How to Answer a Problem Question

Christopher Enright

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Summary

This summary of 'How to Answer a Problem Question' proceeds through each of the four sections in the article in turn.

Section1 Problem Questions

A problem question consists of a set of facts and requires the student to advise on the legal consequences of those facts. Law schools use problem questions to train and assess law students.

Problem questions help students to study law in several ways:
(1) Revision. Students revise the relevant legal rules.
(2) Activity. Students go beyond a mere passive study of law into the active task of applying law to a set of facts. They then see how law operates which helps them better to understand and remember law.
(3) Skills. Problem questions enable student to acquire and to improve some of the basic skills for working with law in practice. These include some of the major skills used in litigation.

There is a common technique proposed for answering problem questions that is sometimes labelled the IRAC method. (However, it has a number of isotopes that vary the acronym although they are easy to recognise and give much the same account of the skill.) In the author's view the IRAC method of answering problem questions and its cohorts are underdeveloped. This brings some negative consequences. First, the IRAC method is an inadequate guide to the skill of answering a problem question. Second, and this consequence flows from the first, it is just not possible for a student to answer a problem question properly using the IRAC method. Third, the IRAC method denies students the opportunity to develop important skills needed for the practice of law, for which problem questions provide useful practice. This is particularly the case for some of the basic skills that are needed to conduct litigation, which the IRAC method excludes.

In writing this article the author has deliberately sought to avoid these problems. By this means he seeks to provide students with an effective and efficient method for answering problem questions that enables students to practise all of the skills that a problem question requires.

Section 2 Constructing the Framework

In the simple case there is one set of parties in which one party is suing one other party for one cause of action. It is possible though, in both a problem

question and in real world litigation, that there are two or more parties in a set, there are two or more sets of parties suing and that in any set of parties there are two or more causes of action. But regardless of how many sets of parties and how many causes of action there is a vital task. This consists of dividing each cause of action into its elements and consequences.

Section 2 entails constructing a framework to capture and record all of these possibilities. This framework consists of the following:
(1) Parties. The framework sets out each permutation of parties who might conceivable sue each other
(2) Causes of Action. The framework sets out each cause of action which these parties might consider bringing.
(3) Elements and Consequences. The framework sets out the elements and consequences of each possible causes of action

Section 3 Working Out the Answer

Section 3.1 Applying Law

The idea is to take each permutation of parties in turn and each cause of action in turn. With each cause of action check each of the elements against each of the facts to see if it is satisfied. There are three possible answers:

א Yes. The element applies to the facts. In this case there is no more to be done with that element.

א No. The element does not apply to the facts. In this case there is no more to be done with that element.

א Maybe. It is not clear whether or not the element does apply to the facts. In this case there is an issue of law. This happens because a word or phrases in the element is ambiguous because it possesses two or more different meanings. According to at least one meaning the element applies to the facts and according to at least one other meaning the element does not apply to the facts. Where there is a maybe there is an issue. Section 3.2 describes how to resolve these issues.

Section 3.2 Resolving Issues

Where there are issues it is necessary to resolve them by interpreting the ambiguous word or phrase that gives rise to an issue. In doing this a lawyer or a law student can only predict as best they can the outcome were the issue to come before a court for decision. The point to interpretation of course is to resolve the issue by deciding which meaning of the ambiguous word or phrase is legally correct (or which combination of meanings are legally correct). Doing this turns the ‘maybe’ answer obtained when applying law to facts into a definite ‘yes’ or a definite ‘no’. This is how interpretation resolves the issue.

Section 3.3 Determining the Outcome

For a legal rule to apply to a set of facts it is necessary that each element of the rule applies. Section 3.1 consisted of applying the elements of each cause of action to the facts of the problem. In some cases there could have been issues of interpretation because it was not clear whether an element did or did not apply to the facts of the case. Section 3.2 Resolving Issues fixed this problem in principle. Interpretation by a court definitively says which meaning of an ambiguous provision is legally correct. This turns the maybe into a definite yes or a definite no. In a problem question, though, a student cannot authoritatively declare one meaning as correct – they can only make some judgment on the relative strength of the competing arguments.

Section 4 Writing Up the Answer

The final step is to write up the answer. The main part of any writing is the overall structure. Here the overall structure comes from the method use to answer the question. Since this was done in a systematic way it generally yields an almost natural structure – a student needs to adapt the structure of working out the answer so that it becomes the template for writing the answer.

Section 1. Problem Questions

Nature of Problem Questions

Problem questions (sometimes just called problems) are a common exercise for training and assessing law students. A problem question presents a student with a set of facts. The problem question then asks the student to apply the law to those facts to work out the legal consequences of those facts and to advise the parties of their legal position. Most problem questions involve remedial law under which at least one party can possibly institute one cause of action against another party (with the cause of action being contained in and based on some legal rule). In this case the task for the student is to advise the parties whether a cause of action is available to them or against them.

Problem questions imitate, although not totally, two tasks in litigation – a judge delivering a judgment and a lawyer advising a client on their prospects of success. However, the core of the lawyer's advice is really a prediction of what the judgment will say, so in this aspect the lawyer and the judge really perform two aspects of the same function.

Use of Problem Questions

Problem questions are a standard exercise for those studying law in many common law jurisdictions, including the United States, the United Kingdom and Australia.[1] Those studying law most obviously are undergraduate law students, but legal education for graduated lawyers is growing and occurs in a number of areas – bar examinations, practical legal training, postgraduate study, continuing legal education and study to be an accredited specialist. For this reason answering a problem question is a technique that is increasingly needed by graduate as well as undergraduate lawyers.

Advantages of Problem Questions

Problem questions provide practice at several skills – organising a major case into the various causes of action that may be involved, sorting facts,[2] organising law, applying law to facts, interpreting law and writing law. Because of this, both the overall exercise of doing a problem and the practice of these skills provides advantages for studying law and for practising law.

Studying Law

Problem questions help students to study law in several ways. (i) Students revise the relevant legal rules. (ii) Students go beyond a mere passive study of law into the active task of applying law to a set of facts. They then see how law operates which helps them better to understand and remember law. (iii) Problem questions are very good

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1. Endnote 1.
2. Sorting facts is a generic term for a number tasks in working with facts that require skills which are part of answering a problem questions. The key tasks are organising the facts into some structured and coherent form and sorting out problems with facts.

practice for examinations and assignments because many assignments and examinations involve problem questions.

Practising Law

Problem questions provide advantages for those who later practice of law. In answering a problem question a law student imitates a major task in legal practice when a lawyer – an attorney, solicitor or barrister – advises a client. Moreover, this advice from a lawyer on the outcome of a case attempts to imitate and predict the judgment that a court would give were the matter to come before it.

Typically the road to litigation starts when a person comes to a lawyer, tells the lawyer the facts of some dispute, and asks for advice. When the lawyer gives advice it may take a number of forms or have a number of components. First, it may be personal advice, on its own or in conjunction with legal advice. Second, it may be advice directed to a settlement of the problem without recourse to legal remedies.

Third, it may be advice about the availability of a legal remedy. To give advice of this sort a lawyer performs a similar task to the task that a student performs when answering a problem question, and in so doing they exercise the same skills. The lawyer has to organise the relevant legal rule by dividing it into elements and consequences. They must apply this rule to the facts. If issues about the interpretation of the legal rule arise the lawyer has to resolve these. If the lawyer gives their advice in writing then they engage in the skill of writing law; but even if the lawyer gives the advice orally, the lawyer still has to organise it in much the same way that they would if they were to write the advice.

Yet the lawyer's advice to a client, whilst it has this similarity to the task of answering problem questions, differs from that task in two ways. First, the lawyer has to consider questions of facts. This does not arise in problem questions because the student generally treats the facts as true and proved. By contrast the lawyer does not know in advance what findings of facts a court might make. It is not sufficient that facts given by the client are true in the objective sense. What is vital in law is proof of those facts. Hence a lawyer in giving advice has to consider how easy or hard it is to prove the client's story. For several reasons such advice can frequently be no better than an informed guess – the client may be an unconvincing witness, her witnesses may not support her testimony, cross examination may shake the testimony of the client or of her witnesses, or the other side may contradict the evidence by putting forward another account of the facts. Faced with this the lawyer may advise on what version of the facts a court is most likely to reach, but the lawyer would indicate the uncertainty to the client by advising that other versions of the facts are possible, and the legal consequences of those other versions.

Second, the lawyer will have to consider not only the legal question of the availability of a remedy or defence, but give the client advice on such matters as the cost, loss of time, delay, inconvenience and stress to which the client will be put by the litigation.

In addition the lawyer needs to advise their client of alternative mechanisms for resolving a dispute without recourses to litigations. These include case appraisal, mediation and negotiation.

From this it can be seen that the task of problem solving is not an exact model of litigation because it does not cover several tasks that a lawyer performs when advising on litigation. But, as indicated, it is concerned with several major legal skills that are used in legal practice in advising a client and litigating on their behalf including organising law, applying law to facts, interpreting law and writing law.

Method for Problem Questions

Current Methods

Various writers have proposed models for answering problem questions.[3] However, there is a broad similarity among many of these that can be illustrated and represented by the commonly proposed IRAC model. This acronym stands for Issue (or Identifying the Issue), Rule, Application and Conclusion. There are four steps,
Step (1) Issue. This involves identifying the legal issues that are raised by the facts of the question.
Step (2) Rule. The task here is to identify the legal rule or rules that potentially apply to the facts.
Step (3) Application. Here the student applies these rules to the facts of the case to see if they fit and in the process resolve the issues.
Step (4) Conclusion. Now the student indicates the outcome for the parties involved. If, for example, the facts fit the legal rule, the relevant party has a cause of action.

While methods such as IRAC dispense some good advice they nevertheless fail to deliver a comprehensive and effective method for performing the task of answering a problem question. There are several pervading and overlapping reasons for this failure but the problems can be highlighted in two propositions. First, the order of these steps is illogical. The core tasks in their proper order are as follows,
Step (1) Rule. Identify the potentially relevant legal rule (or rules).
Step (2) Application. Systematically apply the rule(s) to the facts.
Step (3) Issues. Identify the issues of law, which should emerge when the rule is applied to the facts. Then resolve these issues.
Step (4) Conclusion.

