First Year Law Intensive June 2015

Doctrine of Precedent
Australian Legal System

• Australian legal system is a common law system.
• Australian legal system is a federation.
• Australian legal system is a parliamentary, constitutional monarchy.
• Characterised also by separation of powers:
  – Judicial
  – Legislative
  – Executive.
Common Law

- Two main sources of law in a common law system:
  - Statute Law: passed by Parliament, applicable to relevant jurisdiction.
  - Case law/common law: Made by judges.
Statute Law

• Passed by Parliament (Australia has 9 main Parliaments).
• Parliaments limited by Constitution – limitations most pronounced for Commonwealth.
• Comprehensive and fixed form.
• Interpreted by Courts.
Common Law

- Made by judges.
- Cases decide disputes and can lay down legal principles.
- Piecemeal as opposed to statutory comprehensiveness.
- Each case another ‘brick in the wall’.
• In each decision, courts:
  – Resolve the dispute before them.
  – Can lay down a principle of law to be applied in future cases.
• Courts therefore do not prevent disputes, but resolve them – only an indirect, prospective effect.
• Each case lays down a principle – a building block.
• Subsequent courts, applying the DOCTRINE OF PRECEDENT, apply these principles, or develop them by analogy.
• The separate building blocks laid down together form a framework of rules – contrasts the comprehensiveness of legislation.
**Doctrine of Precedent**/ *stare decisis*

- Rules of the common law are laid down in cases.
- Some rules and cases have greater authority than others.
- The **doctrine of precedent** determines the relative weight to be accorded to the different cases.
- Also called *stare decisis*: ‘to stand on what has been decided’.
- NB: The doctrine of precedent applies to both cases laying down common law/judge–made rules of law **AND** to cases interpreting statutes.
General Rules

• Each court is bound by decisions of courts higher in the same hierarchy.
• Decisions of courts in a different hierarchy (including overseas courts) or lower in the same hierarchy are persuasive, but not binding.
• Courts are generally not bound by their own decisions, but will only depart from them with reluctance.
• Only the reason for a decision (the ratio decidendi – ‘Reason for deciding’) is binding.
• Other statements in a case (obiter dicta – ‘passing remarks’) are not binding, but only persuasive.
• Precedents do not lose their force by lapse of time.
Some Key Concepts

• **Hierarchies:**
  – Australia has 9 court hierarchies – the High Court is atop all.
  – 1 Federal, 6 states and 2 territories.
  – Overseas courts are not *binding* but can be *persuasive*.  

• **Binding:**
  – If a decision is *binding* then the principle *must* be applied by a court lower in the hierarchy.
  – There are ways to ‘avoid’ a precedent.

• **Persuasive:**
  – If a decision is *persuasive* – the principle *may* be applied by a court, but it has a discretion.
  – The *persuasiveness* of a decision varies according to, eg:
    • Authoritativeness of court
    • Closeness of decision to facts under consideration.
• Only the *ratio* (*rationes* (pl.)) of a case is binding.
• Can be hard to identify.
• At one level – all cases have a reason for the decision – but not all lay down a new legal principle.
• **Ruling** on a point of law, not just a *statement* of a rule of law.
• The legal issue must have been a matter of contention before the court.
• Rationale is that only those matters in contention will receive full consideration.
Case Law in Action


**Facts**: The appellant punched the deceased, not intending to kill him, the deceased fell and later died as a result of a brain hemorrhage.

**Legal Issue**: Was it enough for manslaughter that someone would have foreseen ‘some injury’ from the punch, or must it have been a ‘serious injury’.

**Held**: Required that a ‘serious injury’ was objectively foreseeable – this becomes the ratio of the decision.

Think also of *Hart v Rankin* – the interpretations of ‘motor vehicle’ and ‘drive’ – rulings on a legal question.
Appellate Decisions

• The difficulties stemming from the lack of a fixed form of wording are multiplied in appellate decisions.

• For an appellate decision to lay down a legal rule there must be a majority of judges in favour of that rule.

• Where the same conclusion is reached by different paths, there can sometimes be no ratio.

• Such a decision is only binding on subsequent courts if substantially identical facts are being considered.
Obiter Dicta

- **An obiter dictum** (Obiter dicta (pl)) is a statement or consideration of law in a case that is not part of the ratio.
- **Obiter** is persuasive only.
- **Obiter** can take a variety of forms:
  - Hypothetical considerations.
  - Statements of law when the principle is not in dispute.
  - Alternative lines of reasoning to reach a conclusion.
Obiter an Example

- *Wilson:* Not a case of manslaughter by criminal negligence, nevertheless, the court observed:

- as the law stands, there are differences between them [the two categories of manslaughter]. In the case of manslaughter by criminal negligence, it is unnecessary to prove that the accused's act was unlawful …. And the tests of dangerousness are different. An appreciable risk of serious injury is required in the case of manslaughter by an unlawful and dangerous act. For manslaughter by criminal negligence, the test is "a high risk that death or grievous bodily harm would follow"
Rationale and Advantages of Doctrine of Precedent

• Four categories (see *Telstra v Treloar* (2000) 102 FCR 595, 602):
  – Certainty
  – Equality
  – Efficiency
  – Appearance of justice.

• As each case is only a brick in the wall – development of legal principles is incremental and orderly.
Limitations of the Doctrine of Precedent

• Retrospective, rather than prospective – always looking to the past.
• Can only produce new rules when appropriate disputes come before the court – slow and piecemeal.
• ‘Judicial dilemma’: Lower courts bound by an out-of-step precedent.
  – Failing to change leaves open to criticism out of step.
  – Departing from a precedent leads to charges of ‘usurping legislature’ and undermines certainty.
  – Can lead to ‘legal fictions’ – eg, that a land owner will be ‘deemed’ to have invited a child onto the land.