RHODES UNIVERSITY

LEGAL SKILLS 2024

APPLIED LOGIC

&

CRITICAL REASONING

Outcomes for Applied Logic and Legal Reasoning

At the end of the course students should be able to demonstrate the ability to:

- Analyse and explain the concepts of applied logic and critical reasoning in the context of the study of law;
- Organise their approach to legal research, and their production of verbal and written work, in a logical and systematic manner;
- Apply logic and critical reasoning in their construction of legal arguments and opinion.

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CONTENT OF THE COURSE

1. Introduction: applied logic and critical reasoning.
2. Basic principles of applied logic:
    - Deductive Reasoning.
        - Syllogisms.
        - Flawed Syllogisms.
    - Inductive Reasoning.
        - Generalisation.
    - Reasoning by analogy.
3. Reasons & Arguments:
    - Argument.
    - Inference:
        - Perception.
        - Emotion.
        - Other people as sources of information.
    - Relevance, irrelevance and reasoning.
4. Fallacies:
    - Fallacy of irrelevant reason.
    - Strawman fallacy.
    - Fallacy of appeal to ignorance.
    - Fallacy of suppressed or neglected evidence.
    - Begging the question.
    - Either/or fallacy.
5. What makes an effective critical thinker?
6. Legal problem solving: bringing it all together.

TEACHING METHODS AND ASSESSMENT

This component of the Legal Skills course usually consists of four lectures in which applied logic and critical reasoning is analysed in a legal context. Given the current circumstances of the COVID-19 pandemic, these four lectures will be adapted into smaller online videos that will be posted on the Legal Skills RUConnected page.

There is no separate assessment for this component of the Legal Skills course - it is assessed as part of the 72-hour assignment. The 72-hour assignment will take place in the third term and Prof Glover, Mrs Driver and myself will give you a full briefing with adequate notice and a comprehensive breakdown of marking criteria for the assessment.

1. INTRODUCTION: APPLIED LOGIC AND CRITICAL REASONING

WHAT IS LOGIC?

The word **logic** comes from the Greek word **logos**, meaning 'reason'. It is the science of the normative formal principles of reasoning.

Traditionally, logic is studied as a branch of philosophy. This involves the analysis of the patterns of reasoning by which a conclusion is properly drawn from a set of premises. By the mid 19th century, **formal logic** was established as the foundation of mathematics; the development of formal logic is the foundation of computer science.

This course will concentrate on more informal logic, which is the study of the principles and criteria of valid inference and demonstration. More simply put, it

is the study of **truth-preserving arguments**. In this context, logic investigates and classifies the structure of statements and arguments, both through the study of formal systems of inference and through the study of arguments in natural language.

WHAT IS APPLIED LOGIC?

Applied logic is the practical application of right reasoning. Applied logic in this course means logic applied to the study of law. Applied logic enquires into the objective value of concepts, the import and value of judgments and reasoning, the criteria of truth, the nature of evidence, certitude, etc. Logic will assist you to analyse an argument or a piece of reasoning, and work out whether it is likely to be correct or not. You do not need to know logic to argue, but if you know even a little, you will find it easier to spot invalid arguments.

WHAT IS CRITICAL REASONING?

The word critic comes from the Greek word krités, meaning a person who offers reasoned judgement or analysis, value judgement, interpretation, or observation.

Critical reasoning is the process of actively and skillfully conceptualising, applying, analysing, synthesising, and evaluating information to reach an answer or conclusion. It is a mode of thinking about any subject, content, or problem, in which the thinker improves the quality of their thinking by skillfully taking charge of the structures inherent in thinking and imposing intellectual standards upon them. Reasoning and critical thinking are commonly understood as one aspect of the field of **logic** when considered broadly.

A competent critical thinker:

- raises vital questions and problems, formulating them clearly and precisely;
- gathers, assesses and interprets relevant information, to arrive at well-reasoned conclusions and solutions, testing them against relevant criteria and standards;
- thinks open-mindedly within alternative systems of thought, recognising and assessing, as need be, their assumptions, implications, and practical consequences;
- identifies fallacies of reasoning and then avoids them in constructing an argument; and
- effectively communicates solutions to complex problems.

The outcome of the reasoning process (i.e. the process of critically thinking, evaluating and logically considering information) is the conclusion. The challenge of reasoning is to apply logic to arrive at an appropriate conclusion.

Sound, effective reasoning results in a supported, accurate, appropriate conclusion; fallacious reasoning results in an error. It is up to YOU to distinguish sound and appropriate reasoning from fallacious reasoning.

Critical thinking is very important as it allows purposes, questions, information, inferences, concepts, assumptions, implications, points of view, beliefs, and situations to be analysed, evaluated and restructured, decreasing the risk of acting on a false premise.

Critical thinking does not ensure that either the truth or correct conclusion is reached. Important information may be undiscovered or the information may not even be known. Moreover, unjustified inferences may be made, inappropriate concepts used, important implications may be overlooked, or a narrow or unfair point of view used. The writer may be a victim of self-delusion, egocentricity or sociocentricity, or closed-mindedness. Thinking may be unclear, inaccurate, imprecise, irrelevant, narrow, shallow, illogical, trivial,

intellectually arrogant, intellectually lazy, or intellectually hypocritical. These are some of the ways that human thinking can be flawed.

In Summary:
"Reasoning is a process of thought aimed at reaching or justifying a conclusion. The process involves a consideration of facts and impressions, experiences and principles, objectives and ideals." (Zelermyer, 1960).

LOGIC, REASONING AND THE LAW

Many writers argue that logical reasoning is not the be-all and end-all of the law, since the law cannot be reduced to the application of principles or rules to factual situations, leading to an automatic conclusion. Rather, they argue, the law and its decisions must be supported by reason, which may not necessarily be logical. The application of logic is concerned with the discovery of truth by applying principles and rules. However, we do not have a complete set of rules for every situation. Thus, legal reasoning comes into play when we have to fit a particular situation into the context of our legal history and existing legal principles. A logical and reasoned approach is important in law because it assists lawyers in structuring their arguments.

