Box 2 contains some advice on how you can develop your own arguments.
Section 2 considers how judges apply the law.

Box 2 Practical advice on developing an argument

The way in which you choose to frame your argument depends on a variety of factors, including how and why you are arguing and whom you are arguing for.

So, it is helpful to think very carefully about the following points:

- What point are you trying to make?
- How are you going to back up your argument?
- What evidence is available?
- What evidence is most appropriate for the argument?
- Does the evidence support the argument? What is the logical connection?
- What gaps or inconsistencies are there in your argument?
- Is your conclusion based on the evidence?

It is a good idea to consider the nature of any possible objections or contradictions to your argument. Doing so will help you to evaluate the strength of your own argument. It may be that more evidence in support of your argument is required or that your argument needs refinement. Always treat opposing arguments with respect as they will help to make your argument more robust – you will need to think carefully about why you disagree.

2 The Courts and precedent

In giving their judgments judges use legal argument to support their conclusions. This legal argument is known as reasoning. The reasoning can lead to the establishing of a legal principle; given the Latin term *ratio decidendi*. This is often shortened to the words 'ratio of the case'. Under the common law system these principles establish rules which, if all the facts are similar, must be followed in subsequent cases in the same or a lower court. This is known as the doctrine of precedent, which you are about to examine.

2.1 Precedent

Precedent forms the basis of the common law. This is one of the sources of law in Scotland. The judiciary may, on occasion, determine the meaning of a term in a piece of legislation and they also create law through precedent. There are areas of law, such as delict, where little legislation exists. When legislation does not exist, courts have to make a decision on the facts before them and look at previous decisions to determine the outcome of a case. In this way they develop an area of law known as common law.

There are two notions of precedent. Firstly is that it is dynamic, the legal principle developed in a previous case can be applied in subsequent similar cases. This allows the common law to evolve incrementally in order to cover newer factual situations and changing social circumstances and norms that have some resemblance to, or roots in, the first case. Secondly, is that it is a static mechanism to ensure certainty, so far as possible, in the law.

The static doctrine of binding precedent is known as the doctrine of *stare decisis*, which is Latin meaning 'to stand by/adhere to decided cases', i.e. to follow precedent. In other words, once a legal principle is decided in one case it should be followed in similar future cases. The doctrine of binding precedent refers to the fact that, within the hierarchical structure of the courts in Scotland, the decision of a higher court will be binding on a lower court. In general terms, this means that when judges try cases they will check to see if a similar situation has come before a court previously.

If a precedent from a similar situation exists and it was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the legal principle established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow but will certainly consider it.

There are three essential elements to this system of precedent:

- a court hierarchy
- binding precedent
- accurate law reporting.

You should now watch the following video which explores precedent.

View at: [youtube:E8MnKD5q1WE](https://www.youtube.com/watch?v=E8MnKD5q1WE)



Exploring precedent

The UK Supreme Court is the highest court of appeal for civil matters in Scotland. It hears matters which involve points of law of general public importance and concentrates on

cases of the greatest public and constitutional importance. Its decisions are binding on all courts lower in the court hierarchy. In concentrating on cases involving points of law which are of public importance and cases of the greatest public and constitutional importance the court makes decisions which help shape society. It is also the final arbiter on devolution issues.



Figure 6 The Highest Appeal Courts: Scotland

The High Court of Justiciary is Scotland's supreme criminal court. When sitting as an appeal court, the court consists of at least three judges when hearing appeals against conviction and two when hearing sentence appeals. More judges may sit when the court is dealing with exceptionally difficult cases or those where important matters of law may be considered.

2.2 *Ratio decidendi* and *obiter dictum*

Not everything in a court case sets a precedent. The contents of a case report can be divided into two categories:

- *ratio decidendi*
- *obiter dictum*.

2.2.1 *Ratio decidendi*

This Latin term literally loosely translates as the reason for the decision. The *ratio decidendi* of a case is not the actual decision, or order, like 'guilty' or 'the defender is liable to pay compensation'. The *ratio decidendi* establishes a precedent, which is the legal principle (law) used by the judge or judges in deciding the legal problem raised by the

facts of the case. This legal principle, which is an abstraction from the facts of the case, is known as the *ratio decidendi* of the case (see Box 3).

Box 3 Example of *ratio decidendi*

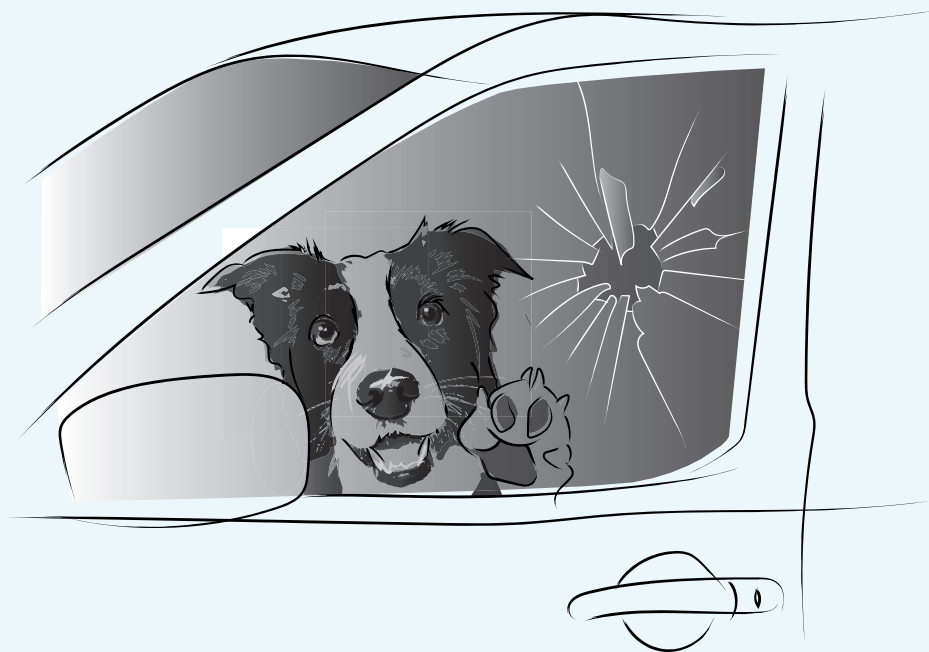


Figure 7 Dog in distress?

A couple leave their dog in their car while they pop out to a shop. For a reason that cannot later be discovered, the dog gets excited and starts jumping around. The dog was not suffering from dehydration or from being overheated. The dog paws the rear glass window. It shatters and a shard of glass flies off and, unfortunately, into the eye of a passer-by, who later has to have his eye removed. Are the couple liable to pay compensation for the man's eye? The court said no. People should take care to guard against 'realistic possibilities'. They should only be liable, the court said, if they caused others harm by doing something that could be reasonably foreseen as likely to cause harm.

We are not liable if we fail to guard against 'fantastic possibilities' that happen to occur. The accident in this case, the judges ruled, was just such a 'fantastic possibility'. The couple therefore did not have to pay compensation. The reason for the decision in this case, the *ratio decidendi*, can therefore be expressed simply as: where harm was caused to a pedestrian by a dog smashing the window of the car that it was in, and where this sort of incident was unforeseeable, the defendants were not liable.

2.2.2 *Obiter dictum*

In a judgment, any statement of law that is not an essential part of the *ratio decidendi* is, strictly speaking, superfluous. Those statements are referred to as *obiter dictum*. This is Latin for 'a word said while travelling' or 'along the way' (*obiter dicta* in the plural).

Although *obiter dicta* statements do not form part of the binding precedent, they can be persuasive authority if taken into consideration in later cases. That is, if the judge in the later case considers it appropriate to do so (see Box 4).

Box 4 Example of *obiter dictum*

In the case above about the dog and the man injured by the shard of glass, one judge said that if you knew your dog had an excitable tendency or went mad in cars, then you would be liable if it caused someone harm in a predictable way (not in the freakish broken window scenario) and would have to pay compensation. The judge did not need to rule on that in the dog-and-the-car-window case, because the couple did not have a dog with a known excitable temperament. His observations were, therefore, made 'by the way' and thus can be referred to as an *obiter dictum*. In a future case involving a dog known by its owners to be excitable, a lawyer for an injured claimant could refer back to the judge's *obiter dictum* in the car window case and use it as 'persuasive' but not 'binding' authority.

The division of cases into these two distinct parts is an analytical tool. Unfortunately, judges do not actually separate their judgments into the two clearly defined categories and it is up to the person reading the case to determine what the *ratio* is. This is a bit like listening to, or reading, a speech made by a politician or a sports team manager and trying to identify what the most important part of the speech was.

In some cases this is no easy matter, and it may be made even more difficult in cases where there are three or five judges and each of the judges delivers their own lengthy judgment so there is no clear single *ratio*.

2.3 Avoiding precedent

The main mechanisms through which judges alter or avoid precedents are:

- overruling
- distinguishing.

2.3.1 Overruling

Overruling is the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case.

It is strange that, within the system of *stare decisis*, precedents gain increased authority with the passage of time. As a consequence, courts tend to be reluctant to overrule longstanding authorities even though they may no longer accurately reflect contemporary practices or morals.

While old principles are not usually good in dentistry or computer science, they are often seen that way in law. In addition to the wish to maintain a high degree of certainty in the law, the main reason for judicial reluctance to overrule old decisions would appear to be the fact that overruling operates retrospectively, with the effect that the principle of law being overruled is held never to have been law. It may even lead to the imposition of criminal liability on previously lawful behaviour. It has to be emphasised, however, that the courts will not shrink from overruling authorities where they see them as no longer

representing an appropriate statement of law. The decision in 1989 to recognise the possibility of rape within marriage may be seen as an example of this.

The courts are rarely ready to challenge the law-making rights of Parliament in an open way and, on occasion, explicitly state that it is a matter on which Parliament should legislate.

Overruling should not be confused with 'reversing', which is the procedure by which a superior court in the hierarchy reverses the decision of a lower court in the same case.

2.3.2 Distinguishing

In comparison with the mechanism of overruling, which is rarely used, the main device for avoiding binding precedent is that of distinguishing the previous case as having different material facts and, therefore, as being not binding on the current case. Material facts are those in any case which have legal consequences.

As has been previously stated, the *ratio decidendi* of any case is based upon the material facts of the case. This opens up the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent, so it will not find itself bound to follow that precedent. Judges use the device of distinguishing where, for some reason, they are unwilling to follow a particular precedent. Law reports provide many examples of strained distinguishing where a court has quite evidently not wanted to follow an authority that it would otherwise have been bound by.

Box 5 Summary of binding precedent

- Not everything in a court case sets a precedent.
- There is a difference between *ratio decidendi* (the statement of legal principles material to the decision) and *obiter dictum* (the discussion of legal principles raised in argument but not material to the decision).
- The binding element in a future case is the *ratio decidendi* and that, while the *obiter dictum* will never be binding, it may have strong persuasive force.
- There are situations in which judges do not have to follow previous decisions:
 - overruling a previous case
 - distinguishing a previous case.

3 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 3 quiz](#)

Open the quiz in a new window or tab and then come back here when you've finished.

4 Summary

This week explored the skill of developing an argument and considered judicial precedent. You learnt how formal arguments can be constructed and how judges use formal legal argument to create precedent. Binding precedent underpins the development of common law. You were introduced to a number of legal terms and these are summarised in Box 6.

Box 6 Summary of legal terms in week 3

Legal Term	Definition
<i>Ratio decidendi</i>	The reason for deciding. The part of the judgment that creates law – the binding precedent.
<i>Obiter dictum</i>	Any thing said along the way. Other parts of the judgment. These may be persuasive but do not create law.
The decision or judgment	The outcome of the case for the parties involved.
Overruling	A decision which states that a legal rule in an earlier case is wrong.
Distinguishing	A method of avoiding a previous decision because the facts in the present case are different.

After this week of study you should now understand:

- how to construct a reasoned argument
- the ways in which an argument can be developed and evidenced
- the development and use of judicial precedent.

Week 4: Judicial reasoning

Introduction

In this week you explore the nature of judicial reasoning and the politics of the judicial role. This means that you think about how judges make their decisions and consider the processes of reasoning that impact on legal judgments.

Two of the concepts underpinning the constitutional framework of the UK are parliamentary sovereignty and the separation of powers.

The separation of powers means is that the executive, legislature and judiciary are separate so that each can act as a check and balance to the others. The existence of a separate and independent judiciary is seen as a cornerstone of the UK's constitution.

After this week of study you should be able to:

- explain the basis of logical reasoning
- outline aspects of judicial reasoning
- understand the complexity of the relationship between Parliaments and the courts.

1 Judicial decision-making and logical reasoning

Law is sometimes described as a system of practical reasoning that involves the application of a logical set of steps based on applying the law to a factual scenario to reach a decision. The rules of statutory interpretation and the principle of the doctrine of binding precedent create the impression that judicial decision-making involves processing outcomes that are largely determined by logic. But is this actually the case?

Logical reasoning helps inform judicial reasoning and decision-making. Here you explore logical reasoning before considering how closely logical reasoning and judicial reasoning resemble one another.

1.1 Three forms of logical reasoning

Three forms of logical reasoning are particularly relevant to the judicial decision-making process: deductive, inductive and reasoning by analogy. Deductive reasoning involves starting with a general principle and drawing a specific conclusion based on it. Inductive reasoning involves upturning this process, using specific outcomes to construct a general principle that also applies to the scenario at hand. The relationship between general principles and specific cases in these two forms of reasoning is illustrated by the following diagram:

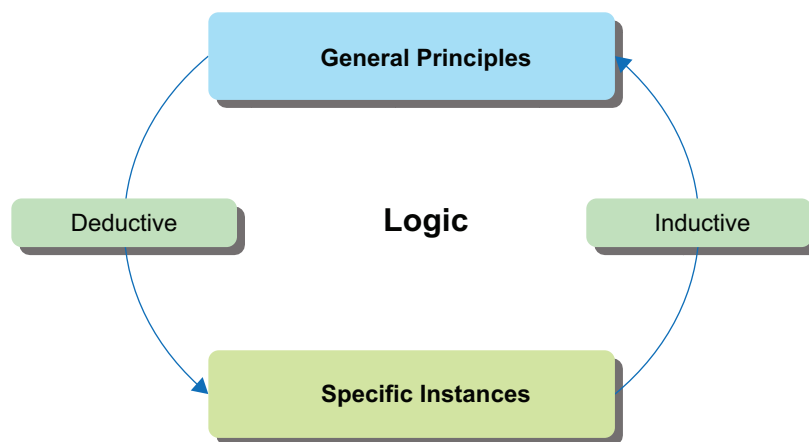


Figure 1 Deductive and inductive reasoning

Reasoning **by analogy** is sometimes considered a branch of inductive reasoning, but it moves from specific evidence to draw a specific conclusion without constructing a general principle. It relies on one set of facts being sufficiently similar to another set of facts to infer that the same outcome ought to be reached.

1.1.1 Deductive reasoning

The most famous type of deductive reasoning is the *syllogism*. A classic example of this involves the ancient Greek philosopher Socrates:

- all men are mortal

- Socrates is a man
- therefore Socrates is mortal.

As legal reasoning is the subject of this course, the following legal syllogism can be used:

- criminal offences are unlawful
- theft is a criminal offence
- therefore theft is unlawful.

This syllogism is illustrated in Figure 2.

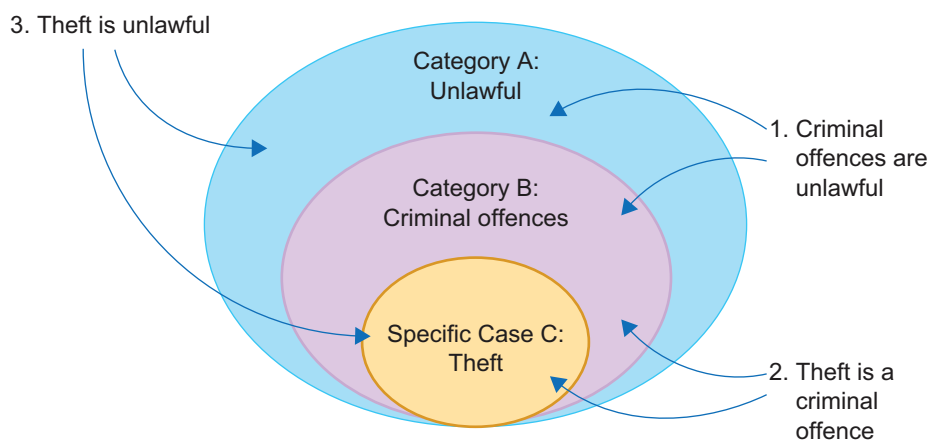


Figure 2 Deductive reasoning

In the diagram the arrows and numbering illustrate the steps in the process. First, there is a 'major premise', a general statement that is known to be true. It describes two categories of things, one that fits inside the other. Second, there is a minor premise, another statement we know to be true, which engages with the smaller category of the major premise and the specific case at hand. The third step allows us to take what is known from the first two premises and conclude something new about the case, which is that it fits within the largest category. The circles in the diagram represent how the categories fit together in deductive reasoning: 'B' fits within 'A' and 'C' fits within 'B', so 'C' must also fit within 'A'.

