

## CASE SUMMARIES

Case name	Ratio decidendi/Significance
Airedale NHS Trust v Bland	Necessity where persons are unable to consent is a valid defence to intentional torts.
Akiba v Commonwealth	Native title should be defined a singular right, not an atomised bundle of rights and should be regulated rather than extinguished where possible.
Aldridge v Booth	Consent must be freely given.
Barton v Armstrong	Threats made over the telephone can still constitute assault and can place the plaintiff in fear of imminent harm. It is not required for assault that the harm will be feared to occur immediately after the assault is carried out. Assault can occur where the plaintiff is given an alternative to suffering physical harm.
Blake v Galloway	Touching between the plaintiff and defendant is not required for battery: direct physical contact includes situations such as thrown objects by the defendant. In situations where the plaintiff has consented to conduct which would otherwise be tortious, implied consent may be used as a defence by the plaintiff.
Bropho v Western Australia	Statutory interpretation should be approached by placing added emphasis on legislative purpose.
Bulsey v Queensland	Restraints which the law imposes on police powers must be scrutinised minutely to defend the protection of personal liberty. In cases of trespass to the person, the onus of proof of legality of actions falls upon the defendant. False imprisonment can occur even in the absence of total restriction of liberty. Trial judge advantage is less significant where a serious delay occurs between evidence and judgment being given, especially if judgment is entered with no reasons.
CBA v Amadio	Not properly considering the possibility of special disadvantage of other parties in a transaction is unconscionable conduct.
Chatterson v Gerson	Consent must be real (the plaintiff must understand what it signifies)
CIC Insurance Ltd v Bankstown Football Club	Statutory interpretation considers context in the first instance, and uses context in its widest sense to include existing law and the mischief rule.
Cowell v Corrective Service Commission	If a legally imprisoned person becomes imprisoned for longer than sentenced due to an administrative error, false imprisonment occurs.
Derrick v Cheung	Harm caused by a driver due to unforeseeable events (situationally dependent) does not demonstrate a lack of reasonable care, and hence is not negligence.
Donoghue v Stevenson	Manufacturers of products which are sold in a form such that they are intended to reach the consumer without the possibility of intermediate examination, with the knowledge that an absence of reasonable care would result in an injury to the consumer, owe a duty to the consumer to take said reasonable care.
Dugan v Mirror Newspapers Ltd	The repeal of legislative materials does not have the retrospective effect of removing existing past effects of those materials (such as felony attain). The mere fact that areas of the law are unjust does not mean that they can be changed by the courts.

## CASES (LEGAL REASONING)

### *Mabo v Queensland (No 2)*

Material facts:

The native inhabitants of the Murray Islands occupied them for generations before European contact.

Under Australian law, Australia was settled, not conquered, based on the principle of *terra nullius*.

Legal issues:

Does native title still exist in the Murray Islands?

Does the state of Queensland hold absolute or radical title over the Murray Islands?

Can certain aspects of Australian common law be changed without fracturing the skeleton of principle of the Australian legal system?

Judgment:

The legal question at hand is whether the state of Queensland holds absolute title over the Murray Islands, as if they do native title will be extinguished.

Absolute crown ownership has negative consequences for indigenous people and hence must be questioned. However, the skeleton of principle of the Australian legal system cannot be fractured.

Legal consequences of acquisition of territory can be considered by the Court so long as the skeleton of principle is not fractured.

The position in the 18<sup>th</sup> century was that settlement was based on *terra nullius*, and hence that English law applied in Australia at that time insofar as it was relevant at the time.

However, *terra nullius* is historically inaccurate, and should not be relied upon.

The doctrine of tenures must be considered next, which refers to the relationship between an ultimate landholder and other persons who have rights to the use of the land.

The doctrine of tenures is a fundamental element of the skeleton of principle of Australian law, and hence cannot be discarded.

The state holds radical title over the islands, not absolute title, as Australia was already settled when the English came to Australia.

