Legal reasoning and the common law

Topic 4

Contents

Introduction

This section of the unit introduces the concept of common law reasoning. This is a chapter that you will need to return to often throughout your law degree as it outlines the basic skills students need to know to apply legal reasoning to problem solving. This reasoning is the foundation of your legal studies as it is the basis for examination in all law subjects throughout your degree.

This chapter specifically examines:

- legal reasoning and problem-solving
- how to read, understand and apply case law
- precedent in Australian Courts
- judicial decision making
- the use of a case study to show precedent in action.

Objectives

At the completion of this topic you should be able to:

- understand the doctrine of precedent
- identify the material facts in a case
- recognise *ratio decidendi* and *obiter dicta*
- understand and develop the skill of legal reasoning
- be familiar with the Federal and Victorian court hierarchies
- appreciate how the doctrine of precedent operates in practice and the flexibility (sometimes) available to judges in its application.

Learning resources

Prescribed textbook

C Cook et al., *Laying Down the Law* (6th ed, 2005). Chapters 4, 5, 6 & 7

Electronic readings

Khorasandjian v Bush [1993] QB 727

Hunter v Canary Wharf Ltd; London Docklands Corporation v Hunter & Ors [1997] AC 655

Deakin Studies Online (DSO)

Access DSO to obtain information about additional resources you can use to supplement this topic.

Legal problems

Reading

Please read Cook et al. 2005, pp. 51–55 and answer the following questions:

Reading and understanding a case

Question 4.1

What method do Cook et al. outline to read and understand a legal case? (Please note that this method provides a very useful guide to reading and understanding exam problem questions—more on this later in the course.)

Question 4.2

What can make the application of this method difficult in some cases?

Question 4.3

What makes some facts material and others immaterial?

Keep in mind that when lawyers are required to reach a conclusion regarding a legal problem that conclusion must take the form of considered advice. That is, a lawyer must tell their client the full range of (possible) legal consequences that flow from their legal problem. *The advice provided to a client must be full and frank even when this may not accord necessarily with what the client wants to hear*.

Legal reasoning

In this section we examine three forms of legal reasoning which are used by lawyers and judges in the common law. Inductive, deductive reasoning and reasoning by analogy.

Reasoning by analogy

> [U]ntil it is established what resemblances and differences are relevant, 'Treat like cases alike' must remain an empty form.
>
> (H L A Hart, *The Concept of Law* (1961) 155)

Analogical reasoning is one of the most common forms of reasoning employed by lawyers. Analogy in this context compares or contrasts[1] facts, policy, or reasoning of one case with the facts, policy, or reasoning of another

[1] The process of pointing out contrasts between cases is frequently referred to as 'distinguishing' a case. Thus, some writers refer to reasoning by analogy as analogisation and distinguishment.

case. You should be quite familiar with this form of legal reasoning, as it is used to predict how a court might rule on a case not yet before it, to demonstrate to a court how it should rule in the absence of controlling precedent, and to analyse a problem-type law school exam question. That is, treat like cases alike and different cases differently. However, it is often quite a task to determine what is 'alike' or 'different' about a particular case. You must also be aware that analogical reasoning is not perfect—it does not always predict an outcome accurately.

Inductive and deductive reasoning

> The common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it.
>
> (Lord Devlin, Hedley Byrne & Co., Ltd v Heller & Partners [1964] AC 465, 516)

You may be familiar with the ideas of inductive and deductive logic from reading detective novels. Dame Agatha Christie's Hercule Poirot is a character famous for noticing a particular clue and suggesting a theory explaining those facts. The great Sherlock Holmes, created by Sir Arthur Conan Doyle, is memorable for his ability to deduce the circumstances of a case by fitting precise details into an overall pattern.

In reality, we all possess the ability to reason in the manner of the great fictional detectives. There is no real mystery about induction and deduction. Essentially, inductive logic involves reasoning from specific examples to propose a general rule. Inductive reasoning is usually associated with extrapolating general rules from different cases where specific facts vary. Deductive logic is the reverse: reasoning based upon a general rule to determine the appropriate outcome in a specific case. Typically, deductive logic is applied in reasoning from statutes, which form a rule of general application under which specific facts may fall. Both types of reasoning require the ability to distinguish important facts from background static and to recognise when those facts would require treatment under a general proposition. In law we refer to those important facts as 'material' facts—facts which matter.