Second, the IRAC account is incomplete. This can be demonstrated by comparing the steps in the method proposed here with the typical statement of the IRAC steps. Some steps are omitted entirely, some steps are not fully covered and many of the relevant techniques – such as organising the legal rules and interpreting law – are not explained at all or not explained properly.

3. Endnote 2.

Proposed Method

This article describes a method for answering problem questions. This method explains the process from start to finish in a logical progression. It is as close to algorithmic in its overall structure as can be achieved. Each step taken properly and in its proper sequence should lead to a good and well-written answer. However, the algorithmic nature of the method cannot be fully sustained in the actual performance of these steps since these involve judgments and processes that are not cut and dried.

There are three main parts to the proposed method,
(1) Constructing a framework
(2) Working out the answer
(3) Writing up the answer

Constructing a Framework

In the simple case with problem questions (and with litigation) there are only two parties, one permutation of parties and one cause of action. One of the parties, the plaintiff, is suing the other party, the defendant. In this case the task is to divide the cause of action into its elements and consequences as part of the standard process of organising a legal rule.[4] Then the task of answering the problem question is to apply the standard technique to this one cause of action and the two parties involved.

This standard technique, as will be explained later in this article, involves checking each element of the cause of action against the facts in order to ascertain if the cause of action is available to the plaintiff. In real life litigation it is often necessary only to check the facts in this way. But sometimes there will be uncertainty because the law is ambiguous. Hence, to complete the task of applying the law to the facts it is necessary to resolve the ambiguity by interpretation. In a problem question in most cases the lecturer inserts at least one question of interpretation purely to enhance the problem question as a training exercise.

This simple case does not require an elaborate framework. However more complicated cases do. In a more complicated case there may be more than two parties, more than two permutations of parties and more than one cause of action. In these cases it is necessary to construct a framework to handle this complexity. This framework is a way of setting out three aspects of the problem in a systematic and accessible way. These aspects are as follows,
(1) Permutations of Parties. To create this part of the framework it is necessary to work out the possible permutations of parties to the case.[5]
(2) Possible Causes of Action. To create this part of the framework it is necessary to work out the possible causes of action that any party might bring against any other party.[6]

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4. Section 2.3 Law
5. Section 2.2 Parties
6. Section 2.3 Law

(3) Organising Causes of Action. To create this part of the framework it is necessary to organise each cause of action by dividing it into its elements and consequences as part of the standard process of organising a legal rule.[7]

Once you have constructed the framework it is possible to proceed with the core of the task of answering the problem question. This, as stated above, involves checking each element of the cause of action against the facts in order to ascertain if the cause of action is available to the plaintiff.

At this stage the reader might like to glance at this framework in order to understand this basic point (and with the advantage that it gives the reader an idea as to what the finished product of this framework looks like). It comprises Figure 7, which is set out below.

Working out the Answer

The method for working out the answer involves taking each cause of action for each permutation of parties in turn. Then one applies the same technique for each cause of action. It consists of the following steps,

(1) Go through each element of the cause of action in turn
(2) Check each element against all of the facts.
(3) You will obtain one of three answers for each element – yes, no or maybe.
(4) A yes answer means the element is satisfied. It is necessary for each and every element to be satisfied for the cause of action to apply to the case.
(5) A 'no' answer means that the element is not satisfied. If even one element is not satisfied the cause of action does not apply to the facts.
(6) A 'maybe' answer means that the element may or may not apply to the facts. This happens because the element is ambiguous, which means it has at least two meanings and possibly has more. This element throws up a 'maybe' answer because according to at least one meaning the element applies to the fact in question and according to at least one other meaning the element does not apply to the fact in question
(7) Where there is a 'maybe' answer it is necessary to resolve the 'maybe' by interpretation. In a real case a court will interpret the ambiguous element and decide which meaning is the legally correct meaning. In a problem question a student presents and possibly weighs the arguments that a court could use when interpreting the ambiguous element in the cause of action. The outcome of a court's interpreting the ambiguous part of the cause of action is to turn the 'maybe' into a definite 'yes' or a definite 'no'.

Writing up the Answer

There are some simple truths that determine the best format for writing an answer to a problem question. The previous discussion has described an organised step-by-step approach to working out the answer. Given this, the key to writing a clear answer is to

7. Section 2.3 Law

convert the method that underlies how we derived the answer to the method that best enables us to organise the answer.

As well as providing a methodical approach to setting out an answer there are two other aids,
(1) The article assists students by identifying some common errors so that they may better avoid them.
(2) The article concludes by illustrating the advice with a worked example.

Section 2. Constructing a Framework

Section 2.1 Facts

Introduction

There are three tasks with facts,
(1) Assume that the facts are proved.
(2) Organise the facts.
(3) Resolve any problems with the facts.

Assume Facts are Proved

Answering a problem question does not generally involve discussing proof of facts. In consequence, there is a basic rule about facts in a problem question that avoids the need to do so, for the purpose of the question assume that the facts are true and proved. Because the facts are taken to be proved, the exercise involves only applying law to facts and resolving any questions of interpretation that arise in the process. This nostrum, of course, applies subject to any instruction to the contrary by the lecturer.[8]

Well founded as this rule is, many students (especially those new to law) still often wish to dispute the facts. The types of facts they most often wish to dispute are facts which are peculiarly within the knowledge of one party, especially where those facts are favourable to that party's case. Additionally, students often baulk at admitting that conversations are provable. It may allay some misgivings about treating these facts as true and proved if this article explains some of the basic rules of evidence.

With a number of exceptions, the general approach of the rules of evidence is that a party may give evidence of anything they saw or of any conversation they heard that is relevant to the case. This includes things that they did themself, and conversations to which they were a party. Subject to some exceptions, evidence by a party of his or her dealings and conversations is admissible if it is relevant to facts in issue. Once evidence is admitted, the court will consider the evidence in reaching its conclusion. In so doing, a court generally speaking has a wide discretion to believe or disbelieve evidence, or to accept only some of a party's evidence. It is obvious that in exercising such a discretion, and in reaching its conclusion, a court will give very careful

8. Endnote 3.

consideration to how much weight it can put on evidence given by a party where that evidence is favourable to that party's case, and where that party's evidence is the only evidence of the facts so alleged (that is, it is uncorroborated). But in principle, there is no legal reason that a party's evidence in these circumstances cannot be accepted, and cannot be accepted entirely. Those who baulk at accepting a party's statement about their own actions and conversations in a problem question are, to use legal terminology, confusing its admissibility with its weight.

Organise Facts

To have a good grasp of facts it is necessary to organise them in a logical way. Facts in a problem question may or may not come organised. If they are not organised in the question then the student needs to organise the facts for themselves especially if they are either long or complicated. Typically organising facts entails putting them in chronological order, arranged by reference to major incidents or transactions. In the process, put like things together[9] and connected events in sequence. Further, inserting well located and thoughtfully constructed headings and subheadings confers a major benefit. Finally, it can sometimes help to organise some or all of the facts in a diagram or a timeline.

Resolve Problems

It is possible that there are problems with facts as they are presented in the question. There are five obvious types of facts,

(1) Omitted Facts. Some relevant facts may have been omitted.

(2) Facts and Inferences. Facts may be inferences rather than raw data. (This is a special case of omitted facts.)

(3) Facts that Infer Law. Facts may contain inferred law, that is, an inference of legal consequences.

(4) Surplus Facts. There may be surplus facts.

(5) Constitutional Law and Administrative Law. Facts in constitutional law and administrative law are in a special position.

In the real world a lawyer can generally deal with these problems by making appropriate inquiry. In law school, however, facts in a problem question are frozen and inaccessible outside the question. Therefore to deal with these problems a student should make some appropriate and reasonable assumptions.

Omitted Facts

It was said above that the facts are to be treated as the truth. But while they are the truth, they may not be the whole truth, because some relevant facts may have been omitted. They may have been omitted accidentally or deliberately.

Whatever the case, if relevant facts have been omitted you should do three things in your written answer,

9. Endnote 4.

(1) Indicate that facts have been omitted.
(2) State all reasonably possible versions of the omitted facts.
(3) Indicate the legal consequences of each version.

Here your task is analogous to that of a lawyer who has listened to a client's story. The lawyer has to identify the gaps in the story, appreciate their significance and ask questions to fill them. In a problem, however, you cannot fill the gap with a definite set of facts. Therefore you have to deal in possibilities. To return to our comparison which is apt here, a lawyer has to see the gap, the possibilities and their consequences before they can ask a question. One of their skills is to be imaginative in facts as well as versed in law. In this the lawyer is not working from the facts to their legal consequences, but in reverse, from the legal consequences back to facts that could support them.

Facts as Inferences

Facts may be inferences. It is obvious that when we convey information to others we sometimes do not give our message as raw data. Instead we use inference and generalisations. We interpret what we see, and pass on a mixture of fact and interpretation. It is almost inevitable then, in written or spoken communication, that some part of what is said is inference, not basic facts. Similarly, in a problem question there are frequently facts that are inferences, and sometimes it is necessary to go beyond the inferences to the facts from which the inferences were made. If this occurs, it is merely a special case of omitted facts. Deal with it on this basis, and point out that you have inferences to deal with, not the more basic facts from which they arise.

A special case of inference is the use of indirect or reported speech, instead of direct speech. For example, you may be told ‘Malcolm put an advertisement in the paper offering $20 for the return of his parrot John’. In direct speech, the advertisement probably read, ‘Lost, pet parrot named John. Reward of $20 to finder’. What is the problem with having indirect speech instead of direct speech? The problem is that in many cases one needs the exact words used by the parties in order to determine their legal effect. For example, in a contract problem involving this advertisement ideally you should have the exact words of the reward to determine two things,
(1) To determine whether the reward constitutes an offer.
(2) If the reward does constitute an offer, to determines the express terms of the contract, because these are contained in the offer.