Radical title, unlike absolute title, can coexist with native title, and indigenous interests and rights under native title becomes a burden on the radical title which must be considered.

If native title has not been extinguished, it must still be considered in relation to land rights. The nature and context of native title must be considered when considering the rights of the parties involved.

Radical title can only be converted to absolute title through a positive action designed to extinguish the native title.

The ultimate finding in *Mabo* was that native title had not been extinguished, and hence that Mabo was successful in his claim.

## LEGAL RESEARCH QUESTIONS

Databases:

<b>Name</b>	<b>Relevant areas</b>	<b>Benefits</b>	<b>Drawbacks</b>
LawCite	Locating Australian cases by various features	Contains a wide range of Australian case law	Less features than similar services like Firstpoint or Casebase
NSW Caselaw	Locating NSW cases by name, date, or citation	More useful for searching for NSW case law	Only contains NSW case law
CaseBase	Locating Australian cases by various features	Can be used to search multiple jurisdictions	Does not contain features such as citation tracking
FirstPoint	Locating Australian cases by various features	Can be used to find where cases have been cited/cite others	Cannot be used to search multiple jurisdictions
AustLII	Locating Australian cases, legislation, and secondary sources	Contains a wide range of Australian content	Less features than more specific services like Firstpoint or AGIS Plus Text
NSW Legislation	Locating NSW state legislation	More useful for searching for NSW legislation	Only contains NSW legislation
Federal Register of Legislation	Locating Commonwealth legislation	More useful for searching for Commonwealth legislation	Only contains Commonwealth legislation
Lawlex	Locating Australian legislation by topic	More useful for searching by topic	Only contains legislation, not as streamlined as NSW Legislation or Federal Register
AGIS Plus Text	Locating secondary sources	Contains a wide range of Australian and Asia-Pacific secondary sources	Does not contain primary or international sources
Index to Legal Periodicals and Books	Locating Australian and international secondary sources	Very intuitive and easy to use, and results are easy to read	Small in comparison to HeinOnline and LegalTrac
HeinOnline	Locating Australian and international secondary sources	Very large collection of secondary sources	Vast majority of content is from England or USA
LegalTrac	Locating Australian and international secondary sources	Both very large and more intuitive than HeinOnline	Vast majority of content is from USA
Factiva	Locating Australian and international news coverage	Can be used to find news coverage	News coverage is not always useful or relevant
Westlaw (International)	Locating international cases by various features	Can be used to find international case law	Only contains international case law

## AUSTRALIAN LEGAL HISTORY (ESSAY QUESTIONS)

- In 1975, the *Privy Council (Appeals from the High Court) Act* terminated all appeals to the Privy Council from the High Court other than s 74 certificate matters (matters relating to issuance of a certificate to be heard by the Privy Council).
- In 1978 the High Court ruled in *Viro v The Queen* that they were not bound by the Privy Council, and that precedent from Australian court decisions were preferable to precedent from Privy Council decisions.
- In 1978 the Northern Territory became self-governing.
- Finally, in 1986 state legislatures enacted legislation consenting to the *Australia Act 1986*, which in turn consented to the *Australia Act 1986 (Imp)* by the British Parliament, removing the ability for Britain to legislate for Australia, removing the doctrines of paramount force and repugnancy, and removing appeal to the Privy Council.
- In 1988 the ACT became self-governing.

### Notes on the Constitution:

- The first three chapters of the Federal Constitution are significant in that they determine the existence of separation of powers in the Commonwealth. The chapters are titled "The Parliament", "The Executive Government", and "The Judicature".
- The doctrine of separation of powers prevents each branch of government from interfering with or exercising the powers of another branch of government. In Australia the separation of powers is mostly between judicial and governmental powers.
- One effect of the doctrine of separation is that only federal courts (Chapter III Courts) can exercise Commonwealth judicial power, and they cannot exercise any form of power apart from judicial power.
- The fact that the states operate in a federal framework and that state courts exercise federal jurisdiction means that the separation of powers doctrine is applicable in the state domain, and that state courts, even when considering state law, must act as Chapter III courts because they can exercise federal power, and hence cannot exercise non-judicial power (*Kable v Director of Public Prosecutions*).

