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Exploiting Legal Reasoning

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In this chapter, we will consider explicitly the theories underpinning legal reasoning, and the way reasoning techniques are employed in legal contexts. In so doing we will examine, first, the logical foundations of legal reasoning, and then explore the extent to which legal reasoning requires us to consider criteria beyond those imposed by the strict necessity of logic (e.g. social values).

Law is often described as a system of 'practical reasoning'. We can see what this means when we think about what 'doing law' involves. Thus, a judge has to give judgment, lawyers have to advise their clients, legislators have to predict the impact of their laws. The key link between all these activities is that they are built upon some kind of reasoning process. The answers found by judges, lawyers, and legislators are not simply based upon some pre-existing knowledge of the law. Although the ability to find and use the various kinds of legal material is important, it is not enough, because your sources may not actually provide you with an answer. To be sure, there are some legal questions which can be resolved simply by looking the answer up in a book. If you wish to know what is the maximum compensation payable for, say, an unfair dismissal, you can find the answer in statute and statutory instrument, or in a textbook. But determining whether Jane Smith is likely to win her case, and what level of compensation she is likely to obtain cannot simply be looked up in a book. There is an important element of creativity, of working out an answer according to a whole range of supposedly rational criteria. In this and the following section, we are concerned with how lawyers must go beyond the legal texts to construct their own answers to discrete legal problems. It is this that constitutes what we have already called the process of *legal argumentation* (see Chapter 5).

Let's start by thinking about thinking itself. This is perhaps not something we are too used to doing, even in an educational setting. Obviously 'learning' is about acquiring new information—but don't forget that we have to be able to *use* that knowledge. Studying maths provides a good example. Mathematical skills reflect an ability to apply the appropriate formulae (knowledge) to a particular problem, e.g. calculating the sine of an angle in a triangle where the length of the sides are known. You might well know that the formula for that calculation is represented as:

$$\text{Sine } x = \frac{\text{opposite}}{\text{Hypotenuse}}$$

But that is not the end. You need to use that knowledge to produce a *specific answer*. That answer will of course vary according to the data you use. Similarly when structuring legal arguments we are working from a source of knowledge about law, and using that to construct an answer to a specific legal problem. It is the process of getting from knowledge to

answer that involves our skills of practical reasoning. The aim of this chapter is to deepen our understanding of what this process involves.

12.1 Logic and Legal Reasoning

Legal argument is first based upon fundamental reasoning skills that are common to most disciplines. By 'reasoning', we mean, in essence, the process of deciding on a given course of action. It is important to distinguish 'reasoning' from the colloquial idea of 'having a reason'. Because we are quite relaxed about our use of language, it is easy, but wrong, to think of reasoning as simply a matter of cause and effect. It is not; reasoning reflects the ability to arrive at a rational, calculated decision.

Let us try to illustrate what we mean. If A hits B because B called him names, he has a reason. A is angry with B and has decided to hit him. Of course, since this is an emotional response, one could say it lacks rationality in the conventional 'thought out' sense that we use the term, since A's anger has probably got in the way of the reasoning process. Would A have been so quick to hit B had he thought about it and realised that later B would come looking for him, with his brother, the champion boxer, seeking revenge? This emphasis upon rationality means that we are essentially grounding legal decisions in the mental process we call *logic*. This point is hardly new. Leith and Hoey (1998: 279), for example, trace the contact between law and logic back through history to the Ancient Greeks, though, as their work shows, interest in the relationship has been given a modern boost by attempts to create computer models of legal decision-making. The link between law and logic has been frequently acknowledged by the judiciary, and notably by Lord Devlin in *Hedley Byrne v Heller & Partners* [1964] AC 465, at 516, where he said:

The common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it.

This is not to suggest that law is unusual; in much day-to-day life we are using basic logic without really knowing it. If I go out in the morning with only enough money for my bus fare back home, I have a simple choice: either I spend that money while out and walk home, or save it for the return bus ride. I know that I cannot do both. The conclusion that I have to choose is founded on a commonsense form of logic. Logic thus provides a commonplace basis for decision-making, by helping us plan our actions in a way that 'makes sense'. At this level, it is hardly surprising that logic is equally significant in helping us to make sense of legal argumentation; however, it is only fair to point out that the image of logic represented in this chapter is an extremely simplified one. Logic is a complex subject of academic concern in its own right, and, as Leith and Hoey point out, the view that most individuals have of logic as clear and precise is erroneous; logicians are as prone to arguing about the merits of different theories and systems of logic as academics of other disciplines!

12.1.1 The Nature of Reasoning

Let us begin by formalising our notion of reasoning a little more clearly. We know that it reflects a particular kind of decision-making process, which, so far, we have described

simply as 'rational'. By this, we mean that it is a structured form of discourse which involves passing from one proposition already known or assumed to be true, to another distinct from the first, but following from it. The classic example of the logical reasoning process is the 'syllogism', a verbal structure which draws a true conclusion from a major and minor premise, each of which is verifiable in its own right, thus:

All men are mortal
Socrates is a man
Therefore Socrates is mortal

In this case the logic is impeccable. We know as a matter of fact that men are mortal; we also know that Socrates is a man. The conclusion of Socrates' mortality is therefore inescapable.

Now, in fact, this represents only one kind of logical reasoning. In logic conventionally we make a distinction between two different processes, called **inductive** and **deductive** reasoning. Robert M. Pirsig uses the example of locating a fault in a motor cycle to illustrate these logical modes in the process of scientific method. If the analogy seems rather out of place, persevere, because it is as applicable to lawyers as it is to scientists:

Two kinds of logic are used, inductive and deductive. Inductive inferences start with observations of the machine and arrive at general conclusions. For example, if the cycle goes over a bump and the engine misfires, and then goes over another bump and the engine misfires...and then goes over a long smooth stretch of road and there is no misfiring, and then goes over a fourth bump and the engine misfires again, one can logically conclude that the misfiring is caused by the bumps. That is induction: reasoning from particular experiences to general truths.

Deductive inferences do the reverse. They start with general knowledge and predict a specific observation. For example, if from reading the hierarchy of facts about the machine, the mechanic knows the horn of the cycle is powered exclusively by electricity from the battery, then he can logically infer that if the battery is dead the horn will not work. That is deduction. (1974: 107)

There is an important distinction between these modes of reasoning. The form of deductive reasoning is such that, so long as the major and minor premises are correctly constructed, the conclusion has to be true. Thus the syllogism we have just considered is a representation of the form of deductive reasoning. Inductive reasoning does not provide us with the same degree of certainty. We can reach an answer inductively on the basis of an assumption that our particular experience is of general application. In some cases, such as Pirsig's for example, our assumption is likely to be pretty accurate, and obviously the more information we have supporting our hypothesis, the more likely it is to stand up in the future. But, in terms of formal logic, we cannot say that our conclusion is conclusive. There is always the possibility that some other conclusion exists.

For example, Patrick Shaw (1981) tells of an experiment conducted in Birmingham some years ago. Drivers in the city were urged to use only dipped headlights at night.