The syllogism can therefore be broken down as follows:

1. major premise – criminal offences (category B) are unlawful (category A)
2. minor premise – theft (case C) is a criminal offence (category B)
3. conclusion – therefore theft (case C) is unlawful (category A).

The logic in this form of reasoning is certain. The conclusion *must* follow from the premises: $A = B$ and $B = C$, so $A = C$. Put another way, because the category of 'criminal offences' is entirely contained within the category 'unlawful', and the specific case of theft is a member of the category of 'criminal offences', theft must also be a member of the category 'unlawful'.

Activity 1 Drawing a conclusion from deductive reasoning

 (Allow 10 minutes)

Consider the following major and minor premises and deduce the appropriate conclusions from them.

- a. All dogs are mammals.
Labradors are dogs.
 - b. All dogs are reptiles.
Labradors are dogs.
 - c. The 'neighbour principle' creates a duty of care.
Donoghue falls within the neighbour principle.
-

Comment

- a. Therefore Labradors are mammals.
- b. Therefore Labradors are reptiles
- c. Therefore *Donoghue* creates a duty of care.

The conclusions to (a) and (c) are correct, but you will have noticed that the conclusion in (b) is incorrect (Labradors are not in fact reptiles). This shows that deductive reasoning is not always reliable, if the premises are flawed or the logic is not applied correctly. You will return to this shortly.

It is worth noting from (c) that you can make a true statement about the law if you are given true premises without having that knowledge already (you will understand why this conclusion is true by the end of this unit). This is how deductive reasoning works. As long as the major and minor premises are true and the reasoning is applied correctly, the conclusion will be true.

While the logic is certain, however, this does not mean that all conclusions drawn using this method are necessarily true. In fact, the truth of the concluding statement is entirely dependent on the truth of the premises on which that conclusion is based and following the reasoning process properly. These are not guaranteed by the structure of the syllogism itself. The truth of the conclusion can be compromised in a number of ways:

- if the major or minor premise is in fact untrue
- if the major premise only applies to some of the cases in category B, meaning that it does not fit entirely within category A
- if the minor premise is true but unrelated to the categories in the major premise
- if the order of the logic of the categories gets mixed up in any way.

Deductive syllogisms depend on a strict order of logic that cannot easily be altered. The idea of deduction in general – reasoning from the general to the specific – is not quite so strict, but you have to make sure each category of objects fits entirely within the wider category above it to be certain of a categorical conclusion.

The important thing to remember about deductive reasoning at this stage is that the *logic* is flawless when applied correctly. If the premises are true and the statements are properly constructed in relation to one another, the conclusion will *always* be true. But the

syllogism itself says nothing about the truth of the premises or the construction of the statements; if either of these is flawed then the conclusion is also fallible.

1.2 Inductive reasoning and reasoning by analogy

1.2.1 Inductive reasoning

Inductive reasoning involves drawing a general conclusion from specific examples. When inductive reasoning takes place, the process is generally the reverse of deductive reasoning. It involves finding out the name of the wider category A of things that correctly describes all of the observable objects in that category. This can then be used to say something new about the specific case C that you are dealing with at the time. It is done by observing what you already know from a number of existing examples, collecting that knowledge together and forming a general rule about all of those examples that should also apply to other examples in the same category.

It is rarely possible, for example, to observe all possible instances of something. Therefore a general conclusion based on *some* specific instances that purports to account for *all* instances will not always or necessarily be true. It will only probably be true based on the available evidence. Look at this example, which might come up if you were wandering around ancient Greece:

Step 1	Observe examples: This human Socrates is Greek. And this human Plato is Greek. And this human Euripides is Greek.
Step 2 (hidden step)	Collect them together based on shared characteristics.
Step 3	Broader conclusion based on Step 2: Therefore all humans (category B) are Greek (category A).
Step 4	Apply to specific case: Therefore this other human Herodotus (case C) is also Greek (category A).

If you happen to see only Greek men, then you might logically but incorrectly conclude that all humans are Greek. (You might also incorrectly conclude that all humans are men.) The logical relationship between the statement categories is consequently less certain than with deductive reasoning, and is illustrated in Figure 3.

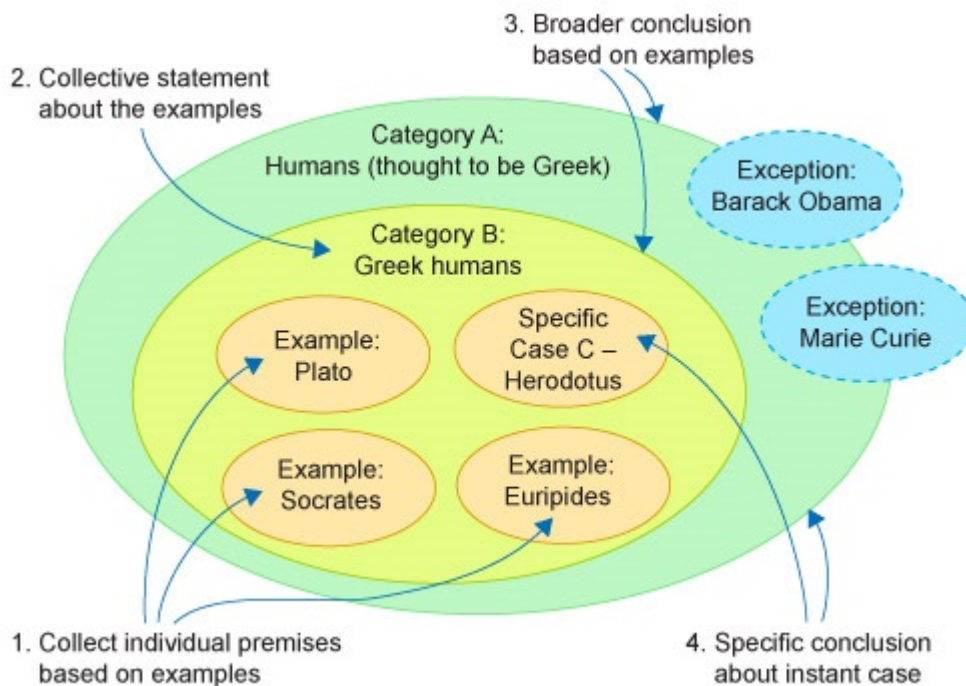


Figure 3 Inductive reasoning

In this example, as you have not been made aware of the existence of Barack Obama or Marie Curie from your experience, you have received incomplete information about the nationality of humans, which has resulted in a discrepancy in the general rule you have constructed from that information, that all humans are Greek. As Figure 3 illustrates, there is no necessary connection between those in the category of Greek humans and those in the broader category of humans. If you then use deductive reasoning to apply a flawed general principle derived from inductive reasoning to a specific case, you may end up with a statement about the case that is not true. It happened to be true that Herodotus was Greek, but if your case had been Marie Curie, this conclusion would not be true as she was French-Polish.

Inductive reasoning is not as rigorous as deductive reasoning in terms of its logical process. Instead, it is the process of building a hypothesis, a theory about a general rule, from the evidence available that both supports that theory and contradicts competing theories. The more evidence there is available, the higher the probability that the conclusion, the general rule, will be correct, but this can never be known for certain.

1.2.2 Reasoning by analogy

Reasoning by analogy involves drawing specific conclusions from other specific examples based on the similarities between them – the fact that they are ‘analogous’ to one another. When reasoning by analogy takes place, the objective is to say something specific about the case at hand based on the fact that it is ‘like’ other examples in certain ways. This can look a lot like how judicial reasoning takes place using case precedents. Consider Figure 4.

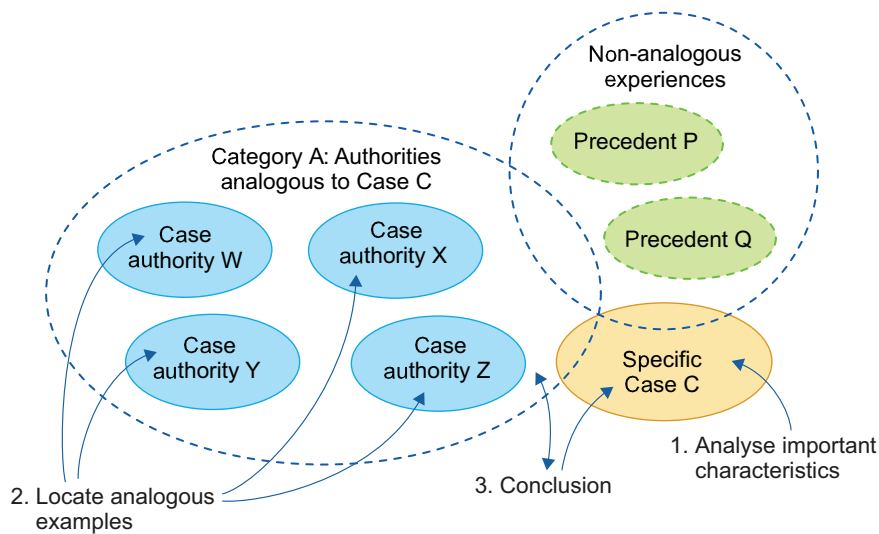


Figure 4 Reasoning by analogy

Here you are aware of the characteristics of your specific case (step 1), and you are aware of a number of previous cases that may share some of these characteristics with your case. You locate the examples that share the material characteristics of your case (step 2). These form a loose collection of analogous experiences (category A) which are similar to a general principle in inductive reasoning. In step 3, based on the similarities, you assume that your case has other similar characteristics to the analogous experiences, effectively placing your case within the same category as them. In judicial reasoning, this usually involves applying the same legal outcome to your case as was applied to the analogous precedent case or cases.

The conclusion using reasoning by analogy is much less likely to be certain than for deductive reasoning. It is sometimes considered a form of inductive reasoning, and is unstable because it relies heavily on the choices that you make about which pre-existing examples are similar to your case and why. The green exceptions in the diagram represent cases that you did not consider to be analogous to your case in important ways, so they are excluded. However, it might be that they share other similarities with your specific case that you did not think of, or did not consider important. In reality, therefore, your case may belong in a different category from that which you placed it on your conclusion. Or it may belong with both sets of examples at once, and you have had to make a choice about which cases are more similar in more important ways to yours to decide which legal outcome to transfer across. The truthfulness of the conclusion is entirely dependent on the strength and accuracy of the analogies drawn.

2 Logic and the law

The examples discussed so far can give the impression that reasoning is quite a straightforward process. While the logical processes involved are reasonably simple, their application to real-life situations is rarely this easy. This applies to their use in judicial reasoning.

Each of the forms of reasoning can be found in the interpretation of the law. The nature of statutory provisions and the system of precedent both appear at first to lend themselves to straightforward deductive reasoning.

The operation of judicial precedent can also be structured in the form of a syllogism. The prior case that has created the precedent is the source of the general rule and the facts of the current case fit within the facts of the prior case, meaning that the facts of the current case also fit within the same general rule.

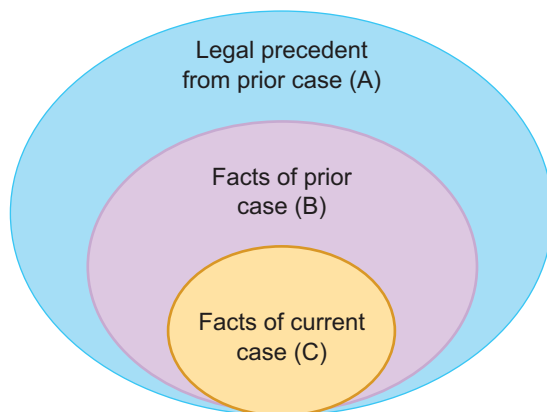


Figure 5 Legal precedent as deductive reasoning

It is however misleading to say that applying case precedent is a deductive process. Common law as a whole can be described as an inductive system of law because it involves developing principles ‘bottom-up’ from specific cases rather than ‘top-down’ from highly generalised legal principles. Applying case precedent involves active choices to select cases with appropriate similarities to a new case and then treating it in the same way as a result. This is more accurately described as an analogous process than a deductive one.

2.1 Reasoning the law

The way in which judges reason their decisions is a vital component of how the law functions. The process of interpreting statutory provisions and applying case law is far more complicated than a simple formula for logical reasoning would suggest. It seems inevitable that factors outside of the logical and legal reasoning process must play a part in judicial decision-making. The amount of uncertainty inherent even in formal logical reasoning processes gives room for the engagement of non-legal factors to contribute to legal judgments: these factors may include morality, economics, politics and social issues. Judgments often come across as highly reasoned arguments, reaching the only inevitable conclusion based on the law through an objective and rigorous analysis of the evidence – statutes, common law, case law, etc. However, this is as much part of the *narrative structure* and *rhetoric* of legal argument as it is a reality.

Judicial decisions are often couched in the language of objectivity and at pains to show that conclusions are based on legal principles and logical argument rather than choices and extra-legal factors. However, the courts have to deal with many issues that require inherently political judgements and/or are not covered by the existing law. In these situations, factors such as the choice of precedent, identification of *ratio decidendi*, identification of relevant analogies, and even the application of overriding public policy concerns can reveal the devices used to ensure judgments appear both neutral and purely legal, and thereby free from bias and the influence of non-legal factors.

3 Parliament and the judiciary

The constitutional and institutional framework in the UK promotes the idea that Parliaments should make law and the judiciary should interpret and apply it, and that these dividing lines should not be crossed. The principles of the separation of powers and parliamentary sovereignty both contribute to this idea. In addition, the principle of judicial deference and the declaratory theory of law operate to restrict the role of the judiciary to applying rather than making the law, and not questioning the enacted will of Parliament. You learn more about these ideas in this section. Together, these concepts support the argument that the judiciary should not and does not usurp or challenge the sovereign law-making power of Parliament. Whether they should, and whether they actually do in practice are of course very different questions with, as you will see, potentially quite different answers.

3.1 The relationship between the courts, the executive and Parliament

The operation of parliamentary sovereignty works to ensure that the judiciary *does not in practice* step beyond its powers and challenge the will of Parliament (Scottish or UK). Its existence also implies that Parliament *should* be sovereign and the courts *should not* have the capacity to undermine this absolute sovereignty.

The separation of powers is there to ensure the appropriate distinction between the spheres of influence; that is, of the institutions of the judiciary, the executive and the legislature. The separation of powers is effectively neutral about whether the judiciary *should* be able to challenge Parliament (the exception being where the Scottish Parliament has passed legislation which is outwith its legislative competence) and adherence to the separation of powers has helped to maintain judicial independence by, for example, putting judicial appointments into the hands of an independent body. Having said that, in practice, because the executive and legislature are not kept institutionally separate in the UK constitution, the actual impact of the current separation of powers is arguably to give the ruling executive branch (government) a significant amount of control over what and how Parliament legislates, which places a great deal of power in the government's hands, whether it be a Scottish or UK Government.

3.2 The declaratory theory and judicial deference

Alongside the constitutional principles of parliamentary sovereignty and the separation of powers, there exist some principles and theories that encourage the idea that the judiciary should not and does not interfere with Parliament's sovereign law-making ability. Here we consider two of these, the declaratory theory of law and the principle of judicial deference. The declaratory theory of law is a theory of how law is interpreted by the courts *in practice*: it supports the idea that judges *do not* impinge on Parliament's law-making competence. Judicial deference is a constitutional principle that supports the idea that the judiciary *should not* overstep its constitutional role in relation to Parliament.

3.2.1 The declaratory theory of law

The declaratory theory of law represents one side of a debate about whether judges actually make law when they produce judicial decisions or merely declare what the existing law is. The declaratory theory in its starkest form says that 'the judge is no more than the voice of an autonomous legal system that she/he, through her/his legal training,

is able to gain access to but is in no way able to influence' (Slapper and Kelly, 2013, p. 472). The logic behind this approach is that the judge is not making the law but merely declaring what Parliament has created. If this is accepted, the judge does not make the law but is only applying the legislation (legal rules) created by Parliament. While it is generally understood that in practice judges do not merely declare the law, they are also often careful in their judgments not to suggest they are creating new law, because this is beyond their formal constitutional role. You saw earlier that it is difficult to see law as a process of pure, logical reasoning, despite the apparent objectivity and neutrality of legal judgments, which give the impression that judges are simply figuring out and applying what the law already says.

3.2.2 Judicial deference

The principle of judicial deference refers to the extent to which the judiciary ought to *defer* to the sovereignty and legitimacy of Parliament when coming to judgments. Legal academic Aileen Kavanagh gives the following definition:

... judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy ...

