

## Foundations of Australian Law (LAWS1201)

### Week 1: 17/2 - 23/2 - Introduction to case law and legal reasoning using HIRAC

#### Reading Notes:

#### 7.1-7.12 of LDL:

- A case is a judicial decision resolving an individual dispute; however, cases are also a source of law
- There is case/common law and legislation
- Common law is the law developed by judges, usually those in superior courts and tribunals
- Due to increasing government regulation during the 20th and early 21st century, legislation in its various forms has replaced cases as the main source of Australian law
- Under the doctrine of precedent, the key factors determining the weight that should be given to the legal principles applied in a past case, or precedent, are:
  - Whether the facts of the precedent are sufficiently similar to the present case (or whether the precedent may instead be 'distinguished')
  - The position in the court hierarchy of the court that decided the precedent relative to the present court
  - Whether the statement of principle made by the earlier court was necessary to the resolution of the case (a ratio) or whether it was merely a passing comment (obiter dicta)
  - In a full court, the number of judges that have given support to the statement of principle

#### Reading and analysing a case:

- In the title of a civil case, the plaintiff's name comes first
- Depending on the jurisdiction, the party bringing criminal charges to trial is known as the prosecution, the Crown, the State or the People
- The party against whom the charges are being brought is known as the defendant or the accused
- In some cases, particularly those involving children or, more recently, refugee cases, the court may conceal a person's identity using a pseudonym, initials, random letters, or numbers
- On appeal, the name of the party bringing the appeal, the appellant, appears first in the case name. The other party in the appeal, whose name appears second, is known as the respondent
- A reader should focus on the following:
  - Citation
  - Court, including whether single judge, Full Court or Court of Appeal
  - Brief statement of material facts
  - Ground(s) of appeal and/or issue(s) to be decided
  - Summary of court's analysis of law
  - Description of how law was applied to the facts
  - Reason(s) for decision, including principle(s) of law

- Decision
- Orders made by the court
- Any features of the case suggesting that it should be viewed in its social, cultural or historical context
- IRAC = Issue, Rule, Application, Conclusion

*Warringah Properties Pty Ltd v Babij:*

- **Claim for restoration of dividing fence - destroyed by deliberate act - distinction between fence and retaining wall - fence may have other functions - legislative changes - intention of the legislature - indemnity** (security or protection against a loss or other financial burden) **costs and leave**
- Analysis:
  - Facts are 'material' when they are crucial to the decision made by the court. Which facts are material if often apparent from the relevant legislation
    - Eg. of a fact that is not material: the defendant had lived on the property for many years. The presence of fill is also immaterial
  - The procedural history can be described as follows:
    - This is a case to the Supreme Court of New South Wales from a decision of the Local Court of New South Wales. At trial the defendant, Babij (who was the plaintiff at trial but is referred to as the defendant in the appeal), was awarded \$26,000 in restoration costs under s 8 of the *Dividing Fences Act 1991* (NSW): at [6]-[7]
  - In this case there were two grounds of appeal, both a mixture of fact and law:
    - The primary judge had made a mistake in determining that the structure was a 'dividing fence' rather than a 'retaining wall'. Under s 3 of the Act, 'fence' was defined so as 'to not include a retaining wall'; had the structure been misclassified at trial, the defendant may not have been entitled to compensation
    - The primary judge erred in awarding costs on an 'indemnity basis', ruling that the appellant on losing the appeal should pay not only the usual party/party costs, but also solicitor/client costs. The awarding of indemnity costs generally reflects the court's disapproval of the way the losing party has conducted its case
- *Statutory provision*: refers to a specific part or clause within a statute (a law passed by a legislative body), essentially meaning a single rule or requirement outlined within a written law; it is a defined section of an Act that establishes a particular legal obligation or right
- *Statutory interpretation*: the process by which courts interpret and apply legislation
- *Party/party costs*: the fair and reasonable costs of conducting the litigation, including court fees and the solicitor's costs; the unsuccessful party is usually ordered to pay the party/party costs of the successful party
- *Solicitor/client costs*: the professional fees of a solicitor for their services; these are usually more generous than party/party costs