During the experiment, it was shown that the number of road accidents had fallen sharply. The local papers immediately declared the experiment to have been a major success. However, it was subsequently found that there had been fewer vehicles on the road than usual during the experiment, so the press had not really got it right. There may have been some correlation between the dipped headlights and the reduction in accidents, but

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the connection was not as great as had been assumed. The relative inconclusiveness of inductive reasoning is a point to which we shall return shortly.

Lawyers use both inductive and deductive reasoning, and legal decision-making will usually involve *both* those modes, used in conjunction with each other to produce a reasoned conclusion. It is, however, helpful to distinguish between a number of processes. First, in reasoning about legal rules, as we have seen, we conventionally distinguish between two distinct contexts: the interpreting of statutes and the use of precedent through case law. Secondly, lawyers are also involved in reasoning about facts (what we shall call, following Alexy (1989), **empirical reasoning**). We will consider each of these in turn.

12.1.2 Reasoning and Precedent

Using precedent involves both deductive and inductive reasoning, but of these the inductive element is the most important.

Inductive reasoning in law can, in its simplest terms be described as follows:

In case x, factors A, B and C existed. Judgment was given for the claimant.

In case y, factors A, B and C existed. Judgment was given for the claimant.

In case z, factors A, B and C exist. Judgment should, therefore, be given for the claimant.

It is thus a process of reasoning by example. It is a technique that we have all used. A child may well reason that it is safe to climb a tree in a friend's garden, because that friend has just done so without falling. That child has reasoned, inductively from the example of his or her friend.

Edward Levi (1949: 2) developed this idea into what he called a 'three step process' of legal reasoning:

- *Step one* is where a judge sees a relevant factual similarity between an earlier case, or cases, and the present one.
- In *step two*, the judge identifies the rule of law on which the previous case(s) rested.
- Finally (*step three*) he or she applies that rule to the present case.

It is this final stage only, of applying the rule, that is deductive. As MacCormick (1978: 197) puts it, 'deduction comes in only after the interesting part of the argument, settling the ruling in law, has been carried through.' One of the clearest judicial examples to this effect comes from Lord Hailsham in *DPP v Morgan* [1976] AC 464, at 516. The case concerned the question whether an honest but unreasonable belief that the victim consented to sexual intercourse could negate the necessary intent on a charge of rape. His lordship identified the following legal propositions as being correct: *If... the prohibited act in rape is non-consensual sexual intercourse and the guilty state of mind is an intention to commit* the prohibited act, *then*, he argued, an honest but mistaken belief as to consent must result in an acquittal (our emphasis, to highlight the deductive element of the argument). In effect, all he is saying is that the accused lacked the necessary intent, but the strength of the argument lies, in his lordship's view, in the fact that to convict would result in a logical absurdity. Up to this point in the reasoning, however, judges use an inductive process, often also called **reasoning by analogy** (though note, as a side issue, that there

is a technical dispute between legal theorists about the nature of what is going on in this process and what we should call it—see **Figure 12.1**.

Induction or analogy: Is there a difference?

Some writers (e.g. Golding, 1984) seek to distinguish ‘true’ induction from a related process—which they believe is the one used by lawyers—called reasoning by analogy, whereas others (e.g. Levi, 1949; Brewer, 1996; Farrar, 1997) seem to treat inductive reasoning and reasoning by analogy as synonymous. To be sure, there is much that these writers agree on. Inductive reasoning/reasoning by analogy clearly involves a process of pattern-matching from previous examples. As Levi notes, finding cases with appropriate similarities is a critical first stage in the process. Where the theoretical dispute emerges is with respect to what follows this stage: having found the cases, how does the judge create his analogy? Thus, Brewer argues that the judge discovers (or constructs) a *general* rule that explains the examples—strictly an inductive process, while Golding favours the idea of an ‘instance classification without generalisation’, i.e., a genuine analogical process of reasoning by inference from *the specific to the specific*.

Philosophically, Golding undoubtedly has a point; analogy is a species of induction, but it is a subset that tends to be inferentially weaker. At the same time, we suggest that it is probably sensible to take the view that *both* the processes we have just described operate in common law systems—both reasoning by analogy from a specific set of facts and reasoning inductively from a set of cases, the latter arising where precedent has effectively hardened into an established common law principle.

Figure 12.1 Induction or reasoning by analogy?

In practice, of course, the process of reasoning from cases is not quite as straightforward as the first example we gave. More often, it involves weighing up and balancing a whole variety of differences and similarities. It will be unusual for the analogy to be so clear, and what is more likely is that only a few of the common factors (for example, **A** and **B**, but not **C**) will be present in the later case, so the judge must weigh up the relative importance of **C** in deciding whether to apply the analogy. We have already given you an example of that kind of technique in **Chapter 7**. This reflects the fact that inductive/analogical reasoning cannot be conclusive. Inductive/analogical reasoning is not about *proof* (unlike deductive reasoning); it is purely about *justification*. A case analogy justifies a later decision, it does not make it, logically, the only possible outcome. To use our earlier example, the child will not know conclusively that the climb will be safe. His or her friend may be lighter, stronger, or taller, all of which might make a difference to the outcome of the climb. It will be up to the child to weigh up the risks and decide whether the example is good enough to follow.

Equally, it follows that the inductive stages inevitably involve a degree of discretion. Levi’s first step gives the judge freedom of action in deciding what similarities—and differences as well—are relevant. In step two, the judge again has some freedom in deciding what rules of law are discoverable from the earlier cases (this is part of what in **Chapter 5** we called the judge’s freedom of justification). A judge is obliged to follow a precedent only once satisfied that *the precedent fits*. By this we mean that the judge must have first accepted that the facts are, in material respects, sufficiently similar, and that the legal principle established in the earlier case(s) should apply.

This also gives us a clue to the main means we have for countering an argument based on analogy or inductive reasoning, namely demonstrating that the analogy is not a good

fit. In law, this is what we do when we seek to *distinguish* a case, e.g., by saying the similarities are insufficient or insufficiently important, or by proposing another, better, analogy. Of course, this is not the same as proving the analogy demonstrably and finally false; indeed, inductive reasoning cannot readily be refuted in that way.

12.1.3 Reasoning and Statutory Interpretation

Using Pirsig's analogy from section 12.1.1, consider the following question:

EXERCISE 21 Zen and the art of legal reasoning?

Statute requires that whosoever takes property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence.

X deliberately takes Y's bicycle and sells it to Z.

Has X committed the offence?

This is, of course, a simple example—but in reaching the logical conclusion that X is guilty, were you using inductive or deductive reasoning?

The process you used is in fact deductive. Our starting point is a general rule, laid down in a statute, which we are then applying to a specific instance. We could convert this into a syllogism, thus:

- An individual who takes another's property with the intention permanently to deprive that other of it, shall be guilty of an offence.
- The accused X has committed the prohibited act.
- Therefore X is guilty of the offence.

A general way of looking at this would be to say that the legal syllogism involves the following elements:

- A rule of general application (*the major premise*);
- the particular fact(s) (*the minor premise(s)*);
- A legal outcome (*the conclusion*).

