

3.4 Custom

Custom is no longer an important source of law in that most of the customs have been recognised, reinforced or abolished by case-law, institutional writings or Acts of Parliament.

3.5 Equity

You have already seen in Part A of Units 6 and 7 that England had a system of courts of equity distinct from its system of courts of common law. The Scottish courts have always administered law and equity together.

In Scotland, equity can mean 'fairness', 'reasonableness' or 'natural justice' (e.g. when a judge is exercising discretion as to the way in which the law is applied, the common law will often require regard to be had to equity).

Equity can also have a more narrow meaning when it refers to the equitable power according to which the Court of Session and the High Court of Justiciary may, as a last resort, provide a remedy where otherwise there would be none.

3.6 Extraneous sources

These are of secondary importance and include obiter dicta (see above), legal literature and foreign law. Traditionally, the Scottish courts would have looked to Roman law for guidance. Now much assistance is drawn from English law, and we have already looked at criticisms of the influence English law has over Scottish law.

In the next activity you will be asked to access the official Scottish Courts Service website, find and read a recent case and answer some questions about it.

ACTIVITY 9

Case research using the internet (allow 1 hour)

Go to the Scottish Courts Service website which is referred to at paragraph 1.7 above and find the case of *John Agnew v. Scott Lithgow*, Extra Division of the Inner House of the Court of Session, 1 April 2003. You should note that an appeal from a judge of the Outer House of the Court of Session is called a reclaiming motion.

You will need to access the Court Opinions part of the website. The quickest way to access the Court Opinions is to select the 'Professional' tab in the top right-hand corner of the home page. Click on 'Court Opinions', then click on 'Court of Session and High Court of Justiciary Search'. Then click on the 'Structured search' tool, you will need to specify two dates within which the search is to be made. A search for the period 01.01.2000 to 01.05.2003 should also disclose two earlier Opinions by Outer House judges in this case. You only require to look at the Inner House judgment for this activity.

After reading the decision, please answer the following questions:

- 1 What was the principal statutory provision applicable to the issue before the court in this appeal?
- 2 Was the pursuer successful in his reclaiming motion?



COMMENT

The case you have been asked to read relates to a defence to a claim for damages for personal injury on the basis of the law of time bar. Most legal systems have time bar laws to prevent claimants bringing stale claims which it may be difficult for the party against whom the claim is brought to investigate properly. Evidence may no longer be available. In Scotland this period is three years for personal injury claims.

Where injury is caused by a single event, such as a car accident, the start date for the period within which the case must be brought in order to avoid the time bar is easy to work out. In cases where the injury is sustained over a prolonged period but may not become apparent until some later date. Therefore some other way of working out the start date is needed.

Agnew's case is an example of this. The injury had occurred by the prolonged use of vibrating tools in the shipbuilding industry. Section 17(2)(b) of the Prescription and Limitation (Scotland) Act 1973 sets out a three-part test to be satisfied in such cases. In its decision the Court affirmed that the test is in part an objective one. The Extra Division agreed with the judge who dealt with the case at first instance that the pursuer failed to satisfy the second part of the test by waiting too long before bringing his action. It declined to be guided by the equivalent English statute which would appear to be more helpful to claimants in a similar position to Agnew.

OPTIONAL EXTENSION TO ACTIVITY 9: ORAL SKILLS

Like the other skills activity extensions in this Unit, this is optional and you do not need to attempt it unless you have the time and would feel comfortable doing so. The extension focuses on interviewing skills, and so you will need to work with another student to attempt the interview itself do not worry if this makes it impossible for you to do this. However, you might like to have a go at preparing for the interview (e.g. by making notes of the questions which you would want to ask).

Having found and read the *Agnew* case, one of you will interview the other to find out some further information about it. The interviewer needs to find out how the court came to its decision, and the view which it took about an equivalent English statute which was under consideration.

COMMENT

The information required is set out briefly below. Points to reflect on in relation to the interviewing skills are:

- how did you prepare for conducting the 'interview'?
- did you have a clear idea of what you wanted to find out?
- how did you establish the questions which you wanted to ask?
- what use did you make of 'closed' questions (i.e. questions which specifically target a piece of information, such as 'what was the English statute which was discussed?')
- what use did you make of 'open' questions (i.e. questions which are much more designed to let the interviewee decide what is important, such as 'Can you summarise why the court came to the decision it did?')
- how successful do you feel you were in eliciting the required information?

If you are interested on looking further into interviewing skills, you might like to look at the module on this which is included in the online materials associated with *Slapper and Kelly*. However, for ease of reference, the relevant materials are available for you to look at on Elite.