In reality, these two logical methods work together to form a significant part of a lawyer's tools of analysis. These complementary forms of reasoning are central to learning to 'think like a lawyer'.

Please read Cook et al. 2005, pp. 55–57 and answer the following questions: Reading

What kind of reasoning was primarily employed by Lord Atkin in his famous judgment in *Donoghue v Stevenson*? (Do a Google search to find out what the case was about and the famous principle derived from it.) Question 4.4

According to Brennan J in *Dietrich*, what does the validity of analogical legal reasoning depend on? Did his Honour consider that a true analogy existed in *Dietrich*? Question 4.5

Do you think 'strict logic' is enough for a judge to decide legal cases? Question 4.6

Case law

The analysis of case law is the foundation of your legal studies. It is the building blocks for the legal principles which you will study in areas such as contract, criminal law and torts. Further the legal principles formulated by case law are often replicated, modified and supplemented in legislation. Therefore understanding and applying case law is essential to the study and practise of law.

Reading

Please read Cook et al. 2005, ch 5 and answer the following questions:

Question 4.7

In the initial hearing of a case, who is the plaintiff and who is the defendant?

Question 4.8

On appeal, how are the parties identified?

Question 4.9

What should you look for when reading and analysing a case?

Question 4.10

Why, in some instances, are case law rules more flexible and less certain than statutory provisions?

Question 4.11

Explain the doctrine of *stare decisis*.

Question 4.12

Outline the general rules of precedent.

Question 4.13

What are the advantages of the doctrine of precedent?

Question 4.14

What are the disadvantages of the doctrine?

Question 4.15

Outline the hierarchy of the Victorian Courts exercising:

(a) civil jurisdiction

(b) criminal jurisdiction.

Question 4.16

What is the difference between original and appellate jurisdiction?

Question 4.17

Does the doctrine of precedent apply to administrative tribunals?

Question 4.18

Define *ratio decidendi*.

Question 4.19

How do judges limit the precedent value of previous cases?

Question 4.20

What is the effect of *obiter dicta*?

Does the date of a decision affect its value as precedent? Question 4.21

Precedent in Australian courts

The doctrine of precedent involves the application of the ratio of a previous higher court decision in the same hierarchy to future decisions in the same hierarchy. The application of precedent provides the basis for the development of case law. The strict application of the doctrine of precedent in the common law system makes it unique to other legal systems in the world.

Please read through Cook et al. 2005, ch 6 and then answer the following questions: Reading

Must the High Court of Australia follow its own decisions? Question 4.22

When will the High Court overrule itself? Question 4.23

Why are courts reluctant to overrule previous decisions? Question 4.24

Must the Supreme Court of Victoria follow its own decisions? Question 4.25

Is the High Court obliged to hear an appeal from a decision of a state Supreme Court? Question 4.26

Must the Supreme Court of one state follow the decisions of a Supreme Court of another state? Question 4.27

What is the difference between an inferior and a superior court? Question 4.28

Are the decisions of courts of other common law countries binding in Australia? Question 4.29

Can you name a Victorian and a Commonwealth administrative tribunal? How do they differ from courts? Question 4.30

What is the significance or otherwise of the doctrine of precedent for administrative tribunals? Question 4.31

What is the effect of a decision of the House of Lords on the Victorian Supreme Court? Question 4.32

Whose opinion prevails when the members of a Court are equally divided on a decision? Question 4.33

Judicial decision making

In this section we look more closely at the theoretical aspects of judicial decision making. First, we examine the crucial distinction in common law systems between matters of fact and law. At law school, the focus is on the small number of cases in which the law or the application of the law to the facts is not straightforward. These are the cases which are likely to go on appeal, providing the higher courts with the opportunity to clarify or develop the law. The bulk of cases which occupy the lower courts are not of this kind; hearings in the magistrates and county courts are focussed on fact finding through the hearing of evidence, rather than in determining complex questions of law. Once the facts have been established, the application of the law is, in most cases, relatively straightforward. Most appeals concern questions of law rather than questions of fact. However, the distinction between fact and law is sometimes difficult to draw.