Ask yourself: What is thinking like a lawyer? On the most basic level, it means using logic to construct arguments.

This course aims to examine some basic logical concepts, and apply these to the practice of law, and to take this further by examining approaches to critical thinking and reasoning in the legal context.

2. BASIC PRINCIPLES OF APPLIED LOGIC

Logic is a theory that provides standards to evaluate arguments on their logical validity. Modern logic is concerned with the form of an argument, rather than its content. In this way, logic provides procedures with which the validity of arguments can be tested.

Traditionally, logical reasoning can be separated into two broad categories: **deductive** and **inductive**. Both of these play important roles in the legal system.

DEDUCTIVE REASONING: SYLLOGISMS

This was a method taught by Aristotle. Deductive reasoning is based on the act of proving a conclusion by means of two other propositions. The conclusion is compelled by the known facts.

The well-known example of this is as follows:

1. All men are mortal.
2. Socrates is a man.
3. Socrates is mortal.

This is known as a **syllogism**.

What we see here is an argument of three statements.

NB: The first two are called **premises**.

- The first is the major premise. It states a broad and generally applicable truth.
- The second is the minor premise. This states a specific and usually more narrowly applicable fact.

- The third is the **conclusion**. This draws on the premises and offers new insight that is known to be true, based on the premises.

Every complete sentence contains two parts: a **subject** and a **predicate**. The subject is what, or whom, the sentence is about, while the predicate tells something about the subject.

In a syllogism, the subject of the first statement is the predicate of the second. The truth of the conclusion is guaranteed by the truth of the premises i.e. if A and B are true, C must also be true.

Thus, a syllogism can be used to test the VALIDITY of an argument.

The syllogism above is **valid**, as is the one below:

1. The Earth is bigger than Mars.
2. Jupiter is bigger than the Earth.
3. Jupiter is bigger than Mars.

The following syllogism is **invalid**. Why?

1. I support the Proteas.
2. Dale Steyn plays for the Proteas.
3. Therefore, the Proteas will win the Test Series.

What about this argument?

1. If Dale Steyn plays for the Proteas, then they will win the Test Series.
2. Dale Steyn is playing for the Proteas.
3. Therefore, the Proteas will win the Test Series.

This argument is valid, but the premises and conclusion are false. The validity only guarantees the truth of the conclusion if the premises are true. Here the premises are false, so the conclusion remains false. However, the **construction** of the argument is valid.

If the premises are true, then the conclusion cannot be false. If the premises are false then the conclusion can never be true.

The essence of deductive validity is the **relationship** between the premises and the conclusion – it says that when these are combined and if the premises are all true, then a false conclusion is impossible. In this way, deductively valid arguments are **truth preserving**: if the premises are true then the conclusion must be true as well.

This form of deductive reasoning forms the basis for most judicial opinions and briefs. The following are some examples constructed from well-known judgments:

S v Makwanyane 1995 (3) SA 391 (CC)

1. The Constitution accords every person the right not to be subjected to cruel, inhuman or degrading punishment.
2. Capital punishment constitutes cruel, inhuman and degrading punishment.
3. Therefore, capital punishment is unconstitutional.

Government of RSA v Grootboom 2001 (1) SA 46 (CC)

1. Under s26(1) of the Constitution, it is unconstitutional to deny individuals their existing access to water, food or housing.
2. The local authority unlawfully evicted squatters from their homes, denying them their existing access to housing.
3. The local authority acted unconstitutionally.

Casey NO v The Master & Others 1992 (4) SA 505 (N)

1. In terms of our common law, no person may benefit from his own wrong, and a person who kills another may not inherit from their estate.
2. Casey killed his wife.
3. Therefore, Casey could not inherit from his wife’s estate.

Law students should get into the habit of thinking in syllogisms. When looking at a case, structuring an assignment or formulating an argument, you need to think in these terms. The premises you use must be true and if this is so, the conclusion should be true and rational.

An argument will be sound when it is deductively valid **and** has all true premises. One of the features of a deductively valid argument is that the conclusion contains no new information i.e. all the information in the conclusion is already contained in the premises.

By using syllogisms to construct arguments, you will ensure that your conclusion is well supported with evidence. Moreover, the person judging your argument will have a clear course of reasoning to follow.

HOW TO CONSTRUCT A VALID SYLLOGISM

- Begin by stating the general rule of law, or the widely known legal rule that governs the issue. This is your **major premise**.
- In your next statement, describe the key facts of the legal problem at hand. This is your **minor premise**.
- Then draw up the conclusion by examining how the **major premise about the law** applies to your **minor premise about the facts**.

An example is this:

1. Major premise: Section 19(3) of the Constitution gives every adult citizen the right to vote.
2. Minor premise: All of the Prisoners in the Grahamstown prison are adult citizens.
3. Conclusion: All Grahamstown Prisoners have the right to vote.

A generic model which can be used as a template for most legal problems is the following, which is based on the argument made by prosecutors in most criminal cases:

1. Major premise: [doing something] [violates the law].
2. Minor premise: [the accused] [did something].
3. Conclusion: [the accused] [violated the law].

FINDING SYLLOGISMS IN LEGAL WRITING

In legal writing syllogisms can be difficult to immediately identify since sentences may have to be rearranged and rephrased. This is because legal writers sometimes do not mention all the parts of the syllogism, leaving you to read between the lines. This happens where the premise or conclusion is obvious, and so it need not be stated. Such an argument is called an **enthymeme**.

Example: The Will may be amended because the provisions are *contra bonos mores*. In terms of a syllogism, this should say:
A Will may be amended when the provisions are *contra bonos mores*.
The Will in this case offends the right to equality, which means it is *contra bonos mores*.
Therefore, the Will may be amended.

This may not all be stated, and therefore it may have to be extracted by the reader.
Legal writers also use **polysyllogisms**. These are multiple syllogisms, where the conclusion of one syllogism supplies a premise for the next syllogism:

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

Theft is a crime.
John committed theft.
Therefore, John committed a crime.