### The impact upon Aboriginals in Australian legal history:

#### Native title:

- The 18<sup>th</sup>-century occupation of Australia by the British hinged importantly on European international law, which stated that occupation of an inhabited country involved *conquering* the country, whereas occupation of an uninhabited country involved *settling* the country, with important legal distinctions.
- The British believed that Australia should be considered uninhabited (*terra nullius*) as the Aboriginals were not cultivating or using the land, but merely living in it. This view dated back to John Locke's 17<sup>th</sup>-century writings on the laws of nature, in which he decreed that *labour* was a necessary facet of ownership of land, saying "as much land as a man tills, plants, improves, cultivates and can use the product of, so much is his property", as well as Blackstone's views on transient possession. As the Aboriginals were nomadic, and no recognisable sovereign or system of government existed, the British did not recognise them as owners of the land under this definition, and hence deemed that Australia was functionally uninhabited, and that they were settling, not conquering, the country.
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## ENGLISH LEGAL HISTORY (ESSAY QUESTIONS)

### *The power of the king*

During the English Civil War, there was dispute over whether legal power was held by Parliament, the King, or the common law. Questions arose as to whether the King could control the judges and to whether the King could control Parliament.

The royal argument arose from the theory of the *divine right of kings*, derived from the *natural law theory* that law is based on reason and on the will of the sovereign. This view was espoused by King James I and his Attorney-General, Sir Francis Bacon.

The common lawyers disputed this view, led by Sir Edward Coke, a lawyer and judge who held many important legal positions during his life including Chief Justice of two different courts and Speaker of the House of Commons. Coke held that the ultimate right of interpreting laws did not lie with the king, but instead with the common lawyers. Coke's actions were symptomatic of fundamental ideological differences between him and the king. Coke's ideology was that the king was a constitutional monarch rather than an absolute ruler. The belief of many lawyers (including Coke) at this stage was that the English common law was a perfect legal system, but could only be interpreted in courts through artificial reasoning as learned by experienced lawyers, not merely by normal reasoning.

Coke was heavily influenced by Sir John Fortescue (who in turn was influenced by the natural law theories of Thomas Aquinas). Fortescue believed that English customary law had developed to protect citizens, and that Parliament represented the non-absolute power of the monarch. Coke's conception of natural law was "the law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction".

Coke argued that the King was not capable of interpreting laws or judging cases. In the 17<sup>th</sup> century, Parliament rose to unprecedented power. However, lawyers argued that the common law fettered not only the King but also Parliament (though Parliament could amend the common law by statute). The argument of judicial supremacy was unsuccessful, and Parliament became the ultimate authority in interpretation of laws.

The royal prerogative remained in existence in the 17<sup>th</sup> century, but it was decided that the determination of conditions allowing the exercise of the prerogative were questions of law. The evolution of the common law in the 17<sup>th</sup> century was seen as a maintenance of individual rights.

In 1626 the House of Commons issued the Petition of Right, which declared inter alia that "no man hereafter be compelled to make or yield any...tax...without common consent by Act of parliament, and that none be called to make answer...concerning the same or for refusal thereof".

Charles I, after a coup, escape from captivity, and an attempt to forge an alliance with Scotland, was tried by a High Court of Justice, found guilty of treason, and executed. From 1649-1660 England was ruled by Parliament alone, headed by Oliver Cromwell (the Interregnum, the only period in English history with a written constitution).

In 1660, Charles II issued the Declaration of Breda, promising amnesty for crimes committed and maintenance of property rights obtained during the Interregnum, and was subsequently invited to take the throne.

His successor, James II, was Catholic. When his wife, Queen Mary, gave birth to a son, the Assembly of Peers invited William of Orange (the husband of James's *daughter* Mary) to assume the throne to