On the face of it, therefore, statutory interpretation seems to be chiefly a deductive process. However this is something of an oversimplification. 'Pure' deductive reasoning can be used only when applying clear rules to specific fact situations (MacCormick, 1978). Statutory interpretation, however, will often involve a significant element of inductive reasoning or analogy, notably where:

- the meaning of words used may be derived from analogous statutory provisions
- there are doubts about the scope of a statutory rule which have to be resolved on the basis of competing precedents.

Consequently it is a mistake to think of case law and statute as involving wholly separate reasoning processes. As our second point highlights, it is not unusual for cases which turn on a question of statutory interpretation to require the court to look at competing arguments about statutory meaning which have existing authority derived

from case law. For example, in *R v Shivpuri* [1987] AC 1; [1986] 2 All ER 334, a case we have already considered, the essential problem was one of interpreting the scope of the Criminal Attempts Act 1981, s. 1. However, the House of Lords could not treat that simply as a question of interpreting the Act; it was required, by the rules of precedent, to consider the meaning given to the Act by an earlier House of Lords decision in the case of *Anderton v Ryan* [1985] AC 560; [1985] 2 All ER 355, and had to justify their decision accordingly.

Where a decision is based on deduction, how can it be challenged? As we have already noted, the difference between induction and deduction is primarily the difference between providing justification for and proof of an outcome. Consequently, where a decision is deductively correct, it cannot, logically, be gainsaid. It follows that the means of challenging deductive reasoning are limited. Nevertheless, they exist.

Denying the premise

If you can show the major (statement of the rule) or minor premise (statement of fact) is false, you can defeat the argument. For example:

All cows eat grass
Cows are mammals
Therefore all mammals eat grass

In fact this syllogism is totally wrong. All we have are two independent statements: cows are mammals and they eat grass. Not only do the initial premises not establish a basis for saying that all mammals eat grass (there is no evidence here about the eating habits of other mammals, nor is there anything which predicates a sufficient similarity between cows and other mammals), the minor premise is flawed. If you think about it, it is really a rule (major premise) masquerading as a fact. Unsurprisingly, then, the conclusion as a matter of logic just does not follow.

By changing one or other of the premises to its 'correct' form we change the pathway through the problem, and hence the conclusion. So we could say:

All cows eat grass
Buttercup is a cow
Therefore Buttercup eats grass

What this actually means in law is that you will attempt to challenge those elements of the reasoning that are more likely to have been arrived at inductively in the first place—the formulation of the rule, or the statement of fact.

Question the validity of the logic

Even where the major and minor premises are verifiable, they may not lead to the conclusion alleged; for example, consider the following syllogism:

All MPs are elected
The Mayor of London is elected
Therefore the Mayor of London is an MP

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The fallacy in the reasoning here can be exposed by reducing the syllogism to its basic logical structure. If we take the Buttercup syllogism as an example of one that works, it takes the form:

All As = B

if C = A

Then C = B

By contrast, the Mayor of London syllogism reduces to the form:

All As = B

if C = B

then C = A

and the fault in the reasoning becomes obvious. Judges are not likely to make this kind of mistake. Law students sometimes do. You have been warned!

12.1.4 Reasoning in Civil Law Systems

Before we move on, we shall consider, briefly, whether the civilian tradition reflects a significantly different approach to legal reasoning.

Michel Villey makes the point that:

Even today English law is the closest to the casuistic art of the classical Roman jurists. The law for the [English student]... is above all a matter of science; or rather of case law; because the law is to be induced from nature, and by the study of each case. (1975: 700)

So, do we assume from this that the role of induction, and hence of analogy, is of far less significance in continental European legal systems? Unfortunately it is not that simple. Legal theorists recognise that, in civilian systems too, legal reasoning takes on a hybrid form which is neither wholly deductive nor inductive. There are, however, two distinctive features of civilian systems which suggest some substantive differences from the common law lawyer's logic.

First, the codes are often said to provide an axiomatic basis for legal rules. By this we mean that they constitute often complete, self-contained principles of law. Second, as we have seen, precedent plays a lesser role in civil law systems, because of the interpretive traditions connected with codified law. Taken together these might indicate that deduction plays a larger role in civil law systems. However, the axiomatic basis of many of the codes only *reduces* (but does not obliterate) the need for the judges to reason from analogy.

The use of reasoning from analogy can certainly be traced back to the techniques used in Roman law and passed down to us through the civilian tradition in the work of the mediaeval scholars we collectively term the 'Glossators' and (later) the 'Commentators'. For them the distinction between *comprehensio legis* (the process of interpreting legislation) and *extensio legis* (the procedures for supplementing legislation) was already well understood. Within this tradition, two distinct analogical processes have been recognised (see, e.g., Zaccaria, 1991: 49–56; Esser, 1972).

First there is the notion of the *analogia legis*—the use of a single, statutory analogy (*Gesetzesanalogie* in German) to fill a gap in the legislation identified by a new or unforeseen situation. This operates by the court saying, in effect, ‘the principle in Article 123 governs not only case A but also case B’. Cees Maris (1991: 71) offers an example from Dutch Criminal Law which, interestingly, resonates in English law as well.

Under the Dutch Penal Code of 1881, the offence of theft required, *inter alia*, that the accused ‘take away’ property belonging to another. In 1920, a Dutch dentist was convicted of theft for ‘milking’ his electricity meter, i.e. extracting electricity by bypassing the meter. He argued that, as electricity was an intangible, it could not be ‘taken away’ since that term (in its Dutch linguistic context) referred only to tangible property. Unfortunately for the dentist, the Dutch Supreme Court disagreed; it felt that extracting electricity was sufficiently similar to a taking away of tangible property to be caught by the Code.

An interesting comparison can be made with England, where a similar problem has arisen both under the old Larceny Acts and under the Theft Act 1968 that replaced them. In *Low v Blease* [1975] Crim LR 513, the Divisional Court held that electricity was not ‘appropriated’ (the Theft Act alternative to ‘taking away’ used in the Larceny Act 1916) by switching on the current, nor, the Court said, could electricity constitute ‘property’ within the Theft Act, s. 4. It may be that the Divisional Court was unduly influenced by the fact that a separate offence of abstracting electricity had been created by the Theft Act 1968, s. 13, as a way of dealing with milking the meter and similar situations (see *Bogeln v Williams* [1978] Crim LR 242), but its literalism was in stark contrast to the willingness of the Dutch court to reason, creatively, by analogy. As the commentary to *Low v Blease* points out, the decision does leave us with the rather bizarre situation where a ‘trespasser who warms himself by lighting the gas fire is guilty of burglary while the trespasser who prefers the electric fire is not’ ([1975] Crim LR 513). Clearly there are analogies and analogies.