Kavanagh, 2010, p. 223

The reasons that Kavanagh gives for adhering to the principle of judicial deference are that Parliament is thought to be more *legitimate* than the courts because it is democratically elected, more *expert* than the judiciary in matters of policy, and more *competent* than lawyers (who are trained only and specifically in legal rules and interpretation) to turn policy into law. Deference is a principle applied by the courts, especially when dealing with sensitive political issues – such as national security – that are often considered best left to the other branches of government. The principle is controversial, with some academic commentators believing that the judiciary is *too deferent* to Parliament and other commentators considering that it ought to maintain deference. Understandably, it is often politicians within the government of the time that argue most stridently that the judiciary should be *more deferent* to the wishes of Parliament than it currently is. This has become increasingly so with debates surrounding the expanding scope of human rights law..

There have also been a number of high-profile cases testing the relationship between judiciary, executive and legislature surrounding decisions taken as part of the process of exiting the EU. These include the Article 50 case (*R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5) and the case relating to the prorogation of the UK Parliament (*R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41A). The latter case is of particular interest as decisions in the lower courts of England and Scotland differed. A House of Commons library insight notes:

On 11 September, the High Court of England and Wales held that the legality of the prorogation was not justiciable in a court of law. That meant that the High Court had determined the question to be beyond the scope of judicial review. On the same day, the Court of Session in Scotland reached the opposite conclusion. It determined that the issue was justiciable. It then concluded that the decision to prorogue Parliament was motivated by an improper purpose.

The Court of Session concluded that the prorogation was “unlawful and thus null and of no effect”.

Decision of the Supreme Court on the Prorogation of Parliament Insight 24 September, 2019

The case went on to be heard by the UK Supreme Court which, in relation to the justiciability aspects of the case, held that the power to prorogue the UK Parliament cannot be unlimited and must, therefore be subject to judicial review.

3.2.3 Questioning parliamentary sovereignty

On the face of it Parliament (whether the Scottish or UK Parliament) is elected and therefore representative of the people. In this sense it is also legitimate and supreme in the law-making arena. Certainly, the judiciary is there to uphold and apply the law, but no more than that. It is not elected, not representative and in these senses not legitimate. However, it might be argued that Parliament for a number of reasons is not representative and the judiciary is democratically legitimised by virtue of its constitutional role. The rule of law is a central principle of the UK's democratic constitution. Judicial independence is an important aspect of the rule of law because it ensures that the law is applied equally to every citizen that no one is beyond its reach. The task of applying the law is carried out by the judiciary and for this it needs to be free from outside influence. The rule of law implies higher legal principles that govern the legislation created by Parliament and these are monitored and enforced by an independent judiciary.

3.2.4 The extent of judicial power

If Parliament should not be completely free to do whatever it would wish in respect of law-making and the role of the judiciary, how much power should the judiciary have, and how much does it in fact have at the moment? Hilaire Barnett's comments that

Sovereignty is ... a fundamental rule of the common law, for it is the judges who uphold Parliament's sovereignty. For as long as the judges accept the sovereignty of Parliament, sovereignty will remain the ultimate rule of the constitution.

Barnett, 2013, p. 112

This suggests that the judiciary has much more power in relation to Parliament than the existence of the principle of parliamentary sovereignty suggests because the principle itself stems from the common law, which is the domain of the courts. Parliamentary sovereignty is not and cannot effectively be laid down in any statute but is among the higher principles alongside the rule of law that are effectively governed by the judiciary. This is also the case for judicial deference. The judiciary tends to pay homage to the sovereignty of Parliament and the deference of the courts, but it is the judges themselves who determine the scope of the principle and are able to flex it as they feel is necessary and appropriate in any particular case.

Judicial review

While the *constitutional* power of the judiciary in respect of challenging the will of Parliament is limited, it has considerable power in the *administrative* sphere, through what is known as 'judicial review'. This refers to the ability of an individual or group that has been subject to a decision by a public body to challenge that decision through the administrative arm of the High Court, and the ability of the courts to invalidate that

decision if it does not comply with certain procedural requirements or is beyond the legal power of the body in question. In recent years this set of powers has expanded considerably as the courts have pushed back against the growth of the 'administrative state'. This development means that many decisions of public importance are now taken by quasi-autonomous and non-governmental organisations (quangos), and political decision-making is increasingly removed from Parliament and centralised in the hands of the executive. While the courts cannot invalidate legislation through this procedure under the UK constitution, the ability to force a decision of, for example, a government department to be reconsidered is a powerful tool. Whether this remains the case in the future following recent consultations discussed in section 3.3.2 remains to be seen.

Human rights

The Human Rights Act 1998 (HRA 1998) gives powers to courts throughout the UK in respect of the protection of the European Convention on Human Rights (ECHR). These are some of the most influential powers that the judiciary has at its disposal to ensure that UK law complies with human rights law. They include a broad power under Section 3(1) HRA 1998 to interpret UK legislation in line with the ECHR. It reads:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Section 3(1) HRA 1998

The HRA 1998 also includes the power of some of the highest courts in the UK, particularly the UK Supreme Court, to declare legislation incompatible with the ECHR. In respect of Scottish legislation this would mean the legislation is void (not valid). In relation to legislation of the UK Parliament the effect of such a declaration is to notify the UK Parliament that a provision is incompatible with the ECHR, so that it has the opportunity to amend it to be compatible. Such declarations are rarely brought into play and have generally resulted in a change in legislation. Used sparingly, therefore, these declarations are very powerful and effective in ensuring laws that the judiciary considers breach the ECHR are amended.

Despite the continued existence of the declaratory theory of law, the principle of judicial deference, the doctrine of parliamentary sovereignty and the separation of powers, it is generally accepted that the judiciary does both make political decisions and make law, in one reasonable understanding of those terms. It might be concluded that the judiciary both *should not* be completely overwhelmed by parliamentary sovereignty and related principles, and that it in fact *is not*, despite political pressure and the apparent formal limitations on its power.

4 This week's quiz

It's time to complete the Week 4 badged quiz. It is similar to previous quizzes, but this time instead of answering five questions there will be fifteen.

[Week 4 compulsory badge quiz](#)

Remember, this quiz counts towards your badge. If you're not successful the first time, you can attempt the quiz again in 24 hours.

Open the quiz in a new window or tab and then come back here when you've finished.

5 Summary

In this week you were encouraged to think about logical reasoning. You explored the nature of judicial reasoning and the politics of the judicial role.

After this week of study you should be able to:

- explain the basis of logical reasoning
- outline aspects of judicial reasoning
- understand the complexity of the relationship between Parliaments and the courts.

Week 5: The case of *Donoghue v Stevenson* [1932] AC 562

Introduction

The case of *Donoghue v Stevenson* [1932] AC 562 is a famous Scottish case. It is known worldwide and has had a significant impact on the law of delict in Scotland and the law of negligence in England, Wales and other jurisdictions.

You read a number of extracts from the case to consider how judicial reasoning works in practice. You also think about the role played by logical reasoning in legal reasoning and the extra-legal factors that contribute to judicial decisions.

After this week of study you should be able to:

- explain the decision in *Donoghue v Stevenson* [1932] AC 562
- outline the reasoning used to reach the decision
- explain the 'neighbour' principle as outlined by Lord Atkin.

1 The facts

Mrs Donoghue drank a bottle of ginger beer purchased for her by her friend at a cafe in Paisley. The bottle, which contained the decomposed remains of a snail, was manufactured by the defendant Mr Stevenson. The bottle was opaque in colour and sealed so the snail could not be detected until Mrs Donoghue had already consumed a large part of the ginger beer. She claimed to suffer from shock and severe gastroenteritis as a result of the incident.

The contract of sale to purchase the ginger beer was between Mrs Donoghue's friend and the shop owner, so there was no direct contractual relationship between Donoghue (herself) and Stevenson (the manufacturer).

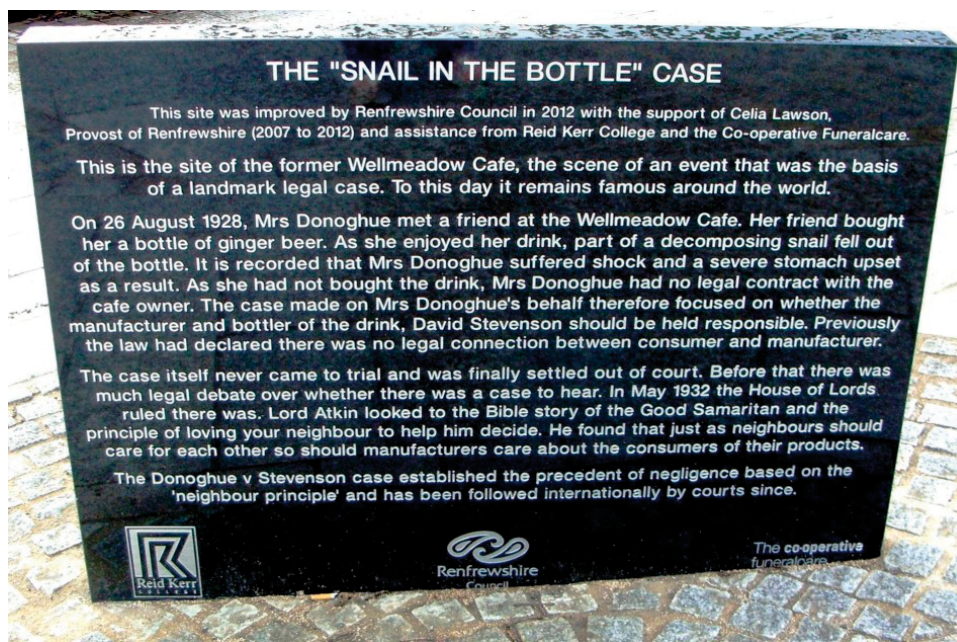


Figure 1 Memorial stone at the site of the Wellmeadow Café, Paisley

Mrs Donoghue sued Mr Stevenson based on the law of delict (referred to as the law of negligence in England and Wales). Delict is a civil law 'tort' in which one person 'B' can seek a remedy from another 'A' for injury or loss suffered due to A not taking reasonable care or skill in performing a task.

Delict covers certain cases where there is no contract between the parties and creates a 'duty of care' from one person owed to another, to reach a certain level of competence in their actions. For example, if you drive a car you owe a 'duty of care' to other road users to take reasonable care when driving your car. This creates a legal relationship between you and them if you negligently cause injury to another road user, even though you do not have a contract with them.

In *Donoghue*, the judges had to decide whether Stevenson owed a duty of care to Donoghue. Was the relationship between them sufficiently close that Stevenson should be required by law to exercise a certain degree of care in carrying out particular tasks? Specifically, when Mr Stevenson manufactured a bottle of ginger beer, sealing it in a container in such a way that it would not be possible to inspect it before drinking it, and knowing that it would be drunk by a consumer, was he required by law to take reasonable care to ensure that the consumer was not injured by the contents of the bottle?

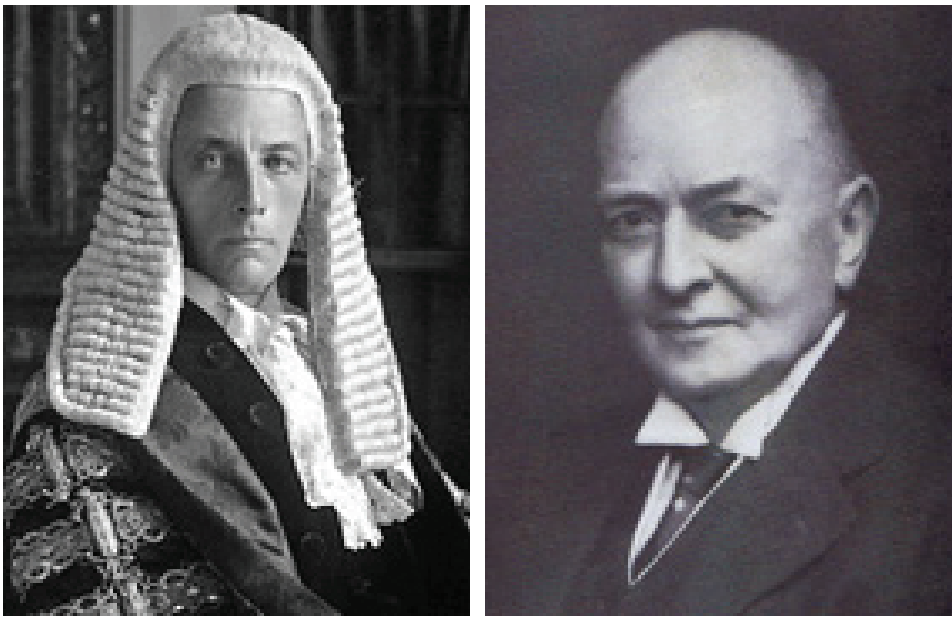


Figure 2 Lord Atkin (1867–1944) and Lord Buckmaster (1861–1934)

The case was brought in the Scottish courts. In the initial hearing, the judge found in favour of the pursuer Mrs Donoghue. This was appealed successfully by the defendant, Mr Stevenson, to a higher court. Donoghue then appealed further to the House of Lords, then the highest court in the UK for civil cases from Scotland. It is the House of Lords judgment that you will consider here.

Lord Atkin's judgment stated:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Donoghue v Stevenson [1932] AC 562

This is the 'neighbour principle', a way of describing at a general level which relationships give rise to a duty in law to take care.

1.1 Finding the *ratio decidendi*

There were five law lords hearing this case in the House of Lords (the final civil appeal court for Scotland at this time). Three found in favour of Mrs Donoghue's appeal, including Lord Atkin. The other two were Lords Thankerton and Macmillan. Atkin's judgment is known as the *leading* judgment.

Lords Buckmaster and Tomlin dismissed the appeal, which means they decided in favour of the defendant Mr Stevenson that there was no legal duty of care owed to Mrs Donoghue. Their judgments are called *dissenting* opinions.

The result was a majority 3 : 2 decision in favour of Donoghue. A majority decision is enough to decide the law (and is one of the reasons an odd number of judges sit in appeal

cases). It does not need to be a unanimous decision. Each lord delivered a separate judgment (although this is not always the case) and they often did not use the same process of reasoning or interpretation of the law to come to their conclusions.

Here we are interested in the *process of reasoning* by which this decision came about. This case is a good illustration of how logical reasoning is transformed into legal reasoning because even though each judge is attempting to answer the same question, using the same set of facts, and by looking at the same common law represented by previously decided cases, the route each judge takes is different and the decisions that they reach sometimes are different also.

The fact that the judges can come to different conclusions by applying the same previous cases to the same set of facts says something about how judges reason using the doctrine of binding precedent.

One *ratio decidendi* we might take from *Donoghue* is the 'neighbour principle'. However, while this is the best-known aspect of the decision, it is a very wide principle that goes beyond the specific facts of the case, so it arguably was not part of the *legal* reasoning. This means it was not necessary to reach the decision that Stevenson owed a duty of care to Donoghue. We might alternatively argue that even though it is not a strictly *legal* principle, it was necessary for Atkin to come to his decision – he deduced his legal decision from a higher, moral principle. However, the *ratio decidendi* of a case is conventionally more specific and maintains the fiction that strictly legal reasoning has been applied to the case. In addition, the other two judges who came to the same ultimate decision did not refer to or endorse this principle, so it was not a common part of the reasoning of all of the majority judges. The *ratio decidendi* is usually a combination of what is agreed by all of the assenting judges, those who agreed with the decision in the leading judgment. A common description of the *ratio decidendi* of the case might therefore be found for *Donoghue* which is more specific to the circumstances of the case.

Read the extracts in Box 1, taken from the judgments of Lords Macmillan, Atkin and Thankerton, the three 'majority' judges in *Donoghue* who agreed that Mr Stevenson owed a duty of care to Mrs Donoghue in the case.

Box 1 Extracts from the judgments in *Donoghue*

Lord Macmillan

I have no hesitation in affirming that a person, who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them, is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact, he places himself in a relationship with all the potential consumers of his commodities, and that relationship, which he assumes and desires for his own ends, imposes upon him a duty to take care to avoid injuring them.

Lord Atkin

A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result

in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Lord Thankerton

The respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer.

You should now move on to Activity 1, which explores the extracts of the judgments in Box 1.

Activity 1 Finding the *ratio decidendi*

 (Allow 25 minutes)

Part One

Find as many things as you can that all of the statements in Box 1 have in common. Note your findings in the table provided. Also make a note of any additions or limitations mentioned. The words might not be exactly the same in each case but the meaning of the words should be similar. For example, they all mention that what is manufactured is a product or an article, but while Atkin does not narrow it down further than this, Macmillan limits it to 'food and drink' and Thankerton specifies 'article of drink' only. The agreed part is the most restricted definition of the product, which is a drink.

Points agreed	Additions or limitations
The object is a drink.	Macmillan (food and drink); Atkin (product generally).
Provide your answer...	Provide your answer...
Provide your answer...	Provide your answer...
Provide your answer...	Provide your answer...
Provide your answer...	Provide your answer...