Nevertheless it is not uncommon for problem questions to use indirect speech. What do you do? Translate the reported speech to direct speech, adopting the most likely version or versions.

Facts Incorporating Legal Consequences

Facts may incorporate or infer legal consequences. For example, you may be told, ‘Fred made a contract with Esmeralda’. If you are told this, in the absence of indications to the contrary you are also entitled to assume that the contract is legal,

valid and enforceable. If, in such a situation you do make these assumptions then you may want to state clearly and briefly that you are making them, and the reasons for your so doing.

An inference of law will usually appear in a problem because the teacher wishes it to be taken as such, since it is not an issue. But slip-ups do occur. There can be cases where the inference is not acceptable. If this happens, point out in your answer that the inference in not acceptable giving your reasons. Then at the appropriate place in your answer, deal with any issues arising from this.

Surplus Facts

Surplus facts are the converse of omitted facts. Sometimes most of the facts in a problem will be relevant. On other occasions there will be many surplus facts. Whether or not a problem contains a lot of surplus facts depends on the policy and imagination of the person setting it.

There is an overwhelmingly strong case for having a generous dose of surplus facts in a problem,

Lawyers deal every day in surplus facts. Not only is it the lawyer's art to sense omissions in a clients story, they have also to prune away irrelevant facts.

Moreover, the exclusion of surplus facts from a problem would give students an artificial advantage, because every fact is then a cue to a legal principle.

Facts in Constitutional Law and Administrative Law

Facts in problems in constitutional law and administrative law are in a special position. Whereas other branches of law are laws about facts, these are branches about laws. Therefore the 'facts' of problems in these two areas will contain laws, usually statutes, whose validity or operation is under question. But despite the presence of these statutes, these are still 'facts' as that term is employed in much of this discussion.

Section 2.2 Parties

Introduction

To understand the tasks with parties it is necessary first to consider both the simple case and the complicated cases. The complicated cases demonstrate how there can be two or more permutations of parties (as well as two or more causes of actions between parties). With this done it is possible to understand the three tasks involved with parties – identifying every party, identifying all of the permutations of parties and identifying what the question requires regarding parties.

Simple Case

Assume that Rachel is suing Sam for trespass to land. This is the case of Rachel v Sam. It illustrates the simple type of case. It is simple on three dimensions,

(1) Constitution of the Set of Parties. There is only one party on each side,
    (i) The set of parties on the plaintiff's side consists of one party, Rachel.

(ii) The set of parties on the defendant's side consists of one party, Sam.
(2) Cause of Action. There is only one cause of action, namely trespass to land.
(3) Permutations of Parties. There is only one permutation of parties, namely Rachel v Sam.

Complicated Cases

A case in real life, and potentially a problem question, can be more complicated than this on any of the three dimensions. These possibilities are two or more parties in a set, two or more causes of action, and two or more permutations of parties.

Two or More Parties in a Set

While a set of parties may consist of just one party there can be two or more parties in the set. Thus A and B and C can sue X and Y so the action is A, B and C v X and Y. In this case there are three parties in the plaintiff's set (A, B and C) and two parties in the defendant's set (X and Y). This complication does not concern us since the focus is on the action. Whether there are two or more parties on either side does not normally affect the substantive legal questions that require our attention. Instead it concerns the special procedural rules such as those regulating multiple parties, joinder of parties and joinder of causes actions.

Two or More Causes of Action

There can be two or more causes of action in a case. So, if A is suing P it is possible that A is bringing two or more causes of action against P. For example, A is suing P for trespass to land, trespass to goods and defamation. This is discussed later in Section 2.3 Law.

Two or More Permutations of Parties

In the simple case there is one permutation of parties. In the example above it was Rachel v Sam. There can, however, be two or more permutations. For example, in a case or a problem question A may be suing X (A v X), and X may be suing A and suing Y (X v A and X v Y). This is discussed below in Section 2.2 Parties. At this point our sole task is to identify the *possible* permutations of all of the parties. At this stage we do this without final judgment as to their possible liability as a defendant or their possible right of action as a plaintiff because that comes in later steps.

This step of identifying the permutations of parties is functionally linked to the next two steps, which involves performing two tasks with law – ascertaining the relevant law or legal rule and organising this law by dividing those legal rules into their elements and consequences. When both of these steps are completed it is possible to put the results on a framework that can be represented by a table. This table presents the possibilities in a clear and simple way. Constructing this framework begins in this step.

Three Tasks

Now that the possibilities with parties and their causes of action have been identified

we can consider the tasks that need to be performed at this stage. These are the tasks,
Task 1: Identify every party.
Task 2: Identify the permutations of parties.
Task 3: Identify what the question requires regarding parties.

Task 1, Identify Every Party

Task 1 consists of identifying each and every party (or person) stated in the facts. Go through the facts from start to finish and identify every person who is mentioned in the facts. For example in a particular question you may find that there are three parties called Arthur, Betty and Clare.

Task 2, Identify the Permutations of Parties

Task 2 is to work out the possible permutations or arrangements of all of these parties on the basis of one party suing one other party. In the simplest case with just two parties, Arthur and Betty, the permutations are Arthur v Betty and Betty v Arthur. With three or more parties (let the actual number be designated 'n'), arranged two at a time, the number of permutations is factorial (n).[10] So, if there are 3 parties, Arthur, Betty and Clare, there are factorial (3) permutations, namely six (3 x 2 x 1 = 6). Figure 2 sets out these permutations in a table.

Task 3, Identify What the Question Requires Regarding Parties

Task 3 requires you to look at the question and see what it asks you to do regarding the parties. If the question says 'Discuss,' then it is necessary to consider all permutations of parties. If the question wants something less than this, it will ask for it. For example, if the question asks you to consider the position of one designated party, or two or more such parties, then only the position of that party or those parties need to be considered. Thus if the parties are Arthur, Betty and Clare, the requirement 'Advise Arthur' in the question would mean that it is necessary to consider only permutations featuring Arthur, where Arthur is suing or being sued. In this case you would consider the permutations Arthur v Betty, Betty v Arthur, Arthur v Clare and Clare v Arthur. The other two of the six permutations – Betty v Clare and Clare v Betty – are not directly relevant and need not be considered.

Simplifying the Three Tasks

Setting out the three tasks that need to be performed for parties in this way displays a logical sequence. Viewing them in retrospect, however, one can see how a student can expedite performance of these tasks by first looking at the question to see which parties need to be advised, then constructing the permutations just for those parties. In fact, this is how you should proceed. Nevertheless, there was an advantage in showing the long way round – it clearly and simply revealed the reasoning that underlies the process.

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10. Conventionally one designates a factorial by using an exclamation mark. So factorial (n) would be written as as n!.

Constructing a Framework

Nature of a Framework

These three tasks have started the process of constructing a framework that displays permutations of parties and their possible causes of action. The finished framework is shown in Figure 7. It may help your understanding if you take a look at Figure 7 so that you can see the end result – before you start a journey it is a good idea to know where you are heading.

These are the steps that have been taken thus far to construct this framework. In Task 1 we identified all of the parties. These were Arthur, Betty and Clare. This can be set out in a table,

Arthur
Betty
Clare
Figure 1. Parties

Task 2 involved identifying all possible permutations of parties. Arthur, Betty and Clare gave us 6 permutations. These permutations can be set out in a table in the following way,

Arthur v Betty		Betty v Arthur
Arthur v Clare		Clare v Arthur
Betty v Clare		Clare v Betty
Figure 2. Permutations of Parties		

Task 3 involved looking at the question and determining which permutations of parties it required us to consider. In the example, it asked us to advise Arthur. This narrowed the permutations that we need to consider because we could remove from our table of permutations those that did not involve Arthur (Betty v Clare and Clare v Betty). The remaining permutations are the following,

(1) Arthur v Betty and Betty v Arthur
(2) Arthur v Clare and Clare v Arthur

Framework, Stage 1

These permutations are the first stage of the framework. They can be set out in a table in the following way,

Arthur v Betty		Betty v Arthur
Arthur v Clare		Clare v Arthur
Figure 3. Framework Stage 1, Permutations of Relevant Parties		

Section 2.3 Law

Introduction

There are two tasks to perform with law,
(1) Ascertaining Law. This involves finding the legal rules that may be relevant to the facts of the problem.
(2) Organising Law. This entails organising each relevant legal rule in the standard way by dividing it into elements and consequences.

Ascertaining Law

The task here is to ascertain or identify the law that might be relevant to the facts for each cause of action in each permutation of parties. In ascertaining or identifying the relevant law for a permutation of parties we are not making a judgment that the law definitely applies (that comes later). Rather, the law is identified as worth considering in that it might apply. Here the position of the law student is analogous to a doctor when they have ascertained their patient's history, signs and symptoms. They then consider the possible ailments that these suggest. The doctor sees this as a prelude to more careful consideration and diagnosis.

So too the law student is simply identifying legal rules that should bear, and will later receive, detailed consideration. An obvious way of making this rough identification is to consider the wrong that the victim has experienced or the circumstances in which they find themselves. If, for example, they have suffered damage to their property, it is necessary to consider the various wrongs that redress injury to property.

General Position

In legal practice the relevant law can come from anywhere. This will normally not trouble a lawyer who is a specialist in the relevant field since they will be familiar, at least in name and substance, with all the legal rules in their field that create a cause of action.

A generalist is not so lucky. Frequently they need to engage in legal research just to identify the relevant rules, then further research to master them. Or they need to refer the case to a lawyer who is a specialist in the area for advice.

Notwithstanding that the volume of law is large, even enormous, the potentially relevant law normally falls into one of two categories which make it easier to identify. It is specialised and obvious, for example company law, family law, or bankruptcy; alternatively, it comes from the major remedial areas, that is, debt, crime, tort, contract, equity, and administrative law.

Where the area of law is specialised, a student needs to scan it for the relevant sections and parts. In the general remedial areas, they must consider the entire area for possible remedies, but fortunately this process can be speeded up in some obvious ways. For

example, if the facts involve injury only to property, there is no need to consider the torts and crimes which are based on injury to the person.

