

Some oddities of the law on age:

So you thought you reached age 21 on your 21st birthday?

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Well, yes you probably did as a legal matter reach (or attain) age 21 at the start of your 21st birthday – ie at midnight at the start of that day (even if you had been born later in the day). But legally this has not always been the case in England and Wales.

Instead at common law in England and Wales (at least) you were treated legally as reaching an age at midnight at the start of the day before your relevant birthday. For England and Wales, it took statutory intervention in 1969 to enshrine the more common sense rule (and move to a day later), but this applied only from 1 January 1970.

While looking at the definition section, s191, in the Pension Scheme Act 1993, I noted a provision dealing with how age is treated. This seems to be saying no more than I assumed to be the case anyway, which made me dig a bit more into the issues that arise on the definition of age.

The note looks in more detail at the history and some of the remaining nooks and crannies in this area, including:

- What happens if you are born on 29th February in a leap year?
- What happens if you are in a different time zone on your birthday? Do you reach the relevant age earlier (or later) than you would in the UK?

An interesting story involving:

- a death in the first world war,
- theft of false teeth,
- a Rear Admiral serving his commutation notice a day before his birthday,
- The Pirates of Penzance,
- soldiers in Hong Kong, and
- a widow arguing that she had reached age 55 when her husband died (on the day before her birthday) because she was born early in the morning in the Philippines.

Some of these issues are now mainly of historical interest, but others remain potentially of importance.

Reaching an age

Reaching a particular age is important. Various things happen at the age of majority (currently age 18) and (importantly for us) pensions come into payment usually on reaching (or attaining) a particular age (eg age 60 or 65).

The Pension Schemes Act 1993, s181 includes a definition:

"age", in relation to any person, shall be construed so that –

- (a) he is over or under a particular age if he has or, as the case may be, has not attained that age;
- (b) he is between two particular ages if he has attained the first but not the second;

Similarly in SSA 1973 and SSCBA 1992, s173.

Aside from the slightly anachronistic use of "he", so far so obvious. Why would the legislation bother to say this? And why did the common law treat the day before a person's birthday as the day they reached that age?

Fractions of a day

At common law, the law ignores fractions of a day, unless the context otherwise requires. I imagine that this is a purely pragmatic rule dating back to the days before watches or clocks were common, so a particular time of day may have been in practice difficult to fix (imagine dashing to the nearest sun dial). Birth certificates still do not include the time of birth.

The common law seems to have taken this principle to a logical extreme when dealing with reaching (or attaining) a particular age. Clearly a person is in their first year until they reach their first birthday. This means that they complete their first year (and so become treated as age 1) at the end of the day just before their first birthday.

So far so good, but the common law seems to then have treated this as meaning that the person completed their first year at the end of the day before their birthday and so, ignoring part of a day, actually became aged 1 at the beginning of the day before. And so on for other ages.

This is clearly illogical (and enough to give the common law a very bad name). But over the years it became so entrenched that the courts were not able to move away from the position (unless the relevant legislation or instrument made the common sense test applicable).

Thus in 1961 in the High Court of Australia in *Prowse v McIntyre* (1961) 111 CLR 264, Kitto J pointed out that the old rule was founded in fallacy, but that it had to be accepted as positive law.

An example from World War 1: *Re Shurey*

Re Shurey, Savory v Shurey [1918] 1 Ch 263 involved a Captain Shurey who had sadly died (of wounds received in action) on the day before his 25th birthday (he was born on 22 July 1891 and died on 21 July 1916). His father's will had left assets to such of his sons as "shall attain the age of 25 years". So the issue arose as to whether Captain Shurey met the condition.

Sargant J (in an unreserved judgment) held that he had. Sargant J followed several earlier cases and held that:

"a person attains the age of twenty-one years, or of twenty-five years, or any specified age, on the day preceding the anniversary of his twenty-first or twenty-fifth birthday, or other birthday, as the case may be."

Sargant J noted that the "popular sense" of the words might indicate that you had to reach the actual anniversary date, but he held that "There is nothing to show that in this will the testator was not using the words in their legal sense".