All mortals can die.
Socrates is mortal.
Therefore, Socrates can die.

All crimes are punishable.
John committed a crime.
Therefore, John is punishable.

People who can die are not Gods.
Socrates can die.
Therefore, Socrates is not a God.

People who are punishable go to jail.
John is punishable.
Therefore, John will go to jail.

FLAWED SYLLOGISMS

Part of knowing logic is knowing when a mistake has been made. **Formal fallacies** are common errors in formal logic – they are invalid arguments that may appear to be valid. **Informal fallacies** are mistakes in reasoning that can occur in valid or invalid arguments and are related to content. An informal fallacy can lead to an untrue conclusion even though the argument form is valid.

Syllogisms are rigidly inflexible, because if the premises are properly constructed, the conclusion must follow. Therefore, you must be on the lookout for the improper construction of an argument:

Some men are thieves.
John is a man.
Therefore, John is a thief.

This is clearly incorrect because the syllogism is fallacious. The premise that **some** men are thieves is not sufficient to conclude that a **particular** man is a thief. This is a common mistake in legal arguments. Certain words should help you to spot this: some, certain, many, a, one, this, that, sometimes, occasionally, somewhere etc.

Deductive reasoning is based on the principle that what is true of the universal is true of the specific. Therefore, you have to reason from the general to the particular. If you are unsure about the general, you cannot draw proper conclusions about the particular.

Is this correct?

All prosecutors work with criminal cases.
Sam works with criminal cases.
Therefore, Sam is a prosecutor.

By using deductive reasoning, you should start learning to think like a lawyer. This is because one of the main questions lawyers ask is whether the facts of a case can fit into the territory governed by a particular rule.

INDUCTIVE REASONING AND GENERALISATION

Many cases cannot simply be settled using deductive reasoning. Where there is an unsettled question of law, there will be no binding precedent to supply a major premise for a syllogism, and so you will not be able to use deductive logic. This is where inductive reasoning may be useful.

Inductively valid arguments have conclusions that go beyond what is contained in their premises.

Valid induction is based on the idea of learning from experience. Inductive generalisation is a form of logic in which big, general principles are obtained from observing the outcomes of many small events. For example, if you are asked to determine whether all men are mortal, but you do not have the benefit of being given the statement ‘all men are mortal’, you will lack a way of deducing it, and so you will have to use inductive reasoning. You will therefore have to use what you know about particular men and their mortality:

- Socrates was a man and he was mortal.
- Shakespeare was a man and he was mortal.
- Jan Smuts was a man and he was mortal.
- Nelson Mandela was a man and he was mortal.
- Therefore, all men are mortal.

The principle relied on here is that the world is sufficiently regular to permit the discovery of general rules. Induction gives us a way of reasoning new ideas and beliefs, rather than only relying on what we already know, as in the case of deduction. In inductive reasoning, past experience is used to guide future conduct.

Unlike deductive reasoning, inductive logic is not so absolute since it exists in degrees. This means that it does not produce conclusions **guaranteed** to be correct. It uses probabilities and generalities rather than certainties. In sum, inductive reasoning can provide workable rules, but **not proven truths**.
Inductive reasoning is particularly important when there is no precedent that provides authority for a case. Lack of precedent means there cannot be a major premise for a syllogism, so here you will have to build the premise yourself. To do this, you will have to draw on other decided cases in order to determine a general rule that supports your position.

In an inductively strong argument, the conclusion contains **new** information unlike in deduction, where nothing in the conclusion is new. This consists of a group of sentences that provide **inductive reasons** for a conclusion.

There is always an **inductive leap** from the inductively strong reasons to the conclusion. The stronger the inductive reasons, the less risky the inductive leap.

- It is important to ensure that you have reference to enough examples (or an adequate number of particulars) before you conclude a general rule. Otherwise, you will construct a **fallacy**.
- A hasty generalisation occurs when a person erroneously creates a general rule from observing too few cases, e.g. if you use an exceptional personal circumstance or experience to construct a general rule. For example, considering the effect of alcohol only on those who indulge in it excessively may lead to the conclusion that all liquor is harmful and that its sale and use should be forbidden by law.

But how many instances are enough to make a generalisation? Generally, the more examples you have, the stronger your argument becomes. But raw numbers themselves are not enough. The sample size must also be representative. For example, if you were collecting crime statistics, you would get different results if you collected results only from people who live in the northern suburbs of Johannesburg in gated communities than if you looked at people in all South African communities.

We can never be certain that an inductive generalisation is true but it can be used to shape persuasive legal arguments when there is no clear precedent.

INDUCTIVE REASONING BY ANALOGY

An analogical argument can be described as reasoning by example: finding the solution to a problem by reference to another similar problem and/or solution.

Hypothetical questions play a central role in legal analyses. You have practice at this all the time. All of your lecturers think up elaborate problem scenarios for tests, assignments and exams, and ask you to determine the correct result from various prescribed cases. Then you may be asked: if the situation changes in some way, does the result change?

Judges also rely on hypotheticals to determine whether a lawyer's argument is valid. However, hypothetical questions are often not managed well by students…and others.

Analogy is a form of inductive reasoning, and it may be used to deal with hypothetical situations and to test legal arguments.

Analogy is a process of drawing similarities between things that appear to be different.

In law, analogies have a specific purpose. They are used to compare new legal issues to established precedents. So the outcome of the new case is predicted

on the other's outcome. Edward Levy, an American authority on the role of analogy in law, identified a 3-step process:

1. establish similarities between 2 cases;
2. announce the rule of law embedded in the first case;
3. apply the rule of law to the second case.

This is different from deductive logic or inductive generalisation. It requires one-to-one comparisons that require no generalisations or reliance on universal rules. A deductive argument is subject to the rules of formal logic, and the argument is either valid or invalid. An inductive argument is not formally bound in the same way, but its conclusion can be tested experimentally, to either verify it or not.

