NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

Remembering that since the *res judicata* principle binds the parties to the particular case, the very specific facts of the case are most relevant here. Those facts will be the names of the parties, the date the incident in question occurred, the loss or damage sustained and so on. These are all the facts that will be important if either party wanted to re-open the case (which they are not allowed to do under *res judicata*). These are the particular facts which may be unique to that case.
The material facts for the *ratio decidindi* however are quite different. None of the facts referred to above will be relevant. Rather it is the basic story. In *Donoghue v Stevenson* the material facts (so far as the *ratio* is concerned) would be:

i. manufacturer of a product designed for consumption;
ii. product reaches consumer in same form as leaves manufacturer;
iii. no reasonable possibility of inspection before consumption;
iv. product negligently manufactured; and
v. causes injury.

You can see here that it is not likely to even be material, that it was ginger beer or that it was a snail that caused the problem. What has been extracted for the *ratio* are the generalized facts which may subsequently apply to another case although it relates to, say for example, a chocolate bar and not a bottle of ginger beer.

3.4 The Ratio as Seen by Later Courts

While one can attempt to decipher the ratio of a case immediately it is handed down, the crucial issue is how is the precedent case treated by later courts. This treatment occurs through the process of **distinguishing or extending the ratio.**

3.5 Distinguishing

Distinguishing happens when a later court refuses to follow the precedent case because it says the precedent case contains relevant facts which are different from the case before it. This is quite a legitimate part of the judicial process. For example, a court in applying *Donoghue v Stevenson* may say that a material fact in that case was that a product was consumed internally and therefore the precedent is different to where, for example, a product is used, such as a power tool, or is worn such as a garment.

If that was the interpretation placed on the *Donoghue v Stevenson* ratio then it quite severely limits its impact. Remember that the pivotal point is identifying the material facts. What a later court might regard as material may be different to what the court deciding the precedent case

seemed to think was material. Accordingly, the ratio of the precedent case (which is in essence the material facts plus the decision) will vary according to how it is treated by later court.

Two factors are likely to be crucial in determining whether a later court distinguishes the precedent. They are **logic** and **policy**. In viewing a precedent case the later court will ask: is there any logical reason why some limit should be placed on the material facts. To use the *Donoghue v Stevenson* example given above, is there any logical difference between consuming something internally or using it or wearing it. Probably not and in fact that is what later courts have decided.

The impact of **policy** is almost certainly harder to identify. This is because quite frequently courts do not spell out what policy factors they have taken into account, if any at all. One reason why there is such reluctance is because courts may not be very well equipped to decide issues to policy. What is policy? It is a collection of reasons why a case should be decided a particular way which goes outside the formal legal process of applying precedent. Policy factors could be economic, social justice, bringing the law up to date, or a desire to introduce certainty or stability. Two policy considerations weighed heavily on the High Court when reaching its decision in the *Mabo* case.

They were the desire to bring Australian common law into step with international law and the desire to eliminate racial discrimination as a basis for determining land right claims.

3.6 Extending the Ratio

The opposite of distinguishing a ratio is where a court **extends** it. Here the second court might accept that there are differences between the precedent case and the facts before it but they regard the differences as insufficient to distinguish the precedent. Instead, the later court extends the ratio to cover the new situation. This is how the law changes. As with the process of distinguishing, the court is guided by logic and policy.

3.7 An Example of Judicial Process

Generally, *Donoghue v Stevenson* has been well received by later courts and the ratio of the case has been extended to cover a much wider range of situations than the snail in the ginger beer bottle. For example, the case has been extended to include liability for garments negligently produced (in that case underwear had a chemical substance which caused dermatitis) and to repairers.

One area where the courts have hesitated before extending the ratio is into the area of economic or financial loss. Between 1932 and 1964 the courts rejected claims for negligence where the injury suffered by the plaintiff was financial only. They said a material fact in *Donoghue v Stevenson* was that the injury caused to the plaintiff was **physical** and that any financial loss (eg medical expenses and loss of wages) stemmed from the physical injury. The courts were concerned that if the duty of care arose where a financial loss **only** was incurred then too many claims might arise and it would be unfair on the defendant. Such a case would be where an auditor negligently audited the accounts of a company. The financial loss suffered by all those who used the accounts could be vast.