Part Two

Having completed your table try to use the things that they have in common to put together a short statement that might be a possible agreed *ratio decidendi* for the case.

Comment

Your table should look something like this:

Points agreed	Additions and/or limitations
The object is a drink	Macmillan (food and drink); Atkin (product generally)
A manufacturer	None
Intended for the consumer – placed on the market	None
In the original form – to exclude interference or examination	None
Duty of care owed to the consumer	Thankerton describes this as an entitlement 'to rely upon the exercise of diligence by the manufacturer'

From this table, your statement of the possible *ratio decidendi* will look something like this:

A manufacturer of a drink who intends it for the consumer in its original form, and manufactures it in such a way to exclude the possibility of interference or examination prior to being consumed, owes a duty to take care to the consumer.

This is reasonably similar to the shorter of the explanations offered by the lords. *Ratio decidendi* statements taken from individual cases are often very specific and tied to a limited set of facts. A wide *ratio decidendi* such as the 'neighbour principle' is often resisted because it can lead to unforeseen consequences and might be found to apply to unintended situations.

Activity 1 produced one example of what the *ratio decidendi* for *Donoghue* might be. Hopefully you will have seen from this that it is not straightforward.

If you were to read the full case report to find the *ratio decidendi*, you would have to look through more than 60 pages of court report, including five different judgments, to agree what the *ratio decidendi* is.

How to interpret the judgments is even more confusing when the *obiter dicta* comments of the judges that surround the *ratio decidendi*, and which are persuasive as to the current status of the law, are taken into account. You will see this very clearly in the next section, where we will consider how the lords in *Donoghue* included the precedent case law in their reasoning process.

1.2 The judgments

To try to find out what the law was, the law lords had to look at the pre-existing cases that made up the common law at the time. The law lords did not agree about whether this specific question raised by *Donoghue* had already been decided in these cases, or even which cases might be best used to determine what the law is. Consequently they looked at lots of different cases between them, and used a number of different issues to distinguish which cases were most relevant and why.



Figure 3 Illustration of *Donoghue v Stevenson*, Snail in a bottle

Lord Atkin gave the leading judgment. Lords Thankerton and Macmillan both added their own comments in their judgments despite agreeing with Atkin's decision and most of his reasoning. Lord Thankerton's judgment is quite brief, adding only a couple of points to Lord Atkin's. Lord Macmillan's judgment is longer and he considers some of the issues in quite a bit of detail. Lord Buckmaster gave the main dissenting opinion. This was

endorsed by Lord Tomlin whose short opinion emphasised a couple of key points as he saw it.

The approaches of the leading and main dissenting judgments by Lords Atkin and Buckmaster are summarised below.

Box 2 Lord Atkin's leading judgment

Lord Atkin felt that there were no authoritative general statements in the cases of the law in relation to when one person owes a duty to another outside of contract. Instead, the courts had dealt with a number of specific situations and relationships between people in previous cases and had tackled and categorised these individually as they came along. Atkin thought that the law should not be pigeonholed into a number of special classes where a duty was owed. Rather, there must be a general principle that applied to all of the cases based on something that was common among them. He based this first on the idea of the law being required to give remedies for obvious social wrongs. He went so far as to suggest he might not apply case law that denied the claimant a remedy in situations such as *Donoghue*.

Fortunately, it did not prove necessary for Atkin to disapply precedent case law because he was able to find a general principle in the previous cases upon which the duty of care in delict is based. This is the neighbour principle, which he also derived from the broader moral and social imperative to love your neighbour. Atkin thought the cases that had denied a duty of care involved a more distant relationship between the two parties. There had been no cases dealing with the same situation as in *Donoghue* that had found there was no duty. To reinforce this, Atkin emphasised the legal rule that only the *ratio decidendi* in these cases was binding. Any *obiter dicta* comments that might deny a duty of care were only persuasive (as they did not form part of the *ratio decidendi*, they were not binding on subsequent cases) and were often drawn too widely.

Atkin distinguished a number of cases that might have been seen as analogous. He claimed that these cases were only about the duty of care under a contract, or fraud (where the manufacturer *knew* of a product defect), rather than negligence. He also did not think that the law had, so far, only allowed exceptions to the general rule that there was no duty of care in certain, specific circumstances involving inherently dangerous objects (such as a gun) and physical proximity (where, for example, the person injured was on the property of the person who owed the duty of care). Atkin saw these alleged 'exceptions' as examples of a wider concept of negligence, rather than the only instances where a duty was enforced. He was able as a result to at least claim he was following the cases rather than introducing a new principle into the common law.

Box 3 Lord Buckmaster's dissenting judgment

Lord Buckmaster adopted an almost completely opposite interpretation of the existing cases to Lord Atkin. He argued that the general rule was that there was no duty of care owed to a third party outside of a contract. The exceptions to this were for objects dangerous in themselves (such as a gun) and defects that were known to the manufacturer (fraud). He then dealt with the very few cases, mainly with *obiter dicta* statements, which might be seen to support a duty of care in other cases such

as that in *Donoghue*. While he thought some of these could be used to impose a duty of care on Stevenson, he also considered them contrary to the clear line of decisions and felt they 'should be buried so securely that their perturbed spirits shall no longer vex the law' (*Donoghue v Stevenson* [1932] AC 562). He saw those cases where physical proximity was involved as belonging to a clearly different category and argued that the established distinction between dangerous and non-dangerous objects in the case law would be 'meaningless' if the duty of care existed all along in both cases. He also said the logical consequences of imposing a duty would extend to all types of objects and to all people who lawfully used them. In this, Buckmaster implied it would not be socially or economically acceptable for manufacturing businesses to be open to claims from such a wide group of people as if a duty was imposed.

These two contradictory interpretations and applications of the pre-existing case law raise a number of questions about the process of reasoning used to come to each judgment. You consider some of these in the following section.

1.3 The reasoning

Activity 2 The reasoning in the judgments

 (Allow 20 minutes)

Read again the summaries of Lord Atkin's and Lord Buckmaster's opinions in Boxes 2 and 3. Note down for each whether you think they are engaging in one or more forms of *logical reasoning*: deductive, inductive and/or reasoning by analogy. If so, why do you think this? Consider whether there might be the appearance of logical reasoning which is not actually present in the decision-making process.

Comment

Lord Atkin. It is possible to argue that Atkin is using all three forms of reasoning: deductive, inductive and reasoning by analogy. What he says he is doing is using the different specific examples of duty of care from the cases to establish a general principle that can be used to show that there is a duty of care in *Donoghue*. This is inductive reasoning. However, he also takes a very general premise, which is to love your neighbour, and deduces from this the rule that there is a duty of care in this case. This is similar to deductive reasoning, represented in Figure 4.

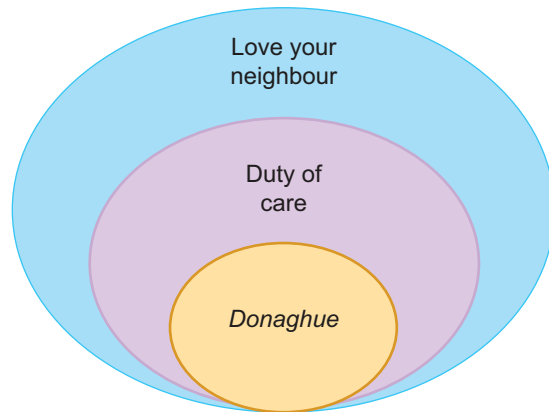


Figure 4 Deductive reasoning in *Donoghue*

Finally, we have seen that common law is most associated with reasoning by analogy, because it requires picking those cases most similar to the current case based on the factors in them that are considered most important. While Atkin does not represent this as his reasoning, he clearly makes decisions based on his selection of different parts of the cases that he considers to be analogous to the case of *Donoghue* and, just as importantly, he excludes cases that he does not think are analogous. He then transfers the additional characteristic in the analogous cases, that of the existence of a duty of care, over to the situation in *Donoghue*. This is reasoning by analogy and probably better describes what he is doing with the cases than straightforward inductive reasoning because his *choice* of analogous cases is the most important element in the process.

Lord Buckmaster. This is presented as a fairly clear case of deductive reasoning from the general to the specific. The pre-existing general rule is that there is no duty of care outside a contract. There are exceptions to this rule. The circumstances in *Donoghue* do not fall within these exceptions. Therefore, they fall within the general rule, so there is no duty of care. This might be represented as the following syllogism:

- major premise – for situations falling within the general rule there is no duty of care
- minor premise – the situation in *Donoghue* falls within the general rule (and not the exceptions)
- conclusion – therefore there is no duty of care in *Donoghue*.

This is deductive reasoning using legal rules, but there is a possibility that Buckmaster might be deducing an outcome from the general and arguably non-legal (social and economic) principle that businesses should not be held responsible for so many people and potential claims when manufacturing products. The case law is then chosen and interpreted to fit this preconceived principle. This is similar to what Lord Atkin is doing with the 'love your neighbour' principle. You might see this as enforcing the purpose behind the law or bringing non-legal factors into legal decisions, or both.

As we have seen, the appearance of deductive reasoning can be misleading in judicial reasoning. Buckmaster, like Atkin, makes choices about the cases he thinks are relevant and the most important parts of them. He is reasoning by analogy when he draws comparisons with some cases and not others based on the information he

considers important. He then transfers an additional characteristic, no duty of care, across from those cases that are analogous.

The question that arises from the end of the previous activity is how *logical* and *legal* the reasoning actually is. We can see that the more logical and certain forms of reasoning are presented more clearly by the lords while less certain forms are more hidden. But Lords Atkin and Buckmaster make many choices when they come to their completely opposite conclusions: choices as to which cases to look at, which parts of those cases, where to find their *ratio decidendi*, how to categorise them, what are the most important facts, how they relate to the current case, and so on. They also have economic, social and moral principles in mind, which influence their choices, and exist outside of a strict legal reasoning process. In light of this is there really any certainty as to what the judges will declare the law to be in any new case, based on previous cases and legislation?

You should now watch the following video, which explores the case of *Donoghue*, judicial opinion and *ratio*.

View at: [youtube:fZNOmB8le8](https://www.youtube.com/watch?v=fZNOmB8le8)



A study of *Donoghue v Stevenson*

2 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 5 quiz](#)

Open the quiz in a new window or tab and then come back here when you've finished.

3 Summary

You considered some aspects of judicial decision-making by exploring extracts from the leading, assenting and dissenting judgments in *Donoghue*. You looked at the role played by logical reasoning in legal reasoning, the extra-legal factors that contribute to judicial decisions.

After this week of study you should be able to:

- explain the decision in *Donoghue v Stevenson* [1932] AC 562
- outline the reasoning used to reach the decision
- explain the 'neighbour' principle as outlined by Lord Atkin.

Week 6: Human rights

Introduction

In this week you explore what human rights are and how these are protected in law. Human rights are widely talked about, discussed and reported on. There is not room in one week to cover fully what is often a controversial topic, so this week will concentrate on the basics.

- What are human rights?
- Why did they emerge?
- What is their relevance in Scotland today?

As part of the discussion you will also explore common myths surrounding human rights.

After studying this week you should:

- have an understanding of what human rights are
- be able to explain the framework for human rights in Scotland
- understand the complexity surrounding human rights and common myths about them.

1 What are human rights?

'Rights' is a word that can be used in many different ways. Its meaning will depend on circumstances and the viewpoint of the individual using the word. Lawyers use it to indicate that a person has a specific legally protected entitlement, for example, not to be dismissed unfairly from their job, not to be prosecuted unless they know what the charge against them is, not to be inhumanly treated, the right of children to state-funded education.



Figure 1 Illustration of human rights

The term 'rights' can, however, also be used in a more general sense, for example, to make a moral claim if you feel you have a right to something, whether or not that right is legally recognised. Such rights claims stem from personal assessments of what is right or should be valued, and can be used to form the basis of an argument that a particular law is unjust or unfair. In this week we use the idea of rights in the legal sense, i.e. when talking about the actual legal claims that individuals can make of, for example, local authorities and government.

In Scotland, and the rest of the UK, individuals have specific and recognised legal rights, for example, to benefits if they are not able to work or to state-funded financial support upon reaching the state pension age. These examples illustrate positive rights (the right to something) and individual rights (rights which do not consider collective or majority interest). However, it is also recognised that there are significant debates about who should have rights and who should be accorded rights and in what circumstances.

The statement in Box 1 is an extract from the Scottish Government policy on human rights and justice (as expressed in 2017 by an SNP-led government). The words 'inalienable', 'respect', 'fundamental' and 'rights are guaranteed' for everyone are commonly used when human rights are being discussed and we will return to these later.

The link in Box 1 will take you to information on how the Scottish Government protects and promotes human rights at home and abroad. You may wish to visit this website briefly, but it is not essential for your studies on this course.

Box 1 Scottish Government statement on human rights in Scotland

Every person is entitled to inalienable fundamental rights and freedoms. In Scotland the legal framework exists to ensure respect for human rights, and we are active in continually and consistently applying these principles so that fundamental human rights are guaranteed for every member of Scottish society and promoted in our international action.

1.1 When does a right become a human right?

Human rights are regarded as being rights that are so important and so fundamental that they deserve special protection. They are the basic fundamental rights it is felt all individuals should have and they are deemed to be common to all humanity.

Activity 1 Rights

 (Allow 5 minutes)

Take a few moments to think about any rights you may have come across. Make a list of those rights and then decide which ones you think may be fundamental to maintaining a civilised society.

Provide your answer...

Comment

What rights you have come across will depend on your personal circumstances, for example, whether you are in school, at work, a carer, receiving some form of benefits, retired, etc. Some of the rights we thought about included:

- not to be dismissed unfairly from your job
- not to be prosecuted unless you know what the charge against you is
- not to be inhumanly treated
- of children to state-funded education
- to benefits if you are not able to work
- to state-funded financial support on reaching the state retirement age.

These rights cover a wide area and which rights you regarded as fundamental will depend on your own viewpoint and experiences. Under human rights legislation, the following from our list would have been regarded as human rights:

- not to be prosecuted unless you know what the charge against you is
- not to be inhumanly treated
- of children to state-funded education.

These are regarded as fundamental and are protected by Articles 3 and 7, and Article 2 Protocol 1 of the European Convention on Human Rights (ECHR). Whilst the other rights we mentioned are not regarded as fundamental rights, they are legal rights.

Note: International Treaties such as the ECHR are drafted in a different way from domestic legislation. Treaties are divided up into Articles. Protocols are later additions to the Treaty.

2 The Universal Declaration of Human Rights (UDHR)

The UDHR was adopted by the UN General Assembly on 10 December 1948. After the end of WWII, the international community vowed never to allow atrocities like those of that conflict to happen again. The United Nations was founded and world leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. This road map became the Universal Declaration of Human Rights (it is a declaration and not a Treaty).

Box 2 Preamble to the UDHR

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

The UDHR was drafted around four pillars – dignity, liberty, equality and brotherhood. Each pillar represents an ideal considered essential to the enjoyment of an individual's life in their community. Protected human rights link back to these pillars:

- dignity – all people may exercise the same rights, to the same extent, and may not be stopped from exercising a right on the basis of any personal characteristic, such as gender, race, religion or sexuality
- liberty – to interact in society is reflected in the right to vote or assemble in groups
- equality – speaks to second-generation rights, such as the right to education or the right to work
- brotherhood – relates to community and solidarity.

Ishay, 2004, p. 359

Though these have been long-standing pillars, it does not mean that there is absolute agreement on these four pillars being the only encapsulation of rights. An argument often lodged against international human rights is that they reflect the ideals of capitalist, Western societies. Many cultures maintain different views of rights, particularly those that are traditionally not in a free-market economy or that are governed by non-democratic traditions or religious laws. In fact, social scientists have long pointed out that many cultures, such as the Mayans of Central America, do not actually have a word that translates into anything resembling rights (Pitarch et al. 2008).



THE UNIVERSAL DECLARATION of Human Rights

WHEREAS recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

WHEREAS disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

WHEREAS it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

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determined to promote social progress and better standards of life in larger freedom,

WHEREAS Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

WHEREAS a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge,

NOW THEREFORE THE GENERAL ASSEMBLY

PROCLAIMS this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

ARTICLE 1 — All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

ARTICLE 2 — 1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether this territory be an independent, trust or Non-Self-Governing territory, or under any other limitation of sovereignty.

ARTICLE 3 — Everyone has the right to life, liberty and the security of person.

ARTICLE 4 — No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

ARTICLE 5 — No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ARTICLE 6 — Everyone has the right to recognition everywhere as a person before the law.

ARTICLE 7 — All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

ARTICLE 8 — Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ARTICLE 9 — No one shall be subjected to arbitrary arrest, detention or exile.

ARTICLE 10 — Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

ARTICLE 11 — 1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

ARTICLE 12 — No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

ARTICLE 13 — 1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

ARTICLE 14 — 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

ARTICLE 15 — 1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

ARTICLE 16 — 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.