The idea in analogy is to find enough similarities between the new case and a precedent to convince the judge that the outcomes must be the same. Proper analogy should identify ways in which the cases or scenarios **resemble** each other, and also the ways in which they **differ**.

Relevance then becomes important, as one has to determine whether the resemblances or differences are relevant to the issue at hand. The degree of similarity is the crucial element. In general, the similarities between the facts in the cases must outweigh the differences. If the relevant similarities outweigh the relevant differences, then the outcomes of the cases should be the same.

There are no rules that prescribe how much or what type of similarity is enough to sustain an analogy. For this reason, analogical arguments are often said to be not reliable enough to support a seriously contested conclusion. Nevertheless, analogy is fundamental to legal reasoning.

3. REASONS AND ARGUMENTS

Arguments are groups of sentences, consisting of one or more premises and a conclusion. Logical arguments are essentially based on syllogisms. An argument makes a **claim** in the form of the conclusion. The premises provide reasons, justification or evidence for the conclusion.

An argument is, to quote the Monty Python sketch, "a connected series of statements to establish a definite proposition." Understanding arguments and the way they are constructed is central to being able to understand and explain the law and legal process.
Arguments may be used for the flowing purposes:

Reasoning

- We use arguments when involved in problem solving or deliberation.
- Here we may not be trying to justify a particular claim, but we are trying to determine what would follow if certain premises are true.
- This is important in reaching the correct basis on which to argue a case. A proper hypothesis of the case must be grounded in sound reasoning.

Persuasion

- Arguments are often used in an attempt to convince or persuade someone else that something is true. We want the other person to accept the conclusion of our argument by giving them reasons to believe it.
- Lawyers belong to a profession where persuasion is often key but this must be built on solid premises and conclusions.

Evaluation

- It is necessary for lawyers to be able to evaluate other people's arguments, often so that they can refute them, or offer alternative arguments.
- It is important to know whether your opponent's argument is any good, so that you can point out where it is going wrong, or so that you can evaluate the strength of your own argument.
- It is also important to be able to evaluate previous court decisions before you can attempt to apply them or distinguish them from the facts of your own case.

In law, **premises** often represent legal principles or statements of fact. **Evidence** is presented and used in court to show that certain principles either apply to, or can be deduced from, the facts of the case. **Argument** is not presented through evidence, but is persuasive comment made by legal counsel with regard to questions of fact or law.

Indicator words in arguments

It is important to determine whether what you are reading or hearing is an argument. You need to be able to identify the premises and the conclusion. Sometimes in written or spoken language, the premises will precede the conclusion, and at other times, they will follow the conclusion.

Certain indicator words may be useful for determining the conclusion:

- <u>If the premises precede the conclusion</u> i.e. these words indicate that the conclusion is to follow: therefore, thus, so, hence, consequently, accordingly, implies that, entails that, we may conclude that, this establishes, in short….etc.

  All men are mortal
  Socrates is a man
  <u>Therefore,</u> Socrates is mortal.

- If the premises follow the conclusion i.e. these words indicate that the premises are coming: because, for, since, due to, as a result of, after all, in view of the fact that, inasmuch as, here are the reasons…etc.

  Socrates is mortal **because**
  All men are mortal
  Socrates is a man.

However, often arguments do not contain any indicator words. Where the premises or conclusion of an argument are not explicitly set out, you may have to extract these yourself, in which case you will have to ask yourself:

- What is the point that is being made?
- What is the speaker or writer trying to prove, or what do they want us to believe?
- What are the premises on which they rely to reach their conclusion?
- Are the premises true, or at least plausible?
- Do the premises support the conclusion?
- Has any relevant information been omitted from the premises?
- Can the argument be constructed in another way? If so, how?

Once the reasons and conclusions in an argument have been distinguished, one can start to determine whether the argument is satisfactory.

Conditionals are not proper arguments

Here is an example of a conditional sentence: If Dale Steyn had played in the match, the Proteas would have won.

This is not an argument because it does not give reasons to support any claim, and it does not advance any conclusion. It is merely hypothetical. You could assert this but go on to correctly add that he did not play in the match and the Proteas did win.

Compare this with:
Dale Steyn did not play in the match.
Therefore, the Proteas did not win the game.

This is an argument (though not a very good one), because it makes two claims and neither is hypothetical.

INFERENCE

We draw an **inference** when we make a judgement based on some evidence, assumption or reason. If you learn that 90% of people are going to vote for the ANC, then you infer that the ANC will win the election. The results of the poll provide a **reason** to draw this conclusion.

Inference is an activity, because we **do** it when we draw a conclusion from assumptions or premises. Arguments, on the other hand, are not processes but groups of sentences, consisting of one or more premises and a conclusion.

We draw inferences when we begin with one or more beliefs or facts (premises) and use them to arrive at a conclusion. We start with a body of information (or misinformation) and arrive at a piece of new information. Much inference takes place very rapidly and below the threshold of consciousness – we gather and assess information from around us, and without even realising it, draw inferences from it. Therefore, inference is closely connected with other factors, including, but not limited to:

- Perception;
- Emotion;
- Our own desires and self-interest;
- Other people as sources; and
- Biases.

PERCEPTION

Many of our beliefs can be traced back to information we acquired from our environment. Perception can be seen as the interface between the mind and the world – it is how we see the world.

Perception is related to reasoning in the following ways:

1. The way we reason is usually based on premises of what we see or hear. We usually think these premises are secure and trustworthy.
2. Perception goes beyond the information we take in from the surrounding environment, and involves reasoning, or inference.
3. Perceptual inference can therefore be influenced by the context, our expectations, our biases, desires and self-interest. Perception is selective and information may be processed in a variety of ways.

Therefore, perception is susceptible to errors, and we need to use critical reasoning to evaluate claims about what we and others perceive. For example, if TB is the major cause of death amongst HIV/AIDS patients, can we infer that most people who have TB also have HIV/AIDS? The argument does not contain enough evidence to support this inference because it is biased by perception, and therefore likely to be incorrect.