Problem Question

For a problem question, the search for relevant law generally takes one of two forms. In some cases it is part of an exercise to test not only the skill of answering a problem question, but the skill of legal research. In this case, of course, the student has to find the relevant legal rule or rules by effective legal research.

In the other case, the principal purpose of the problem question is to test understanding of the law on the syllabus of a particular subject. Here, there is generally an assumption that the student is required to consider only the law that is on the syllabus of the subject that they are studying. They do not need to go beyond this unless they are told otherwise. For example, if a problem in a torts course involved damage to personal property it would be necessary to identify, and later consider, only the torts providing redress for damage to personal property that were on the syllabus.

Illustration

Before illustrating this task let us first recap. By taking the prior steps concerned with parties, we identified the permutations of parties that need to be considered for the problem. These were set out in a table in the following way,

Arthur v Betty		Betty v Arthur
Arthur v Clare		Clare v Arthur

Figure 4. Permutations of Relevant Parties

In the task just described, the student answering the problem would have identified the legal rules that need to be applied to determine the legal position of the parties. To stress the point about this operation, as this stage it is not said that the initiating party will definitely succeed if they invoke these rules. Instead it is asserted simply that these rules are worth serious consideration.

For the purposes of further illustration we continue to assume that the question says, ‘Advise Arthur’. Let us now also assume that when the relevant law has been ascertained and a preliminary evaluation made about the actions to be considered, there are the following results,

(1) Arthur v Betty. Arthur should consider suing Betty for trespass to land and trespass to goods.

(2) Betty v Arthur. There is no feasible action that Betty can bring against Arthur.

(3) Arthur v Clare. There is no feasible action that Arthur can bring against Clare.

(4) Clare v Arthur. Clare should consider suing Arthur for negligence, false imprisonment and defamation.

Framework, Stage 2

The work in identifying the possible or feasible causes of action can be used to develop the framework further. Two kinds of change are needed to upgrade the framework. These changes involving deleting the permutations for which there are no feasible causes of action, including the permutations for which there are feasible causes of action and stating the names of these feasible causes of action.

Now to return to the example. First, with two permutations of parties, Betty v Arthur and Arthur v Clare, there are no feasible causes of action. Therefore these permutations need to be deleted from the framework. Second, there are feasible causes of action for the other two permutations, namely Arthur v Betty and Clare v Arthur. These causes of action need to be inserted in the framework.

When both of these alterations are made, the amended framework takes the following form,

Arthur v Betty
Trespass to Land
Trespass to Goods
Clare v Arthur
Negligence
False Imprisonment
Defamation

Figure 5. Parties and Causes of Action

Organising Law

Elements, Consequences and Conditional Statements

From the perspective of answering problems in the classroom or doing litigation in the real world, one of the most important things about a legal rule is this. Subject to some exceptions which are of no concern here, every legal rule possesses a standard form.[11] This standard form has three components – elements, consequences and a conditional statement,

(1) Elements. A rule contains a checklist of elements. An element depicts a required fact – it delineates a type or category of facts that must be satisfied for the rule to apply. Taken together the categories of facts delineated by the elements depict the overall category of facts to which a rule applies. The fundamental proposition is that each and every element of the rule must be satisfied by the appropriate fact for the rule to apply.

(2) Consequences. A rule must specify the consequences that apply to the parties involved when each of those elements is satisfied by the facts in a particular case. For example, when a rule of criminal law applies the defendant is guilty of a crime and is liable to punishment. When a rule of tort law applies the defendant is liable to pay

11. Christopher Enright *Legal Method* Chapter 3 Organising Law, Chapter 4 Organising Law: Micro Analysis

damages to compensate the plaintiff for their injury and possibly to some other remedy as well.
(3) Conditional Statements. The conditional statement links elements and consequences. Elements describe the overall category of facts to which a rule applies. Consequences describe how the parties to those facts will be legally affected when the rule applies. These are joined in a conditional statement that takes the form, 'When facts of the kind delineated by the elements occur, the consequences designated by the rule apply'.

Thus satisfying each element is a necessary condition for a legal rule to apply to a set of facts. This has two connected consequences,
(1) Satisfying each element with the appropriate fact constitutes the necessary and sufficient condition for the legal rule to apply.
(2) When the law applies to a set of facts it brings legal consequences to the parties involved.

This analysis of a legal rule, termed micro-analysis, can be conveniently illustrated in abstract form by a diagram which takes the following form,

Law
Element 1
Element 2
Element n
↓
Consequences

Figure 6. Micro Analysis of a Legal Rule

Framework, Stage 3

When the relevant law has been organised in this way, the results can be entered into an expanded version of the framework by inserting into it the elements and consequences of each cause of action. In its current form the framework shows two permutations of parties, Arthur v Betty and Clare v Arthur and the feasible causes of action between them. We now need to amend the framework by inserting the elements and consequences of each of the causes of action that it contains.

When this has been done, the framework or table appears as follows (and for the sake of brevity the defences are not specified, although they normally would be),

Arthur v Betty
Trespass to Land
Elements
(1) There is land.
(2) The plaintiff has a right to possess the land.
(3) The defendant interferes with the land.
(4) The defendant interferes with the land intentionally.
(5) The defendant interferes with the land without permission of the plaintiff.

(6) There is not a defence available to the defendant.
Consequences
(1) Damages
(2) Injunction
Trespass to Goods
Elements
(1) There are goods.
(2) The plaintiff has a right to possess the goods.
(3) The defendant interferes with the goods.
(4) The defendant interferes with the goods intentionally.
(5) The defendant interferes with the goods without permission of the plaintiff.
(6) There is not a defence available to the defendant.
Consequences
(1) Damages
(2) Injunction
Clare v Arthur
Negligence
Elements
(1) The defendant owes the plaintiff a duty of care.
(2) The defendant breaches this duty of care.
(3) The breach of the duty of care causes damage to the plaintiff.
(4) There is not a defence available to the defendant.
Consequences
(1) Damages
False Imprisonment
Elements
(1) The plaintiff is confined.
(2) The plaintiff is confined because the defendant causes the confinement.
(3) The plaintiff must be aware of the imprisonment. (The existence of this element, however, is contentious.)
Consequences
(1) Damages
Defamation
Elements
(1) The defendant communicates something to a third party.
(2) What is so communicated is derogatory to the plaintiff's reputation.
(3) There is not a defence available to the defendant.
Consequences
(1) Damages
(2) Injunction

Figure 7. Framework, Parties, Causes of Action, Elements and Consequences

Section 2.4 Framework

Introduction

Section 2.4 gathers the three stages of constructing a framework by way of a summary and a signpost that indicates what the entire task of constructing a framework entails.

Framework Stage 1

Stage 1 of the framework consisted of two tasks. Task 1 involved identifying all of the parties in the case. In our earlier example three were three parties, Arthur, Betty and Clare. Task 2 involved identifying all possible permutations of parties. Arthur, Betty and Clare gave us 6 permutations. These permutations can be set out in a table. This table represents Stage 1 of the framework,

Arthur v Betty		Betty v Arthur
Arthur v Clare		Clare v Arthur
Betty v Clare		Clare v Betty

Figure 8. Framework Stage 1, Permutations of Parties

Framework Stage 2

Stage 2 in constructing the framework involved identifying the possible or feasible causes of action. There were possible or feasible causes of action for only two of the permutations, namely Arthur v Betty and Clare v Arthur. Since there were no possible or feasible causes of action for the other four permutations these were removed from the table. The results of Stage 2 are set out in the following table,

Arthur v Betty
Trespass to Land
Trespass to Goods
Clare v Arthur
Negligence
False Imprisonment
Defamation

Figure 9. Framework Stage 2, Parties and Causes of Action

Framework Stage 3

Stage 2 of the framework set out all of the permutations of the parties and the possible or feasible causes of action for each permutation. Stage 3 entails finishing the framework by dividing each of these possible or feasible causes of action into their elements and consequences. When this has been done, the framework or table appears as follows (and for the sake of brevity the defences are not specified, although they would be normally),

Arthur v Betty
Trespass to Land
Elements
(1) There is land.
(2) The plaintiff has a right to possess the land.
(3) The defendant interferes with the land.
(4) The defendant interferes with the land intentionally.
(5) The defendant interferes with the land without permission of the plaintiff.
(6) There is not a defence available to the defendant.
Consequences
(1) Damages
(2) Injunction
Trespass to Goods
Elements
(1) There are goods.
(2) The plaintiff has a right to possess the goods.
(3) The defendant interferes with the goods.
(4) The defendant interferes with the goods intentionally.
(5) The defendant interferes with the goods without permission of the plaintiff.
(6) There is not a defence available to the defendant.
Consequences
(1) Damages
(2) Injunction
Clare v Arthur
Negligence
Elements
(1) The defendant owes the plaintiff a duty of care.
(2) The defendant breaches this duty of care.
(3) The breach of the duty of care causes damage to the plaintiff.
(4) There is not a defence available to the defendant.
Consequences
(1) Damages
False Imprisonment
Elements
(1) The plaintiff is confined.
(2) The plaintiff is confined because the defendant causes the confinement.
(3) The plaintiff must be aware of the imprisonment. (The existence of this element, however, is contentious.)
Consequences
(1) Damages
Defamation
Elements
(1) The defendant communicates something to a third party.
(2) What is so communicated is derogatory to the plaintiff's reputation.

(3) There is not a defence available to the defendant.
Consequences
(1) Damages
(2) Injunction
Figure 10. Framework Stage 3, Parties, Causes of Action, Elements and Consequences

Advantages of a Framework

This framework serves two related purposes. It creates a checklist for applying law and it structures an answer to a problem question.

First, dividing each rule into elements and consequences in this way provides a checklist for applying law to facts. Using this checklist creates an approach that is both methodical and comprehensive – as such it lessens and even minimises the possibility that anything is overlooked. To use this checklist one proceeds through the framework taking each permutation of parties in turn. For each permutation of parties, one takes each cause of action in turn. For each cause of action, one checks each elements and each consequence in turn against the facts of the problem.