He noted that legislation had seemingly recognized this "slight legal anomaly" by enacting in the National Insurance Act 1911 in s79 an express provision "that, for the purposes of the part of that Act in which the section is placed, a person shall be deemed to have attained the age of seventeen years, not on the day preceding the anniversary of his birth, but on the actual seventeenth anniversary of the day of his birth."

Theft of false teeth

In *R v Scoffin* [1930] 1 KB 741, the accused was charged with, and convicted of, "stealing in a dwelling-house a set of false teeth". In the Court of Criminal Appeal the issue arose as to whether or not the accused was "more than 21 years of age" (if he was, he could not be sentenced to go to borstal). Lord Hewart CJ cited no authority but applied the common law rule (as in *Shurey*).

A pensions case (1982): Rear Admiral Loosli was age 55, but did not realise it

In another Australian case, *Re Rear Admiral RG Loosli, CBE, RAN (Retd) and Chairman, Defence Force Retirement and Death Benefits Authority* [1982] AATA 13, the Administrative Appeals Tribunal dealt with a case involving a retirement benefit with lower commutation factors if the relevant notice was served at age 55, compared to age 54.

The Rear Admiral served the notice on the day before his 55th birthday but was told by the pensions authority that he had already reached age 55 (under the common law rule) and so the reduced factor applied.

The Tribunal noted the caselaw and ultimately held that the right test had been applied, although recommending an ex gratia payment, commenting:

"To quote from Windeyer J.'s researches into the Norman-French from the centuries of which *Prowse v. McIntyre* stems (as we think, anomalously in Australia); 'CEO FUIT UN NARROW PINCHE IN LE CASE' de l'Admiral Loosli."

Statutory intervention in England and Wales

The definition in PSA 1993 represents a throwback to the Social Security Act 1973 (and indeed to the National Insurance Act 1911).

Arguably since 1970, the attained age wording has not been needed. The Family Law Reform Act 1969, s9, applies where the relevant anniversary falls on a date after 1 January 1970 and, in relation to any enactment, deed, will or other instrument, has effect subject to any provision in it. Section 9 states:

9 Time at which a person attains a particular age

(1) The time at which a person attains a particular age expressed in years shall be the commencement of the relevant anniversary of the date of his birth.

(2) This section applies only where the relevant anniversary falls on a date after that on which this section comes into force, and, in relation to any enactment, deed, will or other instrument, has effect subject to any provision therein.

Note that s9 does not extend to Scotland: see s28(4). Perhaps there was a different common law rule in Scotland?

Born on 29th February?

It seems best to consider someone born on 29th February only to reach a further year on 1st March and not 28th February in a non-leap year.

I have struggled to find any commentary on this in relation to English law. The point has doubtless formed part of the plot in various books and plays. In Gilbert and Sullivan's *The Pirates of Penzance* the argument used to deceive the character of Frederic (who wanted to leave the pirates on his 21st birthday and who was also born on 29 February), into believing that he only had a birthday once every four years:

Though counting in the usual way, years twenty-one I've been alive,
Yet, reckoning by my natal day, I am a little boy of five!

(W S Gilbert and Arthur Sullivan, *The Pirates of Penzance* (1879), Act II)"

The note looks at another Australian case, *PM v Childrens Court of the Australian Capital Territory* [2018] ACTSC 258, 336 FLR 379 where McWilliam AsJ, having noted *The Pirates of Penzance*, held that the plaintiff (who was born on 29th February) was not an adult on 28th February but only became an adult on 1st March.

Time zones: Greenwich Mean Time

The note also looks at the position where a person is outside the UK on the relevant dates. Does he or she attain the relevant age at midnight at the start of their birthday in the timezone in which they are situated? Or only at midnight in the UK?

Offences abroad and Time zones: *R v Logan* [1957]

What happens if an Act relates to actions outside the UK? In *R v Logan* [1957] 2 QB 5891 British soldiers stationed in Hong Kong were convicted of assault at about 2.30am on 1 January 1957. They were convicted under a UK Act, the Army Act 1955, which only came into force on 1 January 1957. They appealed on the basis that the relevant UK Act had not, at the time of the offence, yet come into force in Hong Kong (being 8 hours ahead of GMT).