ARTICLE 17 — 1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

ARTICLE 18 — Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

ARTICLE 19 — Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

ARTICLE 20 — 1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

ARTICLE 21 — 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.

ARTICLE 22 — Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

ARTICLE 23 — 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration.

ation insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

ARTICLE 24 — Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

ARTICLE 25 — 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

ARTICLE 26 — 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

ARTICLE 27 — 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

ARTICLE 28 — Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

ARTICLE 29 — 1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

ARTICLE 30 — Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

UNITED NATIONS

Adopted by the United Nations General Assembly at its 183rd meeting, held in Paris on 10 December, 1948
Revised by U.N. Department of Public Information

Figure 2 The Universal Declaration of Human Rights

Should you wish to read the UDHR in more detail a PDF version is available via this link: [Universal Declaration of Human Rights](#).

The UDHR is one of the world's most translated documents yet it does not have the force of law, rather it sets aspirations.

3 The European Convention on Human Rights (ECHR)

The ECHR is an international Treaty that is limited to Europe. It contains rights that governments must honour and ensure that their domestic laws respect. The rights must be respected even in circumstances when this may lead to the interests of a minority being upheld against the views of a majority of the population.



Figure 3 The signature page of the ECHR

One point to note before progressing any further is that the media, students (and sometimes governments) confuse the organisations associated with the Council of Europe (which produced the ECHR, was founded in 1949 and which has 47 members) with the European Union (EU). They are in fact distinct and separate organisations with different aims and objectives. Unfortunately, some of the departments and bodies of the Council of Europe (which was set up to uphold human rights, democracy, rule of law in Europe and promote European culture) and EU have similar names, such as the Council of Europe or European Commission, and this can lead to confusion. This week covers the ECHR, and references to the Council, Commission or European Court will be to those relating to the ECHR.

3.1 The background

Few people now remember the immediate aftermath of WWII. Chaos existed in Europe and beyond with cities and infrastructure destroyed, failing economies, starvation, sickness and mass migration of displaced populations. Public disclosures of numerous cases of brutal, inhuman and tyrannical mistreatment of millions of ordinary civilians emerged. This mistreatment was at the instigation, or with the connivance or concurrence, of the state, by those in positions of power and those in government.

There was almost universal disgust and condemnation at the disclosures and a general recognition that such events must never be allowed to happen again. A number of countries came together and created the Council of Europe. This was set up to defend human rights, parliamentary democracy and the rule of law. The aim of the Council of Europe was to:

achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.



Figure 4 Council of Europe sign

Whilst there was initial reluctance for the creation of an international Treaty, it became generally accepted that this would be one of the most effective ways of achieving their aims. The UK played a leading role in drafting the terms of the Convention.

The Convention is unusual amongst international treaties as it contains enforcement mechanisms. The aim of these enforcement mechanisms was to ensure compliance with the ECHR. They included a court which was to adjudicate on disputes and determine appropriate remedies. The court was not designed as an appeal court. It is not able to overturn a judgment of a domestic court. It can award 'just satisfaction' where it feels it to be necessary. This can include the award of costs and modest damages (although for some applicants, success before the court is considered to be reparation enough). If the court finds that a state is in breach of the Convention, the state which has signed the treaty may be required to change its law in order to rectify the breach.

Many states were initially opposed to the establishment of a European Court of Human Rights (ECtHR). They did not want an international court judging their own domestic law. The UK was one of the countries that took this view. Therefore, to ensure that negotiations did not collapse, a compromise position was reached. States signing up to the ECHR could choose whether or not to allow their individual citizens the right to bring a complaint under the ECHR and whether they wished to submit to the jurisdiction of the court.

Despite reservations about a European human rights court, the UK was one of the founding members of the ECHR. The UK signed the Convention on 4 November 1950 and ratified it on 8 March 1951. The UK became bound by the Convention when it entered into force on 3 September 1953. As a result of the growing political divisions within Europe at the time, the UK Government regarded the development of human rights protections within Europe as an important part of its foreign policy. UK politicians felt that the UK itself had adequate protection of human rights through existing common law principles.

You should now watch the following video, produced by the ECtHR to explain its role and work. This explains the background to, and work of the ECtHR and the range of cases it hears. The video is just over 14 minutes long and you may wish to pause it at key points and reflect on its role.

View at: [youtube:EPWGdhgQlgk](https://www.youtube.com/watch?v=EPWGdhgQlgk)



Video 1 The European Court of Human Rights

The rights and fundamental freedoms within the ECHR are designed for the protection of individuals and the aim of the ECHR is to encourage peace and good relations between states.

3.2 The rights in the ECHR

The ECtHR seeks to give a practical and effective interpretation to ECHR rights. The purpose is to try to give an individual full enjoyment of the ECHR rights, in so far as this is possible. Limitations and qualifications to ECHR rights do, however, exist and can be used, for example, in times of national emergency.

The rights in the ECHR are expressed as broad principles which are potentially open to a wide range of interpretations and not all the rights in the ECHR are absolute. It is recognised that some rights may be limited where that is necessary to achieve an important objective. The precise objectives for which limitations are permitted are set out in each Article. They include things like protecting public health or safety, preventing crime and protecting the rights of others. For example, Article 5 of the ECHR is expressed in general terms: everyone has the right to liberty and security of the person. It goes on to say that no one shall be deprived of their liberty save in the following exceptions and in accordance with the law, and then provides a long list of exceptions to the general right. This does not mean that these rights are seen as less important, nor does it mean that it is enough simply to claim that an action falls within the exceptions provided by the ECHR. Those who infringe rights or try to limit them must also be able to prove that their actions are necessary according to the law, are pursuing a legitimate aim and are proportionate. You should now watch the following video which contains a short overview of the rights in the ECHR.

View at: [youtube:MOcmUQTgjCw](https://www.youtube.com/watch?v=MOcmUQTgjCw)



Video 2 Rights contained in the ECHR

Box 3 contains the headings to the respective rights and freedoms set out in the ECHR. It is necessary to look to the actual wording of each Article as set out in the ECHR to gain a clearer picture of what is encompassed within the particular right or freedom.

Box 3 Examples of the work of the ECtHR

Article	Summary of Article	Example
Article 2	the right to life	This did not originally prohibit the death penalty. The death penalty in times of peace was abolished by Article 1 of Protocol 6. Article 1 of Protocol 13 abolished the death penalty in time of war and provides an example of how the ECHR has responded to social and political change. In <i>Pretty v UK</i> [2002] 35 EHRR 1 141, which concerned a woman who was terminally ill and wanted to end her own life early before she was unable to and her suffering became too great, the ECtHR ruled that the right to life did not imply a corollary right to die, with the assistance of either a third party or a public authority.

Article 3	the prohibition of torture	Case law here has considered the use of hooding, deprivation of sleep, the use of prolonged assaults, deportation, and serious and prolonged mistreatment of children who were in local authority care.
Article 4	the prohibition of slavery and forced labour	The ECtHR has rarely considered this Article and no violation has ever been found. Cases which have been considered include individuals who have complained about the work they were required to do whilst they were in detention.
Article 5	the right to liberty and security	This has been an area where many cases have been considered. It covers matters such as bail pending trial, the review of life sentences and parole, and the detention of terrorists or suspected terrorists.
Article 6	the right to a fair trial	This is one of the fundamental principles of the ECHR as it relates to the fair administration of justice. Case law here has covered the meaning of a criminal charge, access to legal advice, evidence and procedural impartiality.
Article 7	the right not to be punished without law	This requires that punishment can only follow from proper proceedings.
Article 8	the right to respect for family and private life	Case law here has been wide ranging and has included the right to choice in sexual relations, press intrusion, prisoners' letters, police surveillance, the refusal of planning permission, noise pollution, adoption, and punishment of children.
Article 9	freedom of thought, conscience and religion	Case law here has covered limitations on the practising of religion in prison. This right does not include a right to be free from criticism.
Article 10	freedom of expression	Case law here has included injunctions against the printing of stories in newspapers, the seizure of film and pre-trial publicity.
Article 11	freedom of assembly and association	Case law here has generally involved union membership, closed shops and a ban on joining unions.
Article 12	the right to marry	The ECtHR has been reluctant to interfere with domestic laws that regulate marriage, although it has done so in cases involving same-sex couples, transsexuals and prisoners.

Article 13	the right to an effective remedy	The remedy of judicial review has been challenged under this Article. This Article was not incorporated by the HRA 1998.
Article 14	the prohibition of discrimination in relation to other Convention rights	This is only applicable to other ECHR rights and does not provide a general right not to be discriminated against.

Case law, in the form of the decisions made by the ECtHR, which sits in Strasbourg, further defines the application and scope of the Articles of the ECHR. It is not possible to simply think in terms of a breach of an Article. It is also necessary to examine the substantial body of case law (frequently referred to as ‘the Strasbourg jurisprudence’ or ‘the ECHR jurisprudence’) which has been built up over the years. To state the law in this area with any certainty, therefore, reference needs to be made to the wording of the Article in the ECHR, the case law of the ECtHR and the decisions of Scottish courts.

3.3 Balancing rights

Within the ideas of rights and fundamental freedoms is also the idea of responsibilities. It is the responsibility of all a state’s citizens to recognise the rights of others. This leads to the question, if everyone has a number of recognised rights, does this mean that everyone is entitled to enforce those rights? You will explore this in Activity 2.



Figure 5 Rights in the ECHR

Activity 2 Balancing rights

 (Allow 5 minutes)

Within the ECHR are the right to respect for family life (Article 8) and the right to freedom from inhuman or degrading treatment (Article 3). Take a few moments to think about these. What impact do you think these have for the rights of parents who wish to discipline their children?

Provide your answer...

Comment

Both the Scottish and European courts have considered the issues of balance between the right to respect for private and family life and the right to freedom from inhuman or degrading punishment. This involved balancing the rights of parents to discipline their children with the rights of the children not to have inhuman or degrading treatment inflicted upon them. The court decisions in a number of cases including *A v United Kingdom* (1999) 27 EHRR 611 have resulted in limitations being placed on parents.

Following the court hearings and changes in public attitudes, the Scottish government reviewed the position. The Criminal Justice (Scotland) Act 2003

clarified the position on physical punishment making it illegal to punish children by shaking, hitting on the head or using an implement.

Activity 2 demonstrates that there can be conflicts between different individuals' rights. Other examples include the powers of social workers to intervene in the lives of others against their will, in the interest of individual well-being in some extreme circumstances, for example taking a child into care. This action necessarily compromises one person's right to a private and family life, and interferes with that right.

The necessity to balance rights in certain circumstances is recognised in the ECHR. It recognises the limited nature of some rights and the need to balance them against the rights and freedoms of others. For example, the right to express views publicly may need to be balanced with another person's right to a private life. The rights of someone accused of a crime to question witnesses may need to be balanced against the rights of the victim and vulnerable witnesses, such as children. The ECHR also recognises that the system of respecting rights works best when there is a recognition that rights and responsibilities go together. If individuals recognise this and act responsibly towards others and the wider community, then a system of rights can work effectively.

4 The Human Rights Act 1998 (HRA 1998)

Before the HRA 1998, the rights enshrined in the ECHR were not directly enforceable in the Scottish courts or other courts in the UK. They were technically part of international law. Individuals wishing to seek protection from an alleged breach of the ECHR were required to exhaust all domestic remedies before petitioning the ECtHR in Strasbourg.

The HRA 1998 enables individuals to use UK domestic courts to challenge the government and its protection of ECHR rights. It does not change the ability of individuals to make claims against the UK in Strasbourg. It was hoped that enabling access would allow individuals to save time and money as the road to Strasbourg was typically very long and expensive. It was further argued that adjudication by UK courts would provide a more 'British' view of rights and how UK society understood rights.

The HRA 1998 applies to public bodies, these include parliaments, courts, government, local councils. What constitutes a public body is not defined in the Act and so is open to interpretation. Some private bodies who are carrying out 'public' functions have been found to be within the definition of public body, for example, private care homes with council-funded residents. Public bodies must act in a way which is compatible with the rights set out in the ECHR and listed in Schedule 1. Not all ECHR rights are listed in Schedule 1 (for example it excludes Article 13 which covers the right to an effective remedy).

The HRA 1998 impacts in a number of ways:

- all legislation must be interpreted so that it is compatible with ECHR rights
- the HRA 1998 makes it unlawful for a public body to act incompatibly with ECHR rights and allows for a case to be brought in the Scottish courts or tribunals if it does so
- the Scottish courts and tribunals (in fact all UK courts and tribunals) must take account of Convention rights in all cases that come before them.

The Scottish Parliament scrutinises proposed legislation for compliance with the main provisions of the ECHR before the legislation is passed. Compatibility with ECHR rights is seen as important and forms part of the legislative competence of the Scottish Parliament. If there is no compatibility, there is no competence and the judiciary can declare that the legislation is invalid.

Things differ for the UK Parliament. Section 19 of the HRA 1998 states that all new legislation must include a statement of compatibility with the rights set out in the ECHR. If it is not compatible, that incompatibility is recognised. In the case of the UK Parliament a declaration of incompatibility does not automatically invalidate the legislation. The courts do not have the ability to overturn the legislation. The courts have more limited power and cannot invalidate legislation, they can only refer it back to the UK Parliament.

Activity 3 The HRA 1998



(Allow 15 minutes)

The purpose of this activity is to provide you with an opportunity for reading an extract from the HRA 1998. The Act and its consequences have been widely reported and discussed. Here you will be looking at the source of those reports – the actual legislation.

Read the extracts of the Act below this activity, then summarise the provisions it contains in your own words.

Comment

The ability to read, explain and summarise an original source is a very important skill. When reports or summaries are made they may not always reflect the actual meaning or intention of the original. Reading original sources is a particularly important skill for lawyers, who have to implement laws or create rules to ensure that laws are complied with. An example of a summary of the provisions of the HRA 1998 contained in the extract could have been as follows:

The key provisions of the HRA 1998 are:

- Section 2: requiring courts and tribunals to take the cases decided under ECHR into account when deciding an issue which has arisen in connection with the rights contained within the ECHR.
- Section 3: requiring courts to interpret existing and future legislation in a way that is compatible with the rights contained in the ECHR.
- Section 4: giving the higher courts (for example the UK Supreme Court, the High Court of Justiciary or the Court of Session) the power to make a declaration of incompatibility and award a remedy where they decide that a statute is incompatible with the Articles contained in the ECHR. (*Note: there is an expectation that incompatible Acts will be amended through the legislative process.*)
- Section 6(1): making it unlawful for any public authority to act or fail to act in any way that is incompatible with the rights contained in the ECHR.
- Section 6(3): the term 'public authority' includes courts, tribunals, the police, immigration authorities and local and central government. This means that in addition to consulting relevant national law, public authorities need also to be aware of the rights set out in the ECHR.

Box 4a Extract from the HRA 1998

2 Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section “rules” means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

- (a) by ^{F1} . . . [^{F2}the Lord Chancellor or] the Secretary of State, in relation to any proceedings outside Scotland;
- (b) by the Secretary of State, in relation to proceedings in Scotland; or
- (c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—
 - (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) are in force.

Annotations:

Annotations are used to give authority for changes and other effects on the legislation you are viewing and to convey editorial information. They appear at the foot of the relevant provision or under the associated heading. Annotations are categorised by annotation type, such as F-notes for textual amendments and I-notes for commencement information (a full list can be found in the Editorial Practice Guide). Each annotation is identified by a sequential reference number. For F-notes, M-notes and X-notes, the number also appears in bold superscript at the relevant location in the text. All annotations contain links to the affecting legislation.

Amendments (Textual)

F1 Words in s. 2(3)(a) repealed (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(2)**

F2 Words in s. 2(3)(a) inserted (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), art. 8, **Sch. para. 3**

Modifications etc. (not altering text)

C1 S. 2(3)(a): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), **art. 3(2)** (with arts. 4, 5)

Box 4b Extract from the HRA 1998

3 Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Box 4c Extract from the HRA 1998

4 Declaration of incompatibility.

- (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
- (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
- (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
- (4) If the court is satisfied—
- (a) that the provision is incompatible with a Convention right, and
 - (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
- it may make a declaration of that incompatibility.
- (5) In this section “court” means—
- [^{F1} (a) the Supreme Court;]
 - (b) the Judicial Committee of the Privy Council;
 - (c) the [^{F2}Court Martial Appeal Court] ;
 - (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
 - (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.
 - [^{F3} (f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the [^{F4}Chancellor of the High Court] or a puisne judge of the High Court.]
- (6) A declaration under this section (“a declaration of incompatibility”)—
- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
 - (b) is not binding on the parties to the proceedings in which it is made.

Annotations:

Annotations are used to give authority for changes and other effects on the legislation you are viewing and to convey editorial information. They appear at the foot of the relevant provision or under the associated heading. Annotations are categorised by annotation type, such as F-notes for textual amendments and I-notes for commencement information (a full list can be found in the Editorial Practice Guide). Each annotation is identified by a sequential reference number. For F-notes, M-notes and X-notes, the number also appears in bold superscript at the relevant location in the text. All annotations contain links to the affecting legislation.