This checklist of elements and consequences is used in applying law to facts, whether in the classroom with a problem (as is our concern here and as is illustrated below) or in the real world in an actual case. Using this framework to apply a legal rule to facts determines whether this legal rule brings consequences to the parties involved.

Second, the framework provides a natural structure for setting out the answer to the problem question. The methodical way of working out the answer fairly simply translates into a structured way of setting out the answer.

Section 3. Working Out the Answer

Section 3.1 Applying Law

Introduction

Once the framework has been formed the next step entails applying the law to the facts. There is a very good reason that we apply law to facts. When a law applies to facts it brings legal consequences to the parties involved. A rule of law applies to a set of facts when there are facts in the set that satisfy each element of the rule. This explains why two of the key tasks in answering a problem question involve organising each cause of action into its elements (as has been explained) and checking each element of the law against the facts (as will now be explained).

There are three processes in applying law, which are guided by the framework that has been constructed in previous steps and the checklists which this framework incorporates,

(1) Take each permutation of parties in turn.
(2) Take each cause of action in turn.

(3) Check each element of each cause of action against each of the facts. If the cause of action applies to the facts check the facts to see how the consequences would apply. By proceeding in this way you ensure that you do the task systematically and comprehensively.

Permutations

To start, take each permutation of parties in turn. Assume, for example that the permutations were as set out in the example above, where there were two possibilities, Arthur v Betty and Clare v Arthur. In this case you need to consider each of these permutations of parties. It does not matter in which order you consider them. The point is that you must consider them all.

Causes of Action

For each permutation of parties, take each cause of action in turn and check each of the elements against each of the facts. However, it does not matter in which order you consider them. To illustrate, take the example above, where the permutations to be considered are Arthur v Betty and Clare v Arthur. Arthur has to consider suing Betty for trespass to land and trespass to goods, while Clare has to consider suing Arthur for negligence, false imprisonment and defamation. Using the framework, we could start with Arthur v Betty. First we could consider trespass to land, proceeding element by element, checking them against the facts. Then we would consider trespass to goods. Having completed Arthur v Betty, we would move on to Clare v Arthur, and consider the three actions there, negligence, false imprisonment and defamation in the standard way, that is, by taking each element in turn and checking it against all of the facts.

Checking Elements

To check the elements of a cause of action against the facts, go to the checklist of elements. Take the first element in the list. Go to the facts and work through them from start to finish. Your task is to see if the element applies to any one of the facts so that the element is satisfied. An element applies to a fact when the fact fits the element. A fact satisfies or fits an element when the fact falls within the category of facts that the element delineates. So the question for each element is as follows, is there a fact that fits within the category delineated by the element?

When you have finished with the first element, go to the second and check this element against the facts. Proceed in this way until each element has been checked against the facts. The idea is to make a comprehensive and systematic check.

When you apply an element of a cause of action to the facts in this way you ask whether there is a fact to satisfy the element. This question will yield one of three answers – a definite ‘yes,’ a definite ‘no’ or a ‘maybe’. These three possible answers are the foundation for the legal triage system used when applying law to facts.

Definite 'Yes'

One possibility is that the element definitely applies to one of the facts, so that the answer is 'yes'. In this case the element is satisfied. This happens because it is perfectly clear that one of the facts falls within the category of facts delineated by the element.

Since this element is satisfied, this is the end of the line for it – there is nothing more to be done with it. Proceed, therefore, to the next element.

Definite 'No'

A second possibility is that the element definitely does not apply to one of the facts. The answer is 'no'. In this case the element is not satisfied. This happens because it is perfectly clear that none of the facts falls within the category of facts delineated by the element. Since this element is not satisfied, this is the end of the line for it – there is nothing more to be done with it.

Because a plaintiff has to satisfy all of the elements of a cause of action to win it, the plaintiff will fail (unless the element is one of several possibilities). Nevertheless, proceed to the next element because a problem question is training you in technique rather than being a perfect simulation of legal practice in the real world. In the academic world even a hypothetical plaintiff in a problem question is entitled to their day in court however disappointing that day may turn out.

'Maybe'

A third possibility is that there is doubt as to whether the element is satisfied, so in this case the answer is 'maybe'. Since there is doubt about whether an element is satisfied by the facts, there must also be doubt as to whether the whole legal rule applies to the facts (unless the element in doubt is one of several possibilities). Where there is this doubt there is an issue involving a question of interpretation. The issue arises because the element is ambiguous. For this element one has to proceed to the tasks in Section 3.2 that involve first framing and then resolving issues. 'Framing Issues' describes how to frame an issue, once it has been detected to set it up properly for resolution. 'Resolving Issues' describes how to resolve issues by interpretation. Interpretation is crucial because it determines conclusively, one way or the other, whether the element does or does not apply to the particular set of facts. Interpretation by a court converts the inconclusive 'maybe' into a definite 'yes' or a definite 'no'.

Section 3.2 Resolving Issues

Introduction

Section 3.1 described the process of applying law to facts. One of the possible outcomes of this was to detect any issues of interpretation. Section 3.2 now focuses on these issues. It describes the nature of an issue, it revises in brief the process of detecting issues and explains how to frame an issue. These discussions lead to the final showdown that involves resolving issues by interpretation.

Nature of an Issue

To explain the nature of an issue it is necessary to go back to basics. We identified the existence of an issue when we applied an element of a cause of action to the facts and we were not able to be certain whether the element did or did not apply to the face. We obtained the 'maybe' answer, which told us that there was an issue. This uncertainty that generates the 'maybe' answer occurs because an element of the cause of action had two or more meanings. Assume, for simplicity, that there are just two meanings, Meaning 1 and Meaning 2. This uncertainty comes out because on one meaning the element applies to the facts and on another meaning it does not apply. So, for example, if Meaning 1 is legally correct the element does apply, but if Meaning 2 is the correct legal meaning the element does not apply. Thus we can now see how the 'maybe' came about. One meaning, Meaning 1 gives a 'yes' answer and the other meaning, Meaning 2, gives a 'no' answer. This shows how 'maybe' is a combination of 'yes' and 'no.'

Detecting Issues

General Technique

The discussion above explained how to apply law to facts to detect any issues. The article recaps this here since detecting and issue is relevant to this discussion and is also a necessary foundation for explaining how to frame an issue and to resolve an issue.

Detecting any issues that were contained in the problem question entailed applying each element of each cause of action for each permutation of parties to the facts of the case. This inquiry, as we saw above, yields one of three answers. Each of these answers requires its own special response. These answers are as follows,

(1) Yes. The element definitely does apply to the set of facts because there is a fact in the set that satisfies the element. This is the 'yes' answer.

(2) No. The element definitely does not apply to the set of facts because there is not a fact in the set that satisfies the element. This is the 'no' answer.

(3) Maybe. There is doubt about whether the element applies to the set of facts; specifically, the element may or may not apply to one of the facts depending on how the element is interpreted. This is the 'maybe' answer.

To emphasise the position, where the answer is a 'yes' or 'no', so that the element definitely does or does not apply to the facts, there is nothing more to be done. But where the answer is 'maybe' it is necessary to proceed to two further steps for that element in answering the question. These entail framing the issue in this step, and resolving the issue by interpretation in the step that follows.

Strategic Advice

There is an important piece of strategic advice about detecting issues. Sometimes a student may feel that something could be an issue but could not be. In these cases treat it as an issue. If later on closer examination it proves not to be an issue there is no

harm done – just let it go. On the other hand, if a student overlooks an issue because they reject it at this preliminary stage they do considerable harm because the ensuing answer will neither acknowledge nor address this issue.

Framing Issues

Once it is established that there is an issue, our task then is to frame or define the issue in terms of law and fact. An issue arises when law is applied to facts and there is uncertainty about whether it does apply. Hence an issue is framed as a question about whether law applies to facts or, from the reverse position, whether certain facts satisfy an element. Does Element Y apply to Fact X? Does Fact X satisfy Element Y? Or to give a concrete example, Did Ken's statement to Cheryl 'I would be happy to sell my car to you' constitute a legal offer for the purposes of contract law? Thus there are two components of an issue, law and facts,

(1) Law. The law that is part of the issue is in doubt because it is ambiguous (and the ambiguity will be resolved by interpretation).

(2) Facts. The facts that are part of the issue are the facts that may or may not come within the law depending how the law is interpreted.

It helps considerably to refine an issue as much as possible, that is, to define it as narrowly as you can. The more precisely the issue is framed the easier it will be to resolve. To refine the issue, identify as precisely and as narrowly as possible the ambiguous part of the law and the facts relevant to that ambiguity. Proceeding in this way will help ensure that there will be nothing extraneous in the framing of the issue. In turn this should help to ensure that there are no irrelevant considerations involved in resolving the issue.

Resolving Issues

Introduction

Interpretation is necessary when an issue arises in the process of applying law to facts. To understand the role of interpretation it is first necessary to understand the nature of an issue. An issue arises because law is ambiguous because part of the law has two or more meanings. In response to this the court resolves the issue by interpretation when it decides which meaning of the ambiguous word or phrase is the legally correct meaning. By deciding this, the court is also able to decide conclusively whether the element of law applies to the facts or not. In this way it turns the indefinite 'maybe' into a definite 'yes' or a definite 'no' by choosing one of the possible meanings as the legally correct meaning of the ambiguous provision.

Model for Interpreting Law

The analysis here of interpreting law presents a model for interpreting law that focuses on statute law. However, the broad approach that is used for statutes would apply to interpreting common law with some appropriate adjustments.

Interpretation of statutes is explained in other publications so a sketch will suffice here.[12] Once you have identified and framed the issues it is possible to interpret a statute (and also a common law rule) by reference to a model, which has three steps – options, reasons and decision. While these steps are the rational way to proceed when interpreting law, actually performing the steps may not be a cut and dried or precise task. Consequently, a lawyer or court can do no more than to do their best.[13]

Step 1 Options

Step 1 involves identifying the options before the court. These consist of each meaning of the ambiguous provision and the effect that each will cause if chosen as the legally correct meaning of the provision. These options are set out in the following table that shows Meanings 1-n, which are predicted to cause Effects 1-n,

Meanings	→	**Effects**
Meaning 1		Effect 1
Meaning 2		Effect 2
Meaning n		Effect n

Figure 11. Options for Interpreting Law

Column 1 sets out the possible meanings of the ambiguous provision, designated as Meanings 1–n. The court may choose one or any combination of these meanings in the range Meanings 1–n as the correct or official legal meaning of the ambiguous provision.