Second, there is the *analogia juris*, which describes what German jurisprudence would call a legal analogy (*Rechtsanalogie*) as opposed to statutory analogy. This is where the judge reasons from outside the specific case or rule, usually by arguing that it is illustrative of a wider principle of law which can be applied to the new situation. Thus, for example, it is commonly accepted in the jurisprudence of many civil systems that judges may need to take an approach to resolving cases based on a sense of ‘justice’ (in Germany, again, one finds direct reference to this as the *Rechtsgefühl*) rather than on statutory rules. In French private law, for example, the judges have developed a theory of abuse of rights (*l'abus des droits*). This is sometimes used, *inter alia*, in contractual disputes to impose obligations on the contracting parties in much the same way as the English courts have used the notion of ‘implied terms’.

Today, the use of certain general principles has become so formalised that, in some cases, the courts no longer rely on the process of analogy for justification. Rather, these fundamental general principles have effectively hardened into a source of law in their own right. Indeed, in some countries, the right of recourse to general principles has become enshrined in the codified law: see, e.g., Spanish Civil Code, Art. 6. Such general principles, including the principles of proportionality or reasonableness, meaning that state intervention must be restricted only to that which is necessary to achieve the aim of a particular law, operate in a number of domestic legal systems as well as in EU and European Human Rights law (as we saw in Chapters 10 and 11). Ultimately, therefore, we

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suggest that much of the supposed divergence between civil and common law techniques involves drawing a distinction without a measurable difference.

12.1.5 Empirical Reasoning

Solving legal problems, we know, is not simply a question of reading the law. Legal arguments are not constructed in a vacuum, but arise out of real, human, situations. Legal rules are expressed only in very general terms. The application of a rule to a particular case is dependent ultimately on the court or tribunal deciding that the facts of that case fit the rule. This conceals what are in reality, as Ivainer (1988) notes, two distinct processes: the proving of alleged facts (see Chapter 5); and the subsequent interpretation of those same facts. The latter involves a reasoning process. It is up to the lawyers to construct a legal argument to the effect that the facts are *x*, *y*, and *z*, and that on those facts the rules should be applied in such-and-such a way. It is this aspect of the law–fact relationship that we shall concentrate upon for the remainder of this section, as the actual implications of finding that *x* is fact rather than law is best left to courses on the law of evidence, or on the particular area of substantive law concerned.

At the heart of empirical reasoning is what Ivainer (1988:22) defines as '*une démarche hermeneutique*', i.e. a *hermeneutic*, or interpretive, process which seeks to draw a conclusion from the known facts in each case. This emphasis on interpretation is valuable in that it highlights again the extent to which the use of facts in the legal system involves a creative process, which we shall now examine.

From the perspective of the trial lawyer, as opposed to the judge, there are two discrete reasoning techniques that are central to the process of fact analysis. At the early stages of a case, the body of evidence relating to the case is likely to be incomplete; the first task of the lawyer is thus to establish what is sometimes called 'a theory of the case' (see Anderson and Twining, 1991; Maughan and Webb, 2005: ch. 10)—i.e. a plausible explanation of what may have happened and its legal consequences, which can then be used to assist further information-gathering. Developing a theory of the case itself involves two elements: the creation of both legal and factual theories. By *legal theory* we mean simply the creation of arguments for one or more potential causes of action, i.e. a claim for breach of contract, negligence, etc. Although a legal theory is triggered by the factual information you have available, it also underpins the process of fact analysis. A lawyer's legal theory is critical in determining how he or she organises and explains the facts of the case. As Paul Wangerin explains:

Surprisingly, few lawyers and students seem to realize that creating a statement of facts must follow, rather than precede, creating the legal arguments. This chronology must be observed because the statement of facts plays two crucial roles for the advocate. The second role necessitates this order of preparation...[T]he statement of facts' first role is to generate psychological sympathy for the represented client. This role has nothing to do with the merits of any legal position... The statement of facts' second role is to prepare the reader for the legal arguments to follow. This is its key role, which explains why the legal theory must always be planned first. (1986: 435–6)

Creating a *factual theory* involves what is termed **abductive** reasoning. Anderson and Twining define this as 'a creative process of using known data to generate hypotheses to be tested by further investigation' (1991: 443). It is thus a style of reasoning that is

essentially based on *inference*—on using your existing knowledge to infer potential facts and explanations. For example, assume that Lisa approaches you for advice. She tells you that her brother, Bart, was recently killed when his car ploughed through a motorway barrier and overturned. The road was quite wet when the accident happened, but no other car was involved in the accident. She cannot tell you whether there are any witness statements relating to the accident. She is convinced that there must be some explanation, other than Bart's own negligence. The accident occurred soon after he left home; he was not overtired, and he was an experienced and careful driver.

You know that, if you are to help your client, you need to establish that someone (other than Bart) was negligent or the vehicle was defective. So you would start by thinking about a legal theory of the case based either on negligence or, possibly, product liability. What factual theories might you develop? If no other car was involved, you might infer that you should rule out the negligence of another driver. So, alternatively, there is the possibility of a mechanical defect. You could hypothesise along the following lines—was the steering faulty; did a tyre burst, and, if so, was the burst due to a manufacturing defect or some other cause? And so on. Equally, you would have to consider the possibility of driver error: despite his sister's protestations, could Bart have fallen asleep at the wheel, for instance? To get an idea of abductive reasoning in action, see if you can construct a theory suggesting that there was negligence by another driver. (We pause here while you write.)

There are a number of possibilities. Perhaps a vehicle pulled into the lane too close to the front of Bart's car, causing him to brake hard and lose control on the wet road. Perhaps a vehicle in front temporarily lost control, because the driver fell asleep, or lost concentration, causing Bart to take avoiding action from which he was unable to recover, given the conditions. In both situations it is quite conceivable that the car causing the accident was not then caught up in it.

The key point to remember is that these are no more than hypotheses based on limited information. This means that, though akin to the inductive form of reasoning, the results of abductive reasoning are far more tentative, and would not be sufficient to persuade a court in your favour. To take the earlier example, it is pretty obvious that you would not get very far alleging that the accident was due to a burst tyre without evidence from a police accident report that a tyre had indeed burst, and expert evidence supporting your theory that the burst was due to defective manufacture. However, you must recognise that abductive reasoning techniques are necessary to establish the possibility that such an argument exists, before you can think about obtaining the evidence to change the possibility into a specific, supportable, theory at a later stage in the pre-trial process.

Once you have the evidence to establish a supportable theory, the reasoning process moves on to a second stage. Now your empirical reasoning falls firmly within the inductive sphere. Shakespeare, as usual, offers a suitably gory illustration (from *Henry VI*):

Who finds the heifer dead and bleeding fresh,
And sees fast bye a butcher with an axe;
But will suspect twas he that made the slaughter.

Inductively, the conclusion that it was the butcher who did it is acceptable. It is not of course, in formal logic, the only possible answer, but it is *probable*. In any given case of induction the probability will vary by degrees from the slight to the overwhelming—as we

have seen already, reasoning, because it plays little part in the process, therefore, we can draw logically.