Amendments (Textual)

F1 S. 4(5)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(2)**; S.I. 2009/1604, **art. 2(d)**

F2 Words in s. 4(5)(c) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 16**

para. 156; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

F3 S. 4(5)(f) inserted (1.10.2007) by Mental Capacity Act 2005 (c. 9), ss. 67(1), 68(1)-(3), **Sch. 6 para. 43** (with ss. 27, 28, 29, 62); S.I. 2007/1897, **art. 2(1)(c)(d)**

F4 Words in s. 4(5)(f) substituted (1.10.2013) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 14 para. 5(5)**; S.I. 2013/2200, art. 3(g)

Box 4d Extract from the HRA 1998

5 Right of Crown to intervene.

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—

- (a) a Minister of the Crown (or a person nominated by him),
- (b) a member of the Scottish Executive,
- (c) a Northern Ireland Minister,
- (d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the [^{F1}Supreme Court] against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—

“criminal proceedings” includes all proceedings before the [^{F2}Court Martial Appeal Court]; and

“leave” means leave granted by the court making the declaration of incompatibility or by the [^{F3}Supreme Court]

Annotations:

Annotations are used to give authority for changes and other effects on the legislation you are viewing and to convey editorial information. They appear at the foot of the relevant provision or under the associated heading. Annotations are categorised by annotation type, such as F-notes for textual amendments and I-notes for commencement information (a full list can be found in the Editorial Practice Guide). Each annotation is identified by a sequential reference number. For F-notes, M-notes and X-notes, the number also appears in bold superscript at the relevant location in the text. All annotations contain links to the affecting legislation.

Amendments (Textual)

F1 Words in s. 5(4) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(3)**; S.I. 2009/1604, **art. 2(d)**

F2 Words in s. 5(5) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 16 para. 157**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

F3 Words in s. 5(5) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(3)**; S.I. 2009/1604, **art. 2(d)**

Box 4e Extract from the HRA 1998

6 Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) **F1**.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

Annotations:

Annotations are used to give authority for changes and other effects on the legislation you are viewing and to convey editorial information. They appear at the foot of the relevant provision or under the associated heading. Annotations are categorised by annotation type, such as F-notes for textual amendments and I-notes for commencement information (a full list can be found in the Editorial Practice Guide). Each annotation is identified by a sequential reference number. For F-notes, M-notes and X-notes, the number also appears in bold superscript at the relevant location in the text. All annotations contain links to the affecting legislation.

Amendments (Textual)

F1 S. 6(4) repealed (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 146, 148, Sch. 9 para. 66(4), **Sch. 18 Pt. 5**; S.I. 2009/1604, **art. 2(d)(f)**

Modifications etc. (not altering text)

- C1 S. 6 excluded (5.3.2015) by Infrastructure Act 2015 (c. 7), **ss. 8(3)(b)**, 57(1); S.I. 2015/481, reg. 2(a)
- C2 S. 6(1) applied (2.10.2000) by 1999 c. 33, **ss. 65(2)**, 170(4); S.I. 2000/2444, art. 2, **Sch. 1** (subject to transitional provisions in arts. 3, 4, Sch. 2)
- C3 S. 6(3)(b) modified (1.12.2008 with exception in art. 2(2) of commencing S.I.) by Health and Social Care Act 2008 (c. 14), **ss. 145(1)-(4)**, 170 (with s. 145(5)); S.I. 2008/2994, **art. 2(1)**
- C4 S. 6(3)(b) applied (1.4.2015) by Care Act 2014 (c. 23), **s. 73(2)(3)**127; S.I. 2015/993, art. 2(r) (with transitional provisions in S.I. 2015/995)

4.1 Your human rights

Research into the use of the HRA 1998 in Scotland suggests that basic human rights points have been raised in only a tiny fraction of cases brought before the courts. The decisions in these cases have had an important but moderate impact on the courts, public policy, private practice and the legal system. The fair trial provisions in Article 6 have been raised in a number of criminal justice cases and have led to a number of changes, for example, the statutory abolition of temporary sheriffs, the provision of free legal representation to children appearing before a children's panel. The Scottish Government has also pre-empted a number of potential challenges through legislative reform.

You should now watch the following video produced by the Equality and Human Rights Commission, the national equality body. The Commission is a public body established by the Equality Act 2006. It is independent of government and, like the Scottish Human Rights Commission, has been awarded an 'A' status as a National Human Rights Institution by the UN.

View at: [youtube:VO7oS8PqkJY](https://www.youtube.com/watch?v=VO7oS8PqkJY)



Video 3 Your human rights

Box 5 The Equality and Human Rights Commission

Our job is to help make Britain fairer. We do this by safeguarding and enforcing the laws that protect people's rights to fairness, dignity and respect.

We aim to be an expert and authoritative organisation that is a centre of excellence for evidence, analysis and equality and human rights law. We also aspire to be an essential point of contact for policy makers, public bodies and business.

We use our unique powers to challenge discrimination, promote equality of opportunity and protect human rights. We work with other organisations and individuals to achieve our aims, but are ready to take tough action against those who abuse the rights of others.

Our vision

We live in a country with a long history of upholding people's rights, valuing diversity and challenging intolerance. The Commission seeks to maintain and strengthen this heritage,

while identifying and tackling areas where there is still unfair discrimination or where human rights are not being respected.

From the The Equality and Human Rights Commission website May 31 2017

You should now listen to this audio which explores common human rights myths.

Audio content is not available in this format.



Audio 1 Common human rights myths

5 Human rights in Scotland: a leading light

The Scottish Government has a clear commitment to human rights which underpins the agenda for dignity, fairness and equality within Scottish society. Box 6 outlines this commitment.

Box 6 Scottish Government statement on human rights in Scotland

The Scottish Government is committed to creating a modern, inclusive Scotland which protects, respects and realises internationally recognised human rights. We strongly believe in and subscribe to the principles laid out in the European Convention on Human Rights.

Human rights are firmly entrenched at the heart of Scotland's existing constitutional, legal and institutional structures. Section 57(1) of the Scotland Act 1998 enshrines the ECHR as a fundamental standard for the actions of government and all Scottish legislation. The HRA 1998 ensures that every other public authority in Scotland is also obliged to act compatibly with the Convention.

Scotland's devolved institutions have a key role in implementing and upholding human rights standards. In those areas where the Scottish Government has competence, Scotland takes a distinctive approach, in keeping with the importance we have long attached to human dignity, equality and fairness and the pursuit of social justice.

The National Action Plan for Human Rights (SNAP) launched on International Human Rights Day in 10 December 2013 is a clear demonstration of this commitment.

SNAP was the first national action plan for human rights in any part of the UK. It considered experiences of countries all over the world and received guidance from the UN and the Council of Europe. It was an evidence-based action plan setting out outcomes and priorities, initially for the period 2013–2017. During that time SNAP coordinated action by a wide range of public bodies and voluntary organisations. Work is now underway on Scotland's second National Action Plan for Human Rights, SNAP 2.



Figure 6 The logo of the Scottish National Action Plan

The commitment to respecting and developing human rights as a cornerstone of the culture of Scotland (not just the legal culture) is clear as Parliament, government, other public bodies, charities and the private sector all work towards achieving the vision of a

Scotland where everyone can live with human dignity, where social justice, equality and empowerment are the hallmarks of our society.

You should now watch the following video, which explores the national action plan for Scotland a little further.

View at: [youtube:aDbHUFtb4Q](https://www.youtube.com/watch?v=aDbHUFtb4Q)



Video 4 Scottish National Action Plan for Human Rights

Should you wish to learn more about SNAP, or read the plans for SNAP and SNAP 2, information can be found at <http://www.snaprights.info/>

6 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 6 quiz](#)

Open the quiz in a new window or tab and then come back here when you've finished.

7 Summary

Human rights are complicated because every individual has a different view about what rights are and how they should be protected. These views are influenced by upbringing, culture, religion, friends and family and other factors. The most difficult aspect of freedom has always been that the concept requires us to recognise that other people have ideas that may not align with our own. The point of universal human rights is that at their core they can be given context no matter the culture.

All human rights are about ensuring the dignity of every individual. The relationship between the HRA 1998 and the ECHR demonstrates how two legal systems influence one another as rights are continuously defined and redefined.

Understanding how rights are enforced at the European and UK levels gives a broader picture about rights protection in the UK. While every individual may not agree with way in which rights are extended, this is the trade-off of rights. One may not pick and choose who is protected by human rights. They are shared by all individuals, no matter who they are or where they live.

After studying this week you should:

- have an understanding of what human rights are
- be able to explain the framework for human rights in Scotland
- understand the complexity surrounding human rights and common myths about them.

Week 7: Children, capacity and the law

Introduction

In this week you consider how the law relates to children. You explore the special status of children in law and look at how this affects everyday situations. You learn about what powers children have under the law and how these may be limited.

After studying this week you should be able to:

- explain the special status children have in law
- understand how the law is used to determine children's capacity
- understand the complexities in this area.

1 Children and the law

Under the law, children are treated differently from adults. The law recognises that children are not always capable of making the decisions necessary to regulate how they live their lives. It accepts that they have different priorities and needs from adults. On occasions their vulnerability means that they require a special level of protection or more support than adults. You explore, as we consider various issues, how the law has recently developed to reflect changing attitudes towards children and the further recognition of their sometimes complex needs. There are various legal provisions in place to address this and we will examine these in later sections.



Figure 1Children images

Before you start considering children and the law you need to be clear about how the word 'child' is defined.

Activity 1 Definition of a child

 (Allow 5 minutes)

What do you think is the definition of a child? Take a couple of minutes to think about it. When does a child become a child? Is it before or after birth? Is a child a person under a certain age? If so, what age? Or is there another way of defining a child? Is

a child a person of particular mental ability? Could such a definition as this include individuals of any age who have a certain degree of learning difficulty?

Provide your answer...

Comment

You may have reached a number of definitions and even looked up the word 'child' in a dictionary. There are many definitions of the word 'child', but it may surprise you to know that there is no single definition in Scots law as to what defines a child. As we will see, one can sometimes be a child for one purpose and not for others. However, the definition of child is always related to age and not to a person's mental ability. Individuals, who, due to a disability, retain the limitations of power of children, can legally be adults.

In Scots law a person first becomes a child when they are born. Although we may refer to an unborn child, the law does not recognise an unborn individual as being a child. Unborn children do not have the same rights and protection as children, for example, they do not have the right to be a party to legal proceedings (the legal term for which is called 'standing') prior to their birth. This matter has not been considered widely by the Scottish courts but featured in the case of *Kelly v Kelly* [1997] SC 285. Mr Kelly went to court in an attempt to prevent his wife from terminating a pregnancy. The Court of Session considered that if the father of a foetus was to have the right to prevent the pregnancy being terminated, this could only be if he was acting on behalf of the foetus. It held that a foetus was, in law, part of its mother's body and not an individual with actionable rights. On that basis, Mr Kelly's application was unsuccessful.

So, a child legally becomes such when physically separated from its mother at birth. After this, whether or not a person is a child for any particular purpose will depend on what age they are.

What do we mean by age? This may seem a silly question but think about it for a moment. When we talk about someone being, say, 15, what exactly do we mean by that?

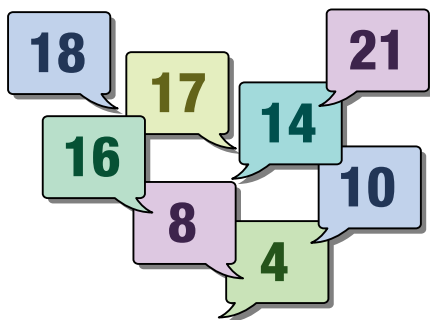


Figure 2Speech bubble image

Scots common law provided that an individual attained a certain age at the moment of that anniversary of their birth. So an individual born at 2.15 p.m. on 1 January 1980 legally became aged 10 at 2.15 p.m. on 1 January 1990. They would be aged 9 until 2.14 p.m. However, the Age of Legal Capacity (Scotland) Act 1991 changed the position for birthdays after it came into force on 25 September of that year. After that date a person attains a particular age at the beginning of their relevant birthday. The time of birth is no

longer relevant. However, it is important to remember that the new provisions only apply to birthdays after 25 September 1991. Calculation of age prior to that date is still according to time of birth. The Act also considers the position of birthdays falling on 29 February. Age is then calculated from 1 March, other than in leap years.

You now considering what powers a child has in relation to various aspects of the law. This is referred to as capacity, the ability to enter into a legal transaction.

2 Capacity

What power do children have to interact in legal situations and what standing do they have to carry out their own legal transactions? At first you may think that is not particularly important. After all, how often does anyone actually enter into a proper legal transaction? Take a minute to reflect on your own life. Have you entered into a legal transaction in the last year? Perhaps in the last week? Have you, or will you do so, today?

For most of us the answer to all these is likely to be yes. Legal transactions are not only entered into for major matters such as buying a house, buying a car or getting married. We all make transactions regularly as part of living our life in society.

For example, did you buy a coffee when you went out this morning? If so, the purchase and sale of the coffee constituted a contract – a legal transaction. Have you been to work? If you are employed, you are discharging your obligations under a contract every time you do your job – another legal transaction. Did you withdraw cash from a cash machine? This is also a legal transaction – exercise of a term of the contract you have with your bank to hold your money. Did you use a debit or credit card? Again, a legal transaction – exercise of a term of the contract you have with your bank to hold your money. Did you give anyone a gift? Did you visit the dentist and have a filling? Did you buy goods at the supermarket? Did you use your mobile phone? These are all examples of legal transactions.

We all enter into many transactions every day which have legal implications.

2.1 Historical position

Roman law traditionally reflected the fact that young children lacked the power to carry out legal transactions and that a child's ability to do so developed with age. There was therefore a distinction between the capacity of younger children, who were referred to as pupils, and older ones, who were referred to as minors. A pupil was a girl under the age of 12 or a boy under the age of 14. Pupils lacked legal capacity and any transaction involving them had to be carried out on their behalf. After pupillarity a person would progress to minority; that is, they became a minor until reaching majority, which was when they attained full adult power to transact. Minors did have legal capacity but often required the consent of their curator (a guardian who was usually a parent).

Until 1991, Scots law followed the Roman example. Boys and girls were pupils until 14 and 12 respectively and then minors until majority, which was the age of 21 until 1969 when it was lowered to 18. Pupils effectively had no capacity in law, although this was subject to some exceptions such as the ability to buy necessities. A minor on the other hand had legal capacity, but if they had a curator they normally required the curator's consent to transact. Perhaps surprisingly, minors all had the power to marry until 1929 when the Age of Marriage Act 1929 raised the age to 16 for both sexes.

The absolute capacity to enter into a marriage at the age of 16 was different from the position in England and Wales where parental consent was – and still is – required in order for a young person aged between 16 and 18 to marry. A result of this was the famous practice of young people in England who sought to marry against their parents' wishes, eloping to Scotland where they could marry freely. The border town of Gretna Green was famed as a frequent destination for such individuals.



Figure 3 Images of the Gretna Green marriage anvil

2.2 The present situation

The position was radically altered in 1991 with the passing of the Age of Legal Capacity (Scotland) Act 1991.

Box 1 Section 1 Age of Legal Capacity (Scotland) Act 1991

1 Age of legal capacity.

(1) As from the commencement of this Act—

- (a) a person under the age of 16 years shall, subject to Section 2 below, have no legal capacity to enter into any transaction;
- (b) a person of or over the age of 16 years shall have legal capacity to enter into any transaction.

(2) Subject to Section 8 below, any reference in any enactment to a pupil (other than in the context of education or training) or to a person under legal disability or incapacity by reason of nonage shall, insofar as it relates to any time after the commencement of this Act, be construed as a reference to a person under the age of 16 years.

The consequences of Section 1 are that anyone under the age of 16 has no legal capacity to enter into any transaction. Persons of or over the age of 16 years have legal capacity to enter into any transaction. The Act later defines a transaction as a transaction having legal effect and specifically includes certain examples, such as unilateral transactions (transactions where only one party benefits, for example the giving of a gift) and giving consent which has legal effect.

There are, however, some exceptions to this:

- the specific power of a person over the age of 12 to make a will
- the right for a person over the age of 12 to consent to the making of an adoption order
- perhaps most widely known, is the specific power of a person under the age of 16 to consent to medical or dental treatment (including surgery) if the doctor or dentist attending them is of the opinion that the patient can understand the nature of the treatment and the possible consequences.

In addition to the specific exceptions, there is a general exemption, the power of a person under the age of 16 to enter into any transaction of a kind commonly entered into by persons of their age and circumstances, provided the terms are not unreasonable. A transaction can, in certain circumstances, be a valid one.