Column 3 sets out the effects that each meaning will cause, more accurately is predicted or believed to cause, if the court chooses it as the correct legal meaning. These effects are Effects 1–n which correspond with Meanings 1–n so that Meaning 1 is predicted to cause Effect 1, Meaning 2 is predicted to cause Effect 2 and so on.

Column 2 contains an arrow at the head. This arrow indicates that the meanings in Column 1 are predicted to cause the effects in Column 2.

When given their maximum operation the effects of a meaning encompass both their direct and indirect effects. Direct effects involve the scope of the rule because each meaning encompasses or will apply to a different set of facts. Indirect effects involve responses to a meaning. For example if an interpretation of a provision in an anti-fraud statute makes fraud harder to prove it may encourage some people to be fraudulent. In turn this might generate a response from would-be victims as they implement some preventative measure. In practice, however, courts are often concerned only with direct effects and will leave indirect effects alone because judges are generally not trained in policy analysis.

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12. Christopher Enright *Legal Method* Chapters 8-20
13. The account here for the rationale for each step of the model is a highly condensed account of a much fuller treatment in Christopher Enright *Legal Reasoning*.

The basic idea in formulating options is to identify every possibility. There is a good reason for this. It is rational to want the best outcome and this notion is incorporated into this model. It is possible to achieve the best only by considering all possible options, because if any option is overlooked or omitted, there is the possibility that this is the best option. Being omitted and overlooked means that the court will not consider the option in its judgment.

Step 2 Reasons

Step 2 involves formulating reasons to determine which option the court should choose. Policy is the logical method of reasoning to use for this because it involves seeking the best outcome. It is impossible to be more rational than wanting the best.[14] In practice courts also use precedent and maxims of interpretation. As the author has argued and explained elsewhere, these should be used only on the basis that they are derivatives of policy.[15]

When reasoning by reference to policy the logical approach is to identify the meaning of the ambiguous provision that causes the best effect and to make this the legally correct meaning of the provision. The best effect is the one that possesses the highest net benefit. There is, however, debate as to who should judge what is the best effect.

There are three major sides to this debate, which are here labelled judicial legitimacy, legislative legitimacy and metademocracy. There will now be a brief explanation of these approaches to interpretation.[16]

Judicial Legitimacy

Judicial legitimacy is feasible in jurisdictions where judges are elected. Because of their election the judges have some claim to legitimacy in making their own assessment as to which effect is best. Therefore each judge forms his or her own opinion as to which meaning of an ambiguous provision yields the highest net benefit. The obvious justification for this is that the people elected the judge to make up their own mind when deciding a case.

Legislative Legitimacy

Legislative legitimacy arises because the people elect the legislature. In this case the court refrains from exercising its own independent judgment as to the best effect based on the court's calculation of net benefit. Instead it yields to legislative intent on the basis that a court should interpret a statute so that it performs the function that the legislature intended when it enacted the statute. That is, the court interprets the statute in the way that the legislature wanted it to be interpreted. In doing this, the court defers to the judgment of the legislature for determining the most desired outcome. This is in

14. Christopher Enright *Legal Reasoning*
15. Christopher Enright *Legal Reasoning* Chapters 23 and 24
16. There is a fuller account in Christopher Enright *Legal Reasoning* Chapter 22 Social Choice, Interpreting Law.

contrast to judicial legitimacy where the judge exercises his or her own personal judgment.

Metademocracy
Instead of deferring to the judgment of the legislature as to how to interpret a statute, a court might interpret a statute by taking into account the defects in representative democracy both in principle and in practice.[17] This approach is called metademocracy. It encompasses a range of approaches with a common theme. These involve interpreting the statute in the way it would be interpreted if the legislature were composed and functioning in a proper way so that it was truly democratic (instead of the partially formed democracy that now exists). Obviously to interpret by this means the court has to somehow divine an imputed popular intent by determining what the people would have wanted. This is no easy task and may involve a substantial degree of guesswork or speculation.

Diagram
The diagram below depicts the three basic approaches to interpretation. It has five columns. This is their function,
* Column 1 lists the meanings of the ambiguous provision.
* Column 3 lists the effect that each meaning is predicted to cause.
* Column 2 contains an arrow linking Column 1 and Column 3. The arrow depicts causation. It designates that the meanings in Column 1 are predicted to *cause* the effects in Column 3.
* Column 5 sets out the three schools of thought – legislative legitimacy, judicial legitimacy and metademocracy – on the desired effects that a court should achieve when it interprets a statute. Obviously the court has to choose which method of interpretation it will adopt. These options are put in square brackets to show that the diagram is not depicting a court actually matching one of the actual effects. The diagram is simply stating the options for matching depending on how the court chooses to interpret the provision.
* Column 4 contains the mathematical symbols for equal to (=) or approximately equal to (≈). These depict how when interpreting the ambiguous provision the court is seeking to find a perfect match, or failing that the best match, between the chosen desired effect and one of the predicted effects.

This is the diagram showing the options for the court to use for interpretation,

Meanings	→	**Predicted Effects**	=/≈	**Desired Effects**
Meaning 1		Effect 1		[Legislative Legitimacy]
Meaning 2		Effect 1		[Judicial Legitimacy]
Meaning n		Effect 1		[Metademocracy]

Figure 12. Meanings, Actual Effects and Desired Effects

17. For an account of these defects see Christopher Enright *Legal Reasoning* Chapters 20-22.

Step 3 Decision

Step 3 flows directly from Step 2. In Step 2 the court determines which option it should choose. When it reasons with policy it identifies the option by determining the best outcome or effect. So, if Meaning 2 causes Effect 2 and Effect 2 is the best outcome, the position is that Meaning 2 yields the best result. Consequently, in Step 3 the court declares Meaning 2 to be the legally correct meaning of the ambiguous provision.

Section 3.3 Determining the Outcome

There is a simple proposition that underlies the method for determining the outcome of a case in a problem question. This is the proposition, for a legal rule to apply to a set of facts it is necessary that each element of the rule applies. This means that there must be facts within this set of facts that fit the elements because they fall within the categories of facts that the elements delineate.

To proceed, let us recap what has been done so far. Section 3.1 Applying Law involved applying the elements of each cause of action to each of the facts in the problem to determine if there was a fact to which the element could apply (or a fact that satisfied the element to put this another way). This yielded three possible answers,

(1) Yes. There was a fact to which the element applied.

(2) No. There was not a fact to which the element applied.

(3) Maybe. There was doubt. Some word or phrase in the element had two or more meanings. According to at least one meaning the element did apply (a 'yes), while according to at least one other meaning the element did not apply (a 'no'). Thus 'maybe' is a mixture of 'yes' and 'no'.

In these cases it is necessary to interpret the ambiguous phrase to determine which meaning is correct. This was described in Section 3.2 Resolving Issues. In the real world a court can determine which meaning is legally correct and pronounce it so in a judgment. In a problem question a student can only put arguments that might be used in court to address the issue or make a reasoned guess as to the way that the court will decide the matter.

Interpretation by a court definitively says which meaning of an ambiguous provision is legally correct. This turns the 'maybe' into a definite 'yes' or a definite 'no'. In this way a court in the real world resolves the issue and settles the dispute. In a problem question, though, a student cannot authoritatively declare one meaning as correct – they can only make some judgment on the relative strength of the competing arguments.

Where does this leave the student answering a problem question? There are three possibilities for each cause of action,

(1) All the elements of the cause of action are satisfied by the facts and there are no issues of interpretation. In this case the plaintiff wins.

(2) Not all of the elements of the cause of action are satisfied by the facts. This means that there is at least one element that is not satisfied. In this case the defendant wins.
(3) Some of the elements are clearly satisfied but one or more are uncertain because there are issues of interpretation. In this case the final result is uncertain. To explain how to handle this assume that three are seven elements and that there were issues of interpretation in Element 3 and Element 5 as a student labelled them in their answer. In this case their statement as to the outcome would be something like this, 'For this cause of action it is clear that Elements 1, 2, 4, 6 and 7 are satisfied. There are doubts as to whether Element 3 and Element 5 are satisfied. There are two possibilities depending on how the court decides these issues,

(a) Plaintiff Wins. If a court were to resolve the issues for both of these elements in the plaintiff's favour the plaintiff has made out their cause of action and wins the case.

(b) Defendant Wins. If a court were to resolve the issues for one or both of these elements in the defendant's favour the defendant wins the case.

Section 4. Writing Up the Answer

Introduction

Answer

Essentially the answer to a problem question involves writing up the thinking processes for answering the questions that have been described so far. In setting out an answer a student is imitating, to an extent, a lawyer's advice to a client on the legal consequences of facts.

Here we look at what to put in an answer and how to present it. However, our concern is not to explain the general techniques for writing and for writing law but to deal with the specific task of writing an answer to a problem question.[18] On this basis the advice here on writing an answer has three components – a preliminary comment on dealing with the facts, then a discussion that emphasises the two key qualities of an answer, being structured and being comprehensive.

Facts

General Rule

In an answer to a problem question it is usually not necessary to restate the facts of a problem, especially in an examination, as these will be known to the reader who will be your teacher or examiner. There are, though, some qualifications to this general rule, which are discussed below. These things apart, it is sufficient in your answer to refer to the facts as stated in the problem question as the occasion demands. It is not necessary to transcribe or summarise them.