3.7.1 Complex Factors

The important point to note is that the whole process of finding and applying *ratios* is quite a complex and a variable one. A lot may turn on whether the precedent case is considered solid and well based or whether later courts think it is too expansive (or restrictive). The process is not purely based on logic or some precisely defined legal process and may come down to the personality of the judges involved.

In one case, Lord Denning (a famous English judge) stated that the fact that an action was novel did not appeal to him. He noted that in many of the important cases the judges were divided in their opinions. He went on, 'On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.' *Candler v Crane Christmas* (1951) 1 All ER.

SELF ASSESSMENT EXERCISE 2

1. In what ways are the following terms significant in the doctrine of precedent:

a. Court hierarchy, and
b. ratio decidendi

2(a) How does the doctrine of precedent provide certainty with flexibility?
(b) What are some of the factors that might influence the application of precedent?

3.8 Obiter Dictum

As noted previously, it is only the *ratio* of a case that is binding on another court. Contrast a statement which is termed the *'obiter dictum'*. It is not binding because it was not necessary for the judge in question to decide the particular issue or question. Again it gets back to material facts. If a judge makes a statement of law which pertains to facts or circumstances which are not material then that statement is *obiter*. This is not to say that every judgment contains *obiter* remarks (unlike *ratio*). Sometimes, judges clearly telegraph *obiter* statements by words such as 'If I had to decide that issue I would…' 'or while it does not arise in this case…' Perhaps more commonly there is no useful prelude and the reader of the judgment has to work back from the material facts and see which statements (of law) are not relevant to them.

An example of this is the extract from Lord Atkin's judgment in *Donoghue v Stevenson* set out above. You will notice that in casting in the duty of care he includes a reference to 'the consumer's life or property'. The reference to 'property' is obiter because it is immaterial to the case in hand.

How later courts regard *obiter* will depend upon a range of matters. Principally, they will be concerned about the status of the court or judge involved, whether the remark was well considered and ultimately whether they think the principle in question is reasonable. Are there policy factors militating against its use or application?

4.0 CONCLUSION

The application or precedent involved two questions.

(a) which decisions of which bind other courts; and
(b) which part of a decision binds other courts.

The first part of this process is relatively straight forward because it is largely a question of deciding where the court which has handed down the precedent fits within the hierarchy as compared with the court faced with applying the precedent. Remember it is only the courts within the same hierarchy that are bound.

The second part of the process is much more difficult. It centers around finding the *ratio*. The crucial question is what are the material facts. These facts form the basis upon which a subsequent court might distinguish or expand a *ratio*. Bear in mind the influence of policy. It is always open to any judge to distinguish the precedent by the way in which he or she interprets the material facts. On the other hand, a judge

might quite readily adopt an *obiter* remarks because it makes good sense even though the material facts may be different.

Also based also on the material facts is the notion of obiter dictum. No court is bound to apply *obiter dictum,* however influential the judge or court making an *obiter* remarks is.

5.0 SUMMARY

Mr. Justice Murphy summoned it all, saying:

> *Then there is doctrine of precedent, one of my favourite doctrines. I have managed to apply it at least once a year since I've been on the Bench. The doctrine is that whenever you are faced with a decision, you always follow what the last person who was faced with the same decision did. It is a doctrine eminently suitable for a nation overwhelming populated by sheep. As the distinguished chemist, Cornford said: 'The doctrine is based on the theory that nothing should ever be done for the first time'.*

6.0 TUTOR-MARKED ASSIGNMENT

Explain how *obiter dictum* may become part of *ratio* of another case

7.0 REFERENCES/FURTHER READINGS

Christolm, R. & Nettheim G. (1984). *Understanding Law*. Sydney: Butterworths.

Derham D, Maher F & Waller P. (1986). *An Introduction to Law*. Sydney: The Law Book Company Ltd.

UNIT 2 STATUTORY INTERPRETATION

CONTENTS

1.0 INTRODUCTION

Statutes are the primary sources of law. They drafted by legal drafters, and passed into law by the legislature. It is left to the courts to interpret the legislatives. In this unit we shall look at the attitude of the court in interpreting statutes. An understanding of the "maxims of interpretation" enables one as a lawyer to predict the possible outcome of a given case.