EMOTION

Human reasoning never occurs in a vacuum, because people have feelings, desires and emotions and this influences the way in which we think and reason. Our moods, for example, influence our perception. For example, people watching the same sports match will see it differently because of how they **feel** about their team. Similarly, if we like someone we may give too much weight to their testimony. When it comes to memory, our emotions and moods may affect the way we fill in details.

Emotions can therefore give rise to fallacious reasoning because of our inherent biases. This does not necessarily mean that emotions must be set aside

because many are valuable, and they can also be supported by evidence and rationality. For example, the fact that you are afraid of lung cancer gives you a good reason to stop smoking. Intense emotions such as anger and fear may cloud judgment, or provide an incentive for bad reasoning. This can be exploited by other people.

Thus, some emotions are positive, and others may be negative. This must be remembered, particularly when evaluating information from other people, as their perceptions, memories and reason may be influenced by stress, pain, anger, joy etc.

Many lawyers, when arguing, resort to appeals to emotion in order to try to sell their cases. This is often done where their argument lacks proper support, in order to divert attention from the real issues. It may be a form of manipulation. You need to be aware of this in your opponents' arguments, and you must guard against it in your own arguments. The case must be evaluated on its merits, not on illegitimate appeals to emotion. For example, to say that your client had a terrible childhood, and to lead this as evidence may not at all be relevant to the fact that he is guilty of a crime that has more to do with his own wickedness than his childhood. There is an urban legend in legal circles that involves a lawyer pleading with a judge for leniency in sentencing a woman who was convicted of the murder of both of her parents to take pity on her because she is an orphan!

Emotions can also lead us to fool ourselves. For example, we may practice wishful thinking by disregarding evidence and convincing ourselves that what we believe, or what we want to be true, is in fact the truth. The opposite is self-deception. These are self-serving biases.

Example: I did well in my Property exam because I am bright and I studied really hard; I did badly in my Contract exam because I wasn't feeling very well, and anyway the exam wasn't fair.
This does not reflect good argument or reasoning.

OTHER PEOPLE AS SOURCES OF INFORMATION

Most of our knowledge and reasoning is based on things we learn from other people. This may be reliable, but often it is not, as people make mistakes or may purposefully misrepresent the true state of affairs. It is therefore important to be able to separate reliable sources of information from unreliable ones. For example, it is often necessary to evaluate the evidence from a witness or an expert. We also learn and hear things from the media, textbooks and other reference works, from friends, the internet etc. These have a tendency to shape our views and perceptions.

It is therefore necessary to obtain background information to determine whether our premises are plausible, or whether they omit relevant information, and we often have to rely on others to supply us with this information. Thus, it is important to learn how to acquire and evaluate information.

Information from primary sources will generally be more reliable than secondary sources e.g. referring directly to a case will be better than relying on the interpretation of a case in a textbook (or in syndicate notes); obtaining evidence from an eyewitness himself will be better than relying on the police report or witness statement, etc.

Three important questions about any argument:

1. Do the premises support the conclusion?
2. Are the premises plausible?
3. Has any relevant information been omitted?

Example:

Many people argue that we should retain capital punishment because it deters murderers.

Background knowledge is required here to determine whether the premise that capital punishment deters murderers is true. What do the statistics show? What

is the rate of recidivism? You also need to know whether information has been omitted: is this the state of affairs in all countries, or just some?

RELEVANCE, IRRELEVANCE AND REASONING

Relevance is a term used to describe how pertinent, connected, or applicable certain information is to a given matter. When reasoning or presenting an argument, opinion or point of view, reasons or evidence must be given that have a bearing on the topic i.e. are **relevant** to it. Relevance involves a relationship between one statement and another, and is important in all communication.

Fallacies of relevance occur when premises or evidence are used that are not relevant to the conclusion. It will be irrelevant if it has no bearing on the truth or falsity of the conclusion. A premise can be relevant to one conclusion, but completely irrelevant to others.

Examples of relevance:

1. The premise that witnesses claim to have seen Shrien Dewani meeting with the man who killed his (Dewani's) wife is relevant to the conclusion that Dewani is guilty of planning his wife's murder.
2. The premise that Jack had 10 bottles of beer at the party is relevant to the conclusion that he drove home drunk.
3. The premise that the death penalty deters murder is relevant to the claim that we should retain capital punishment for murder.

Examples of irrelevance:

1. The fact that Shrien Dewani has many friends and is suffering from stress is irrelevant to the claim that he is guilty of planning his wife's murder.
2. The fact that Jacob Zuma was charged with rape was irrelevant to the claim that he was guilty of fraud.
3. The fact that a famous person endorses a product is irrelevant to the claim that it is a good product e.g. just because David Beckham uses a certain razor blade does not mean it is a good razor blade.

Remember that relevance is not the same as truth. A premise can be true but irrelevant to a conclusion, e.g. it is true that Oscar Pistorius has a certain astrological sign but this is irrelevant to the claim that he is guilty of murder.

In the same vein, irrelevance is not the same as falsity. A premise can be false but can still be relevant to the conclusion.
Example: The claim that Shrien Dewani wrote a letter to his in-laws saying that he was guilty of planning his wife's murder is false. However, it would be relevant to the claim that he is guilty because if he had written such a letter, it would make it more likely that he was guilty.

Relevance is not the same as importance. An important claim can be irrelevant to a conclusion.
Example: It is a very important fact that the SA taxpayer is negatively affected by the fraud, but this is irrelevant to the conclusion that X committed the fraud.

Conversely, an unimportant claim can be relevant to a conclusion.
Example: The fact that X drives a BMW is not very important to anyone, but it is relevant to your claim if your claim is that he bought the BMW with money obtained through fraud.

Relevance does not offer conclusive support. It comes in degrees and some premises may be highly relevant to a conclusion, others somewhat relevant and still others completely irrelevant.

A claim that provides evidence for or against another claim is relevant to it.