This general exception is very important. Consider the extent to which legal transactions are part of everyday life in our society. Consider also how early in life we start functioning in this way. Children of a young age often have limited amounts of money to spend, for example on sweets. It could certainly be argued that children of six, for instance, may commonly transact to buy sweets. What is covered by this general exception will of course depend on the circumstances. It is probably not common for a child of six to transact the payment of a bus fare in return for a bus ride. However, the same cannot be said of a 12-year-old.

It is important to note that a transaction entered into by a person under the age of 16, which is not covered by one of the exceptions in the Act, is void. This means that in law there has been no transaction. Such a transaction is not voidable, i.e. capable of being reduced, in effect cancelled by the court. It has no legal effect at all.

As we have seen, the Age of Legal Capacity (Scotland) Act 1991 applies to individuals under the age of 16. So does that mean that any person over the age 16 has full capacity? The answer is yes, but there is an important point to remember. Any transaction entered into by a person aged between 16 and 18 may be reduced by the court before their twenty-first birthday if it is deemed to be prejudicial to them.

Box 2 Section 3(2) Age of Legal Capacity (Scotland) Act 1991 - definition of a prejudicial transaction

3 Setting aside of transactions.

(1) A person under the age of 21 years ("the applicant") may make application to the court to set aside a transaction which he entered into while he was of or over the age of 16 years but under the age of 18 years and which is a prejudicial transaction.

(2) In this Section "prejudicial transaction" means a transaction which—

- (a) an adult, exercising reasonable prudence, would not have entered into in the circumstances of the applicant at the time of entering into the transaction, and
- (b) has caused or is likely to cause substantial prejudice to the applicant.

Activity 2 Legal transactions and children

 (Allow 15 minutes)

Consider the following scenarios. Which do you think describe valid legal transactions which have legal effect and which do not?

1 Andrew is six years old and has been given £1 by his grandfather. On his way to school the next day he goes into the local shop and spends half of the money on crisps and the other half on a bar of chocolate. That evening he gives the chocolate to his mother for her birthday.

2 Ben is nine years old and has inherited £1000 pounds. He spends £850 of it on a new television and DVD player for his bedroom.

3 Claire is 13. She goes with her friends to a burger restaurant where she buys a meal and a drink. Her share of the bill is £30. Claire thinks this is very expensive and a lot more than she was expecting; despite this, she pays it.

4 Ali is 12. He has toothache and goes to the dentist. He asks the dentist to extract the painful tooth. The dentist extracts his painful tooth.

5 Elizabeth is 15. She has inherited £1000 from her grandmother. Now she has some money, she makes a will leaving half of it to her favourite charity.

6 Freddie is also 15. He has inherited a flat from his great-uncle in Glasgow. He grants a lease of the flat to his elder brother who is a student at Glasgow University. The lease states that there shall be no rent payable by his brother to Freddie.

Provide your answer...

Comment

1 There are two possible transactions here, the purchase of the crisps and chocolate and the gift Andrew has made to his mother. Although he is only six, the nature of the goods he has bought and the amount they cost mean these are both probably transactions a 6-year-old child in Andrew's circumstances would enter into. The terms are not unreasonable and as such these are valid transactions.

2 By the time a child is the age of nine, the value of goods involved in a purchase will often be more than that involved in a purchase by a 6-year-old. However, 9-year-olds do not usually make large purchases such as televisions. We do not know whether the price paid was reasonable or not, but even so it is unlikely this could be a transaction commonly entered into by persons of Ben's age. As such, there is no valid transaction here.

3 Buying a burger whilst with friends is certainly a transaction commonly entered into by 13-year-old girls. However, we are told that Claire's share of the bill is £30. Assuming Claire is correct in her view that this is not reasonable, the terms of the transaction will not be reasonable; as such, it would be void.

4 The Act specifically includes the giving of consent as a transaction and states that it is valid if in the opinion of the dentist the person understands the nature of the treatment and any possible consequences. Therefore the consent is valid provided that Ali's dentist has formed the view that Ali has this understanding.

5 The Act specifically states that testating (making a will) is a transaction. It also provides that a person over the age of 12 has the power to do so. Therefore this is a valid transaction.

6 There are two important points here. First of all, is this transaction commonly entered into by persons of Freddie's age and in his circumstances? It is clear that most 15-year-olds do not lease property – even those who own some – and as such there will be no transaction. Second, even if there were a transaction, we would have to consider whether the terms were reasonable. We are told Freddie's brother is not to pay rent under the lease. That being the case it is very unlikely that the terms of the lease would be reasonable. There is therefore no valid transaction.

2.3 Capacity and the courts

One important consideration when looking at capacity is the age at which a child acquires the capacity to commit a criminal offence. This is often referred to as the age of criminal responsibility. Until recently in Scotland at the age of eight years, a child was deemed to be responsible for their criminal actions. They could not however be formally prosecuted under the Criminal Justice and Licensing (Scotland) Act 2010 until they reached the age of 12 (but not for any offence committed prior to reaching that age). Growing concerns were expressed over the age of eight, in particular in relation to the rights of children and the strategy for Scotland to be seen as leading the way in areas such as human rights, equality and social justice. These concerns resulted in change. Box 3 outlines the Scottish Government's reasons for the change, which were published on 1 December 2016.

Box 3 Changing the age of criminal responsibility

Minimum age of criminal responsibility

Move to increase age from eight to 12 years old.

The minimum age of criminal responsibility in Scotland is to be increased to 12, under plans set out by the Minister for Childcare & Early Years.

At eight years old, Scotland currently has the lowest minimum age of criminal responsibility in Europe and this move will bring the country in line with UN and international standards. The minimum age in England and Wales is 10.

The increase will include safeguards to allow the police to deal with and investigate the most serious and exceptional offences involving under 12s.

Earlier this year, a Scottish Government consultation found 95% of respondents supported an increase to 12 or above. Mark McDonald today announced plans for legislation that would raise the age in a statement to Parliament.

He said:

“The case for change is clear and compelling. Having the lowest minimum age of criminal responsibility in Europe does not match with our progressive approach to youth justice and ambitions to give children the best start in life.

“In 2010 we raised the age of criminal prosecution to 12 – meaning no one under the age of 12 will be prosecuted or sentenced in the criminal courts and are instead dealt with through the Children’s Hearing System.

“Raising the age of criminal responsibility will mean people no longer face potentially damaging and life-altering consequences, such as a criminal record, for events that took place when they were a young child.

“I recognise that in exceptional cases appropriate safeguards are needed. Therefore we will ensure police powers to investigate harmful behaviour by under 12s, while there will be risk management and monitoring measures for those who need it.”

Background

The intention is to bring forward a bill, with the change implemented in time for Scotland’s Year of Young People in 2018.

A consultation exercise took place from March to June with 95% supporting an increase to 12 or above. Respondents included the police, prosecutors, victims groups and Who Cares? Scotland. The consultation analysis published today: <http://www.gov.scot/Publications/2016/12/9972>

Further engagement events with more than 200 children and young people, including victims, took place over June and July also found support for the increase.

The decision to raise the age was informed by the Minimum Age of Criminal Responsibility Advisory Group, which included those working with children and with victims, as well as the Police and Crown Office. It reported in March and a key recommendation was to raise the minimum age to 12, accompanied by safeguards: <http://www.gov.scot/Publications/2016/03/3627>

The UN Committee on the Rights of the Child has stated that setting the age of criminal responsibility below 12 is considered ‘not to be internationally acceptable’: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

From the Scottish Government website, 1 December 2016

In 2015 amendments to raise the age of criminal responsibility were attempted at both Stage 2 and Stage 3 of the Criminal Justice (Scotland) Bill (now the 2016 Act) but failed. However, at Stage 2, the Cabinet Secretary for Justice made a commitment to establish an expert Advisory Group to consider the issue. An Advisory Group on the Minimum Age of Criminal Responsibility was set up in autumn 2015 and a report published in 2016 which recommended raising the age of criminal responsibility to 12.

In 2016 UK was examined by the United Nations Committee on the Rights of the Child which expressed concerns about the age of criminal responsibility and called for the age to be raised.

The Age of Criminal Responsibility (Scotland) Act Bill was presented to the Scottish Parliament in March 2018. The main purpose of the Bill was to raise the age of criminal responsibility from 8 to 12 and in doing so align it with the minimum age for criminal prosecution.

The Bill was designed to reflect Scotland's progressive commitment to international human rights standards and to ensure that children were not stigmatised by being criminalised at a young age or disadvantaged by having criminal convictions at an early age which then need to be disclosed when they became adults. An age of criminal responsibility of 8 was also contrary to the international reputation and aspirations of Scotland. The Children's Hearings System in Scotland is unique and internationally recognised as providing a child-centred approach. The Scottish Government is also committed to a policy of 'Getting It Right For Every Child'.

In May 2019 the Bill was passed unanimously by the Scottish Parliament. It received Royal Assent on 11 June 2019.

Once implemented, the Act will raise the age of criminal responsibility in Scotland from 8 to 12. Additionally, it will provide certain safeguards to ensure that harmful behaviour by children under 12 can be responded appropriately and with the well-being of a child being a primary consideration.

3 Employment of a child

One transaction of particular interest in relation to children is that of employment. Applying the criteria already discussed, an individual would only be able to enter into a contract of employment if it fell within the definition of a transaction which would commonly be entered into by persons of the same age and in the same circumstances. This is still the case, but in addition there are particular provisions relating to the employment of children. The legislation covering the employment of children is the Children and Young Persons (Scotland) Act 1937. The provisions within the Act apply not simply to individuals under the age of 16, as would be consistent with the Age of Legal Capacity (Scotland) Act 1991, but also to those under school leaving age.

Section 28 of the Children and Young Persons (Scotland) Act 1937 as amended by The Children (Protection at work) Regulations 1998 provides that children may not be employed under the age of 13. There can be an exception to this: local authorities may make by-laws that permit parents or guardians to employ children under the age of 14 in light work. Children between 13 and 14 may only be employed in light work specified by their local authority. This generally includes activities such as delivering newspapers. Over the age of 14 the employment options for children are expanded but children can still only be engaged in light work. Examples of light work provided in the Act are:

- agricultural or horticultural work
- delivery of newspapers, journals, etc.
- shop work, including shelf stacking
- work in hairdressing salons
- office work
- car washing by hand in a private residential setting
- work in a cafe or restaurant
- work in riding stables
- domestic work in hotels and other establishments offering accommodation.

Children may not be employed before 7 a.m. or after 7 p.m. on any day. They are also restricted to working two hours a day on days their school is open and on Sunday. On other days, children under the age of 15 are restricted to five hours a day and a total of 25 hours a week. Once over 15 years old, the limits rise to 8 hours a day and 36 hours a week. In addition to these restrictions, the Act also allows local authorities to make by-laws which prohibit children from being employed in specific occupations. These typically include occupations and places of work such as:

- cinemas, theatres, discotheques, dance halls or nightclubs, except in connection with a children's performance
- selling or delivering alcohol, except in sealed containers
- delivering milk
- delivering fuel oils
- a commercial kitchen
- collecting or sorting refuse
- any work above three metres from ground (or floor) level
- any work where they may be exposed to physical, biological or chemical agents

- collecting money or selling/canvassing door to door, unless supervised by an adult
- work involving exposure to adult material
- telephone sales
- a slaughterhouse
- an attendant or assistant in a fairground or amusement arcade
- the personal care of residents in a residential care home unless supervised by an adult.

Local authorities are further able to regulate other matters such as intervals for meals and rest. They can also require children to be in possession of a work permit issued by the authority once it is satisfied that the nature of the work to be undertaken is appropriate and the child's health and welfare is not likely to be at risk. Although these vary, most councils in Scotland have such bylaws. It is important to remember that a child need not be paid to be in employment in order to come within the terms of the Act.

Activity 3 Children and employment

 (Allow 10 minutes)

Consider the following scenarios. Do you think the child has been lawfully employed?

- 1 Andrew is 12. He is employed by his father to weed the garden.
- 2 Brenda is 13. She has a paper round from her local shop. She starts work at 6.30 a.m. every day and finishes at 7.45 a.m.
- 3 Carol is 15. During the school holidays she is employed stacking shelves in her local supermarket from 9 a.m. until 4 p.m. with a break of an hour for lunch.
- 4 Dylan is also 15. He also works in a supermarket during the holidays but he is employed doing four 12-hour shifts from 10 a.m. to 10 p.m. with an hour's break.
- 5 Eric is over school-leaving age. He has a milk round which he does every morning from 6.30 a.m. until 8.30 a.m.

Provide your answer...

Comment

1 Andrew is not aged 13 yet so generally he cannot be employed. However, his local authority has the power to make by-laws permitting children under the age of 13 to be employed in light work by their parents. If that is the case, Andrew's employment is lawful.

2 We are told Brenda is 13 and therefore she may be employed. What she may do depends on what is specified by her local authority, but delivery of papers is usually permitted for 13-year-olds. However, no child may be employed before 7.00 a.m. and therefore Brenda is being employed illegally.

3 Carol is over the age of 14. It is likely her local authority permits employment of this type. We are told she is working during the school holidays and as such she can

work up to eight hours a day with a maximum of 36 hours a week. Carol is working within these parameters and thus her employment is lawful.

4 Dylan is also able to work in a supermarket during the school holidays. However, we are told he is working 11 hours at a time which is more than the permitted eight hours. We are also told he has exceeded the permitted 35 hours a week. As such, we can conclude that Dylan's employment is not lawful.

5 Although Eric is working in an occupation which may be prohibited by the local authority he is over the school leaving age. As such, his employment is not contrary to the terms of the Act.

There are some areas, such as babysitting, where there is no law on how old someone has to be. Children under the age of 13 are also able to take part in activities such as sport, advertising, modelling, films, television or theatre productions if local authority child performance licensing rules are followed. A young apprenticeship scheme has also been introduced for 14- to 16-year-olds.

4 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 7 quiz](#)

Open the quiz in a new window or tab and then come back here when you've finished.

5 Summary

You have considered the special status of children in law and explored how the law is used to determine capacity and responsibility. You learnt about the powers children have under the law and how these are limited by considering the employment of children. Finally you considered the complexities in this area and anomalies that exist.

After studying this week you should be able to:

- explain the special status children have in law
- understand how the law is used to determine children's capacity
- understand the complexities in this area.

Week 8: Legal skills

Introduction

In this week you explore a number of legal skills including legal writing and consider the role of justice.

After studying this week you should:

- understand the importance of problem-solving and good written skills
- be able to explain the complexities surrounding law and justice
- be able to explain examples of the role of law in society.

1 Reflections on law

Parliamentary bodies create, codify, consolidate and amend laws. This is not the only way in which laws develop. Courts have a role in interpreting statutes according to legal principles, and their decisions (which are referred to as case law) must be taken into account before we can confidently state that a particular position is the law. Court decisions are also subject to appeal and review, so the law does not remain static. The fact that laws are not fixed can be frustrating for students and others who are seeking certainty and firm guidelines to underpin their practice. Another aspect of law which can also strike students as strange when they first study is that the law often fails to provide ready solutions to the dilemmas. It is not black and white and there are many grey areas. This dynamic quality of law, however, is its strength. It can change to reflect the needs of the society in which it operates, remaining relevant and current.

Law is not just a series of commands that dictate certain outcomes and impose obligations. It is also enabling and empowering, providing options for decision-makers to exercise choice. This aspect of law is particularly relevant in professional settings – for example, police officers, social workers, doctors, nurses – where roles are characterised by the need to exercise professional discretion. Although policies and procedures may set the parameters within which choice is exercised, it is often individual workers who make the decision about which legal option to take. Their choice will be influenced by a range of factors, including their knowledge and understanding, their experience of similar situations, the viability of available options, and their values.

Activity 1 Thinking about law



(Allow 10 minutes)

Take a few minutes to think what you have learnt about law on this course. What key points will you remember? At the start of the course you were asked to think about your perceptions of law. Have these changed or been reinforced?

Provide your answer...

Comment

Each answer to this activity will differ. The purpose of this activity was to provide a point at which you look back and reflect on your studies. Providing an opportunity to think about the knowledge you have gained and how, or whether, this has impacted on your perceptions of law.

The rest of this week provides an opportunity to develop your knowledge using some basic legal skills.

2 Legal skills

Legal skills are central to the study and practise of law. These include problem-solving and the ability to communicate. This section considers some of the skills you have encountered in your studies on this course and provides an opportunity to practice some of them. Good basic skills, such as an ability to solve problems and write clearly, are transferable skills which can be useful in all aspects of life.

2.1 Problem-solving

Being able to solve problems is an important skill. Problem-style questions require learners to identify and explain the correct legal principles and to use their reasoning skills to apply the law to facts of the problem-style question. That is a skill that needs to be practised and Activities 2 and 3 provide an opportunity to do this.

Problem-style questions invariably present a hypothetical set of facts and involve one or more legal issues and are often based on existing case law. When approaching a problem-style question you should:

1. read the question carefully
2. read the law carefully
3. analyse the facts you have been given
4. apply the law to the facts you have been given
5. organise your answer carefully.