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have seen already, the law sets its own standards of probability in fact-finding. Deductive reasoning, because it requires that the formal conclusion is absolute, not merely probable, plays little part in empirical reasoning, because the facts are seldom conclusive. The process, therefore, is essentially one of mustering the information that you have, and using it to draw logical inferences regarding the guilt/innocence/liability of a particular person.

In seeking to resolve factual problems there are a number of useful techniques, though in the end much of this boils down to careful application of common sense.

First, think dialectically: essentially all this means is that you need to think through alternative explanations. Do not be afraid to challenge your own assumptions. It is not advisable to develop your own theory of why or how something happened, and ignore other possibilities. This applies as much to the student answering a problem question (where there will often be gaps in the facts waiting for you to construct alternative solutions) as it does to the practitioner preparing a case.

Second, be systematic. It is usually important to have an accurate picture of the nature and course of events in order to create a structure within which you can develop your argument.

Third, and following from the preceding points, proceed step by step in presenting the facts of a case. Proof is best built up in small stages. Making major quantum leaps from fact to conclusion may help in developing an initial strategy, but it is unlikely to build a convincing case. This too doubles as sound advice in dealing with problem questions as a student.

12.2 The Limits of Logic

In looking at the limits of logic, we shall again divide the issues into their two constituent areas of legal rules and facts.

12.2.1 Reasoning about Legal Rules

Under this heading there are two points to make. First, it follows from what we have already said that the form of logic in legal reasoning is qualitatively different in legal as opposed to scientific method. Second, the courts are willing to impose practical or policy-based limits on the extent to which they will apply logic. Let us consider each point in turn.

Earlier we suggested that reasoning is about discovering the truth. In law, we are not concerned with truth (or facts, if you prefer) in a scientific, i.e. verifiable, sense. The statement 'water is wet' is verifiable—no one would question the truth of that. Also in scientific method, logic enables prediction, so that it is possible to say that if conditions A and B are satisfied, then C will follow as a matter of necessity. In law, we are dealing with rules which are—to use the technical jargon—**normative statements**. This means that they are based essentially upon a value judgement made by Parliament or a judge that a particular consequence *should* or *ought to* follow certain behaviour. The normative nature of law does not mean that we are stepping outside the realm of induction, but it does introduce the qualitative difference between legal and scientific method that was intimated. This was explained by the American jurist Karl Llewellyn (1960):

in law your logical system refuses to remain on the level of description, of arranging existing observation. Backed by the fact and doctrine of precedent, your logical system shifts *its content* to the level of Ought (this does not affect the logic). Its remarks change in tone and substance. Now they run: '*If I am a correct description of the accepted doctrine*, the future cases *a* and *b* *are* to have the outcome *x*—they *should* have that outcome, and if the judge is on the job he will see to it that they do'... No longer are these initial data statements *merely* of how courts have held on given facts. They have—thanks to the addition of precedent—become each one a statement simultaneously of how a court *has* held, and in addition how future courts *ought* to hold.

Let's look more closely at this statement in respect of two issues: first, the problem of defining accepted doctrine, and, second, the question of the relationship between prediction and what we shall call 'public policy'.

Defining legal doctrine

Llewellyn's 'if' in the foregoing extract is crucial. As we have already seen from Levi's three-step process, the existence of competing analogies means that the arguments in law are not necessarily just about the logical deductions in step three, but about the premises upon which deduction is to be based. The difficult questions for law tend to be located at the point of defining 'accepted doctrine', and it is there that pure logic is often of little help. We can illustrate this by looking at two contrasting decisions of the Employment Appeal Tribunal (EAT) in the cases of *Kidd v DRG (UK) Ltd* [1985] ICR 405 and *Clarke v Eley (IMI) Kynoch Ltd* [1983] ICR 165. Both cases arose on very similar facts whereby the applicants had alleged that redundancy schemes operated by their respective employers were contrary to the Sex Discrimination Act 1975 in that, by selecting part-time workers for redundancy first, they indirectly discriminated against women, and married women in particular, who were disproportionately dependent upon part-time employment. The legal basis of the women's claim, and the defence raised by the employers in each case, were also closely comparable. In *Clarke*, the EAT had found in favour of the women applicants, but in *Kidd* a differently constituted tribunal came to the opposite decision. How could this be? Had a strict analogy been applied, then *Kidd* should have followed *Clarke*. In departing from the latter, Waite J, giving the decision of the EAT in *Kidd*, recognised that their decision left the concept of indirect discrimination 'exposed to criticism by the orderly minded as lacking form or precision' (at 417). Clearly this did not unduly worry the tribunal; in fact, just the reverse, since they justified the refusal to apply *Clarke* on the ground that they wished to preserve flexibility in this area of law by avoiding drawing general principles from specific cases. In other words, the tribunal was really *rejecting* the need to define a precise legal doctrine in the first place!

Prediction and public policy

Llewellyn's reference to outcomes means that we are preserving the element of prediction based upon logical deduction, but the legal context changes the nature of that prediction from one of fact to one of value, or, if you prefer, from 'is' to 'ought'. This change is vital. We can see that there is a major qualitative difference between 'is' and 'ought' statements. A parent's comment that a naughty child *is* going to be smacked obviously has a very different meaning from an onlooker's observation that the child *ought* to be smacked.

Precedents in law are very much the second kind of statement. They show that there may be an answer which logic predicts should apply, but what if that runs contrary to the

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system of values held by the judge deciding a case which is analogous to the precedent? Is he bound to follow it? The answer is plainly no. The judicial ability to distinguish what are perceived to be 'awkward' precedents can often provide a judge who is sufficiently determined not to apply precedent strictly with the means of so doing. Similarly, in statutory interpretation, the element of choice between literal and purposive approaches also reduces predictability. In short, differences within accepted legal methods can justify different results. The point is well made in more abstract terms by the French legal theorist, Jean-Louis Bergel (2001: 136):

For this search for the legal solutions to factual situations, jurists use processes which come more from approximations than strict reasoning, principally analogy and induction. They cannot, equally, totally leave aside the various moral, social and human considerations from which the solution of the problem being considered could escape from only at the cost of being inadmissible or impractical. Reasoning which is formally correct can lead to unjust or absurd consequences, of such a kind that one cannot blindly accept the result. It has been said that 'the basis of legal reasoning consists not in finding the exact solution, that is to say the solution which is found to be in perfect harmony with the content of the premises'; the basis of this reasoning 'consists in arriving at a useful, practical, just and equitable result'. The jurist should reason, then, in a kind of reverse way, in considering the conclusion more than the premises. 'Legal wisdom' should consist in tempering the rigidity of logic.

The role of theoretical logic is thus limited by the fact that it may take the judge only as far as identifying a number of rational options. From there, the values that the legal system is seen to serve will play a significant part. This is often explicitly recognised in the legal process by reference to such terms as 'public policy' or 'public interest'. The idea of public policy has always played some part in the legal process. Many of the more recent innovative developments in the law have come about precisely because the judges have stopped to ask 'what is the best policy for the law to adopt'? Examples of this kind of reasoning have influenced developments in both the Common Law and the application of statute law. Thus, Lord Atkin's 'neighbour principle', developed in *Donoghue v Stevenson* [1932] AC 562, was clearly actuated by his lordship's belief that a generally applicable test for negligence was desirable. The case could have been resolved without the 'neighbour principle', as established criteria already existed which could have included the issue of manufacturer's liability raised by the facts of that case. Moreover, *Donoghue v Stevenson* would not have become a landmark case if other judges had chosen to interpret it restrictively rather than expansively (freedom of justification again!).