Relevance may be either positive or negative. It has a positive relevance if it supports the other claim, or a negative relevance if it counts against it.

- The claim that John's fingerprints are on the murder weapon is relevant to the conclusion that he committed the crime. This is a positive relevance.

- The claim that John was out of the country at the time of the murder is also relevant to the conclusion that he committed the crime. This has negative relevance to the conclusion.

Two claims that are irrelevant to each other are said to be **independent** of each other. Whether or not one is true has no bearing on the truth-value of the other e.g. the outcome of Shrien Dewani's trial was that he would be found either guilty or not guilty. However, the outcome of his extradition hearing was independent of whether or not he would be found guilty of murder.

In the law of evidence, relevance is closely related to admissibility. Section 210 of the Criminal Procedure Act provides that no evidence as to any fact, matter or thing shall be admissible if irrelevant or immaterial and if it cannot conduce to prove or disprove any fact or point at issue in criminal proceedings. The Civil Proceedings Evidence Act has a similar provision.

4. FALLACIES

What follows are common ways in which argumentation and reasoning go wrong. Bad reasoning is said to be **fallacious**, so fallacies are common ways of reasoning badly. Fallacies are quite common and can often seem persuasive at first, but knowing how to spot and avoid fallacies will improve your legal writing and advocacy. There are many types of fallacies, but we will only consider a few in this course.

THE FALLACY OF IRRELEVANT REASON

This means using an irrelevant premise to support a claim. If the premises of an argument are irrelevant to the conclusion, then the argument is flawed. This is true even if the premises are important or true, or relevant to other conclusions.

It is tempting to supply irrelevant reasons to support a conclusion when we do not have relevant reasons to try to deflect attention from the real issue. This is often done with jokes, ridicule, sarcasm, flattery, insults, etc. To avoid falling into this trap, remember the following:

- Always stay focused on the conclusion – whether the reasons are relevant depends on the conclusion and how it is stated.
- Do not allow yourself to be deflected from the issue at hand – appeals to emotion, insults, sarcasm etc. can cause this to happen.
- Be sure that you and your opponent are not speaking at cross-purposes, but are considering the same claim. Try to explain your view before defending it.

Are there any fallacies in these statements?

1. Oscar Pistorius is not guilty of murder. He never intended to kill his girlfriend and he believes in women's rights.
2. Oscar Pistorius is innocent. He is a popular person and has worked hard to succeed, despite his disability.

Which of the following are relevant to the conclusion that laws should not make it difficult for people to obtain handguns?

(a) The Bill of Rights says that we have a right to freedom and security of person.
(b) Many people have protected themselves from being robbed and killed because they had a gun and were able to scare off an intruder.
(c) People who favour gun control are actually just scared of guns.
(d) Many children are accidentally killed each year by guns in their homes.

We also commit a fallacy of irrelevant reason if we launch an irrelevant attack on a person rather than their argument. Here we shift our focus to the person we are attacking, rather than to issues that are relevant to the conclusion.

Example: you are debating gun controls laws with someone, and they advance their opinion for why gun control should be mandatory.
You counter the argument by stating that your opponent is biased because he is a bleeding heart who is just on the side of criminals, and so cannot see the true picture.
Here you have attacked your opponent rather than the issue.

However, not all attacks on a person are irrelevant e.g. if someone purports to be a good source of information about something, it is acceptable to expose them if they actually are not a good source.

Example: if an eyewitness to a crime is testifying in court, it is reasonable to offer testimony to show that his eyesight is poor, or his memory is faulty, or that he has a reason to lie.

The issue here is that we commit a fallacy if we ignore someone's arguments or reasons, and instead attack the person. Focus your attention on the argument rather than the person, unless the personal attribute is relevant to the issue at hand. Rape cases are a prime example: the defence will often resort to attacking the character of the victim in order to discredit them.

STRAWMAN FALLACY

A person commits a strawman fallacy when he distorts or weakens someone's argument in order to discredit it. Here he is not countering the person's views but distorting their position to make it easier to attack. It creates the illusion of having completely refuted or defeated an opponent's proposition by covertly replacing it with a different proposition and then to refute or defeat that false argument instead of the original proposition. In other words, a weakened version of the argument is attacked, and this shifts attention from the issues that are relevant to the conclusion giving the impression of refuting an opponent's argument, while actually refuting an argument that was not advanced by that opponent.

It is better to show that your own case is strong by building a solid basis for it, than to make the alternative view look weak.

Example: People who think abortion should be banned have no respect for the rights of women. They treat them as nothing but baby-making machines. That is wrong. Women must have the right to choose.
Example: People who are in favour of abortion think that it is fine to commit cold-blooded murder.

In the two examples above, the position of the opposing side is misrepresented in such a way that the opposing position appears obviously false or ridiculous.

Extreme cases may be treated as representative of an entire group e.g. people who oppose gun control laws may quote the views of people who would like to ban all guns as though they were representative of the views of all people.

Another way in which a strawman fallacy can arise is where early, incomplete or simplified versions of a view are criticised, rather than the current, stronger form being considered. If you want to show that a theory is wrong, you must consider the strongest version of it.

FALLACY OF APPEAL TO IGNORANCE

This occurs where a person makes a claim that seems implausible, and then instead of building a positive case to support this claim, tells his opponent that he (the opponent) cannot show that it is wrong.

‘Ignorance’ here does not bear its normal meaning – the person is suggesting that the fact that they have not been shown to be wrong is actually evidence that they are right.

Example:

Defence Counsel: It is true that the Defendant drove into the Plaintiff's car, but this happened because a headless horseman ran across the road and the Defendant swerved to avoid it. There is no evidence to show that the headless horseman was not there, and therefore the Plaintiff cannot show that the Defendant was wrong…

The fact that the opponent does not know of any evidence to show the claim is wrong, does not mean that it is true. Put another way, the fact that it cannot be shown that the claim is false is **not relevant** to showing that it is true. What the person making the claim is doing here is unfairly shifting the burden of proof onto his opponent.