- Order made by the court: summons dismissed with the appellant to pay costs of the appeal

*Hart v Rankin:*

- **Criminal law and procedure - driving offence - motor vehicle - driver - whether person in charge of motor car under tow driving a motor vehicle - Road Traffic Act 1974-1978 ss 49(1), 5(1).**
- **Transport - motor vehicle - driver - whether person in charge or motor car under tow of driving motor vehicle - Road Traffic Act 1974-1978 ss 49(1), 5(1).**
- **Criminal law and procedure - sentence - sentences imposed for three offences occurring over comparatively short period of time - whether sentences should be cumulative - question of degree - whether total period of imprisonment excessive.**

Lecture Notes:

- Natural law theories - laws are recognisable by their central moral content aligned with ancient philosophy and religion
  - Eg. Cicero, re-stated John Finnis
  - Finnis' proper laws are derived from basic human values. Laws that reflect human values are moral and just and thus 'natural laws'
- Positivist theories of law - laws are a set of rules
  - Eg. Bentham, Austin, HLA Hart
- "Legal positivists will say that it is unlawful to take another's life because the law of the state forbids it. Natural law theorists will say that the duty not to take a human life exists even in the absence of positive law." - Suri Ratnapala in *Jurisprudence*, p144, Cambridge Uni Press, 3rd edition, 2020)

Tutorial Notes:

- Court visit: sit into one of the court sessions, discuss how you felt and what was interesting (general observations), sign up sheet for presentation, and be there for '1 session'
- Common law vs civil law → common law dominated in Australia
- Adversarial vs inquisitorial
  - Adversarial → 2 parties against each other with the judge acting as adjudicator/referee
  - Inquisitorial → broad reaching investigative powers, call and question witnesses
- Coroners court investigates deaths
- *Judgment* made by the court (1 'e') vs personal *judgement*
- Legislation and case law → formal written law within Australia
- The doctrine of precedent → if you have a case that is very similar to a previous case of a higher level, you should, for the most part, follow the decisions of the case prior. Ensures that the law is consistent.
- Obiter dictum vs ratio decidendi
  - Obiter dictum → something said in passing, not essential to the decision and therefore not legally binding as a precedent

- Ratio decidendi → the reason, the rationale for the decision
- 2 kinds of law reports
  - Raw judgment → straight from the judge
  - Authorised report → once the judge has made the judgment, it is drafted and added value, made concise and clearer, and approved by Chief Justice
- CLR → common law report, HCA → High Court of Australia
- Use information that has been approved by Chief Justice
- Civil cases use 'and', and common law cases use 'against'
- Citation notes:
  - Mabo v Queensland (No 2) [1992] HCA 23
    - 2nd case that is called Mabo v Queensland
    - Year
    - High Court of Australia
    - 23rd case that year
    - Broad judgment from High Court, not authorised
  - Mabo v Queensland (No 2) (1992) 175 CLR 1
    - 2nd case that is called Mabo v Queensland
    - Year of case
    - 175th volume
    - Common law report
    - 1st page
  - Square v Round brackets → square implies the judgment number resets to 1 every year, round can continue
  - Where to use italics
    - Party names in citation
    - Legislation
  - Hart v Rankin [1979] WAR 144  
Burt CJ  
30 September 1977
    - Western Australia Report
    - Page 144
    - Burt CJ → Chief Justice Burt
    - The case occurred in 1977 but went to court in 1979
    - Operating a motor vehicle without a license → defense was (1) he was not driving, the car was being towed and he was just behind the steering wheel (2) debated whether it could be defined as a motor vehicle (3) did not understand the actions, but he had been convicted of the same offense on 9 previous occasions
    - All 3 appeals were rejected
    - 12 months for each charge (3) was claimed to be excessive → Burt CJ deemed it to be appropriate, however, because of the short duration between each charge (around 12 hours), he allowed the sentences to be served concurrently instead of cumulatively

- He agreed with the overall term of imprisonment (3 years) but ‘the period to be served before being eligible for parole... should be 6 months’ instead of 18
- State court hierarchy
  - High court
  - Supreme Court - court of appeal
  - Supreme Court single judge
  - District court
  - Magistrates court