

### Lecture 3

Judges have NO DIRECT POWER (from a constitution) to make law

Judges have 3 scenarios when they can indirectly make law:

- ➔ Extend law to a new situation
- ➔ When an existing law is unclear, unambiguous, the judge can interpret the law into a new meaning
- ➔ Declare a new Australian law

**Ratio Decidendi is the material facts which can determine the type of situation considered by the court.**

**It is the particular rule of law which the court has used to resolve the issue raised by the facts.**

#### Outline of procedure in civil cases

1. Exchange of written documents (pleadings) between the plaintiff and defendant. When intentions of the dispute and the sides they're taking are clear, the dispute will be taken to trial.
2. Once in trial, facts will be ascertained by the judge. This can be proven by witnesses, documents etc. When facts are in dispute, they'll check who is the right one and see who is the reliable source. The judge will decide which facts can be proven.
3. It is time for the argument, each side has a chance to state their point of view, what rules are relevant and what rules should be applied.
4. Having heard the argument, the judge can decide what rules to be used, and applied.

When a court has decided a case, the judges will record and write a 'judgement', and compiled into something known as 'law report'. The LR make it possible to find out how previous cases were solved.

Plaintiff (person taking it to court) v Defendant (being sued)

Appellant v Respondent (being sued) – For appeal cases

Catchwords are the list of keywords/phrases used in law reports.

Headnotes are the summary of the law report. Written by editors, it's just a summary

2 dates, first one is the date the argument was heard, 2<sup>nd</sup> one is the date judgment was given

Material facts are the significant differences/distinguishers of the case

**The doctrine of precedent is a good way of ensuring that law remains certain, predictable and consistent. It means that if there was a case that has been decided in the past, it serves as a model of how a case in the future ought to rule the case if they are materially similar. These rules are known as 'case law' or 'general law'**

***Stare Decisis***- let the decision stand

(a) Must be followed by previous decisions of a higher ranking court (same court hierarchy). It is binding to lower courts

(b) The case can be distinguished on their material facts and treated as differently.

*If the previous decision is not sufficiently similar or material facts that can be distinguished/if It was by a higher court in a different court hierarchy, then the decision is not binding on the court, it is however, persuasive to the court.*

Process of using Case Law

**Step**

- 1: Facts of the new case are identified and the legal issues**
- 2: Look for previously decided case that may indicate how previous courts have decided**
- 3: Check whether case and material facts are similar**
- 4: In which court was this reported?**
- 5: Identify the ratio decidendi of the previously decided case**
- 6: Apply ratio decidendi to the new case**