Problem-solving is important in law as one of the ways in which law is used is to resolve problems. Activity 2 asks you to read the law: Article 6 of the European Convention on Human Rights (ECHR). Activity 3 then asks you to apply that knowledge to reach a conclusion.

Box 1 Article 6 ECHR

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Activity 2 The right to a fair trial: Article 6 ECHR

 (Allow 15 minutes)

To complete this activity you will need to carefully read Article 6 of the ECHR in Box 1 above. Once you have read Article 6 and familiarised yourself with the rights it contains, answer the questions that follow.

Questions

- a. What rights are outlined by Article 6(1)?
- b. What does Article 6(1) say about judgment?
- c. What is the presumption of innocence?
- d. What minimum rights are contained in Article 6(3)?

Provide your answer...

Comment

The answers we gave to the questions were as follows.

Question a.

In any civil or criminal matter everyone is entitled to a fair and public hearing. The hearing must take place within a reasonable timescale. The hearing must be before a court or tribunal which has been properly created and is independent and impartial. (I also noted that 'reasonable time' is not defined, nor are the words 'independent' and 'impartial'.)

Question b.

The starting point is that the judgment of the court or tribunal should be given publicly. In certain circumstances, however, the press and public may be excluded. The list of circumstances ranged from public order, in the interest of morals, national security, in the interests of young offenders, and for the protection of private life, where it would be prejudicial to the interests of justice.

Question c.

The presumption of innocence means that until someone is found guilty according to the law they are presumed innocent. There was no definition of 'according to the law'.

Question d.

The minimum rights are to:

- be informed promptly of the charge they face in a language they understand
- be informed of the nature of the charge and the circumstances leading to the charge
- have adequate time to prepare a defence
- provide a defence, either in person, through legal assistance of their choosing, or with the help of free legal assistance (which is provided when the interest of justice requires legal representation)
- examine witnesses (both for and against them)
- ensure all witnesses are to be treated in the same way
- have an interpreter if they cannot speak or understand the language of the court.

You should now attempt Activity 3.

Activity 3 What amounts to a fair trial?

 (Allow 15 minutes)

Using the knowledge gained from Activity 2, read each of the scenarios that follow. Based on your knowledge of Article 6, decide in each scenario whether there has been a breach of that article.

- a. Ben is found guilty of theft. He complains that the judge frequently interrupted, both when he was giving evidence and when his defence advocate was questioning witnesses. The court record shows that there were numerous interruptions. The case goes to appeal. Is Ben's conviction unsafe?
- b. A government minister drafts some legislation. A few years later the minister becomes a judge and hears a case which involves discussion of the legislation they drafted. Should they hear the case?
- c. Melanie brings a case against her employer to an employment appeal tribunal (EAT). She finds out that the advocate representing her employer also sits as a part-time chair of an EAT. She discovers that in their role as chair of the EAT the advocate had previously worked with the lay members of the tribunal which was hearing her case. She is concerned that the lay members may be biased when hearing her case.

Comment

Each of the scenarios was based on facts considered by the courts. Their decisions were as follows:

- a. The facts are based on *CG v UK* [2002] 34 EHRR 34. The case was heard by the European Court of Human Rights (ECtHR). The ECtHR took account of the appeal and made a careful examination of the case. It found that there were interruptions; some of these were due to misunderstandings but they had not interrupted the flow or development of the defence case. The ECtHR held by a

majority that Article 6 had not been breached. In our scenario Ben's conviction would not be unsafe.

- b. The facts here are based on *Davidson v Scottish Ministers* [2004] UKHRR 1079. The case came before the House of Lords. Here Lord Hardie had been a government minister. As part of his role he helped draft and promote a piece of legislation. When he subsequently became a judge he was required to rule on the effect of the legislation he had drafted. It was held that he should not hear the case because of the risk of bias. There were concerns that he may subconsciously try to give a result which would not undermine the assurances he had given when promoting the legislation. The court made it clear that this cast no aspersions on Lord Hardie's judicial integrity. In our scenario the judge should not hear the case.
- c. The facts are based on similar facts in *Lawal v Northern Spirit* [2003] UKHL 35, whereby an advocate who had returned to his own practice having been chair of an EAT found himself appearing as an advocate before lay members of an EAT, with whom he had worked previously as chair of an EAT. An objection was made. The matter was considered by the House of Lords. They held that lay members would look to the chair for guidance on the law and could be expected to develop a close relationship of trust and confidence with the chair. There was no finding of the rule against bias. In our scenario it is unlikely there would be a finding of bias. You may be interested to know that in the case the House of Lords also ruled that having barristers and advocates sitting as part-time chairs of EAT (which meant they were, in effect, part-time judges) should be discontinued, to ensure that there was no possibility of unconscious bias on the part of lay members in such situations and to ensure that public confidence was not undermined. The practice has now been discontinued.

2.2 Thinking about legal writing

The study of law requires effective written communication. When writing, authors, whether legal academics or legal professionals, consider their audience. The style adopted and level of detail provided will vary depending on the context. There is no one 'correct' style that should be adopted. Each person needs to develop their own style and write in their own words. However, the style does need to be appropriate.

As you have seen, legal writing, particularly in legislation and judgments, is relatively formal and uses language in an accurate and precise way. However, when writing in other contexts it is important to resist the temptation to be too formal. It is not necessary to copy the rather archaic language in the older law reports; words such as 'aforesaid', 'pursuant to', and 'hereafter' should be avoided. Writers should avoid being pompous or pretentious as this style may obscure their meaning or alienate their audience.

There is a move towards the plain use of English in law: it is important not to complicate language unnecessarily for effect when a simple word or explanation will do. One tip often given is to read what you have written aloud and if it sounds formal but still natural you have probably got the style about right. If it sounds convoluted or pretentious and is difficult to read aloud, then it probably needs to be altered.

Box 2 Things to avoid when writing

Avoid:

- the use of slang and colloquialisms, such as 'he was nicked by the old bill', or 'when she was off her head she set fire to the house'
- 'text speak' – the language and symbols of text messages
- lists and bullet points.

Common abbreviations should be avoided, such as those in Activity 4. Use the complete expressions instead.

There are certain abbreviations of legal terms which are acceptable and used commonly, for instance ECHR. It is a good idea to take your cue for what can be abbreviated from the course and it is important to set out the full name once, followed by the abbreviation that you are going to use in brackets or parentheses.

In order to write effectively for law you need to explain principles and arguments in a detached and objective way. Personal opinions should be avoided unless they are specifically asked for.

An essential part of writing in a detached and objective way is to avoid writing in the first and/or second person. When a person writes as 'I' they are writing in the first person. This is not generally appropriate in academic writing. Nor is 'we' (first person plural). The use of the first person situates the writer as the authority on the issue and expresses the writer's opinion. The use of 'you' (second person) and 'one' (third person neutral) are not appropriate either.

Academic writing requires objectivity and the maintenance of some distance from the subject matter that is being written about.

There has been a move away from the use of Latin words and phrases within the legal profession. However, certain Latin phrases are still regularly used. For instance, you have come across the terms *ratio decidendi* and *obiter dictum*. Italics are often used for Latin phrases so that they are distinguishable from the main text.

There are certain legal phrases which are 'terms of art' in that they have specific meanings and cannot be replaced by alternative words. Some of the words may also have an everyday meaning and so it is important to think about the context in which you are using the word to ensure that you give the word its precise and appropriate meaning.

It is now widely accepted that academic writing should use gender-neutral language and so the use of 'he' or 'she' should be avoided wherever possible.

Box 3 Use of gender-neutral language

The expression 'each judge will decide which rule, if any, he will use' is not gender-neutral as it assumes that judges are male.

There are two ways of avoiding the assumption that all judges are male:

- 'Each judge will decide which rule, if any, he or she will use'. However, this is rather long-winded.
- 'Each judge will decide which rule, if any, they will use'. This version has the advantage of simplicity and is the solution that is commonly adopted. However it is grammatically incorrect as 'they' is plural and 'judge' is singular.

Be precise

Avoid phrases such as 'some judges argued' or 'it is argued': try wherever possible to identify the person concerned and where they said it. For instance, you may say: 'Lord Bingham argued in his book *The Rule of Law*' or 'Lord Atkin stated in *Donoghue v Stevenson* [1932] A.C. 562 that'.

Be concise

Keep your sentences as short and as simple as possible, only state what needs to be said. Think carefully about your use of words.

- avoid using several words where one will do
- avoid unnecessary and irrelevant details
- avoid using flowery adjectives that do not add anything to what you are saying.

Box 4 Using language accurately

Using language in an accurate way is often very important. Suppose you were told that 'recently an organisation produced a report that said most new houses built this century are of a bad quality'.

You might well think then that what was wrong with the houses included things like defective woodwork, broken tiles, windows that do not shut properly, and sloping floors. If it turned out that what the report was really identifying as bad were features like lack of front gardens (as double driveways were used instead) and lack of visible similarity with older properties in the same district, then you might well say: 'That's not bad quality. If anything, it is bad design. It is the design of the houses that the report seems to be attacking, not the quality of the workmanship. Such a misunderstanding stems from the fact that, initially, I said to you that the report claimed houses were of bad quality.'

This sort of misunderstanding that comes from using language in a careless way happens all the time. In any area where rules operate, it is essential for people to be careful about the way they use language.

Activity 4 Writing concisely

 (Allow 10 minutes)

Read the following extract and consider how you could make it more concise but not lose any of its meaning. Write your concise passage in the text box provided.

The European Convention on Human Rights was born out of the terrible human rights atrocities that occurred during the continuance of the Second World War 1939–1945, in which millions of people of Jewish origin and extraction were murdered across Europe by the infamous Nazi German regime under the command of their leader, Adolf Hitler. After the Second World War there was an ardent desire on behalf of the members of the newly formed Council of Europe to work towards ensuring that such inhuman and degrading treatment of innocent civilians could never occur again on the continent of Europe. Accordingly, the states concerned worked together in cooperation to

devise for future generations an international agreement to protect human rights in the guise of the European Convention on Human Rights.

Provide your answer...

Comment

When undertaking this activity you needed to read the passage carefully, think about the meaning of each word and phrase, and consider whether it was required and what it adds. For instance, 'the terrible human rights atrocities that occurred during the continuance of the Second World War' could be more concisely explained by saying 'the human rights breaches that occurred during the Second World War'. This uses fewer words and it is also more neutral and less emotive in tone. It is not possible to detect the writer's opinion from the words used and this is a more appropriate objective style for writing for law.

A similar approach can be taken to 'After the Second World War there was an ardent desire on behalf of the members of the newly formed Council of Europe to work towards ensuring that such inhuman and degrading treatment of innocent civilians could never occur again on the continent of Europe'. This could be more concisely phrased as 'After the Second World War the newly formed Council of Europe was determined to prevent the re-occurrence of human rights abuses in Europe'.

Writing concisely means that you will use as few words as possible to communicate all the required information. You should also check what you have written carefully. Does it comply with the rules of grammar and is it spell checked? Think about phraseology and the sense of what you have written.

Box 5 Avoid the use of flowery adjectives

An often-quoted example of a long-winded explanation is taken from a biology student but it is relevant to all disciplines:

Although solitary under normal prevailing circumstances, racoons may congregate simultaneously in certain situations of artificially enhanced nutrient resource availability.

(O'Connor, cited in Cherkassky et al., 2011, p. 194)

In other words – although racoons are normally solitary they do feed together if food is left out for them.

3 Finally: is it all about justice?

The traditional image of justice was introduced earlier in this course and the symbolism of the scales and sword were explained. Justice is often seen as the main aim of the law, but it is not always achieved in every case. What one individual regards as justice may not always match another individual's views. It is often thought that applying rules equally to all people ensures justice. If the rules are rigid, however, injustice may result.



Figure 1 Images of justice

Justice is sometimes described as what distinguishes good laws from bad. Injustice occurs if a person's rights are overridden, thus rights are inextricably linked with justice. A legal system that allows people to be deprived of life, liberty or property without due process is unjust. Justice is done when the rules of law are applied fairly. One rule of justice, which you encountered earlier in this course, is that like cases should be treated alike. The system of precedent is an example of this. However, even this rule is unlikely to produce justice in every case.

Box 6 Applying the rules

A year or so ago a swimming meet took place at the University of Toronto. Most of the races proceeded as planned. But at the end of one race, there was a challenge to the winner of the race. The appropriate group of officials convened. The deliberations were lengthy and tense. After much argument and poring over the rules, a decision was announced: the winner has been disqualified and the second swimmer was acclaimed the victor. The referee took the unusual course of offering a brief justification of the committee's decision – 'the rules were clear ("the winner is the first swimmer to touch the side of the pool with both hands") and, if this regrettable outcome is to be avoided in the future, it will be necessary to change the rules.' The winning swimmer had only one arm.

(Hutchinson, 1988, p. 23)

In this example the rules were applied strictly. It shows that the consistent and impartial application of the rules resulted in the winner being treated unjustly. Thus, applying the principle that people should be treated equally by the law does not guarantee that justice will occur in all cases and may lead to injustice.

4 This week's quiz

It's time to complete the Week 8 badged quiz. It is similar to previous quizzes, but this time instead of answering five questions there will be 15.

[Week 8 compulsory badge quiz](#)

Remember, this quiz counts towards your badge. If you're not successful the first time, you can attempt the quiz again in 24 hours.

Open the quiz in a new window or tab and then come back here when you've finished.

5 Summary

You have practiced problem-solving, considered the role of law in society and what is justice.

After studying this week you should:

- understand the importance of problem-solving and good written skills
- be able to explain the complexities surrounding law and justice
- be able to explain examples of the role of law in society.

Now you've completed *Legal skills and debates in Scotland*, you may like to enrol on these free OpenLearn courses:

[*The Scottish Parliament and law making*](#)

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[*Law and change: Scottish legal heroes*](#)

And if you would like to take your study in this subject area further, sign up to the Open University course [*Law making in Scotland*](#).

Tell us what you think

Now you've completed the course we would again appreciate a few minutes of your time to tell us a bit about your experience of studying it and what you plan to do next. We will use this information to provide better online experiences for all our learners and to share our findings with others. If you'd like to help, please fill in this [optional survey](#).

References

Wolfenden, J. (1957) *Report of the Departmental Committee on Homosexual Offences and Prostitution*, HMSO, Cmnd 247.

Legislation

Sexual Offences Act 1967 c 60

Cases

Adler v George [1964] 1 All ER 628

Brock v DPP [1993] 4 All ER 491

Corkery v Carpenter [1951] 1 KB 102

Duport Steels Ltd and others v Sirs and others [1980] 1 All ER 529

Fisher v Bell [1960] 3 All ER 731

Galashiels Gas Co Ltd v O'Donnell (or Millar) [1949] AC 275

Grey v Pearson (1857) HL Cas 61

Heydon's Case (1584) 3 Co Rep 7a,

London and North Eastern Railway Company v Berriman [1946] 1 All ER 255

Magor and St. Mellons Rural District Council v Newport Corporation [1950] 2 All ER 1226

Pickstone v Freemans plc [1989] AC 66

Legislation

Union with Scotland Act 1706 c 11

Union with England Act 1707 c 7

Licensing Act 1872 c 94

Interpretation Act 1889 c 63

Official Secrets Act 1920 c 75

Factories Act 1937 c 67

Restriction of Offensive Weapons Act 1959 c 37

Equal Pay Act 1970 c 41

Interpretation Act 1978 c 30

Dangerous Dogs Act 1991 c 65

Scotland Act 1998 c 46

Interpretation and Legislative Reform (Scotland) Act 2010 asp 10

National Galleries of Scotland Act 2016 asp 6

Concise Oxford Dictionary, Eighth edition 1990

Legislation

Corporate Manslaughter and Corporate Homicide Act 2007 c 19

Barnett, 2013, p. 112

Kavanagh, 2010, p. 223

Legislation

Human Rights Act 1998 c 42

International instruments

European Convention on Human Rights

Cases

Donoghue v Stevenson [1932] AC 562

Ishay, 2004, p. 359

Cases

A v United Kingdom (1999) 27 EHRR 611

Pretty v UK [2002] 35 EHRR 1 141

Legislation

Scotland Act 1998 c 46

Criminal Justice (Scotland) Act 2003 asp 7

Equality Act 2006 c 3

International instruments

European Convention on Human Rights

Universal Declaration of Human Rights

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Cases

Kelly v Kelly [1997] SC 285

Legislation

Age of Marriage Act 1929 c36

Children and Young Persons (Scotland) Act 1937

Age of Legal Capacity (Scotland) Act 1991 c 50

The Children (Protection at work) Regulations 1998 (SI 1998/276)

Criminal Justice and Licensing (Scotland) Act 2010 asp 13

Hutchinson, 1988, p. 23

O'Connor, M. cited in Cherkassky et al., 2011, p. 194

Cases

CG v UK [2002] 34 EHRR 34

Davidson v Scottish Ministers [2004] UKHRR 1079

Lawal v Northern Spirit [2003] UKHL 35

International instruments

European Convention on Human Rights

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