The Courts-Martial Appeal Court heard the defendant's counsel, but did not call on the Crown counsel. Lord Goddard CJ did not cite any authority, but referred to:

"An ingenious solicitor who appeared before the court-martial persuaded them to put in the exact time of the alleged offences, 2.30 a.m., and then took the point that as Hong Kong time was some hours in front of Greenwich mean time the Army Act, 1955, was not in force in Hong Kong at the time that this offence was committed."

This defence was dismissed. Lord Goddard holding:

"If an Act is said to come into force on January 1, it comes into force on the day which is January 1 in the particular place where the Act has to be applied."

This of course is dealing with a statute and seems to involve the English court recognising local law on dates and times.

Jumping ahead by travelling to Australia?

Some four years later the High Court of Australia in *Prowse v McIntyre* (1961) 111 CLR 264 Windeyer J discussed a similar time zone point (but *Logan* was not cited). He commented that "time is a local phenomenon" and that (say) a twin born second but who as in Sydney on his birthday might achieve a particular age before his "older" twin who had remained in the UK. He commented further:

"Some interesting situations can be imagined on this basis with results even more striking than the experience of Phileas Fogg. It seems, however, that any question of personal rights, capacities, disabilities, or qualifications gained or lost by the lapse of a given period of time must be determined according to the clock and the calendar at the place where the person in question is."

Born in the Philippines

In *Roberts v Secretary of State for Social Security* [2001] EWCA Civ 910 an application for leave to appeal was dismissed by Arden LJ. Here Mrs Roberts had been born in the Philippines on 27 June 1942. Her husband died on 26 June 1997 and so under the relevant legislation her widow's pension was subject to a 7% reduction on the basis that she was under age 55 at the time the applicable qualifying condition (her husband's death) was fulfilled.

Counsel argued that as Mrs Roberts had been born in the early hours of 27 June in the Philippines, this was actually still the 26th June in the UK and so she must be taken to have been born on the 26th June, namely the same day as her husband died. Arden LJ described this as "attractive", but considered that the decision in *Logan* did not help and that the argument did not get over the problem of s9 of the Interpretation Act 1978 which requires Greenwich Mean Time to be used (unless otherwise specifically stated). Arden LJ stated:

¹ See also '*The Odd Date*' (1957) 73 LQR 462 and the brief discussion in Sir Robert Megarry '*A Second Miscellany-at-Law*' (1973, Stevens & Sons) at p303.

"It seems to me that it would not be possible to argue that the date of the birth was anything other than 27 June, whether the birth occurred here or elsewhere. Under s173, she attains the relevant age that her birth date starts at the commencement of her 55th birthday. In that respect then s9 has the effect, it seems to me, of saying that Greenwich mean time must be applied to establish the commencement of her birthday irrespective of whether her birth took place here or not. In my opinion there is no prospect of success in the argument that her birth date commenced at some other date for the purposes of s39(4)."

With respect, this is not obvious. If Mrs Roberts was born in the early hours of 27 June in the Philippines, then at that time (under Greenwich Mean Time) it was presumably still 26 June in the UK – and s9 seems to be implying that you should look at GMT on her birthday as well as when Mr Roberts died.

Having said which this is probably a pragmatic solution as otherwise it could be necessary to give evidence of the precise time to the relevant event (eg birth) and the impact of time zones on that.

Note that as a refusal of leave to appeal, this decision is not citeable as a binding precedent in court – see the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

End Piece

The attained age issue at common law seems rather odd to modern readers. Thankfully the 1969 Act seems to have resolved the point (and there is now equivalent legislation in Australia). The wording in the pre 1969 National Insurance Acts included an odd reference to Scotland:

"a person shall be deemed, according to the law in England as well as according to the law in Scotland, not to have attained a given age until the commencement of the relevant anniversary of the day of his birth"

This makes me guess that Scots law never went down this route.

Ultimately all of this seems to mean that there is now no need to have an express age attaining clause in pension scheme deeds.

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