Similarly, questions of value cannot be excluded from the process of statutory interpretation. We cannot just sit down and logically analyse an Act of Parliament without taking any account of a whole variety of variables, including not least judicial attitudes to that legislation. In particular, any judicial claim to be adopting a broadly purposive approach to statutory interpretation is likely to disclose some element of policy analysis—as in the abortion law case of *Royal College of Nursing v DHSS* [1981] AC 800; [1981] 1 All ER 545. Historically, the extent to which judges depend upon policy arguments has not been openly acknowledged, for fear that the judges would be seen as adopting a 'political' law-making role as opposed to a 'legal' interpretive role (see Frank, 1947). However, this narrow view of judicial intervention has been largely rejected by academics and by increasing numbers of the judiciary in recent years.

Equally the judge may not be endorsing a specific public policy argument, but arguing from a more generalised sense of what is right. This is sometimes signalled in the courts by reference to concepts such as 'justice' or 'equity'. The meaning of such terms is, of course, virtually impossible to pin down with any degree of certainty—and indeed they have been the subject of debate among legal theorists for centuries! Nevertheless they provide a useful, but unpredictable, mechanism for a lawyer to favour one (more or less) rational answer over another. This can be illustrated by the case of *DPP v Majewski* [1977] AC 443. Like *Morgan*, this was a case dealing with the problem of *mens rea* in rape. However, here, the Court refused to be swayed by the logical argument that if a person is incapable through drink of forming the requisite intent to commit the crime, he cannot be guilty of it. In finding that an intoxicated accused lacking intent could still be guilty of rape, certain members of the House of Lords recognised that they were departing from logic, but, in the words of Lord Salmon, to do so in this case accorded with 'justice, ethics and commonsense' (at 484).

The point is, as Bergel (2001) and others have argued, that pure logic does not necessarily give the desired answer. It may be, therefore, of limited value in predicting future decisions. To return to our original simile, the observer's prediction that the child ought to be smacked will be a pretty poor predictor if the parent is actually opposed to corporal punishment. Legal arguments and decisions are inevitably influenced by the values of the actors within the legal process, and there is thus no guarantee that what is formally logical will necessarily be 'right'.

In recognising this gap between logic and 'good law' (whatever that may be), we must recognise that the limiting of logic carries with it a definite cost. That is, that the introduction of policy or of notions of 'justice' creates greater uncertainty in legal reasoning. We might argue that it is worth the cost, because it enables the judges, and hence the law, to be responsive to changes in (say) social or economic conditions, or to cases which are taken to be exceptional. In responding to such changes, the judges are inevitably acting with a degree of subjectivity. This is not necessarily to imply political bias, but, given the homogeneity of the English judiciary, there is some recognition that the judiciary tends to speak with the voice of the 'Establishment'. As a senior judge admitted some years ago:

Impartiality is rather difficult to obtain in any system. I am not speaking of conscious impartiality, but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. (*Scruton LJ*, 1923: 8)

Whether, therefore, the judiciary is well placed to evaluate the demands of public interest or policy is a debatable question, though one that goes beyond the scope of this book. It is, however, worth noting that a number of academic critiques (notably Griffith, 1997) have suggested that it frequently fails in that evaluation. Ultimately, the significance of such value-based reasoning might also lead us to question whether there is, in reality, any truly deductive basis within legal reasoning as practised; though this too remains an issue over which legal theorists are themselves divided.

The growing recognition among philosophers that formal logic perhaps does not play as major a part in legal reasoning as we may have assumed has reopened interest in a sister discipline called **rhetoric** (see Goodrich, 1986: 168–208). Put simply, rhetoric is the art of constructing an argument. Like logic, it recognises that a persuasive argument must

be built upon certain principles.
Chaim Perelman

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In this way rhetoric is not the opposite of any version of logic. It is, however, a religious, political, and social force in Roman society; it is not just a matter of pure logic. Modern legal theory has developed a new view on argumentation, based on the concept of the elements of European culture.

12.2.2 Rethinking legal reasoning

In empirical research, the emphasis is often placed upon the question of what constitutes a good argument. This has already been considered in this chapter, and it is now time to develop some further insights.

Most cases that are discussed in *Cham Perelman and Olbrechts-Tyteca* (1969) in the Criminal Appeals section are concerned with the question of how to sort out what is right and wrong.

The first limitation of the classic type of argumentation is that it will be given a set of rules that have practical value in solving fundamental issues.

Formal definiteness is not always the best way to approach the problem, though there are situations where it is appropriate. The issue is one of finding a balance between the two extremes. (to put it a little more precisely, between the two extremes of being too strict and being too lenient.) The problem is that the law itself is a problem, because it is not always clear what we perceive with the naked eye (generally 'receiving' the facts) or other specialities (such as 'knowing' the law). In law, fact-finding and the drawing of the guilty plea are two separate processes (Figure 12.2).

If I tried to describe the process of fact-finding, I would say that it consists of three main stages: observation, interpretation and conclusion. Observation is the process of collecting data from the scene of the crime. Interpretation is the process of analyzing the data and determining what happened. Conclusion is the process of drawing a final judgment based on the evidence and the interpretation.

be built upon certain rules. The father of what is now called the 'New Rhetoric', Professor Chaim Perelman, argued that:

the domain of argumentation is that of the likely, the plausible, the probable, to the extent that the latter escapes mathematical certitude. (1963: 134)

In this way rhetoric has always recognised that truth is contingent, and the establishment of any version of 'the truth' is dependent upon argument. Historically this meant the religious, political, and legal emphasis on oral argument central to Ancient Greek and also Roman society; hence the colloquial understanding of rhetoric as oratory or 'speechifying'. Modern legal interest in rhetoric has understandably centred upon this emphasis on argumentation and its opposition to formal reasoning processes. As an alternative view on the construction of legal arguments it has been significant in the development of elements of European critical legal theory (Goodrich, 1986; cf. Alexy, 1989).

12.2.2 Reasoning about Facts

In empirical reasoning, the quality of our decisions on the facts of a case will be dependent upon the quality of the fact-finding process, and it is this relationship which probably constitutes the greatest limit on the role of logic in empirical reasoning. We have already considered, in **Chapter 5**, some of the problems of fact finding. Here, we intend to develop some of those issues in a more abstract and theoretical fashion.

Most cases that come before a court concern a dispute over the facts. *R v Wallace*, discussed in **Chapter 5**, is a prime example. The difficulties referred to by the Court of Criminal Appeal in that case did not concern tricky questions of law, but arose in trying to sort out what actually happened.