Secondly, we consider the techniques used by judges to avoid applying what appear to be binding precedents. Former Chief Justice of the High Court, Sir Anthony Mason, has observed that:

> [t]he pressure on the courts to take a more active part in updating the law brings the doctrine of precedent into critical focus. The tension between the desire for consistency and predictability on the one hand and the desire for adaptability and justice in the particular case presents a problem for precedent. It calls for a doctrine which is sufficiently flexible and elastic to enable to courts to share in the best of inconsistent worlds. And it explains why it is that there is a want of precision in some aspects of the doctrine.[2]

The methods used by judges to avoid applying precedents give the doctrine of precedent the flexibility it needs to allow for change and development in the common law.

Reading

Please read Cook et al. 2005, ch 7, paras [7.1]–[7.13].

Question 4.34

When can a criminal appellate court overturn a jury's guilty verdict?

Question 4.35

Will an appellate court ever question findings of fact in civil cases?

Question 4.36

Twining and Miers give five reasons for the need to distinguish between matters of fact and matters of law. What are they?

Question 4.37

What is the declaratory theory of law?

Question 4.38

What are the common methods for avoiding the application of what appear to be an otherwise binding precedent? Which of these methods are open to lower courts as well as appellate courts?

[2] Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review*, 93.

Precedent in action: The limits of the doctrine of nuisance

The tort of nuisance is committed by a person who unlawfully interferes with a person's use or enjoyment of land, or of some right over, or in connection with it: *Hargrave v Goldman* (1963) 110 CLR 40, 59.

The interference must be substantial enough to amount to damage. Examples of interferences which may amount to nuisance are noise, smells, pollution of air or water and vibration. Interference with personal comfort, if substantial, will be sufficient damage.

Because the purpose of nuisance is to protect the right of a landowner to use and enjoy his or her land, only a person with a proprietary interest in the affected land has standing to bring an action in nuisance: *Oldham v Lawson (No 1)* (1976) VR 654.

Generally, the defendant will be the owner or occupier of neighbouring land, but there is authority for the proposition that creators of nuisance may be liable where they are not in occupation or control of the land on which they commit the acts.

In *Khorasandjian v Bush* [1993] QB 727, the plaintiff was a young woman who was receiving harassing telephone calls at home from a former boyfriend. She lived with her parents in a house owned by her mother. The Court of Appeal granted an injunction against the defendant on the basis that the telephone calls constituted an actionable nuisance. The House of Lords subsequently overruled the Court of Appeal's decision.

Please read the extracts from *Khorasandjian v Bush* [1993] QB 727 and *Hunter v Canary Wharf Ltd*; *London Docklands Corporation v Hunter & Ors* [1997] AC 655 available on DSO.

Reading

Why do you think no tort of harassment has developed at common law?

Question 4.39

Dillon LJ relied on the case of *Motherwell v Motherwell* (1976) 73 DLR (3d) 62 as authority for the proposition that a mere licensee was entitled to sue in nuisance. In which jurisdiction was the case decided? Why did Dillon LJ consider that he was 'entitled' to adopt the same approach as in *Motherwell v Motherwell*?

Question 4.40

Why did Lord Goff consider that the Court of Appeal's decision in *Khorasandjian v Bush* was undermined in so far as it was founded upon *Motherwell v Motherwell*?

Question 4.41

Why did Lord Goff consider that the Court of Appeal's approach in *Khorasandiian v Bush* was not 'a satisfactory manner in which to develop the law'?

Question 4.42

Why did Lord Goff conclude that the right to sue in nuisance should not be extended to 'mere licensees'?

Question 4.43

Question 4.44

What views of the doctrine of precedent were demonstrated by Dillon LJ in *Khorasandjian v Bush* and Lord Goff in *Hunter v Canary Wharf*? In your view, which of the extracted judgments is more compelling (a) in terms of the doctrine of precedent and (b) in terms of policy?

Further resources

A MacAdam and J Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998).

A Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93.

J Lockhart, 'The Doctrine of Precedent—Today and Tomorrow' (1987) 2.

M Kirby, 'In Praise of Common Law Renewal' (1992) 15 *New South Wales Law Journal* 462.

W Twining and D Miers, *How to Do Things with Rules* (4th ed, 1999).