FALLACY OF SUPPRESSED OR NEGLECTED EVIDENCE

This occurs where evidence that is relevant to an argument has not been considered, or has been overlooked. It may be that relevant premises have been included, but a fallacy is committed because other relevant information has been left out.

Lawyers are officers of the court, and have a duty to bring all relevant information to the court's attention, whether it advances their case or not. Rather show your skills by constructing an argument that takes into account all relevant information, but still sways the case your way.

BEGGING THE QUESTION

This means that you are assuming what you are trying to prove.

Example:

Appellant: I concede that the general public has a right to a healthy environment free from contagious diseases. But these rights must be balanced against the individual's rights not to seek treatment or to be hospitalised when suffering from XDR TB, since it is clear that individual liberty must take precedence.

Judge: If the Bill of Rights applies equally to the public at large and to individuals, how can it be that individuals have a greater right?
Appellant: Because under the Bill of Rights they do.

When we put this argument into a standard form, it looks like this:
Premise: The Bill of Rights affords individuals greater rights than the public as a whole.
Conclusion: Therefore, individuals have a greater right.

Is this argument convincing? Why not?

Ask yourself if the argument has the features we have learned about so far:

- Validity
- Soundness
- Relevance

When using an argument to try to convince another person of your claim, what you are doing to is trying to convince them to accept the claim (the conclusion) by giving them reasons (premises) to believe it. In order to do this, you must use premises that the other person accepts. If you use premises that they do not accept, then they have no reason to believe that your conclusion is true, even if your argument is deductively valid.

Thus, if you are arguing with someone who accepts the position that individuals suffering from disease deserve greater protection by the law, then you could use this claim to convince the person that the law accords individuals a greater right to make decisions that may detrimentally affect the health of the rest of the population. You both agree on this premise: it is common ground. However, if the other person does not accept that individuals have a greater right than the rest of society, it is no use trying to use this to convince them of your position.

Begging the question occurs when we put forward as a premise the very thing that we are trying to show in our conclusion. This is a fallacy, because if the point is in dispute, we cannot assume it as a premise.

Usually arguments that beg the question are more subtle than the one above.

Example:

Jenny: I know abortion is a terrible thing, but I do not think it should be illegal.

Mary: You are missing the point: abortion is murder, and the law prohibits murder. Therefore, the law should prohibit abortion.

In standard form, Mary's argument looks like this:

Premise 1: Abortion is murder.

Premise 2: The law prohibits murder.

Conclusion: So the law should prohibit abortion.

Both Jenny and Mary agree that the law prohibits murder, so it is appropriate for Mary to presume this as her second premise. The point at issue is whether abortion is wrong, and therefore whether the law should prohibit it. Jenny denies that it is wrong, so she would not accept the first premise, i.e. that abortion is murder. Mary's first premise assumes the point at issue, and so begs the question. Mary needs to give some further argument to support this premise – if she can do this, then Jenny may accept her further claim that the law should prohibit abortion.

THE EITHER / OR FALLACY

This fallacy assumes there are only two alternatives, when in fact there are more.

A **disjunction** is an either/or sentence – it claims that at least one or the other of two alternatives is the case.

Example: Either the husband did it, or the witness is lying.

This assumes that the statement will be true if the husband did it or if the witness is lying. It therefore assumes only two alternatives, when in fact there could be more. Maybe the witness made an honest mistake, maybe the husband has a brother who looks just like him, maybe the husband was there but did not do it, etc.

Example: Either we have to reinstitute the death penalty, or we will have to live with the same people continuing to commit crimes once they are released from prison.
This is an oversimplification of the problem.
Disjunctions can also be disguised as **conditionals**:
Disjunction: Either you are part of the problem, or you are part of the solution.
Conditional: If you are not part of the solution, then you are part of the problem.

Thus if you are presented with the claim:
If we do not provide condoms to everyone, then we will never curb the AIDS epidemic
It may not be immediately obvious that this statement contains the either/or fallacy, as follows:-
Either we must provide everyone with condoms, or we will never curb the AIDS epidemic.

This fallacy occurs whenever someone claims there are fewer alternatives than there actually are. It is used to try to convince someone of a position by making them believe that the only alternative is a very extreme position. Many law students do this by oversimplifying the problem at hand!

When you encounter the either/or fallacy, consider the possibilities and alternatives. Are these really the only options? Have other alternatives been overlooked?

By avoiding this fallacy will you will ensure that your own arguments are more rigorous. By identifying the fallacy in someone else's reasoning, you will be able to counter their argument more easily.

5. WHAT MAKES AN EFFECTIVE CRITICAL THINKER?

The following is taken from: Elder, L. and Paul, R., (June 1996), Foundation for Critical Thinking: www.criticalthinking.org

Irrespective of the sphere of thought, “a well cultivated critical thinker":

- raises vital questions and problems, formulating them clearly and precisely;
- gathers and assesses relevant information, using abstract ideas to interpret it effectively;
- comes to well-reasoned conclusions and solutions, testing them against relevant criteria and standards;
- thinks open-mindedly within alternative systems of thought, recognising and assessing, as need be, their assumptions, implications, and practical consequences; and
- communicates effectively with others in figuring out solutions to complex problems.

Guidelines that may be helpful as you work toward developing your reasoning abilities:

1. All reasoning has a **PURPOSE**:

   - Take time to state your purpose clearly.
   - Distinguish your purpose from related purposes.
   - Check periodically to be sure you are still on target.
   - Choose significant and realistic purposes.

2. All reasoning is an attempt to **SETTLE A QUESTION OR TO SOLVE A PROBLEM**:

   ¬ Take time to clearly and precisely state the question at issue.

- Express the question in several ways to clarify its meaning and scope.
- Break the question into sub questions.
- Identify if the question has one right answer, is a matter of opinion, or requires reasoning from more than one point of view.

3. All reasoning is based on **ASSUMPTIONS**:

- Clearly identify your assumptions and determine whether they are justifiable.
- Consider how your assumptions are shaping your point of view.