2.0 OBJECTIVES

On successful completion of this unit, you should be able to:

- describe, explain, illustrate and critique the Nigerian legal system
- describe, interpret, explain, demonstrate and assess the role and application of precedent
- describe, interpret, explain and demonstrate the role and application of the rules of statutory interpretation.

3.0 MAIN CONTENT

3.1 Complexity of Legal Drafting

The law on any particular subject comes either from the common law, equity or a statute; or sometimes a combination of these. Historically, the common law was the most important source of law but in modern time lawyers look first to a statute to find the solution to a legal problem and before going to the common law.
You will have noticed from your readings a number of reasons why legislation is the important source of law:

- Upon the passing of an Act on a certain subject the common law is automatically abrogated
- Legislation allows law reformers to effect a wholesale and dramatic change in the law
- The sheer volume of legislation and the fact that it is increasing makes it an important source of law.

With these attributes one would hope that legislation would clearly and concisely set out the law on a particular subject, however this is not always so. There are a number of reasons for this:

1. As Chisholm and Nettheim, (1984, p 56) state:

The English language, for all its glories, is not a precision instrument, and there will always be people (or their legal advisers) ready to argue that the words used in a statute or regulation do not extend to cover their particular cases.

The difficulties facing courts in the interpretation of legislation are pointed out by all the text writers. To borrow one example: Say an Act passed with the following provision: 'Any person who throws litter in the street shall be liable to a fine not exceeding N100.00'.

This may seem at first glance to be quite clear yet does it cover a person who drops something or leaves something on a park bench? How widely should the word 'throw' be interpreted? Another possible area of controversy is what does the word 'litter' mean in this context? Assume it means something which is useless or rubbish – but rubbish to whom? When does the evening paper become rubbish (or useless); the next day?

Of course it would be extremely unlikely that you would encounter a Statute so vaguely worded, because no doubt, the draftsmen would anticipate at least some of the difficulties referred to above. It is the need to include definitions, exceptions, exclusions and so on which make our

Acts of Parliament so complex. The English language often does not allow Statutes (and legal documents) to be drafted simply and concisely.

2. Some people suggest that lawyers set out deliberately to make the law obscure so that they are the only ones who can understand and citizens will have to pay lawyers for their interpretation. This sort of glib assertion is often ill informed. More commonly, the problem arises because lawyers in drafting documents or Statutes tend to rely on precedents which are often cast in old fashioned English. To these precedents, amendments or modifications are made (in the same style) which adds to the complexity.

3. Another factor is that drafters of both Statutes and legal documents set to try to cover every conceivable contingency. So what commences as tolerably simple becomes very unwieldy. Frequently, this process occurs with legislation because a loophole in the particular provision is exposed by a court case and the government rushes through an amendment to close the loophole. This process is particularly evident with revenue raising Statutes.

   When drafting documents lawyers try to cover all angles because that is precisely what the clients expect. If a lawyer fails to deal with a contingency and the matter has to be resolved in court then the client understandably may be put out.

4. One reason complex or obscure legislative drafting is not amended is because over time its meaning might be drafted by the courts in the way they interpret the particular provisions. If the law is amended then the value of the clarifying decision may be lost and the new wording may raise its own ambiguities. The more court cases you get, the more it is lost by any changes and the greater the inertia for change.

SELF ASSESSMENT EXERCISE 1

Take any Act of the Federation on Law of a State and attempt to identify the following components:

a. Short title
b. Long title
c. Date of reprint
d. Heading
e. Marginal notes
f. Schedule

g. Looking at the table of provisions what section provides, for making of regulations?
h. Definition section or dictionary

3.2 Plain English Drafting

This is not to suggest that the complexity and obscurity of legal drafting is tolerable or is justified by the above factors. Few commentators would disagree that more of an effort should be made to produce statutes and documents in a form that can be understood by the non-lawyer. In fact, there is now afoot in Nigeria a concerted effort in that regard. This drive is coming from a number of sources including:

- State and Federal Government policy. For instance one object of Interpretation Act is to facilitate 'Plain English Drafting'.

- Business is complaining loudly about the cost and uncertainty in complying with laws which are almost impossible to comprehend. One result of this pressure is recent revision of the Company Law and the enactment by the Federal Government of the Companies and Allied Matters Act, 1990.

- In deciding whether the actions of a person or company in a particular transaction is unjust or unconscionable, the courts will have regard to whether any relevant documents could be readily understood. This has caused many finance and insurance companies to re-draft their documents into a more comprehensible form.

