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University of  
New England

# 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’.

# Building Blocks

- 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

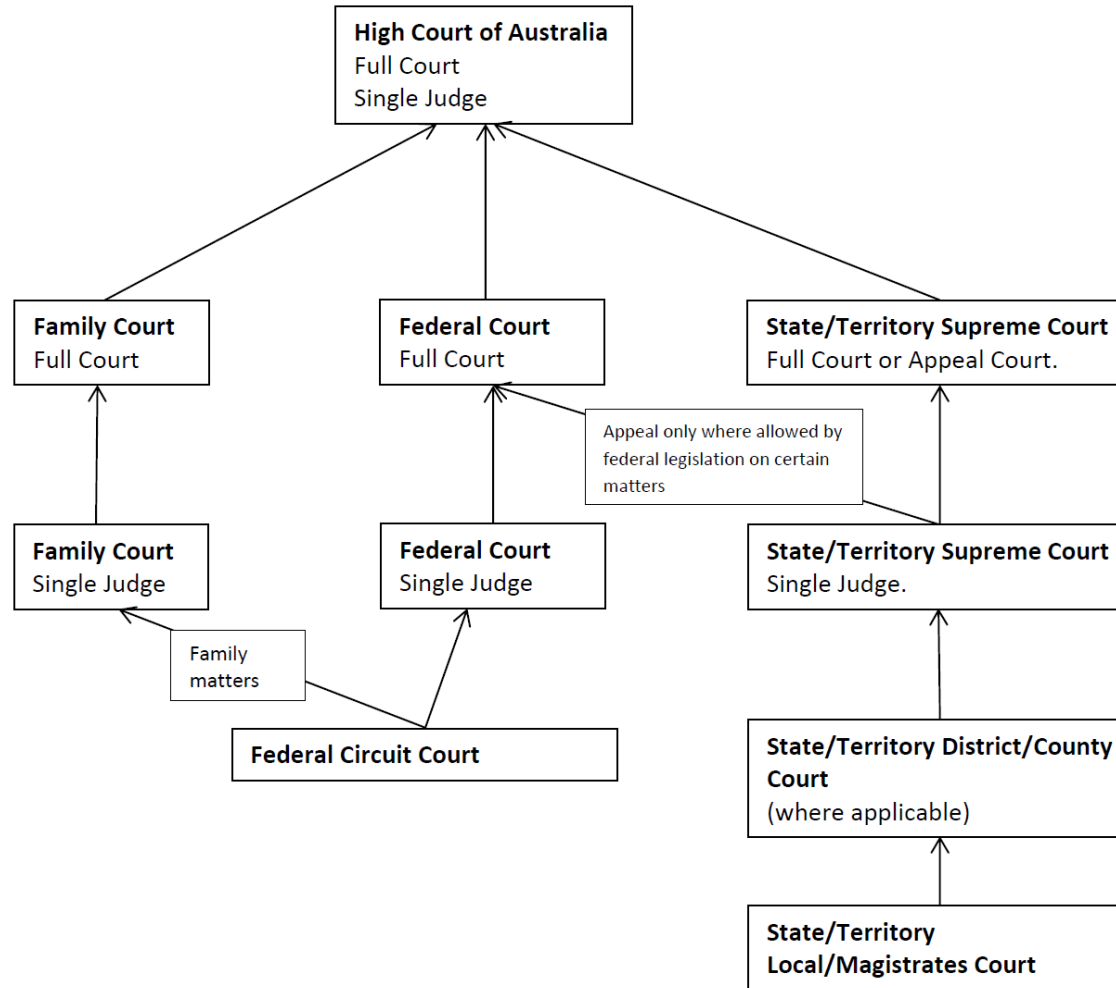
- Each court is bound by decisions of courts higher in the same hierarchy.
- Decisions of courts in a different hierarchy (including overseas courts) or lower in the same hierarchy are **persuasive**, but not **binding**.
- Courts are generally not bound by their own decisions, but will only depart from 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.

# Court Hierarchies



# Ratio decidendi

- 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

- *Wilson v R* (1992) 174 CLR 313
- **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 Trelor* (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.