4. All reasoning is done from some **POINT OF VIEW**:

- Identify your point of view.
- Seek other points of view and identify their strengths as well as weaknesses.
- Strive to be fair-minded in evaluating all points of view.

5. All reasoning is based on **DATA, INFORMATION AND EVIDENCE**:

- Restrict your claims to those supported by the data you have.
- Search for information that opposes your position as well as information that supports it.
- Make sure that all information used is clear, accurate, and relevant to the question at issue.
- Make sure you have gathered sufficient information.

6. All reasoning is expressed through, and shaped by, **CONCEPTS AND IDEAS**:

- Identify key concepts and explain them clearly.
- Consider alternative concepts or alternative definitions to concepts.
- Make sure you are using concepts with care and precision.

7. All reasoning contains **INFERENCES or INTERPRETATIONS** by which we draw **CONCLUSIONS** and give meaning to data:

- Infer only what the evidence implies.
- Check inferences for their consistency with each other.
- Identify assumptions which lead you to your inferences.

8. All reasoning leads somewhere or has **IMPLICATIONS** and **CONSEQUENCES**:

- Trace the implications and consequences that follow from your reasoning.
- Search for negative as well as positive implications.
- Consider all possible consequences.

ALWAYS REMEMBER:

- Do not cite inappropriate secondary authorities.
- Be careful with cases from outside jurisdictions.
- Do not rely on attacks of your opponent's character.
- Do not rely on appeals to emotion, or on fast-talking or charm.
- Read every legal document carefully – logical fallacies can be very difficult to identify.

6. LEGAL PROBLEM SOLVING: BRINGING IT ALL TOGETHER

The primary reference for problem solving is the Faculty of Law Survival Guide. Please refer to this. The following is merely a summary of the problem-solving process.

The use of logical processes and critical reasoning techniques should allow you to engage in reflective and independent thinking, and to be able to tackle problems put to you in everyday life and in your profession. The legal profession is one in which it is constantly necessary to acquire knowledge, analyse principles, solve problems and express ideas. The various modules in the Legal Skills course have provided you with some of the basic building blocks needed to do this. The final step then is to look at ways of bring it all together with problem solving skills.

At University, you generally set about solving problems that are well formulated. However, this will not necessarily be the case in the workplace, where you will have to identify the problem in a given case and formulate it correctly.

Problem solving is about the informed application of method. This indicates that the way in which you go about problem solving is important. A legal problem may arise from a complicated set of facts, concerning a number of issues and may involve different areas of law. Therefore, legal problem solving must be undertaken in a structured way.

THE PROCESS

In looking at the legal problem-solving process, it will be assumed that you are reading a problem. In practice, you will generally have to take down a statement and notes before going through this process. Make sure you cover everything

that may possibly be relevant, and make detailed notes, since you will have to rely on these in your preparation of the case.

Step 1: Fact Analysis

1. Read the problem carefully, at least twice.
2. Your first read can be quite swift to just get some sense of the subject matter. But read it again, carefully, highlighting key points.
3. What are the material facts? These are the facts that have a bearing on the decisional issues.
4. In hypothetical legal problems most of the facts you will be given will be material, but this will not be the case in practice.
5. Sifting through the facts in this way will assist you in formulating the problem. Remember that the formulation of a problem can indirectly influence us in the direction we take in seeking a solution. It is therefore often useful to come up with alternative formulations of the problem.
6. Avoid vagueness – be specific.

Step 2: Plan Your Answer

1. This will ensure that you do not overlook anything important, and that your answer is comprehensive and balanced.
2. Organisation of your answer is essential. Your answer must be structured logically and comprehensibly. Use headings for different issues.

Identify the Issues

1. What are the relevant issues? It is necessary to identify:
2. the area of law in which the problem lies, and
3. the legal issue/s which it raises.
4. What are the specific questions to be answered?

Make a list, e.g.: Question 1: Does X have any contractual rights?
Question 2: Can X sue for damages on the contract?
Question 3: How will X's damages be calculated?

Ascertain the Law & Apply Relevant Legal Principles to the Facts

1. Apply the law to the facts throughout your answer. Do not expound the law for several pages and only then apply the law to the facts.
2. DO NOT USE FILAC!
3. The answers to the issues of law will require knowledge and application of the relevant case law and/or statute law. Therefore, the legal rules and principles relevant to the issue/s must be identified.
4. This process is VITAL. It requires thorough research. Without collecting and understanding the relevant law, you cannot expect to answer the question/s correctly or convincingly.
5. It will be necessary to research and state the relevant legal rule/s relating to each issue or sub-issue, identifying the authorities in the process.
6. Depending on the issues and the relevant law, you may also have reference to legal opinions (of academic writers etc.) on the interpretation of relevant law where this is not clear from the precedent / statutes.
7. It is important to remember that the relevant authorities must be critically analysed in the process, and the applicable legal principles extracted.
8. If facts are omitted, you may say so, and state the alternative possibilities.
9. For each issue, you will answer the questions that you have posed, by applying the material facts to the rules and principles of the applicable areas of law and other information that you have collected.
10. To arrive at an answer it is necessary to draw on both the law and the facts, in the context of the issues identified and the questions posed. This is the essential intellectual process of problem solving.
11. You will need to address both the strengths and weaknesses of your case, to arrive at a balanced conclusion.
12. Your conclusion on each issue must be well supported by **valid premises**, so that you have a sound, logically constructed argument.

Step 3: Write Out Your Answer

1. All of the above should be done before you start writing!

Overall Conclusion

1. Write a brief conclusion bringing together the legal conclusion/s on the relevant issue/s, and summarising the advice to be given, or your opinion on the matter. If you have dealt with your answer in a logical orderly fashion, there is no need for a lengthy conclusion.
2. Identify practical options for a client in light of that conclusion, and make a recommendation.

FINALLY: Re-read your answer. Does it make sense to you?

Thank you and Good Luck with the Assignment!