- Finally, it is being realized that it is rarely possible to cover every contingency, especially in legislation and a better alternative is to lay down some broad and simple guidelines for conduct; if necessary leaving the courts to provide further guidance through their decision. This is sometimes known as 'fuzzy law'.

The advantage is that this type of Statute Law will be much concise and hopefully it can be understood by at least that section of the community most affected. The drawback is that costly litigation may be required to provide the clarification necessary. On the other hand the old style and more complex approach often does not exactly stem the flood of litigation either.

Legal drafting which used to be taught only in the Law School is now being taught in many universities including NOUN at undergraduate and postgraduate levels.

3.3 Principles, Approaches and Rules

To assist courts to interpret statutes, a number of principles and rules have been adopted over the years. These rules are not necessarily hard and fast and there is still a considerable discretion available to judges.

Courts, by interpreting either widely to cover a particular situation or narrowly to exclude it, in a sense create new law. The effects of a court decision on the interpretation of a Statute can be clearly shown by looking at the Companies Income Tax Act (CITA) and the Income Tax Management Act (ITMA). The scheme of the Act is to impose tax in certain circumstances and almost daily tax payers are challenging that Act saying that its terms do not cover their particular situation for various reasons. If the taxpayers' arguments are upheld by a court, then often, a loophole is opened up and a new legal situation comes about until of course the government closes up the loophole.

The courts have over the years worked out ways and means of interpreting Statutes. These ways and means may be classified into:

- Approaches to the way in which statutes should be interpreted – these approaches are of a general nature; and
- Specific rules which aid statutory interpretation.

Judges differ in opinion on the correct approaches. However, the specific rules are more or less universally accepted.

3.3.1 Approaches to Interpretation

Set out below, is an explanation of the three traditional 'approaches' to the interpretation of legislation. While these methods or rules provide some guidance, their importance should not be over-stated. It could be rare for instance to hear a judge refer to one of these approaches when giving reasons for interpreting a statute in a particular way. While no formal recognition may be given by the judge, certain aspects of these approaches may, however be gleaned from the decision especially if, for example, the objects of the statute are identified. A study of the three approaches therefore can provide a setting against which statutes are interpreted.

Also, they provide a useful illustration of the latitude that courts often have (or consider they have) when interpreting an Act. Just as we saw with precedent and ratio decidendi there is no pre-ordained path or automatic process that will produce a given result.

a. **Literal Approach:** This means you simply interpret the words of the statute as they stand. If this leads to an unjust result, that is

not the concern of the courts but rather of Parliament and the injustice can be remedied by Parliament.

b. **Golden Rules:** A gloss on the literal approach is the **golden rule** which means you apply the literal approach unless that would lead to a manifest absurdity or injustice – which presumably Parliament did not intend.

c. **Mischief Approach:** This involves a consideration of what Parliament intended, which is usually tied up with the question: What mischief does the Act attempt to stamp out?

None of these approaches has received universal acceptance by judges. However, the modern trend is towards the purpose approach, especially it has been recognised by statutes dealing with the interpretation of statute themselves. This development is explained below.

Let us talk more on some examples of these three approaches:

3.3.2 The Literal Approach

In *Prince Blucher, Ex parte Debtor* (1931) 2 Ch 70 is quite a good case in point. That decision turned on the interpretation of a section of the *English Bankruptcy Act* dealing with arrangements by debtors with creditors as an alternative to bankruptcy. The section provided that to avoid bankruptcy the debtor must within a certain period of time lodge with the Official Receiver a proposal in writing signed by him embodying the terms of the composition or scheme. In the particular case the debtor did not sign the proposal but rather his solicitor did – the reason being that the debtor was too ill at the time (this fact was not contested at the trial).

The court had to interpret the words **signed by him** in the relevant provision and did so by applying the literal approach. It was held that the debtor had not complied with the provision and could not gain the benefit of the section. The court recognised the injustice created by this interpretation but followed an earlier English case of *Warburton v Loveland* (1832) 6 ER 806 which expressed the rule that where the language of an Act is clear and explicit the court must give effect to it, whatever may be the consequences; in that situation the words of the Statute speak the intention of the legislature.

3.3.3 The Golden Rule Approach