The first limitation we explore concerns the way in which lawyers perceive facts. In the classic type of problems set by law teachers, that issue normally does not arise. You will be given a set of 'facts' and asked to advise on the law. Though such exercises have practical value in developing problem-solving skills, they inevitably bypass this rather fundamental issue.

Formal definitions of 'fact' in the abstract are, as we have shown, thin on the ground; though there are plenty of cases where the judges have to decide whether a particular issue is one of fact or law. This reflects the commonsense approach to facts, which says (to put it a little crudely): 'we all know what a fact is, don't we? Facts are things we know to be true. They just exist. So what's the problem?' We argue that this level of certainty itself is a problem. Our sense of what is fact is largely based upon observation (what we perceive with one of our five senses) or else some more abstract form of knowledge (generally 'received wisdom', or, e.g., in a more specialised sense, a forensic scientist's, or other specialist's, expertise). The danger is of treating instances of 'observation' or 'knowledge' as absolute truths—a fallacy we first discussed in the context of **Chapter 5**. In law, fact-finding is not that simple. We know that one and one make two, but in the courts facts have to be established from a very unscientific source—us! Kohler's famous drawing of the goblet/faces is an example of the kind of difficulty we must deal with (see **Figure 12.2**).

If I tried to describe this I might simply say that I saw the profiled faces of two people, staring at each other from close to. That might be an accurate, and therefore 'true',

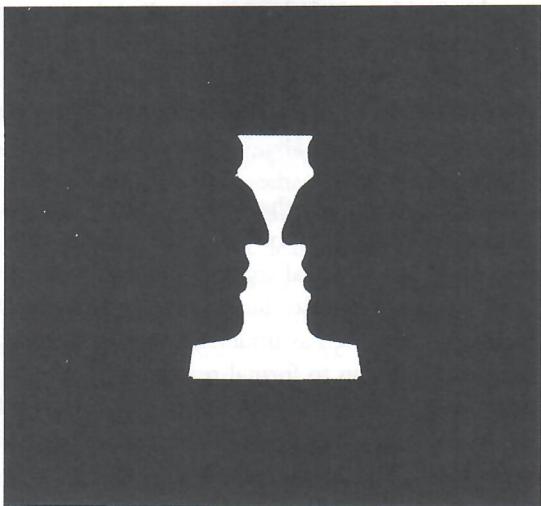


Figure 12.2 Kohler's goblet/faces

description, because it might be all that I saw. If another person described accurately a drawing of a goblet she had been shown, would you necessarily realise that each of us was describing the same thing? Two individual perceptions of the same fact may thus be very different, because there may well be equally valid alternative forms of explanation.

This example does not take into account another variable, which is the quality of the observation. Considerable psychological research into skills of observation has emphasised human fallibility (Lloyd-Bostock, 1988: 3–23). To put it bluntly; we are not particularly good at remembering what we have seen or heard or done. To make matters worse, the more time that passes between the event and the point of recall and the more stress we were under at the time the event happened, the less accurate our recollections are likely to be. Stress or external factors may not be the only cause of unreliability. The internalised values of a particular witness may, consciously or unconsciously, influence testimony; personal expectations or prejudices may well play an important part. For example, Mr Brown lives in a wealthy suburb of town which has suffered a recent spate of burglaries. One day he sees two cars drive slowly down his road. The first is driven by Mrs Smith, the second by Mr Jones. He informs the police about Mr Jones, but does not mention Mrs Smith because he does not think it relevant. Why? Because Mr Brown may be influenced by his own value judgements of what is suspicious behaviour. He may assume that a woman is less likely to be engaged in criminal activity than a man; if Mrs Smith is well dressed and in a smart car, while Mr Jones is badly dressed and in a battered old car, he may be more likely to consider Mr Jones's behaviour deviant, and so on. In recent decades, some scientists and social scientists have come together to argue that we too easily disregard the extent to which what we call 'knowledge' is not wholly objective, but socially constructed. This is what Hanson means by his observation: 'seeing is a theory-laden undertaking' (1958: 19). This applies not just to lay witnesses, but also to expert evidence.

Expert evidence is quite commonly used in court to establish technical evidence outside the competence of lawyers and ordinary witnesses—the cause of an accident, the handwriting on a letter, the ballistics of a particular gun are all likely subjects of expert

testimony. The experts, who will depend on the testimony, which can often be

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On 30 May 1986, Ronald Reagan. This was received but not subsequently mentioned in the defence war against Libya. The defence which received most attention. It was reported that a student at the University of Texas at Austin, and a member of the *Taxi Driver* cult, had been killed.

Taxi Driver alleged that the lonely young protagonist in the film, Bickle, was a woman who had seen *Taxi Driver* as evidence of her ent with society. Bickle and his wife had 'rescue' Foster and turned out to be that although Foster had Hinckley was a killer. In an intriguing twist of ways in which Foster the advocate of Foster's As she concluded, 'I

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testimony. Given the adversarial nature of proceedings, each side may have its own experts, whose opinions may well be diametrically opposed. This is because expert testimony, which may reflect on not only what has happened, but also a version of how or why, will depend heavily upon the individual's perspective on his or her subject. Courtrooms can often become a point at which different 'world views' meet head-on.

This is a tendency which is exacerbated by the manner in which such evidence is used in the trial process. To explain this, let us consider an example from a real, American, case which is of some notoriety.

On 30 March 1981, John Hinckley attempted to assassinate the US President, Ronald Reagan. The assassination attempt failed, though four people, including the President, received bullet wounds from Hinckley's gun. Hinckley was arrested on the spot and subsequently put on trial for attempted murder (see Low *et al.*, 1986). His (successful) defence was one of insanity, and it was the facts that would be used to establish that defence which, even more than the celebrity of his intended victim, caught the public attention. It soon emerged that Hinckley was obsessed with the actress Jodie Foster, then a student at Yale University. He had written to her, phoned her, and followed her repeatedly, and, a fact that was to take on major significance in the trial, watched her in the film *Taxi Driver* over fifteen times.

Taxi Driver became a key piece of evidence in establishing Hinckley's insanity. It was alleged that Hinckley had been particularly influenced by a leading character in the film, the lonely and mentally unstable taxi driver Travis Bickle, who was befriended by the young prostitute portrayed by Jodie Foster. Of critical importance was the fact that, in the film, Bickle was stalking and preparing to assassinate a politician who employed a woman with whom Bickle had unsuccessfully tried to form a relationship. Using *Taxi Driver* as evidence, the defence sought to show that Hinckley's behaviour was consistent with schizophrenia. It was argued that there were clear links between the actions of Bickle and the formulation of Hinckley's bizarre plan to assassinate Reagan and thereby 'rescue' Foster. In essence, it was argued that Hinckley had adopted the persona of Bickle, and turned the fantasy into his own 'reality'. Conversely, the prosecution sought to show that although he may have held certain false beliefs or delusions, this proved only that Hinckley was a 'dreamer'—an essentially ordinary man—and not that he was mentally ill. In an intriguing re-evaluation of the case, Rosanne Kennedy (1992) has focused on the ways in which expert explanations of Hinckley's behaviour and beliefs were polarised by the advocates into sets of binary images: rational–irrational; real–imaginary; mad–bad. As she concludes:

Over and over, the trial lawyers force essentially indeterminate medical testimony into categories of truth or falsity, thereby masking the undecidability on which the insanity defence is based. (1992: 21)

The role of the advocate in creating an image of the 'facts' of a case, therefore, should not be overlooked. It is worth thinking back to the quotation from Paul Wangerin, cited earlier in this chapter. What Wangerin is stressing is not just an analytical technique, but a *rhetorical* device. It is a creative use of fact whereby the statement of facts is constructed so as to support the legal argument and persuade an adjudicator of its correctness. Do not forget that this is a technique used not only by advocates. Judges may also use the statement of facts as a rhetorical device, as we have seen from Lord Denning's judgment in *Miller v Jackson* in Chapter 5.