Qualifications to the General Rule

Qualifications to this general rule obviously describe circumstances where it is helpful or necessary to restate facts, in whole or in part, in an answer to a problem question,

18. Christopher Enright *Legal Writing*

(1) You may have encountered problems with the facts. Vital facts may be omitted, a fact may be an inference, or a fact may contain an inference of law. In the real world a lawyer can deal with these problems by making appropriate inquiry. In a problem question, however, facts are frozen and inaccessible outside the question. To deal with these problems a student should make appropriate and reasonable assumptions. If this is done in the answer it may be helpful to make some preliminary reference to the matter in the introduction before considering it in more detail in the body of the answer. This alerts the reader to the fact that to understand the answer they must take these assumptions into account.
(2) You may wish to emphasise certain facts, or to rearrange them in a way that is more suitable for your purposes in answering the problem. If this happens you may well wish to display this rearrangement in the answer.
(3) Outside of the examination room there is a good practical reason, as distinct from a formal academic requirement, for including a copy of the problem question with your answer. Consider what may happen after you write an answer to a problem question. You may bring it to a tutorial where the problem will be discussed, in which case you will write comments on your answer. Alternatively, you may submit it for marking or grading and it will be returned to you. In either case, if you are organised you will then put it in the file dealing with the topic or subject covered by the problem. Some time later when you are revising the subject, in particular revising for examinations, you will want to look at your answer and the comments. At this stage it can be a matter of great practical convenience if the problem question is attached to the answer. It saves your having to dig the problem question out from some other file and run the risk that you may not otherwise have access to it. Also, if you give it to a fellow student or your tutor for particular comment or to discuss the grading, it will also facilitate that process as well if there is a copy of the question with your answer.
(4) Keeping a copy of the facts with the answer helps to train you to be organised, logical and comprehensive in your thinking and presentation. In the practice of law, an opinion or advice is the equivalent of the answer to a problem. There, for several reasons, it is highly desirable to have the statement of facts included in the opinion. This makes it immediately clear to anyone who reads it the basis on which the opinion was given. Remember in this regard that several people may read the opinion,

(i) Client. The client will surely read it (and here there is another advantage with including facts in the opinion because it emphasises to the client the basis on which the advice was given).

(ii) Another Member of Your Firm. Another member of your firm may read it. This may happen when the matter is current. It may also happen much later because it is sensible office management and a common practice to file the opinion as an in-house precedent so that it can be used later when similar issues arise.

Need to Be Comprehensive

An answer must be comprehensive, which in consequence will also make it self-contained. When writing as a student in a law course, in general you assume that the person reading your answer is a lawyer but one who is not intimately acquainted with

the area of law under consideration. Hence the answer must be comprehensive and self-contained given this imputed level of knowledge of the reader.

This requirement is one of several good reasons that an answer must contain a statement of the elements of the relevant legal rule or rules. This sets the scene for the reader. It gives basic information as a necessary foundation for the later detailed discussion of issues. By this means the answer can be self-explanatory because any lawyer who reads it is immediately made familiar with the elements, which are the requirements of the relevant legal rule.

Need to Be Structured

As with any technical writing, an answer must be structured so that it is coherent. The technique advocated here has involved working out the answer in a structured way according to several steps. This sets us up to write the answer in an organised way by using this same structure (although as is commonly the case with any general rule or guideline there may be occasions when an intelligent variation is required).

Our technique has involved structuring the task according to parties, causes of action, issues and discussion of issues. Consequently these become the main divisions in the answer. Rather than explain your divisions it is simpler to use headings.

Structure, Overall Plan

To illustrate this, the main structure of an answer, using our earlier example of Arthur, Betty and Clare takes a form similar to this,

Introduction
Arthur v Betty
1. Trespass to Land
2. Trespass to Goods
Arthur v Clare
1. Negligence
2. False Imprisonment
3. Defamation
Conclusion

Figure 13. Structure of an Answer

Figure 13 shows that within the main structure the key components are the causes of action. So, the next matter to consider is how to structure each cause of action.

Structure, Cause of Action

There is a logical structure to use when considering each cause of action. Obviously the way to present this structure in an answer is to use appropriate headings. Here now is the structure,

(1) Elements. State briefly the elements of the cause of action. It is a good idea to label them as Element (1), Element (2) and so on. It can also assist to attach a brief label of one or two words to an element (as illustrated in Figure 14 below). So, for example when organising the tort of trespass to land Element (1) might become Element (1) Land and Element (2) might become Element (2) Possession. In later discussion it is simpler to refer to the elements by their labels, that is as Element (1) Land, Element (2) Possession, or just Element (1), Element (2) and so on, in preference to using their full description which becomes clumsy.[19] By stating the elements you communicate to the reader everything needed for the cause of action to be available. And since the primary reader is your lecturer or examiner it also indicates to him or her that you know the content of the relevant legal rule.
(2) Satisfaction of Elements. Indicate which of these elements are clearly satisfied or not satisfied (with a brief explanation if appropriate). Items that are clearly satisfied or not satisfied do not require further consideration.
(3) Issues. Indicate that the remaining elements involve ambiguity and give rise to some issues.

Then deal with those issues. Use a heading to introduce each issue. Make the heading a summary of the issue. There are five steps (which are derived from the model for interpreting law[20]),
(1) State the issue in terms of law and fact. Explain that it is an issue because the provision has more than one meaning.
(2) State the possible meanings of the ambiguous provision giving rise to the issue and the effect that each will cause.
(3) State the arguments for and against each meaning. If possible evaluate these arguments. In arguing a point resist the temptation to do what many students do and launch into a general and undirected discussion of principles, cases, statutes, legal history and social policy. Instead these should be referred to only to the extent necessary to state, explain, develop and assess the arguments for the issue or to provide a useful background to enhance the readers' understanding.
(4) If required by your teacher, try to predict which meaning the relevant court will choose.
(5) After discussion of each issue it helps the reader to understand the overall picture. (i) Indicate the possible legal consequences. (ii) Indicate how those consequences are dependent on the way in which a court might resolve an issue. A way to do these tasks is to state the possible outcomes and the basis on which each rests. This can be done in a 'Conclusion'.

Common Errors

Introduction

There are some common student errors in approaching a problem. It may help students to avoid these errors by pointing them out.

19. Christopher Enright *Legal Method* Chapter 4 Organising Law, Micro Analysis
20. Christopher Enright *Legal Method* Chapters 8-20

Missing an Issue

Students may miss an issue because they see a good argument for one side or another and fails to see that there is another side. A student assumes that the argument obliterates the issue. To counter this fairly human tendency, develop a disciplined approach under which there is a systematic, deliberate and detached attempt to detect ambiguity.

Missing an Argument

Sometimes an argument is missed or undervalued. Counter this with a two-pronged approach,

(1) To ensure that all possible arguments are found you should systematically and deliberately look for arguments for and against each meaning.

(2) Having identified and formulated the arguments, only then should you try to evaluate them.

Working in this way forces you to bring up for consideration arguments that may not initially appeal to you and will prevent you from being misled by judgments made on the run. This will also develop your powers of creative legal thinking.

By not rushing to judgment you will be surprised at how often an argument that you initially thought weak is seen to be much stronger on closer examination. In other words, taking time to reflect on something often gives a clearer perspective and better tunes your judgment. To use a horse racing expression, the early favourite is not always the winner.

Diverting to Another Issue

A student working on one issue will sometimes branch off into another issue. If there are three issues it is no answer to the second issue, say, to make a point about the third issue. Sometimes a student will do this on the basis that if a plaintiff loses on one major issue they lose their case. This may be so but (i) you cannot be sure in advance how a court will decide an issue and (ii) in any event issues are put in problem questions to test your skills, so do not walk away from them. Remember one of the maxims of answering problems – even a hypothetical plaintiff is entitled to their full day in court.

Concerns About Justice

One of the things that sometimes disturb a beginner in answering problems is that the answer or plausible answer to the problem does not appear to be just, and therefore, in their view, should not be entertained. To this there is a twofold answer – keep thinking about justice but do not worry about it here.

Keep thinking about justice. If law can lay claim to any contribution to civilisation it is that it exists to do justice.

Do not worry about justice here because problems are training in legal method and are not intended to provoke evaluation of how just or desirable laws are. Moreover,

(1) Some problems are set on hypothetical statutes which are drafted by the lecturer for the purpose of the exercise. They are usually designed to test skills of interpretation rather than to do hypothetical justice.
(2) Even if the law used for the problem is a real law, matters not covered by this particular law may be covered by some other provision.
(3) What is 'just' can be a matter of debate. There is a vast amount of literature on what constitutes justice. One way of viewing justice is to see it as a question of values, what outcomes from a legal system should society value and pursue?[21]

Illustration

Introduction

The method described in this article will now be used here to answer a problem question. Clearly this answer is posed as a suggested answer and not dogmatically as the right answer. The purpose is not to answer the question as such but to illustrate how the method works in devising and writing an answer to a problem question.

In this worked example for reasons of convenience and circumstances the answer is more confined than it might be in real life. First, the arguments canvassed on questions of interpretation are based on interpreting the section of a hypothetical Act on which the problem is based by reference to its original policy. Policy for the purposes of the answer is derived from two sources – common sense inferences about the purpose of the legislation and the maxims of statutory interpretation. Obviously if this was a real case with a real statute done in the real world the arguments would include any permissible direct sources of policy, inference from the overall terms of the statute and precedent. That said, while a restricted approach is adopted here for practical reasons it is enough to achieve our purpose, namely to demonstrate how the overall method works.

Second, as has been discussed, there are other approaches to statutory interpretation besides original policy, namely choice by an elected judiciary or choice by reference to considerations of metademocracy.[22] If these approaches are required for a problem then it is a simple matter to substitute one of these methods of interpretation in working out and writing the answer.

Third, in the model for interpretation (as outlined above) the options include the meanings of the ambiguous provision as well as the effect that each will cause. However, discussion of options here is largely confined to identifying just the meanings of the provision. There are two reasons for not dealing directly with effects. (i) It makes the demonstration of how to answer a problem question simple. (ii) Commonly, when a court is interpreting a legal rule it is generally interested only in the narrow effect of the rule. This focuses on which parties and which action will fall

21. Christopher Enright *Legal Reasoning*
22. Christopher Enright *Legal Reasoning Reasoning* Chapter 22 Social Choice, Interpreting Law

within or without the rule. It flows directly from the possible meanings of the provision because each meaning marks out the scope of a provision.

Question

Law

This question is based on section 14 of the (hypothetical) *Motor Traffic Act 1955*, which provides as follows,

> **14 Cancellation of licence**
> Where a person is convicted before a court of any offence in connection with the driving of a motorcar, and the person convicted of the offence holds any licence to drive a motorcar under this Act, the court may cancel the licence

Facts

The facts are as follows, 'Zachary was the holder of a licence to drive a motorcar under the *Motor Traffic Act.* When he was driving his car down the street he became annoyed at the way another motorist, Tina, was driving. Zachary followed Tina to a shopping centre where Tina parked her car. Zachary stopped his car and went over to Tina who was still sitting at the wheel of her parked car. Zachary said to Tina, 'You are a fool, an imbecile and an idiot. You are not fit to drive a golf ball, let alone a motorcar'. Zachary then punched Tina on the nose. Further violence was prevented by passers-by. Zachary was later convicted of assault in the Local Court and fined three thousand dollars. The Court also suspended his licence for twelve months under s14 of the *Motor Traffic Act 1955*'.

Task

Advise Zachary as to whether he has grounds for appeal on any questions of legal interpretation in relation to the suspension of his licence.

Introduction to the Answer

We are asked to advise Zachary on his proposed appeal against the suspension of his licence under s14 of the *Motor Traffic Act*.

Elements and Consequences

Section 14 has the following elements and consequences,

Element (1) Person	The defendant is a person.
Element (2) Licence	The person holds a licence.
Element (3) Motorcar	The licence is a licence to drive a motorcar.
Element (4) Motor Traffic Act	The licence is held under the *Motor Traffic Act 1955*.
Element (5) Conviction	The person has been convicted of an offence before a court.
Element (6) Driving	The offence is an offence in connection with the driving of a motorcar.
↓	
Consequences	The court may cancel the person's licence.

Figure 14. Elements and Consequences

Application of Law

Satisfied Elements

Elements (1)-(5) in s14 are clearly satisfied for the following reasons,

Element (1) Person is satisfied because Zachary is a person.

Element (2) Licence is satisfied because Zachary holds a licence.

Element (3) Motorcar is satisfied because the licence is a licence to drive a motorcar.

Element (4) Motor Traffic Act is satisfied because Zachary holds this licence under the *Motor Traffic Act*.

Element (5) Conviction is satisfied because Zachary was convicted before a court of the offence of assault.

Elements in Doubt

There is doubt about two things. First, there is doubt as to whether Element (6) Driving is satisfied. Zachary was convicted of assault. There is doubt as to whether an assault is an offence 'in connection' with the driving of a motorcar.

Second, there is doubt in relation to the consequences as to whether the court properly suspended Zachary's licence. When all of the requirements are satisfied s14 authorises the court to *cancel* the licence. In fact in this case the court has *suspended* Zachary's licence.

These issues are discussed below. If any one of the issues is decided in Zachary's favour he will succeed on the appeal. If Zachary succeeds on the first issue he will show that the court did not have any power to take action on his licence. If he succeeds on the second issue he will show that the court took an action on his licence that it was not authorised to take.

Issue: 'In Connection With'

Introduction

The issue here is whether the offence for which Zachary was convicted, that is assault, is an offence 'in connection with' the driving of a motorcar. The phrase 'in connection with' indicates that there must be some link or relationship between the 'offence' and 'the driving of a motorcar'. While there must be some sort of link, it leaves open what that link is. There are in fact two dimensions or variables – one thing can be connected with another in different ways and in varying degrees for the same way. In short, the issue devolves upon the nature of the link and the strength of the link. [Comment, It cannot be stressed enough how important it is to understand the nature of the ambiguity before proceeding to resolve it.] In this case the ambiguity devolves upon the nature of the link.

Options

Given that the phrase 'in connection with' is so open there are many possible meanings. Three obvious and plausible ones are suggested here in Meanings 1-3.

These vary according to the nature of the link between the offence and the act of driving a motor car. There are no questions involved as to the degree of these links.

Meaning 1
One meaning is that driving a motorcar is one of the legal elements of the offence. For example a provision making driving a motor vehicle while under the influence of alcohol an offence would read something like this, 'Any person who *drives a motorcar* on a public street while under the influence of alcohol is guilty of an offence'. The very words of the offence refer to the offender as a person who drives a motorcar. It is therefore not possible to commit the offence without driving a motorcar. If this meaning is correct Zachary is not guilty.

Meaning 2
A second meaning is that driving a motorcar is in fact (rather than in law as above) involved in committing the offence. This may happen in at least two ways,
(1) Directly, for example a person assaults another by running them down with their motorcar.
(2) Indirectly, for example a motorcar is used as the getaway car after an assault.
If this meaning is correct Zachary is not guilty.

Meaning 3
A third meaning is that driving a motorcar is involved in the facts as part of the overall picture. This meaning covers Zachary's situation. So, if this meaning is correct Zachary is guilty.

Reasons

In this case several arguments point strongly towards Meaning 1, that is, driving a motorcar is an element of the offence. These arguments are as follows,
(1) Both the short title (the *Motor Traffic Act*) and the penalty provided by s14, cancellation of the licence, indicate that the Act is concerned with the safe regulation of motor traffic. It is likely, therefore, that the Act contains offences where driving a motorcar is an element of the offence.[23] If this supposition is correct, it points strongly toward the meaning of the provision proposed here.
(2) Generally, provisions creating criminal offences or imposing penalties are construed narrowly. On this basis Meaning 1 is narrower than Meaning 2 and Meaning 3.
(3) This meaning is clear, simple, relatively unambiguous and easy to apply, whereas the other meanings involve a further test of degree.

There is also an argument that favours Meaning 2. This argument is that the punishment, cancellation of a licence, is intended to fit the crime. Therefore where a

23. Here we speculate on the content of the statute. In real life we would look at the provisions.

person uses a motorcar to commit a criminal offence part of the punishment should be to have his or her licence cancelled.

Issue: 'Cancel'

Introduction

Here the issue arises because the court has suspended Zachary's licence whereas s14 authorises it to 'cancel' the licence. The issue therefore is whether power to 'cancel' a licence confers power to 'suspend' the licence.

Options

According to the *Macquarie Dictionary* the usual meaning of 'cancel' is to make void or to annul, while 'suspend' means to cause something to cease for a time from operation or effect. Thus the ambiguity is whether 'cancel' can include a temporary annulment as there is with suspension, or whether it is confined to permanent annulment.

Reasons

As pointed out above, the literal meaning of 'cancel' is to annul or to avoid completely. So, a literal reading suggests that 'cancel' does not include 'suspend'. There are, however, at least two arguments against the literal meaning.

There is an argument in logic that the greater must include the lesser. That is, a power to cancel includes the lesser power to suspend.

There is an argument in justice. It is based on the fact that the power is discretionary because the words are 'may cancel'. Hence there is no obligation to do so. Thus if the literal meaning is correct, the choices open to the court are (a) to do nothing to the licence, or (b) to cancel it completely.

This interpretation, however, creates an anomaly. To appreciate the anomaly of this, assume a person had committed an offence that as a matter of justice necessitated some suspension but not cancellation. If 'cancel' does not include 'suspend' the court has a choice between two untenable positions. Either it grants more leniency that it should and does nothing, or imposes a harsher penalty than it should and cancels the licence. Treating a power to cancel as including a power to suspend allows a court to do what is just and meet in any particular case.

Thus it seems appropriate to allow an intermediate step of a temporary cancellation as there is with a suspension. This just result is achieved by abandoning the literal meaning of cancel and construing it to include suspension. There is some support for this approach from the golden rule of interpretation.

Endnotes

Endnote 1 Footnote 1

In the United States, many law schools use the case method as the standard method of teaching. This has limitations. One of them is that law has now entered the age of statutes. A second limitation is that problem questions provide valuable practice in many legal skills, especially some of the skills that lawyers use in litigation. Because of these limitations, some law teachers, for example Maskovitz (1992), have argued the law schools should shift the emphasis from case analysis alone to incorporate at least some answering of legal problem questions.

Endnote 2 Footnote 3

Some texts espousing and explaining the IRAC method or one of its derivatives include Askey, S; McLeod, I (2005); Brogan, M; Spencer, D (2008); Corkery (1999); Foster (2006); Keyzer (2002); Krever (2001).

Endnote 3 Footnote 8

Teaching how to prove facts is not easy to do in the classroom since the process of investigating evidence to prove facts involves a search, often a prolonged search, for evidence. Of course it is possible to ask students to comment on the types of evidence that they would seek and the places where they might look. However past this point the exercise has to take place in real life because the inquiry that now follows is determined by the nature and direction of the information and evidence that is uncovered in this first wave of investigation. The point is that investigation of evidence if a process of stages. One starts the investigation by following up obvious lines of inquiry. But answers to inquiries frequently demand or suggest further inquiries. So the process of investigation is a chain made up of repeated inquiries, followed by answer to inquiries and then followed by further inquiries based on the set of answers to the latest inquiry.

All that said, it may still be illuminating and stimulating to discuss these matters briefly with students. Discussion can be enlivened by reference to current cases being tried or recently tried as reported in the newspapers, or famous cases of the past written up in academic or popular literature or in the media. While this does not constitute a comprehensive training in the search for evidence it starts the process and should stimulate some interest.

Endnote 4 Footnote 9

To illustrate organising facts assume that the facts of a problem question provide that Jenny was carrying a brief case that contained a pen, a note pad and an address book. Later the facts recount that Jenny was also carrying a photograph of a house. In your account of the facts, put all of these items together. Trivial as this illustration seems, it makes an important point – that organising information in the most neat and tidy way possible greatly facilitates working with it. Lawyers are often unaware of this. If you

want guidance from another profession think of the ordered way in which accountants lay out a balance sheet.

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Author

Christopher Enright is qualified as a barrister, solicitor and chartered accountant. He is a legal writer. He has a Master of Commerce (Management) from the University of New England. He is also the proprietor of the publishing firm Maitland Press – www.legalskills.com.au.