This limited objectivity in fact-finding has important implications in the legal context. It means that there is often something to be said both supporting and denying the existence of a supposed fact, to the extent that it may be difficult to establish that one party's assertion constitutes fact at all. It is hardly surprising that many cases revolve around disputed testimony from witnesses about their observations. The uncertainties of fact-finding in law led some legal theorists to become what have been described as 'fact-sceptics'—theorists who have used the uncertainty of the fact-finding process to challenge the rationality of legal decision-making—the most famous of these was the American Jerome Frank, who once, succinctly if provocatively, argued that 'facts are guesses' (1949). Although such fact-scepticism may seem negative, it provides an important insight into the legal process. By recognising that 'truth' in the courtroom is established by the court arriving at an agreed view of events, rather than by discovering an absolute reality, we are recognising both the extent to which facts have to be created in court, and the extent to which that means that inferences drawn upon legally established facts may be based upon uncertain foundations. This much has been admitted extra-judicially by the Australian judge, Fox J. when he said:

When it is said that the rules of evidence tend to the ascertainment of truth, the most that can be meant is that by their application a particular piece of evidence may be more reliable, or may be the more correctly assessed by the tribunal. This may or may not be the effect in relation to a particular piece of evidence, but one cannot by any process of aggregation of those pieces have any assurance that what is seen as the resultant situation (the ultimate proposition, or finding on the issue) accords with the truth. (1982: 152)

The extent to which facts are established according to rules of evidence and procedure may itself set a further limit on the value of logic to empirical reasoning. The point is that the application of such rules may not accord with strict logic, but with other values endorsed by the legal system. As Fox J. points out, these rules frequently depend upon the demands of expediency, such as expense or delay to proceedings, or upon substantive claims of public policy (for example the assumption, only recently challenged, that the evidence of young children is inherently unreliable, and therefore insufficient by itself to ground a criminal conviction), rather than any devotion to the ascertainment of truth. We thus concur with Professor Julius Stone in his description of the limits of logic:

The outcomes of 'pure' logical procedures do not correspond to what necessarily is (or will become) law of any actual community. They may be invaluable for criticising existing legal propositions by reference to a hypothetical model of internal logical consistency or... to test the extent to which a legal system can be conceived as a logically consistent set of legal propositions... These are all legitimate outcomes of logical analysis; but they must always be carefully distinguished from erroneous uses of these outcomes. (1985: 45–6)

The various forms of uncertainty we have discussed suggest that the best that we can try to achieve is to ensure that our arguments or decisions are essentially rational in the way they are structured, and that they take into account the considerations of legal principle and/or public policy that seem to apply. In this final section which follows, we suggest a practical technique for structuring legal decisions that you will be able to use.

12.3 The Structured Decision

The technique of structured decision-making is a business decision-making technique that helps to summarise and analyse complex situations.

The major advantage of structured decision-making is that it forces hard thinking about the problem, its causes and its consequences, examining all possible options.

Do not be afraid to be original, when applying basic techniques. There are six steps.

- (i) Structuring the problem; in practice, this is like school's 'problem-solving'.
- (ii) Identifying the problem and/or the relevant principles or assumptions; this is like innocence or guilt, or the resolution of a claim by a court.
- (iii) Determining the remedy or the liability; this is like the determination of the damages.
- (iv) Assessing the objective evidence to see if it supports the claim; this is like the assessment of the evidence.
- (v) Identifying the factors that are relevant to the same case; this is like the consideration of another case that cannot be directly applied.
- (vi) Evaluating the options and deciding which to use; this is like the evaluation of the options and the decision to use them.

12.3 The Decision Analysis Method

The technique we are about to describe is derived from techniques of decision analysis in business decision-making. The idea of decision analysis is a useful one. Keeney and Raiffa summarise its aims succinctly:

The major role of formal analysis is 'to promote good decision-making'... As a process, it is intended to force hard thinking about the problem area: generation of alternatives, anticipation of future contingencies, examination of... effects, and so forth. (in Moore and Thomas, 1988: 245)

Do not be put off by this; the model we have adopted is a much simplified version of the original, which has been adapted to fit the legal context more closely. It also builds on the basic techniques of problem solving that we have already discussed. The method involves six steps.

- (i) *Structure the problem:* make sure you know who you are and for whom you are acting; in practice, begin to establish the parameters of your theory of the case (in a 'law school' problem, simply identify your relevant facts).
- (ii) *Identify alternative courses of action:* e.g., do the facts disclose an action in contract and/or tort (e.g., the possibility of an action on the basis of both negligent misrepresentation and negligent misstatement); civil and/or criminal proceedings; multiple or alternative grounds for proceeding (e.g., theft and handling of stolen goods; innocent or negligent misrepresentation); a court action or some alternative form of resolution (e.g., a common law action for wrongful dismissal and an unfair dismissal claim before an industrial tribunal)?
- (iii) *Determine your objectives:* what does the 'client' want—compensation; some other remedy (e.g., injunction, specific performance); or just advice as to his or her liability?
- (iv) *Assess the consequences:* will each of your alternative courses of action achieve the objectives you have identified? For example, it may be little consolation advising X that he might be able to sue Y for trespass (by Y stealing fruit from his orchard), if X is concerned at his own liability to Y for the injuries that Y suffered being chased off the land by X's Doberman dog! Discard any alternatives that are clearly incompatible with your objectives. By this stage you should have a clearer idea of the facts that will be material to your case.
- (v) *Identify and account for uncertainty:* what are the main uncertainties you face—are there gaps in the facts, or alternative arguments that may be constructed from the same facts; contradictory precedents; ambiguous wording in the Act creating liability, etc. (in which case, can you create rational arguments supporting your case)? Are there strong policy arguments which might sway a court one way or another? Determine which of these uncertainties you can resolve and which you cannot.
- (vi) *Evaluate your remaining alternatives:* taking into account the uncertainties you face, decide which alternative(s) come(s) closest to achieving your objective(s).

This technique is not foolproof—none is! Ultimately it can only be as good as your initial preparation. Do bear in mind that a decision-making technique such as this is dependent upon your doing sufficient thorough research into the issues first—it cannot make a poorly prepared argument look good!



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